



UNITED STATES

The Price of Freedom

Bail and Pretrial Detention of Low Income
Nonfelony Defendants in New York City

HUMAN
RIGHTS
WATCH





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Summary

“[Bail] is hostile to the poor and favorable only to the rich. The poor man has not always a security to pledge...”

—Alexis de Tocqueville, *Democracy in America*, 1835

Decades ago New York City pioneered bail reforms that have been enormously successful in reducing the number of people detained in jail while awaiting trial: each year judges order the pretrial release without bail of tens of thousands of men and women accused of crimes who are then able to remain in their homes and communities pending conclusion of their cases. When judges believe defendants might not otherwise return to court, however, they set money bail as a condition of release. Unfortunately, today as years ago, bail is usually out of reach for poor defendants. For people scrambling to pay the rent each month or who live on the streets, a bail of US\$1,000 or even \$500 can be as impossible to make as one of \$100,000. Unable to post bail, they are sent to jail for pretrial detention.

Pretrial detention may be appropriate for dangerous defendants charged with violent crimes. But the preponderance of criminal defendants in New York City are accused of low level offenses such as smoking marijuana in public, turnstile jumping, or shoplifting. Sending them to jail for want of a few hundred dollars cannot be squared with basic notions of fairness, human rights, or fiscal common sense.

In the eyes of New York law, pretrial detention is not punishment but a precautionary measure to ensure defendants show up in court for their cases. From the perspective of those enduring days and nights behind bars, this is a distinction without a difference. People should not have to endure jail simply because they are too poor to buy their way out, particularly when there are other ways of ensuring that such defendants make their scheduled court appearances.

This report addresses the pretrial incarceration of New York City defendants accused of nonfelony crimes, mostly misdemeanors. Previously unpublished data provided to Human Rights Watch by the New York City Criminal Justice Agency (CJA)—covering all cases (117,064) of nonfelony defendants arrested in New York City in 2008 that proceeded past arraignment—suggests the extent of the problem: In slightly more than three-quarters (90,605) of the cases defendants were released pending trial on their own recognizance (i.e., without money bail). In most of the cases where bail was set (19,137 of 26,459 cases), the bail amount was \$1,000 or

less. Nevertheless, despite the relatively low bail amount, the overwhelming preponderance of defendants required to post that bail amount were jailed because they could not do so.

- In 87 percent of the cases (16,649) in which the defendants arrested in 2008 had bail set at \$1,000 or less, the defendants were not able to post bail at their arraignment and were incarcerated pending trial; and
 - Their average length of pretrial detention was 15.7 days;
 - Almost three out of four (71.1 percent) were accused of nonviolent, non-weapons related crimes.

At any given moment, 39 percent of the city's jail population consists of felony and nonfelony pretrial detainees who are in jail because they have not posted bail. The equitable and human rights concerns about conditioning pretrial freedom on financial wherewithal is, of course, present in felony as well as nonfelony cases. In this report, however, we focus solely on the pretrial detention of persons accused of nonfelonies (primarily misdemeanors, but also including violations and infractions), because their incarceration is uniquely difficult to reconcile with the fundamental notions of fairness and equality that should be the cornerstones of criminal justice. Pretrial detention is a disproportionate curtailment of liberty in light of the non-threatening, petty nature of most of the alleged nonfelony crimes.

Time in jail before one has had one's day in court is particularly troubling for the one in five detained nonfelony defendants who, according to the CJA, will not be convicted. It is also disproportionate in light of sentences typically imposed when there is a nonfelony conviction: data from the New York State Division of Criminal Justice Services, for example, indicates that eight out of ten convicted misdemeanor arrestees receive sentences that do not include jail time.

Monetizing pretrial freedom is inherently disturbing, but more than principle is involved. Jail is unpleasant and dehumanizing in the best of circumstances; it can be violent and degrading as well. In addition to the stress of incarceration itself, pretrial detention can harm individuals and their families in countless ways: for example, detained men and women lose income they and their families need, and even their jobs; they cannot care for children or ailing relatives who depend on them; they miss school and exams; they cannot attend substance abuse and mental health treatment programs; and they can lose their places in homeless shelters.

Pretrial confinement also increases the likelihood of conviction. Pretrial confinement—or just the threat of confinement—prompts defendants to plead guilty and give up their right to trial.

Most persons accused of low level offenses when faced with a bail amount they cannot make will accept a guilty plea; if they do not plea at arraignment, they will do so after having been in detention a week or two. Guilty pleas account for 99.6 percent of all convictions of New York City misdemeanor defendants.

Under New York law, defendants accused of nonfelony offenses have the right to pretrial release on recognizance or bail. The theory of money bail is that it provides a financial incentive for released defendants to attend scheduled court proceedings; the threat of losing the funds used to post bail will deter or inhibit the temptation to avoid court. While neither the US nor New York state constitutions guarantee that bail shall be made available to defendants, they do prohibit “excessive bail,” that is, conditions of bail that are greater than reasonably necessary to achieve the goal of ensuring court appearances.

In theory, if the arraignment judge making the initial bail determination decides to impose money bail, he or she should tailor the bail amount to the defendant’s financial resources, setting it only as high as necessary to reasonably assure the defendant will return to court. The amount that would provide a meaningful incentive to return to court for someone who lives on \$600 a month is, obviously, different than it is for someone who lives on twice or ten times that much. In practice, however, judges lack the time, information, and perhaps sometimes even the inclination, to make careful, individualized bail determinations. In what has not unfairly been called “assembly line” justice, the entire arraignment process for a New York City nonfelony defendant is a rushed affair of no more than a few minutes.

Judges have broad discretion to make release and bail decisions, and they exercise that discretion according to their individual concerns, prior experience, and predilections, with the prosecutors’ positions having a major influence. Although the legal purpose of bail in New York is solely to encourage the defendant to return to court, judges in an unknown and unknowable number of cases take other factors into consideration in any given case. For example, judges may decide to set bail with an eye to protecting public safety (the incarceration following inability to make bail serving as a form of sub rosa preventive detention), to encourage the defendant to plead guilty, or to impose preemptive punishment on defendants they assume, based on their prior criminal records, to be guilty. These

Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support.
—National Association of Pretrial Services Agencies, “Standards on Pretrial Release,” 2004

reasons are not authorized by law—and they may violate the right to be presumed innocent—but judges do not have to explain their bail decisions.

Whether deliberately, inadvertently, or carelessly, judges usually set money bail at an amount the defendant cannot afford, as evidenced by the fact that defendants in only 10 percent of all criminal cases in which bail is set are able to post it at arraignment. Bail set at under \$500 is rare. Judges also almost invariably set bail in the form of cash or secured bond (a commercial bail bond or other bond secured by a deposit of money or lien upon property), even though New York law provides alternative financial forms of bail that are less onerous for low income or indigent defendants. For example, the law permits unsecured bonds. For reasons that are obscure, however, alternatives to cash bail or secured bonds are simply not part of customary court practice in New York City. Defendants who do not have the resources at arraignment to pay cash bail and who cannot obtain a bond from commercial bondsmen find themselves in pretrial detention.

The American Bar Association (ABA) has long criticized money bail, pointing out that it undermines the integrity of the criminal justice system, is unfair to poor defendants, and is ineffective in achieving key objectives of the pretrial release/detention decision. The ABA's Standards for Pretrial Release mandate that financial conditions should be used only when no other conditions will provide reasonable assurance a defendant will appear for future court appearances. If financial conditions are imposed, the court should first consider releasing the defendant on an unsecured bond, and if that is deemed an insufficient condition of release, bail should be set at the lowest level necessary to ensure the defendant's appearance and with regard to his financial ability. Significantly, ABA Standard 10-1.4 prohibits bail that results in pretrial detention: "The judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay."

According to the Pretrial Justice Institute of Washington, D.C., many states have laws that establish a presumption or preference for nonfinancial conditions of release or unsecured bonds. The federal government and the District of Columbia prohibit courts from imposing money bail that defendants cannot meet and which therefore results in their pretrial detention.

Judges may set bail at levels they know are likely to result in defendants' pretrial detention because they believe such detention is necessary to ensure the defendants appear in court. But failure to appear is in fact relatively infrequent: most New York City defendants who are released pretrial show up for the court proceedings in their cases. Sixteen percent will miss a

scheduled court appearance prior to disposition of the case, but most of those who miss an appearance will return to court voluntarily within 30 days.

Our interviews show that defendants released pending trial come to court for multiple appearances even though they have to miss work or school, arrange for childcare or care of ailing relatives, miss drug treatment programs or medical appointments, have to find the money for transportation to and from the court building, and even though they may have to spend the entire day sitting in the courtroom waiting for their case to be called. When they miss a proceeding, it is often because they simply could not manage to make it, their lives too chaotic or stressful. No doubt some defendants are irresponsible. There is also little doubt, as many prosecutors point out, that some defendants miss court appearances because they do not want to risk adjudication and they know there is little likelihood of the police picking them up on the bench warrant for their arrest that the court issues when they do not show up. But a large majority of those who miss an appearance show up for subsequent proceedings. According to the CJA, only 6 percent of released defendants miss a court appearance and do not return to court within 30 days: the pool of defendants who deliberately seek to evade justice is quite small.

The criminal justice system has a compelling interest in making sure all criminal defendants appear in court for their cases. But bail or jail need not be the only means to that end. Pilot initiatives in New York City and the experience of pretrial services agencies across the country have shown that there are other ways to secure defendants' appearance in court. Systems that employ court date notification and pretrial monitoring and supervision, graded in intensity as warranted by the circumstances, all promote a defendant's return to court while respecting the right to liberty and the presumption of innocence.

Incarcerating defendants who cannot post bail is not a problem unique to New York. According to the Bureau of Justice Statistics of the US Department of Justice, 62 percent of the nation's jail population consists of detainees awaiting trial. The Pretrial Justice Institute estimates it costs \$9 billion annually to incarcerate defendants held on bail nationwide. That the problem is widespread, however, is no excuse.

"In the pretrial context, money does one thing, and only one thing, well: separate those who have it from those who don't."
—Timothy J. Murray, Executive Director, Pretrial Justice Institute, 2010

Human Rights Watch believes New York City can go a long way toward addressing the economic inequities of the present bail system by providing supervised pretrial release programs for defendants who are not suitable for release on their own recognizance and who cannot afford bail. Such pretrial supervision would not only honor the

presumption of innocence, but would save the city tens of millions of dollars in jail costs. According to the New York City Department of Correction, the amount that would be saved by reducing the jail population by 800 or more inmates is \$161 per inmate a day. Applying that figure to the data above on nonfelony defendants arrested in 2008—16,649 nonfelony defendants unable to post bail of \$1,000 or less held in pretrial detention an average of 15.7 days—it is easy to see how significant the savings could be. If the city had not incarcerated any of those nonfelony defendants, it would have saved more than \$42 million; if it had incarcerated only a third as many, it would have saved more than \$28 million; and so on.

Any form of pretrial supervision established to replace jail for defendants who cannot afford bail would surely cost far less than jail. The cost of probation services, for example, is a fraction of the expense of institutional confinement: in New York state the annual cost of probation services per probationer is approximately \$4,000; the average annual cost per inmate in New York City jail is \$76,229.

Even if it would not yield cost savings for New York City, action should be taken to end the pretrial detention of nonfelony defendants who cannot afford bail. Although it is routine, happens every day, and has gone on for decades, confining people in jail simply because they are too poor to post bail when charged with a low level offense is a serious inequity in the city's criminal justice system. Poverty should not be an impediment to pretrial freedom.

Recommendations

No individual government agency controls the flow of individuals into pretrial detention because they cannot afford bail. But the problem is not insoluble, and concrete, effective measures could accomplish much should the key stakeholders—the mayor, city council, prosecutors, courts, defense attorneys, and civil society representatives—decide to work together for needed reforms. Limiting the use of pretrial detention would not increase crime nor harm the interests of justice. Indeed, a far more parsimonious use of pretrial detention is consistent with the integrity of the judicial system, human rights, public safety, and fiscal prudence.

Even absent more systematic reform or the institution of pretrial supervision programs for nonfelony defendants, much could be done under existing law to limit to a far greater extent than today the pretrial detention of nonfelony defendants who lack the financial resources to post bail (and who are not granted release on their own recognizance). Judges, prosecutors, and defense attorneys should not accept such pretrial detention as inevitable, much less desirable. They should vigorously, consistently, and where necessary, creatively exercise their respective authority under the law to try to ensure nonfelony defendants are not incarcerated pretrial for want of the funds to buy their freedom. We are asking in short, for a change in the way business is done with regard to bail setting and its outcomes. It may not be easy, but it is much needed and long overdue.

We hope that this report raises awareness about the serious problems in New York’s bail system. We also note below a few key recommendations.

- I. The New York State Legislature should amend the New York Criminal Procedure Law to incorporate provisions that will prevent the incarceration of misdemeanor defendants solely because they cannot afford financial conditions of release imposed to secure their appearance in court. Human Rights Watch strongly recommends the legislature carefully consider amending the law to incorporate the American Bar Association’s Standards for Pretrial Release. At the very least, we urge the legislature to amend the law to incorporate the following provisions:
 - When financial conditions of release are imposed on defendants accused of nonfelony crimes, the court should first consider releasing the defendant on an unsecured bond. If an unsecured bond is not deemed a sufficient condition of

release, bail should be set at the lowest level necessary to ensure the defendant's appearance with due regard to the defendant's financial ability.

- Courts should not impose bail in a form or amount that results in the pretrial detention of a defendant charged with a nonfelony offense solely due to the defendant's inability to pay.

II. New York City judges should use their discretionary authority under current law to set bail in forms and amounts that misdemeanor defendants can afford. In particular:

- Judges should make greater use of unsecured bonds and other bail forms currently authorized under New York law that are less financially onerous than cash bail and secured bonds.
- Judges should make greater effort at arraignment to tie bail amounts more directly to a defendant's financial resources and should not set bail at amounts they know or believe the defendant is likely not to be able to pay.
- Administrative judges should take steps to inform and educate judges about the nature and significance of the different forms of bail currently authorized under New York law.

III. In its training program for new judges, the New York State Court Judicial Institute should ensure judges understand the nature and significance of the different forms of bail permitted under New York law and the importance of making bail decisions that respect the right to liberty and to equality under the law.

IV. Defense counsel representing low income and indigent defendants should gather as much information as they can regarding the financial condition of their clients and should advocate vigorously for bail to be set in a form and amount that the defendant can afford, including by advocating for judges to use unsecured or partially secured bonds. In each case, however unlikely a good outcome may seem, they should take every opportunity provided by law and procedure to keep the defendant out of pretrial detention.

V. Prosecutors should not request bail at an amount greater than reasonably necessary to ensure the defendant's future court appearances taking into account what is known about the defendant's financial resources, even if the information is unverified. They should not press for bail in a form or amount that is likely to result in the defendant's pretrial detention and they should support bail being set in unsecured or partially secured bonds.

VI. New York City should establish supervised pretrial release programs for defendants accused of nonfelony crimes who are not released on their own recognizance and who do not have the financial resources to post bail. Once such a program is operational, the cost savings from greatly reduced use of city jails to confine pretrial defendants should generate ample funds to pay for it. The city should consider whether current pilot initiatives in pretrial release for certain felony defendants provide a suitable model for nonfelony defendants and, if so, should scale-up those initiatives for such nonfelony defendants. A mayoral task force or commission of key stakeholders should be created to review the experience of the pilot programs, and to develop the appropriate input and support for expanded supervised release programs.

I. The Bail Process

Arrest through Arraignment

Misdemeanor Arrests

New York City police made 340,859 adult arrests in 2009, up from 282,958 arrests five years earlier.¹ Most of the defendants in New York City criminal cases are men, in half of the cases the defendant was under the age of 30, and most of those aged 29 and under are involved in a full-time activity: school or work.²

Most of the arrests are for nonfelony offenses, the vast bulk of which are misdemeanors.⁴ The number and proportion of felony arrests has declined since the city adopted an aggressive law enforcement strategy targeting low level “quality of life” offenses. In 1989

Anthony C., arrested for selling handbags on the street without license, said he was worried about losing his temporary job: “I’ve got \$100 in my pocket. That’s it. No bank account, no nothing. Without my job I have nothing.”³

half the arrests were for felonies. Twenty years later in 2009, almost three-quarters (72 percent) of the arrests were for misdemeanors.⁵ Most of those arrested for misdemeanors, 82.4 percent, are black or Hispanic.⁶ According to the New York State Division of Criminal Justice Services, a substantial proportion of those arrested have no prior convictions: 60.4 percent of persons convicted of a misdemeanor in fiscal year 2009 had no prior felony convictions; and 47.4 percent had no prior misdemeanor convictions. Some, however, have

¹ New York State Division of Criminal Justice Services, *Adult Arrests: 2000-2009*, <http://criminaljustice.state.ny.us/crimnet/ojsa/arrests/nyc.htm> (accessed October 25, 2010).

² New York City Criminal Justice Agency, “2008 Annual Report,” December 2009, <http://www.cjareports.org/reports/annual08.pdf> (accessed October 25, 2010), pp. 8-9, Exhibits 2 and 3. The figures are for both felony and nonfelony defendants.

³ Human Rights Watch interview with Anthony C., New York City, March 9, 2010.

⁴ Misdemeanors are offenses, “other than a ‘traffic infraction,’ for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed.” New York Penal Law, sec. 10.00(4). Also included among nonfelony offenses are violations, which are offense, other than traffic infractions, for which the maximum sentence is fifteen days. New York Penal Law, sec. 10.00(3).

⁵ There were 245,121 misdemeanor arrests and 97,738 felony arrests in 2009. Reflecting the ongoing priority given to drug law enforcement in New York City, drug offenses accounted for 33 percent of all misdemeanor arrests; indeed, misdemeanor drug arrests accounted for one-quarter of all criminal arrests. New York State Division of Criminal Justice Services, *Adult Arrests: 2000-2009*. In fiscal year 2009, there were 43,787 arrests just for possession of marijuana in public view. Unpublished data on NYC misdemeanor arrests by charge in fiscal year 2009 provided to Human Rights Watch by New York State Division of Criminal Justice Services. Data on file at Human Rights Watch. For an illuminating study of changes in New York City nonfelony defendants, cases, and outcomes between 1989 and 1998, see Freda F. Solomon, New York City Criminal Justice Agency, “The Impact of Quality-of-Life Policing,” Research Brief No. 3, August 2003, <http://www.cjareports.org/reports/brief3.pdf> (accessed October 26, 2010).

⁶ Unpublished data on the criminal records of persons convicted on misdemeanor charges in New York City in fiscal year 2009 provided to Human Rights Watch by New York State Division of Criminal Justice Services. Data on file at Human Rights Watch.

substantial prior records: 13.5 percent had three or more prior felony convictions, and 36.8 percent had three or more prior misdemeanor convictions.⁷

Arraignment

After a criminal arrest, New York City defendants will be brought to criminal court⁸ for arraignment, usually within 24 hours of the arrest.⁹ In 2009, there were 375,837 arraignments citywide, 82 percent of which were for nonfelony offenses.¹⁰ The five most frequently charged offenses at arraignment in 2009 were misdemeanors: criminal possession of marijuana (smoking or possessing marijuana in public¹¹), assault in the third degree, possession of drugs other than marijuana, petit larceny (shoplifting), and theft of services (most typically turnstile jumping).¹²

Half of all criminal cases end at arraignment,¹³ either because the defendant pleads guilty to a charge or because the case is dismissed or adjourned in contemplation of dismissal.¹⁴ The disposition rate at arraignment varies by charge severity, with misdemeanor and lesser offenses having higher disposition rates citywide (excluding the Bronx) at arraignment than felonies.¹⁵ If the case does not end, then the judge must make a decision to release the

⁷ Ibid. Reflecting histories of drug addiction and drug law enforcement, persons convicted of misdemeanor drug offenses tend to have more prior convictions. For example, among those convicted in fiscal year 2009 of misdemeanor criminal possession of a controlled substance, 23 percent had 3 or more prior felony convictions, and 61.4 percent had three or more prior misdemeanor convictions.

⁸ New York City's criminal courts handle arraignments for all arrests, from turnstile jumping to murder. They have trial jurisdiction over all misdemeanors and criminal violations in Kings, New York, Queens, and Richmond Counties from the initial court appearance until final disposition. In Bronx County, misdemeanors that survive criminal court arraignment are transferred to the Criminal Division of Bronx Supreme Court.

⁹ Criminal Court of the City of New York, "Annual Report 2009," p. 21. The average time from arrest to arraignment citywide is 25.39 hours, up from 21.65 in 1999. Instead of holding a suspect after arrest until the arraignment, police may issue a Desk Appearance Ticket (DAT), which requires the arrested person to return to court at a specified date and time for arraignment. DATs may be issued for any nonfelony offenses as well as some nonviolent Class E felony arrest charges. New York Criminal Procedure Law, sec. 150.20.

¹⁰ Among arraignments in 2009, 54,970 were on felony charges, 276,112 on misdemeanor charges, 31,853 on infraction/violation charges, and 12,902 other. Criminal Court of the City of New York, "Annual Report 2009," p. 26. The total number of arraignments has grown since 2001, when the total was 339,993. Ibid.

¹¹ New York Criminal Procedure Law, sec. 221.10. Although possession of small amounts of marijuana for personal use is a violation in New York, holding or smoking marijuana in public is a misdemeanor.

¹² Criminal Court of the City of New York, "Annual Report 2009," p. 31.

¹³ Ibid., p. 29.

¹⁴ Among the total of 300,319 criminal case dispositions in New York City in 2009, 151,094 (50.3 percent) cases ended with guilty pleas, 44,988 (15 percent) were dismissed, and 75,530 (25.1 percent) were adjourned in contemplation of dismissal. Criminal Court of the City of New York, "Annual Report 2009," p. 16. When a case is adjourned in contemplation of dismissal, the court will "in furtherance of justice" dismiss the case after the applicable period (either six months or one year) if the defendant has complied with the conditions of the adjournment, such as performance of community service, and there have not been any other developments such as a new arrest that might change the court's decision. New York Criminal Procedure Law, sec. 170.55 and sec. 170.56.

¹⁵ Bronx rates differ significantly from the other boroughs because they transfer most criminal cases to the Supreme Court at arraignment and cases that are equivalent to Criminal Court cases in other boroughs are categorized as continued rather than disposed. New York City Criminal Justice Agency, "2008 Annual Report," p. 18, Exhibit 10.

defendant on his promise to return (release on recognizance),¹⁶ set bail, or remand (which is not permitted for nonfelony defendants). In 65 percent of the cases—felony and nonfelony—that continued past arraignment in 2008, the defendant was released on recognizance, and bail was set in 34 percent. The more serious the charge, the less likely the defendant was to be released on recognizance. Bail was set in 67 percent of the cases of defendants charged with the highest severity felonies, 21 percent of cases of defendants charged with misdemeanors, and in 13 percent of cases with defendants charged with violations or infractions.¹⁷ The defendant was remanded, i.e., ordered detained without bail, in the remaining 1 percent of the continued cases.¹⁸ In 2008 the median amount of bail set at criminal court arraignments citywide was \$2,000.¹⁹ In 84 percent of the cases, bail was set at \$7,500 or less. In about 2 percent of the cases, bail was set at \$100,000 or more.²⁰

The New York City Criminal Justice Agency provided Human Rights Watch with new, unpublished data on the cases of individuals arrested in 2008 on nonfelony charges whose cases did not end at arraignment. According to that data, as shown in Table 1, 90,605 or 77.4 percent were released on their own recognizance; 19,137 were given bail equal to or less than \$1,000; and another 7,322 received bail of more than \$1,000. In 58 percent of the cases in which bail was set, the amount was \$1,000 or higher. It was almost as likely to be at an amount greater than \$1,000 (28 percent of the bail cases) as at \$1,000 (30 percent).

When asked what would happen if her son had to post bail, the mother of a 17-year-old who was being arraigned on his second arrest told us: “Oh, he’ll sit there [in jail]...Some people just can’t afford it.”²¹

¹⁶ “A court releases [a defendant in criminal action or proceeding] on his own recognizance when, having acquired control over his person, it permits him to be at liberty during the pendency of the criminal action or proceeding involved upon condition that he will appear thereat whenever his attendance may be required and will at all times render himself amenable to the orders and processes of the court.” New York Criminal Procedure Law, sec. 500.10(2).

¹⁷ Misdemeanor rates calculated from rates for all level misdemeanors combined. New York City Criminal Justice Agency, “2008 Annual Report,” p. 18, Exhibit 11.

¹⁸ New York City Criminal Justice Agency, “2008 Annual Report,” p. 16, Exhibit 9.

¹⁹ *Ibid.* Where bond is ordered along with a cash bail alternative for a lower amount, the CJA uses the lower amount in its bail calculations.

²⁰ *Ibid.*, p. 21.

²¹ Human Rights Watch interview with defendant’s mother (name withheld), New York City, March 8, 2010.

Table 1

Release on Recognizance and Bail Amount at Arraignment of Nonfelony Cases		
Release/Bail Category	Number of Cases	Percent of Total
Release on Recognizance	90,605	77.4%
Bail below \$500	739	0.6%
Bail \$500 to \$749	7,178	6.1%
Bail \$750 to \$999	3,204	2.7%
Bail equal to \$1000	8,016	6.8%
Bail greater than \$1000	7,322	6.3%
Total	117,064	100%

Source: New York City Criminal Justice Agency

Note: Includes cases of New York City defendants arrested in 2008 on nonfelony charges. Cases with bail set at \$1 excluded.

The Statutory Framework

Under the New York Criminal Procedure Law, persons arrested for nonfelony offenses have a right to release on their own recognizance, or bail.²² Although the statute does not express a presumption in favor of release on recognizance, it does indicate a legislative intent that defendants accused of nonfelonies remain free pending conclusion of their cases, while recognizing that in some cases, pretrial release should be subject to conditions.

The New York bail statute enumerates the factors for judges to consider in making bail decisions:

- i) The defendant's character, reputation, habits and mental condition;
- ii) His employment and financial resources;
- iii) His family ties and the length of his residence if any in the community;
- iv) His criminal record, if any;
- v) His record of previous adjudication as a juvenile delinquent, if any;
- vi) His previous record in responding to court appearances when required or with respect to flight to avoid criminal prosecution, if any;
- vii) The weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability of conviction; and
- viii) The sentence which may be or has been imposed upon conviction.²³

²² New York Criminal Procedure Law, sec. 530.20(1). "When the defendant is charged...with an offense or offenses of less than felony grade only, the court must order recognizance or bail." In felony cases, the statute grants the court discretion to order recognizance or bail, subject to certain limitations. *Ibid.*, sec. 530.20(2)(a).

²³ *Ibid.*, sec. 510.30(2)(a). Although the statutory language limits these factors to cases in which the judge's release or bail order is discretionary, that is, in felony cases, judges apparently consider these factors in misdemeanor cases as well.

These factors “are not a catechism or checklist...they are objective indicia of responsibility which, if favorable, generally correlate with a likelihood that the defendant will reappear in court.”²⁴ Each factor should be looked at to “correlate the likelihood that a defendant will reappear in court.”²⁵ The seriousness of the crime charged and severity of possible punishment are relevant, for example, “but only to the extent that they demonstrate a defendant’s propensity to flee....The nature of the case against the defendant and possible punishment are only some of the numerous factors to be weighed...”²⁶

In simply enumerating a laundry list of factors, New York law provides little guidance to judges in how to actually make sound and fair release or bail decisions. Neither the legislation nor the relatively few court decisions interpreting it indicate how the different factors should be weighed and balanced against each other, nor does the law even set a target level of risk of nonappearance that judges should use as a guidepost. As a practical matter, judges’ discretion in bail decisions is extremely broad, although not completely unfettered.²⁷ They have wide latitude in deciding which of the enumerated factors to consider, how much weight to give them, and even what conclusions to draw from them.

If the judge decides not to release on recognizance a defendant charged with a nonfelony offense, then he must set bail. The court may choose to set bail in any two or more of the authorized forms of bail, designating one as an alternative.²⁸ New York bail law was overhauled in 1970 as part of the new Criminal Procedure Law, and, among other bail provisions, the new law increased the permissible forms of bail with the goal of permitting more defendants to be released on bail.²⁹ Currently, the following forms of bail are authorized³⁰:

- a. cash bail
- b. an insurance company bail bond

²⁴ *People v. Torres*, 446 N.Y.S.2d 969, 973 (1981).

²⁵ *Ibid.*

²⁶ *People ex rel. Benton v. Warden*, 499 N.Y.S. 2d 738, 740 (1986)(court found an abuse of discretion with regard to the bail amount when the lower court’s “determination as to the amount of petitioner’s bail seems to have been based exclusively on its conviction that petitioner would be found guilty of serious crimes entailing a lengthy term of imprisonment, and that there was no discernable attempt to assess whether petitioner’s presence in court would accordingly be rendered uncertain (a conclusion that must be considered improbable in light of petitioner’s unblemished record of court attendance).”).

²⁷ *People ex rel. Klein v. Krueger*, 25 N.Y.2d 497 (1969) (internal citations omitted)(the court’s exercise of its discretion must not be “improvident....The determination of the bail-fixing court will not be overturned unless there is the ‘invasion of constitutional right,’ and not a ‘difference of opinion.’”).

²⁸ New York Criminal Procedure Law, sec. 520.10(2)(b).

²⁹ The New York Code of Criminal Procedure, repealed in 1970, authorized bail only through cash, surety, or insurance company bond.

³⁰ See New York Criminal Procedure Law, sec. 500.10, for definitions of the different types of authorized bail.

- c. a secured surety bond
- d. a secured appearance bond
- e. a partially secured surety bond
- f. a partially secured appearance bond
- g. an unsecured surety bond
- h. an unsecured appearance bond
- i. a credit card³¹

In essence, the statute permits bail for criminal defendants in the form of cash or bonds.³² The bonds may be secured, unsecured, or partially secured by the defendant (appearance bonds) or secured, unsecured, or partially secured by someone other than the defendant, (e.g., commercial bail bonds).

New York law does not direct judges to give preference to release on recognizance or priority in bail decisions to unsecured bonds or other less financially onerous forms of bail.³³ But the legislature was well aware of the importance to poor defendants of alternatives to cash or secured bonds. Unsecured or partially secured bonds “were innovations initiated by the [new Code of Criminal Procedure Law] and represent less burdensome forms of bail than those previously available. They were added to vest the court with the utmost flexibility, including the ability to designate alternative forms with alternative amounts.”³⁴

For example, the statute authorizes bail in the form of an unsecured appearance bond, which permits the defendant to secure her freedom pretrial with a written promise to pay the specified bail amount to the court should she fail to appear for the proceedings.³⁵ The statute also authorizes a partially secured appearance bond, by which the defendant would deposit a fraction of the bail amount (which could be set at whatever percentage the court wanted but no more than 10 percent).³⁶ While requiring the defendant to come up with some cash, the financial burden is still far less than cash bail. For a \$500 partially secured appearance bond, the defendant would have to place no more than \$50 with the court (which would be refunded at conclusion of case), a far cry from \$500. She would be liable for

³¹ New York Criminal Procedure Law, sec. 520.10(1). Effective August 2010, the law only authorizes credit cards to be used to post bail when the charge is a traffic or vehicle violation.

³² Whatever the forms of bail specified in the court’s order, the defendant may always post cash bail in the amount designated in the order setting bail. New York Criminal Procedure Law, sec. 520.15.

³³ Preiser’s Practice Commentary to Criminal Procedure Law sec. 520.10, *McKinney’s Consolidated Law of New York* (annotated), 2009.

³⁴ *Ibid.*

³⁵ New York Criminal Procedure Law, sec. 520.10(1)(h).

³⁶ *Ibid.*, sec. 520.10(1)(f).

the full \$500 if she did not make all her scheduled court appearances. The statute also authorizes unsecured surety bonds, in which someone other than the defendant, such as a parent or grandparent, promises to pay the specified sum of money should the defendant fail to appear in court; that promise is not accompanied by any deposit or lien upon property.

As originally enacted in 1970, the statute provided that if the court set a bail amount but did not designate the form of bail, the defendant had to post bail as cash or a secured bond. In 1972, the law was amended to permit defendants to post unsecured bonds in the event the judge failed to designate the form.³⁷ Once again, the legislature did so with an eye to addressing the plight of defendants too poor to post bail:

In authorizing a wide variety of bail alternatives, the legislature intended to rationalize and make more flexible an admittedly archaic system. Unfortunately, the courts have tended not to focus on the various alternatives available to them with the result that many defendants are incarcerated prior to trial for lack of collateral, even though the court may have been inclined to and under the impression that release of such defendants following[sic] the fixing of relatively low bail.³⁸

While not wanting to interfere with the court's discretion to fix bail in the amount and form it chooses, the legislature made the change in the law to promote the use of bail forms that were "less onerous" for defendants.³⁹ The legislative history to this amendment includes several letters supporting it (only the District Attorneys Association of the State of New York opposed it). For example, the Legal Aid Society wrote in 1972 (in words that unfortunately remain descriptive of bail setting in 2010):

The present procedure is much too casual. \$500 bail is set frequently without any thought of the form it should take or its effect on the defendant. A recent study we conducted in New York City showed that 61 percent of the defendants with \$500 or less bail fail to make it. This seriously affects the outcome of the defendant's case.⁴⁰

³⁷ Preiser's Practice Commentary to Criminal Procedure Law sec. 520.10, *McKinney's Consolidated Law of New York* (annotated), 2009.

³⁸ Memorandum from John Haggerty, 45th District chairman, Committee on the Judiciary, to the Honorable Michael Whitman, state senator, in support of L. 1972, c.784.

³⁹ Preiser's Practice Commentary to Criminal Procedure Law sec. 520.10, *McKinney's Consolidated Law of New York* (annotated), 2009.

⁴⁰ Letter from James T. Prendergast, director, Research and Legislation Project, The Legal Aid Society, to Nelson A. Rockefeller, governor of New York, June 1, 1972.

Human Rights Watch does not have statistics to indicate how often judges set a bail amount and fail to designate the form. Our interviews and observations, however, suggest that they usually do specify the form and that the 1972 amendment has thus not had the intended effect.

New York City judges almost invariably designate bail in the most financially onerous forms, cash and a secured surety bond, with the latter being set at a greater amount than the former.⁴¹ For example, the bail may be set as \$1,000 cash bail or a \$5,000 secured bond. Cash bail requires a defendant (drawing on her own resources or that of her family and friends) to post the entire amount of bail in full and in cash. Most of those accused of misdemeanors who flow through New York City's courts do not have the financial resources to post \$1,000 cash bail or offer the court a secured bond.⁴² Commercial surety bonds are of limited help: while commercial bail bondsmen do work in New York City, they rarely take on bail involving \$1,000 or less and their services are too expensive for low income offenders.⁴³

It is not clear why New York City judges rarely set bail in the form of unsecured or partially secured appearance or surety bonds. During our research several reasons were suggested. First, it may be judges believe that defendants not appropriate for release on recognizance (ROR) are such a flight risk that they should be incarcerated pending trial; not being able to order pretrial detention of misdemeanor defendants directly, they secure the detention by making bail unattainable. Second, judges may ignore alternative forms of bail because they simply are not part of the common, traditional judicial practice. In the pressured environment in which arraignment decisions are made, judges follow well-established patterns of decision making and have scant incentive to do something different. Some judges suggested to Human Rights Watch that many of their colleagues on the bench are simply unaware of the options; if they did know them once, they have essentially forgotten about them from disuse.

Third, some judges (as well as prosecutors) place responsibility on defense counsel for the infrequency with which these alternative forms of bail are used. This is somewhat disingenuous, as judges have the authority to choose the form of bail regardless of what

⁴¹ The statute is generally interpreted as prohibiting "cash only bail." See, for example, New York State Commission on Judicial Conduct, "Annual Report 2009," pp. 20-21. Judicial education and training programs have stressed that "setting bail in one form only, typically announcing 'cash only,' is contrary to CPL 520.10." Whatever forms of bail a court designates, the defendant also always has the option to post cash bail. New York Criminal Procedure Law, sec. 520.15.

⁴² New York law authorizes the use of secured bail bonds secured by personal and real property; the surety may be provided by the defendant himself or someone other than the defendant.

⁴³ Bond agents charge a 10 percent fee for the first \$3,000, 8 percent for the next 7,000, and 6 percent for amounts over \$10,000. The fee is not refunded. Bondsmen also require collateral, typically cash, which is refunded unless bail is forfeited for failure to appear. Mary T. Phillips, New York City Criminal Justice Agency, "Making Bail in New York City: Commercial Bonds and Cash Bail," March 2010.

defense counsel request. But it is true that defense counsel rarely request a judge to set bail as an unsecured bond or a form of bail other than cash or secured bonds; it is not part of their standard operating procedure. They believe judges will deny the request for a different bail form were they to do so, and pressed for time as everyone is during arraignments, they feel they cannot afford to make arguments for anything unusual that slows up the process, particularly if the request will be futile. By not requesting judges to set bail in alternative forms, however, defense counsel contribute to their disuse. If the defense bar consistently pressed for unsecured bonds, for example, judicial practice might change.

Some professional participants in and observers of New York City's criminal justice system question whether unsecured bonds are appropriate for poor defendants given the likelihood that their poverty would make it difficult for them to ever pay the bond amount should they fail to show up in court. But this simply raises the inherent equitable dilemma of conditioning pretrial freedom on financial resources. In addition, the fact that the bond amount may not be paid does not leave the criminal justice system without recourse. Defendants who do not show up for scheduled court appearances have violated court orders and judges will issue bench warrants for their arrest. As a practical matter in New York City police do not typically seek to arrest defendants who fail to show up in court (most of whom, as discussed below, will in any event return to court voluntarily). But if persons with a bench warrant are subsequently arrested for a new offense, the criminal record check will uncover the bench warrant and they can then be prosecuted and held accountable for violating the court order.

Like many observers of or participants in the US criminal justice system, the American Bar Association (ABA), as noted above, has long criticized financial bail, pointing out that it undermines the integrity of the criminal justice system, is unfair to poor defendants, and is ineffective in achieving key objectives of the release/detention decision.⁴⁴ The ABA's standards for pretrial release provide that financial conditions should be used only when no other conditions will provide reasonable assurance a defendant will appear for future court appearance. If financial conditions are imposed, the court should first consider releasing the defendant on an unsecured bond, and if that is deemed an insufficient condition of release, bail should be set at the lowest level necessary to ensure the defendant's appearance and with regard to his financial ability. According to the ABA, when financial conditions are imposed to secure a defendant's appearance in court, they should not be set at an amount that results in a defendant's incarceration solely because he could not post the designated amount.⁴⁵

⁴⁴ American Bar Association, *ABA Criminal Justice Standards: Pretrial Release*, 3rd ed. (Washington, DC: American Bar Association, 2007), Introduction.

⁴⁵ *Ibid.*, Standard 10-1.4(e).

After arrest, the accused who is poor must often await the disposition of his case in jail because of his inability to raise bail, while the accused who can afford bail is free to return to his family and job....This is an example of justice denied, of a man imprisoned for no reason other than his poverty. Think of the needless waste – to the individual, the family, and the community – every time a responsible person presumed by a law to be innocent is kept in jail awaiting trial solely because he is unable to raise bail money.⁴⁶

—Supreme Court Justice Arthur Goldberg

⁴⁶ Arthur Goldberg, “Equality and Governmental Action,” *New York University Law Review*, vol. 39 (1964), 218-222.

II. Who Suffers?: Bail and Pretrial Detention of Low Income Defendants

For the Poor, Bail Means Jail

When bail is ordered at arraignment and defendants cannot post it (provide the court with the designated bail amount), they are incarcerated.⁴⁷ Pretrial incarceration, including the incarceration of defendants who cannot post bail, is not a problem unique to New York. According to the Bureau of Justice Statistics of the US Department of Justice, 62 percent of the nation's jail population consists of unconvicted detainees, and in the nation's 75 largest counties, 37 percent of felony defendants are held on bail until case disposition.⁴⁸ The Pretrial Justice Institute estimates it costs \$9 billion annually to incarcerate defendants held on bail.⁴⁹

It is rare to learn of a wealthy defendant who is unable to post bail and is consequently incarcerated, even when the bail amounts are extremely high.⁵⁰ In the past twelve months, for example, John "Junior" Gotti, accused of racketeering, was able to post a \$2 million bail, and Sonny Franzese, accused of extortion, posted a \$1 million bail.⁵¹ But inability to post bail and subsequent incarceration is all too common for people of scant financial means. Even when they are accused of low level offenses, such as smoking marijuana in public, the lack of money to pay bail results in the pretrial loss of liberty.⁵²

The incarceration of pretrial detainees has a significant impact on New York City jails. According to the New York City Department of Correction, at any given moment, 39 percent of New York City's jail population consists of inmates who are in jail pretrial solely because

⁴⁷ New York Criminal Procedure Law, sec. 510.40(3). "If the bail fixed is not posted, or is not approved after being posted, the court must order that the [defendant] be committed to the custody of the sheriff."

⁴⁸ Todd D. Minton, Bureau of Justice Statistics, "Jail Inmates at Midyear 2009-Statistical Tables," June 2010; Thomas H. Cohen and Tracey Kyckelhahn, Bureau of Justice Statistics, "Felony Defendants in Large Urban Counties, 2006," May 2010.

⁴⁹ Human Rights Watch telephone interview with Timothy Murray, executive director, Pretrial Justice Institute, Washington, D.C., August 11, 2010.

⁵⁰ According to unpublished data provided to Human Rights Watch by the New York City Department of Correction, in 2009 there were 817 admissions of inmates held on bail of more than \$100,000, including 34 on bail of \$1 million or more. Data on file at Human Rights Watch. We have no information concerning the inmates' financial resources.

⁵¹ Bruce Golding, Doug Montero, Murray Weiss and Kati Cornell, "John 'Junior' Gotti case ends in mistrial, again," *New York Post*, December 1, 2009. John Marzulli, "Legendary mobster Sonny Franzese, 93, indicted for shaking down Hustler, Penthouse strip joints," *Daily News*, May 4, 2010.

⁵² For an excellent overview of the connection between poverty, bail and pretrial detention, see Jarrett Murphy, "Awaiting Justice: The punishing price of NYC's bail system," *City Limits*, vol. 31 no. 3 (2007).

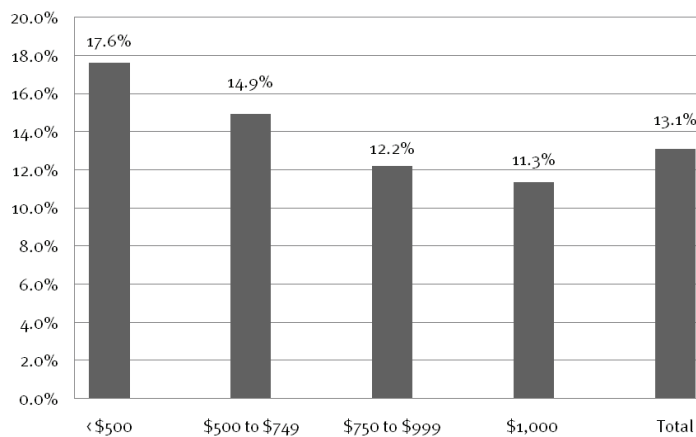
they have not posted bail.⁵³ In 2009, there were 98,980 total admissions to the city’s jails, a little more than half of which (51,047) were pretrial detainees incarcerated solely because they had not posted bail. Pretrial detainees charged with misdemeanors who had not posted bail constituted 22,846 admissions, or 23 percent of all admissions.⁵⁴

Twenty-three year old John F., a black man, was arrested in Brooklyn for walking between subway train cars. He had no prior arrests, but had six prior summonses for having an unleashed dog. The judge set bail at \$500. John F. was lucky; his mother was able to bail him out.⁵⁵

Among defendants arrested in 2008 on nonfelony charges and given bail of \$1,000 or less, only 13 percent were able to post bail at arraignment (See Figure 1).⁵⁶ Not surprisingly, the higher the amount at which bail was set, the less likely the defendants would be able to post it. In cases with bail set at \$1,000, only 11.3 percent of defendants were able to post bail, compared to 17.6 percent in cases in which bail was under \$500.

Figure 1

Making Bail at Arraignment, Nonfelony Cases by Bail Amount



Source: New York City Criminal Justice Agency
 Note: Includes cases of New York City defendants arrested in 2008 on nonfelony charges with bail set equal to or less than \$1,000. Cases with bail set at \$1 excluded.

⁵³ Unpublished data provided to Human Rights Watch by New York City Department of Correction. Data on file at Human Rights Watch. The figure, based on a snapshot of the city jail population on October 18, 2010, excludes pretrial detainees for whom bail has been set but who might be detained in custody even if they posted bail because of restraints on them. Such restraints might include, for example, a remand placed on the defendant by other New York courts or warrants from other jurisdictions of agencies, e.g. federal courts or Immigration and Customs Enforcement.

⁵⁴ Ibid. The data does not reflect unique defendants, but admissions. If a defendant were sent to jail for pretrial detention twice in a year, that would be counted as two admissions.

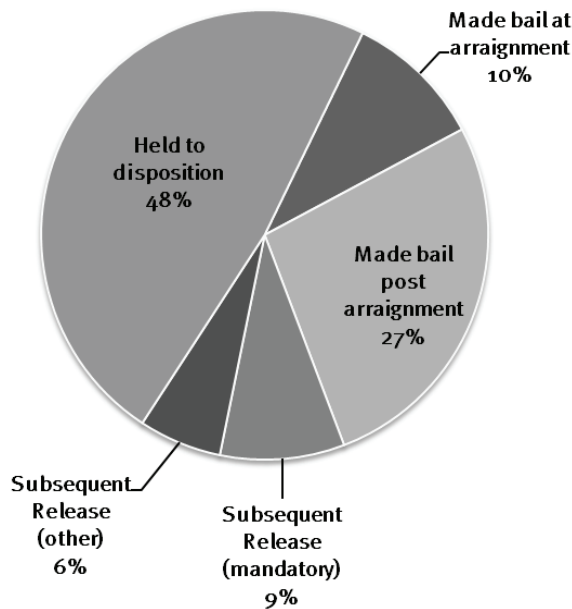
⁵⁵ Human Rights Watch interview with Brooklyn Defender Services defense counsel for John F. (not his real name), New York City, March 2, 2010.

⁵⁶ Unpublished data provided to Human Rights Watch by New York City Criminal Justice Agency, June 2010. When felony and nonfelony cases are combined, defendants in only 10 percent of the cases are able to post the designated bail at arraignment. New York City Criminal Justice Agency, “2008 Annual Report,” p. 22, Exhibit 14.

Some of the nonfelony defendants sent to jail for pretrial detention because they cannot post bail will subsequently be released before their case ends, because they were subsequently able to put together the bail amount, for example, or because they are released on their own recognizance after the prosecutor has failed to “convert” the misdemeanor complaint within the prescribed time period (See Figure 2).⁵⁷ But many will remain in pretrial detention for the duration of their cases.⁵⁸

Figure 2

Release and Detention in Nonfelony Cases with Bail Set at Arraignment



Source: Mary T. Phillips, New York City Criminal Justice Agency, “Bail, Detention, & Nonfelony Case Outcomes,” Research Brief No. 14, May 2007.

Although some nonfelony defendants who are not able to post bail at arraignment are released from pretrial detention within a day, most are held in jail for considerable periods

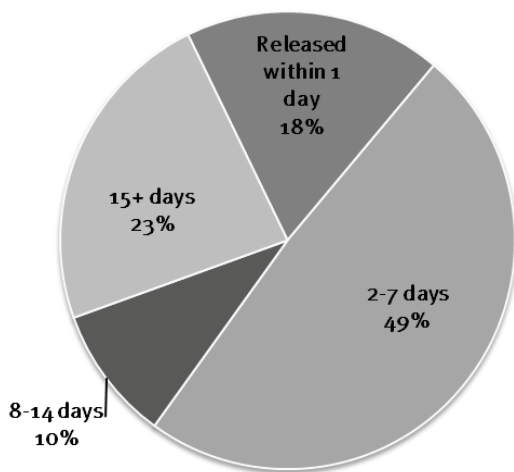
⁵⁷ Mary T. Phillips, New York City Criminal Justice Agency, “Bail, Detention, & Nonfelony Case Outcomes,” Research Brief No. 14, May 2007, <http://www.cjareports.org/reports/brief14.pdf> (accessed October 26, 2010), p. 2. The dataset was taken from the period October 1, 2003 to January 21, 2004. In figure 2, subsequent mandatory ROR includes cases in which defendants benefited from New York Criminal Procedure Law sec. 170.70 which requires the release of a detained nonfelony defendant after five days (six if over a Sunday) if the prosecutor has not replaced the complaint with formal charges signed by someone with firsthand knowledge of the offense. In 45 percent of cases in Criminal Court with bail set at arraignment, the defendant was not released before the case ended. New York City Criminal Justice Agency, “Annual Report 2008,” p. 24, Exhibit 15.

⁵⁸ New York City Criminal Justice Agency, “Annual Report 2008,” p. 24, Exhibit 15. Low bail did not significantly increase the likelihood of release: among defendants whose bail was set at \$500 or less, 40 percent were not released prior to case disposition.

of time even when their bail is relatively low. As shown in Figure 3, the defendants spent two to seven days in pretrial detention in almost half the cases of nonfelony defendants who were not able to make bail of \$1,000 or less at arraignment, and nearly one in four spent more than 15 days.⁵⁹ The mean length of pretrial detention was 15.7 days, the median 5 days. In 3,848 cases, the defendants spent more than two weeks behind bars.

Figure 3

Length of Pretrial Detention in Nonfelony Cases



Source: New York City Criminal Justice Agency
 Note: Includes cases of New York City defendants arrested in 2008 on nonfelony charges with bail set equal to or less than \$1,000. Cases with bail met at arraignment, or with bail set at \$1 excluded.

The New York City Criminal Justice Agency (CJA) calculated the proportion of detained nonfelony defendants who remained in pretrial detention at different times following their arraignment.⁶⁰ According to its calculations, 85 percent were in detention after one day, nearly two-thirds (64 percent) remained incarcerated after the fourth day, and 43 percent were still in detention at the end of the fifth day. By the 18th day, 25 percent remained in detention, and 10 percent remained in detention after 50 days.

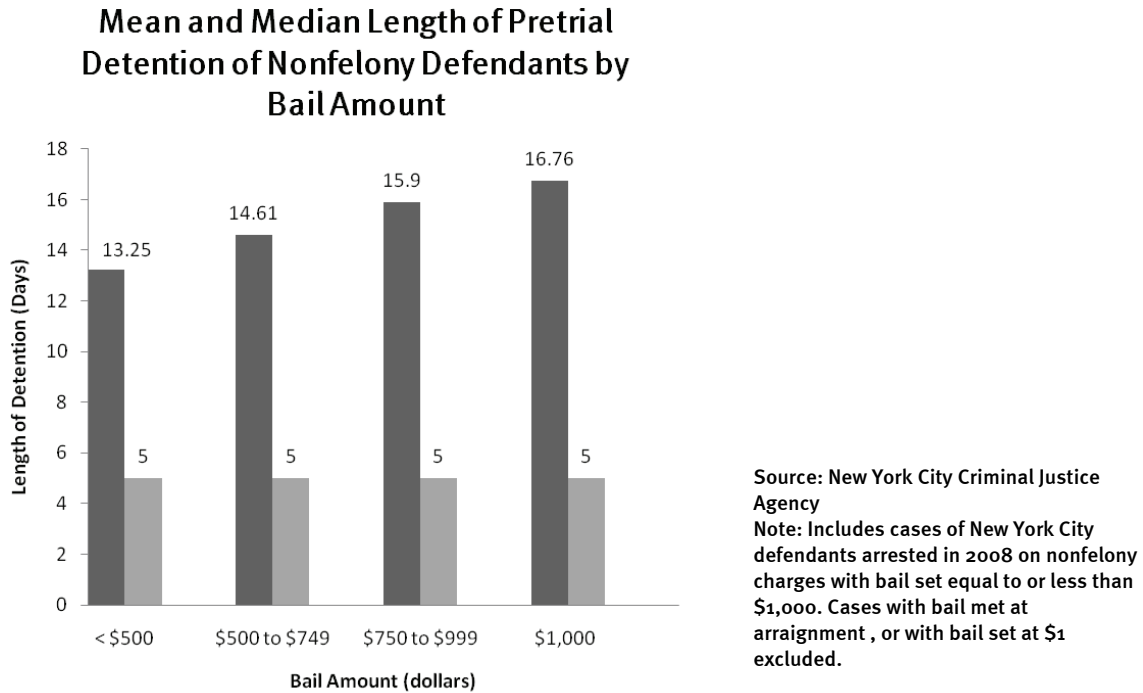
The greater the bail amount, the longer the pretrial detention. Among defendants arrested in 2008 on nonfelony charges and given bail of \$1,000 or less, the mean length of pretrial

⁵⁹ Percentage calculation excludes 110 cases in which length of detention was unknown.

⁶⁰ The analysis was based on a dataset including all arrests from October 1, 2003 through January 31, 2004. The length of detention is measured by the number of days the defendant spent in jail prior to release on bail or ROR or prior to the disposition of the case. Phillips, "Bail, Detention, & Nonfelony Case Outcomes," p. 3, Figure 2.

detention was 13.25 days in cases in which the bail was less than \$500, compared to a mean of 16.76 days when the bail was at \$1,000 (See Figure 4).⁶¹

Figure 4



Misdemeanors and lesser offenses by definition are not very serious offenses, and some of them include conduct that might be (and in some other jurisdictions is) discouraged without recourse to criminal arrests, such as smoking marijuana in public, turnstile jumping, or trespassing on public housing property. Nevertheless, in New York City, persons charged even with such petty offenses will be held in pretrial detention if bail is set and they cannot post it at arraignment. As shown in Table 2, the average length of detention for defendants accused of possession of marijuana in public view who were not able to post bail of \$1,000 or less was 10.4 days. For defendants arrested on theft of services charges—typically turnstile jumping⁶²—the mean length of pretrial detention was 15.35 days. Defendants arrested for physically injurious nonfelony offenses (assault, domestic violence) and for property crimes (e.g. shoplifting) had the longest average periods of pretrial detention, 17.25 and 19.01 days, respectively.

⁶¹ See also, Phillips, “Bail, Detention, & Nonfelony Case Outcomes,” p. 4. The median number of days in detention increased from 4 days for cases with bail of \$500 or less to 9 days for cases with bail above \$5,000.

⁶² Although there are no definitive statistics, it is generally agreed that most defendants prosecuted for misdemeanor theft of services are accused of having used the subway without paying the fare, by “jumping” over or ducking under the subway turnstile.

Table 2

Length of Detention	Number of Days in Detention by Charge Type										
	Drug PL 220 (excluding Marijuana)	Drug PL 221 (Marijuana)	Physically Injurious	Misconduct, Obstruction, Prostitution	Property crime/Theft	Computer crimes	VTL	Weapon	Unknown Charge Type	Total	
Made bail at arraignment	278 7.0%	250 17.7%	874 17.3%	376 10.8%	242 8.5%	53 7.2%	339 32.9%	71 17.7%	5 5.6%	2,488 13.1%	
Released within 1 day	317 8.0%	291 20.6%	1,038 20.5%	499 14.3%	323 11.4%	115 15.7%	335 32.6%	96 25.1%	22 24.4%	3,036 16.0%	
Detained 2-7 days	2,290 57.7%	615 43.6%	1,837 36.3%	1,469 42.2%	1,152 40.6%	299 40.7%	222 21.6%	149 37.2%	42 46.7%	8,075 42.4%	
Detained 8-14 days	298 7.5%	94 6.7%	276 5.5%	402 11.5%	303 10.7%	116 15.8%	49 4.8%	35 6.1%	7 7.8%	1,580 8.3%	
Detained 15+ days	784 19.8%	161 11.4%	1,034 20.4%	738 21.2%	818 28.8%	151 20.6%	84 8.2%	64 13.9%	14 15.6%	3,848 20.2%	
Number of cases	3,967 100%	1,411 100%	5,059 100%	3,484 100%	2,838 100%	734 100%	1,029 100%	415 100%	90 100%	19,027 100%	
Mean days detained	14.28	10.42	17.25	15.97	19.01	15.35	10.62	14.93	8.82	15.7	
Median days detained	5	5	5	5	5	5	2	5	5	5	
Maximum days detained	324	298	460	370	482	333	284	419	127	482	
Length of detention unknown	14	7	29	27	20	3	7	3	0	110	
Total	3,981	1,418	5,088	3,511	2,858	737	1,036	418	90	19,137	

Source: New York City Criminal Justice Agency

Note: Includes cases of New York City defendants arrested in 2008 on nonfelony charges with bail set equal to or less than \$1,000. Cases with bail set at \$1 excluded.

Sub Rosa Preventive Detention

When bail is set at amounts that make it impossible for defendants to obtain pretrial release, the bail decision operates to secure a “form of sub rosa preventive detention.”⁶³ No doubt some judges set bail at unaffordable levels not realizing they are doing so. But our research suggests that judges also set bail assuming—and sometimes intending—that pretrial detention will be the result. As one judge told Human Rights Watch, if judges see a defendant who “is a junkie, with no job and no home, [they] set bail.”⁶⁴ That is, in some cases judges believe jail is the only way to secure a defendant’s future appearance in court; since the statute does not permit sending the defendant to jail directly, that goal is accomplished indirectly through unaffordable bail. Judges know that many, if not most, misdemeanor defendants are not going to be able to post bail and that incarceration will be the consequence of their bail decision. Judge Emily Jane Goodman told Human Rights Watch: “Bail equals jail as a practical matter. Everyone knows that’s what’s going to happen. Judges know that \$1,000 will do the trick of keeping them in jail.”⁶⁵ As another New York City judge told us, “setting bail of \$500 is the equivalent of remand [ordering detention] for most people, even though the law doesn’t permit remand in misdemeanor cases.”⁶⁶

New York law contains no provision such as that recommended by the American Bar Association to prevent bail from becoming an indirect and unacknowledged mechanism for pretrial detention. Standard 10-1.4(e) of the ABA Pretrial Release Standards states: “The judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant’s inability to pay.”⁶⁷ As the ABA commentary to this standard explains:

[The] intent behind this limitation is to ensure that financial bail serves only as an incentive for released defendants to appear in court and not as a subterfuge for detaining defendants. Detention should only result from an explicit detention decision, at a hearing specifically designed to decide that question, not from the defendant’s inability to afford the assigned bail.⁶⁸

⁶³ National Association of Pretrial Services Agencies, “Standards on Pretrial Release, Third Edition,” October 2004, Commentary to Standard 1.5 B.

⁶⁴ Human Rights Watch interview with Judge Michael J. Obus, Supreme Court, New York County, New York, New York, April 3, 2010.

⁶⁵ Human Rights Watch interview with Judge Emily Jane Goodman, Supreme Court, New York county, New York, New York, May 26, 2010.

⁶⁶ Human Rights Watch interview with New York City judge (name withheld), New York, New York, June 18, 2010.

⁶⁷ American Bar Association, *ABA Criminal Justice Standards: Pretrial Release*, Standard 10-1.4(e), Conditions of release.

⁶⁸ *Ibid.*, Commentary to Standard 10-1.4(e), p. 44. Federal law contains just such a limitation, see, 18.U.S.C. §3142(c)(2) (“the judicial officer may not impose a financial condition that results in the pretrial detention of the person.”).

Federal law and the law of the District of Columbia contain provisions similar to that called for by the ABA.⁶⁹

Human Rights Watch agrees with the ABA that a decision to detain a defendant prior to trial should only be made at a hearing in which the government proves by clear and convincing evidence that no condition or combination of conditions of release will provide reasonable assurance that the defendant will appear for court proceedings or protect the safety of the community or any person.⁷⁰ Unfortunately, in New York City arraignments, there is no need for the prosecutor to present convincing evidence concerning the necessity of detention. Such limited argument as takes place during arraignment is ostensibly focused on financial conditions of release, but it is a largely a charade because everyone knows detention is the most likely outcome if bail is not set at an amount that the defendant has acknowledged he or his family can pay.

Human Rights Watch also agrees with the ABA that eligibility for pretrial detention should be limited to defendants charged with violent or dangerous crimes, or charged with serious offenses who pose a substantial risk of failure to appear in court.⁷¹ Defendants charged with non-serious offenses should not be eligible for detention before trial unless there is a substantial risk the defendant “will obstruct or attempt to obstruct justice, or threaten, injure or intimidate a prospective witness or juror.”⁷² The ABA appropriately calls for a degree of proportionality between the seriousness of loss of liberty and the seriousness of the risk posed by the defendant. As discussed below, there are ways short of detention to mitigate the risk that a nonfelony defendant will not appear for court proceedings.

Pretrial Punishment

For many people charged with misdemeanor crimes in New York City, the pretrial “process is the punishment.”⁷³ As Rick Jones, executive director of Neighborhood Defender Service of

⁶⁹ “Judicial officer may not impose a financial condition that results in the pretrial detention of the person.” 18 U.S.C. sec. 3142(c)(2). Judicial officer “may impose such a financial condition to reasonably assure the defendant’s presence at all court proceedings that does not result in the preventive detention of the person.” D.C. Code Ann. sec. 23-1321(c)(1)(3).

⁷⁰ American Bar Association, *ABA Criminal Justice Standards: Pretrial Release*, Standard 10-5.8(a). See also, National Association of Pretrial Services Agencies, “Standards on Pretrial Release,” Commentary to Standard 2.8(a). The “clear and convincing evidence” required is a deliberately high standard that “reflects the high value placed on individual liberty in the American legal system.”

⁷¹ The definitions of dangerous, violent, and serious offense for purposes of this standard is left to individual jurisdictions to determine. The ABA commentary suggests a defendant charged with criminal fraud who has access to large amounts of money as an example of a defendant charged with a “serious” offense who may pose a substantial risk of failing to appear in court.

⁷² American Bar Association, *ABA Criminal Justice Standards: Pretrial Release*, Standard 10-5.9(a). See also National Association of Pretrial Services Agencies, “Standards on Pretrial Release,” Standard 2.9(a).

⁷³ Thirty years ago, Malcolm Feeley observed the functioning and impact of lower courts in New Haven handling misdemeanor defendants. The thesis and title of his justly famous book, *The Process is the Punishment*, is all too apt a description of the

Harlem, points out: “It is a legal fiction that the system will vigorously prosecute those who are arrested. Prosecutors know they cannot and will not prosecute all the cases. For many defendants, arrest and pretrial detention is the punishment.”⁷⁴ In the eyes of the law, pretrial detention is not punishment. But for those who are in jail because they cannot post bail, the experience scarcely differs from being in jail because of a sentence of guilt. They endure the same loss of liberty, the same stress and turmoil of incarceration, and the same loss of income and ability to care for their families.

The judges we interviewed denied any punitive motivation in their bail decisions. Nevertheless, defense attorneys we interviewed believe that at least in some cases judges intend pretrial detention to serve as de facto “preemptive punishment “ for misdemeanor offenders who—legal niceties about presumed innocence aside—are often assumed to have done something wrong to have landed in court, especially if they have a criminal record.⁷⁵ In addition, as one New York City judge told us, “many judges have what must be considered contempt for the street people parading before them...[they have] no problem sending them to jail—better than having them hanging around the neighborhoods.”⁷⁶

Some criminal justice practitioners insist that the mere fact of a prior criminal record predisposes judges to set bail, even though prior convictions do not predict failure to appear (see discussion below). Certainly, as shown in Table 3, about three-quarters of those who were given bail at or under \$1,000 had prior convictions. We do not have the data that would tell us, however, whether those defendants with prior convictions also had backgrounds (such as prior bench warrants or weak community ties) that have been demonstrated to predict failure to appear.

Criminal Court in New York City today. Malcolm M. Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (New York: Russell Sage Foundation, 1979). The book was republished with a new foreword and preface in 1992.

⁷⁴ Human Rights Watch interview with Rick Jones, executive director, Neighborhood Defender Service, New York, New York, April 20, 2010.

⁷⁵ Many of those arrested for misdemeanors do have records: 39.6 percent of New York City arrestees in 2009 on nonfelony charges have prior felony convictions, 52.6 percent have prior misdemeanor convictions, and 36.8 percent have three or more prior misdemeanor convictions. Unpublished data for fiscal year 2009 provided to Human Rights Watch by New York State Division of Criminal Justice Services. Data on file at Human Rights Watch.

⁷⁶ Human Rights Watch interview with New York City judge (name withheld), New York, New York, June 7, 2010.

Table 3

Criminal History of Nonfelony Defendants Released on Recognizance (ROR) or with Bail of \$1,000 or Less				
Defendant's Criminal History	ROR	Percentage of ROR	Bail at or under \$1,000	Total
No prior convictions	52,943	58.4%	4,579	57,522
Prior misdemeanor conviction only	9,042	10.0%	4,448	13,490
Prior felony conviction only	3,854	4.3%	939	4,793
Both misdemeanor and felony priors	9,123	10.1%	8,203	17,326
data not available	15,643	17.3%	968	16,611
Total	90,605	100.0%	19,137	109,742

Source: New York City Criminal Justice Agency

Note: Includes cases of New York City defendants arrested in 2008 on nonfelony charges with bail set equal to or less than \$1,000. Cases with bail set at \$1 excluded.

The punishing experience of pretrial detention is endured by thousands of nonfelony defendants who are never convicted. According to CJA:

In 22 percent of nonfelony cases with a detained defendant, the defendant was ultimately acquitted or the case was dismissed. In an additional 24 percent of cases with detention, the defendant was convicted but the sentence did not include any jail (not even time served). This means that nearly half of detained [nonfelony] defendants served time in jail only because they were unable to post bail—often a very small amount.⁷⁷

Among the defendants arrested in 2008 on nonfelony charges and given bail under \$1,000, 23.8 percent were not convicted.⁷⁸

Pretrial detention is also disproportionate to the punishment that can be expected for minor crimes. As shown in Table 4⁷⁹, more than half of the persons arrested on misdemeanor

⁷⁷ Phillips, "Pretrial Detention and Case Outcomes, Part 1: Nonfelony Cases," p. 59.

⁷⁸ Unpublished data provided to Human Rights Watch by the New York City Criminal Justice Agency, June 2010. Data on file at Human Rights Watch.

⁷⁹ The data in Table 4 reflects the case outcomes in 2009 of arrests in which most serious charge was a misdemeanor, regardless of when the arrest occurred. Convictions include convictions for offenses other than those charged at arrest, e.g., a misdemeanor arrest may result in a conviction for a violation. Indeed, 56.1 percent of misdemeanor arrests lead to convictions for non-criminal offenses. For example, a quite common scenario is that a person arrested for a misdemeanor of criminal possession of marijuana in public view, pleads guilty to the non-criminal offense of disorderly conduct. Only 490 misdemeanor arrests (0.4 percent) ended with felony convictions. New York State Division of Criminal Justice Services,

charges and subsequently convicted are sentenced to fines, probation, or conditional discharge.⁸⁰ The time in pretrial detention (as well as in police lockup pre-arraignment) is quite literally punishment paid in advance for the additional 19.5 percent of such defendants who received sentences of time served.⁸¹

Table 4

Dispositions of Misdemeanor Arrests in 2009			
		Total	
		N	%
Total Convictions		128,351	100.0%
Sentences to:	Prison*	177	.1%
	Jail	26,475	20.6%
	Time Served	25,009	19.5%
	Jail with Probation	211	.2%
	Probation	724	.6%
	Fine	19,631	15.3%
	Conditional Discharge	55,746	43.4%
	Other	378	.3%

Source: New York State Division of Criminal Justice Services, New York City Adult Arrests Disposed—Misdemeanors, <http://criminaljustice.state.ny.us/crimnet/ojsa/dispos/nyc.pdf> (accessed November 15, 2010).

*Prison sentences given for convictions in cases in which the charge was increased from misdemeanor to felony following arrest.

When a jail sentence is imposed, some misdemeanants receive sentences shorter than the length of time in pretrial detention. The median length of pretrial incarceration for misdemeanor defendants arrested in 2008 is five days, the average is 15⁸²; yet according to the New York State Division of Criminal Justice Services, in 48 percent of cases in which people arrested on misdemeanor charges are convicted and sentenced to jail, the sentence is less than 15 days; in 9 percent of the cases, it is less than five days.⁸³

Disposition of Adult Arrests 2009, <http://criminaljustice.state.ny.us/crimnet/ojsa/dispos/nyc.pdf> (accessed November 1, 2010).

⁸⁰ New York Penal Law, sec. 65.05. A court may impose a sentence of conditional discharge for an offense if it is “of the opinion that neither the public interest nor the ends of justice would be served by a sentence of imprisonment and that probation supervision is not appropriate.” Conditional discharge sentences, which can last for one year for misdemeanor convictions, typically require the defendant to comply with specified treatment programs or engage in community service.

⁸¹ The percentage of misdemeanor arrests ending with sentences to time served varies somewhat according to the arrest offense. According to unpublished data for fiscal year 2009 provided to Human Rights Watch by the New York State Division of Criminal Justice Services, for example, 27.8 percent of convictions for criminal possession of marijuana resulted in sentences to time served.

⁸² See Table 2 above. Among the nonfelony cases in Table 2, the great preponderance are misdemeanors. As discussed above, the cases of most lesser offenses end at arraignment.

⁸³ Unpublished data on the sentences for NYC misdemeanor defendants in fiscal year 2009 provided to Human Rights Watch by New York State Division of Criminal Justice Services. Data on file at Human Rights Watch.

Plea Bargains

The desire to end the ordeal of the pretrial process—particularly pretrial detention—pressures defendants to plead guilty and give up their right to trial.⁸⁴ According to the New York State Division of Criminal Justice Services, about 60 percent of all misdemeanor arrests result in guilty pleas.⁸⁵ In 99.6 percent of the cases in which misdemeanor arrestees are convicted, the convictions are secured through guilty pleas.⁸⁶

Defense attorneys believe prosecutors ask for bail, including in cases they know are likely to be dismissed—as 34.5 percent of misdemeanor arrest cases are—simply to get pleas from defendants who will not want to languish in pretrial detention. Prosecutors deny this. But absent considerations of plea bargaining, it is difficult to fathom why prosecutors seek bail in the countless cases of petty crime which are extremely unlikely ever to be tried. Timothy Murray, executive director of the Pretrial Justice Institute, believes that prosecutors across the country, including in New York City, truly believe they are doing the best that can be done when they make their bail requests. “But woven into their mindset is the idea you should somehow ‘pay’ from the moment of arrest, that you owe the system something just by virtue of being accused...because they implicitly believe—and must believe—that people who are arrested are guilty.”⁸⁷

The unfortunate reality is that many clients in poor communities of color like the Bronx are too poor to post even modest bail of \$500, \$1,000 or \$1,500. Forced to remain behind bars, their lives destabilize: They lose their jobs; their physical and mental health deteriorates; and their families’ social and economic networks fall apart. In the face of these consequences and under the threat of continued incarceration, many defendants, whether guilty or innocent, plead guilty simply to get out of jail.
—“The Bronx Freedom Fund Report,” Fall 2009, on file with Human Rights Watch.

Judges, prosecutors, and defense counsel all know that defendants at arraignments who face the prospect of pretrial detention because they cannot post bail are likely to agree to plea bargains. If a defendant does not accept the plea, she can spend weeks, months, and

⁸⁴ Hardly any misdemeanor cases are actually tried. For example, in 2009, there were only 425 misdemeanor trials in the Criminal Court citywide. Criminal Court of the City of New York, “Annual Report 2009,” p. 52. Although 39 percent of the 425 defendants who went to trial were acquitted, it took over a year on average for them to be vindicated in their contention of innocence. *Ibid.*, p. 53.

⁸⁵ Of 205,068 New York City misdemeanor arrests in which the criminal proceedings ended in fiscal year 2009, 123,670 resulted in a conviction secured through a guilty plea. Unpublished data on the disposition of NYC misdemeanor arrests in fiscal year 2009 provided to Human Rights Watch by New York State Division of Criminal Justice Services. Data on file at Human Rights Watch.

⁸⁶ In addition to convictions, 34.5 percent of misdemeanor arrests in which the cases ended in fiscal year 2009 resulted in dismissals, and 10 percent resulted in other dispositions, e.g., transfers to other jurisdictions or prosecution declined. New York State Division of Criminal Justice Services, *Disposition of Adult Arrests 2009*, <http://criminaljustice.state.ny.us/crimnet/ojsa/dispos/nyc.pdf> (accessed November 1, 2010).

⁸⁷ Human Rights Watch interview with Timothy Murray, Washington, D.C., May 4, 2010

even longer behind bars before the case ends. She can go home immediately, however, if she pleads guilty and receives the typical sentences of conditional discharge, a fine, or time served. Defense attorney Mark Loudon-Brown explained the choice facing many defendants: “Do you want to plea and go home, or do you want to fight the case for a year?”⁸⁸ Or as defense attorney Leah Horowitz said: “If you can’t [post bail], the easiest way to get out of jail is to take a plea...People don’t want to sit in jail to get their day in court and be vindicated. They would rather have their freedom.”⁸⁹

Even defendants who are not in pretrial detention will plead guilty. As one judge explained to Human Rights Watch, “Even innocent people plead just to get it over with. They do not want to come back for court appearances that will continue for months, they want to move on with their lives.”⁹⁰

While the plea may prevent or end pretrial detention, it also may get him a criminal record.⁹¹ A New York City judge told Human Rights Watch the criminal justice system “is a self-fulfilling system; defendants have to plea, and end up with a record” which brands them for life as a criminal and influences judges in a future case if arrested again.⁹² The convictions can also carry numerous collateral consequences, such as precluding the individuals from obtaining public housing.⁹³

Whether or not a defendant is in pretrial detention affects the terms of the plea bargain. As Robin Steinberg, executive director of The Bronx Defenders, told Human Rights Watch, “if you are in jail [pretrial] your ultimate sentence will be higher because your bargaining position is weaker.”⁹⁴ Conversely, when nonfelony defendants are free pretrial—either because of release on recognizance or bail—they have little incentive to accept a plea that involves a sentence of additional jail time. As one New York City prosecutor explained to Human Rights Watch, “If a defendant is not in jail, he is not going to plea to jail time...Time is

⁸⁸ Human Rights Watch interview with Mark Loudon Brown, The Bronx Defenders, New York City, March 9, 2010.

⁸⁹ Human Rights Watch interview with Leah Horowitz, The Bronx Defenders, New York City, March 9, 2010.

⁹⁰ Human Rights Watch interview with New York City judge (name withheld), New York City, March 8, 2010. Defendants may be called to court five to fifteen times in a case before it is finally disposed of, and each court appearance may consume an entire day as they must arrive in the morning and their case may not be called until the afternoon.

⁹¹ Defendants charged with misdemeanors may be offered a plea to a violation, which is not a crime. For example, a defendant charged with possession of marijuana in public view, a misdemeanor, may take a plea to disorderly conduct, which is a violation. But that conviction is still on his record, and carries collateral consequences.

⁹² Human Rights Watch interview with New York City judge (name withheld), New York City, June 18, 2010.

⁹³ Human Rights Watch, *No Second Chance: People with Criminal Records Denied Access to Public Housing* (New York: Human Rights Watch, 2004); Legal Action Center, “After Prison: Roadblocks to Reentry,” 2004, <http://www.lac.org/roadblocks-to-reentry>; Legal Action Center, “After Prison Report: 2009 Update,” 2009, <http://www.lac.org/roadblocks-to-reentry>.

⁹⁴ Human Rights Watch interview with Robin Steinberg, executive director, The Bronx Defenders, New York City, January 12, 2010.

defense's friend when the defendant is out of jail. Cases weaken over time, witnesses fall away, and evidence gets stale. The defendant can hope the case will fall apart and will hold off agreeing to plea."⁹⁵ Prosecutors make plea offers based on the charges, the strength of the evidence, and the defendant's record. "But you negotiate from strength. If you know the defendant is in jail, you have more strength to drive a better bargain."⁹⁶

The desire to secure a plea can also influence prosecutor bail requests. Another prosecutor acknowledged: "You assume the defendant will not be able to make bail. You want them behind bars. Because chances of disposing of the case is easier. Defendants are more likely to plead guilty once in jail. They have a strong incentive to plead. If not in jail they will never agree to a plea that requires jail time."⁹⁷ Timothy Rountree, attorney-in-charge at The Legal Aid Society in Queens, described what he considers a common scenario: "Prosecutor will make a plea offer and defendant rejects it. Judge sets bail to force a person to rethink the offer. If defendant cannot make bail, prosecutor's offer will look better than sitting in jail...Prosecutor requests bail to coerce plea."⁹⁸

The prevalence of plea bargains, many triggered by the desire to avoid or end pretrial detention, helps explain the connection between pretrial detention and adverse case outcomes that has long been reported.⁹⁹ In a sophisticated and exhaustive analysis of the link between pretrial detention and case dispositions,¹⁰⁰ the New York City Criminal Justice Agency found that cases with a nonfelony defendant who was released until the case ended had a 50 percent conviction rate and cases with a nonfelony defendant who was detained to disposition had a 92 percent conviction rate. The CJA found that "pretrial detention had an effect on conviction after controlling statistically for the number and severity of arrest charges, the offense type of the arraignment charge, the defendant's criminal history, demographic characteristics, borough, and length of case processing, among other factors."¹⁰¹ The CJA concluded, that:

⁹⁵ Human Rights Watch interview with New York City prosecutor (name withheld), New York City, June 21, 2010.

⁹⁶ *Ibid.*

⁹⁷ Human Rights Watch interview with New York City prosecutor (name withheld), New York City, April 16, 2010.

⁹⁸ Human Rights Watch interview with Timothy B. Rountree, attorney-in-charge, Criminal Defense Practice, The Legal Aid Society, New York City, March 23, 2010.

⁹⁹ For an overview of the research addressing the link between pretrial detention and case disposition, see Phillips, "Pretrial Detention and Case Outcomes, Part 1: Nonfelony Cases," pp. 2-7.

¹⁰⁰ Phillips, "Pretrial Detention and Case Outcomes, Part 1: Nonfelony Cases." The study, using a dataset of arrests in New York City from 2003 and 2004, sought to determine whether 1) detention itself caused the outcomes (because jailed defendants are likely to plead guilty to gain release and are at a disadvantage participating in their defense); or 2) judges adjusted their release and bail decisions according to the probable outcome (setting high bail to keep defendants in custody who are likely to be convicted and given jail or prison sentences).

¹⁰¹ Phillips, "Bail, Detention, & Nonfelony Case Outcomes," p. 5. CJA's research also showed that detention has a small independent effect on the likelihood of incarceration following conviction, but only has a trivial effect on sentence length.

[The research] supports the hypothesis that pretrial detention has an adverse effect on case outcomes, especially the likelihood of conviction. The hypothesis is impossible to prove because some factor or factors for which data are unavailable—the strength of the evidence, for instance—could be the reason for both higher bail (resulting in detention) and for the conviction. However, we were able to control for a wide range of case and defendant characteristics. None, either singly or in combination, completely explained away the relationship between detention and likelihood of conviction in nonfelony cases.¹⁰²

¹⁰² Phillips, “Bail, Detention, & Nonfelony Case Outcomes,” p.7.

III. Factors Influencing Judges' Bail Decisions

The Exercise of Judicial Discretion

Judicial discretion regarding release and bail decisions is vast. As a judge explained to Human Rights Watch, “there are no written guidelines for bail; no one tells a judge what to do. Nothing is written. It’s a matter of practice.”¹⁰³ Judges can and do make profoundly different decisions regarding release and bail for similarly situated defendants. If faced with the identical defendant, one judge might set bail at \$500, another judge might set bail of \$1,500, and another might release the defendant on his own recognizance. The decisions regarding whether to release a defendant on his own recognizance or to set bail, and if bail is set, at what level, are supposed to be made solely with an eye to ensuring the defendant’s appearance in court. But it is difficult to discern how judges in fact assess the risk of failure to appear.

Understanding why judges exercise their discretion as they do is difficult because while the outcomes of their release and bail decisions are public (announced in open court), the reasons for those decisions are not. Judges are not required to explain orally at the arraignment or in writing the basis for their decisions.¹⁰⁴ They are not, for example, required to explain why they have chosen bail of \$500 instead of \$150, or why they require cash bail instead of an unsecured appearance bond. The lack of transparency, and hence of accountability, in release and bail decisions is particularly troubling when the potential consequence—loss of liberty—is so serious.

Judges we interviewed believe they and most of their colleagues are fair and reasonable in their arraignment decisions.¹⁰⁵ They suggest it is difficult, if not impossible, to identify patterns in the decisions because each case is unique, presenting endlessly varied individual factors. They also acknowledge the role of personal background, experience, predilections, and temperament in arraignment decisions. Judges who are former prosecutors may, for example,

¹⁰³ Human Rights Watch interview with New York City judge (name withheld), New York City, March 18, 2010.

¹⁰⁴ New York practice thus differs from that recommended by the American Bar Association that when release on personal recognizance is denied, the judicial officer “should include in the record a statement, written or oral, of the reasons for this decision.” American Bar Association, *ABA Criminal Justice Standards: Pretrial Release*, Standard 10-5(c). The Commentary to the Standard states the “purposes of this requirement are to encourage rational and fair decision-making, foster accountability for release/detention decisions made, and provide a record for review of the decision at later stages of the case.” According to one judge, given the volume of cases, as a practical matter arraignment judges would not have the time to spell out their reasoning in release and bail decisions. Interview with New York City Judge (name withheld), New York City, August 30, 2010.

¹⁰⁵ We were disappointed by the number of judges who refused to be interviewed, typically citing concerns about the propriety of commenting, even generally, about judicial bail practices. Among those who did agree to be interviewed, all but two requested that the interviews be anonymous.

approach arraignment with a different perspective on defendants than judges with no criminal justice experience. Defense attorneys say certain judges have reputations for being more likely to release defendants on their own recognizance than others, or for setting high bail. Judges' decisions can become quite idiosyncratic: one judge, for example, always releases women charged with prostitution; another is particularly prone to setting bail in domestic violence cases; another will usually set bail when the offender is charged with breaking into a car. Research by the CJA confirms that the release decision and amount of bail depends on the individual judges, and cannot be predicted simply on the basis of the charge or the particulars of a defendant's criminal history.¹⁰⁶

Judges are able to move quickly through the scores of cases in each shift because they know how they are likely to rule within seconds of reviewing the documents in front of them and identifying what for them are the salient features. They set bail in amounts that are familiar and entrenched, and not closely tailored to the individual's particular resources. Bail amounts tend to fall into categories, e.g., \$500, \$1,000, or \$1,500. That is, it is rare for a judge to set bail at, say, \$125 or \$325 (let alone \$124 or \$322).

Although each case is unique, they also fall into familiar categories and over time judges establish fairly predictable responses to cases in those categories. In fact, judges, prosecutors, and defense attorneys interviewed by Human Rights Watch agreed that there is typically a shared understanding, based on experience with countless cases, regarding the likely release and bail outcome in any given case. It would be considered unusual, for example, for a defendant not be released on her own recognizance if she were picked up smoking marijuana in a park, had no prior arrests, had a full time job, and had lived in the community all her life. In the cohort of defendants arrested in 2008 on nonfelony charges who either received ROR or bail under \$1,000, judges in fact released defendants on their own recognizance in 98 percent of the cases in which the CJA had recommended release because the defendant had strong community ties and no prior bench warrants, there were no prior convictions, and there was no open (or pending) case.¹⁰⁷ Most cases, however, are not so clear cut, and hence the great variability among judges as they respond to the factors in each case.

¹⁰⁶ The CJA concluded that "it was impossible to characterize judges overall as 'lenient' or 'strict.' Judges with higher than average ROR rates for misdemeanor defendants did not necessarily have the same tendency in felony cases, and leniency in setting low bail amounts did not carry over to ROR." Mary T. Phillips, New York City Criminal Justice Agency, "Factors Influencing Release and Bail Decisions in New York City: Part 3. Cross-Borough Analysis," July 2004, p. 39. Using data from Manhattan and Brooklyn, the CJA sought to identify and assess the specific factors influencing judicial release and bail decisions.

¹⁰⁷ Unpublished data provided to Human Rights Watch by New York City Criminal Justice Agency, June 2010. Data on file at Human Rights Watch.

Defense counsel have learned from experience to foresee what particular judges are likely to do in a given case. Human Rights Watch watched defense counsel meet with over a dozen defendants before arraignment and each time the lawyers explained what they thought the plea offer from the prosecutor would be, whether the judge would grant release on recognizance or set bail, and what the likely bail amount would be. In the subsequent arraignments, the defense counsel's predictions proved remarkably accurate. Similarly, prosecutors have a sense of whether a defendant is likely to be released or face bail, and if bail is set, what the basic range is within which the judge is likely to operate. They adjust their bail requests accordingly, knowing if they ask for bail amounts that are wildly out of line, they may annoy the judge and lose credibility.

In trying to understand release and bail decisions, one cannot ignore the deep impact of the objective strictures under which the Criminal Court operates. The volume of cases presented for arraignment, two-thirds of them for misdemeanors, has grown markedly and the number of prosecutors, defense attorneys, judges, and court personnel has not kept pace. As a result, arraignments are brief and hurried affairs, typically lasting no more than a few minutes. During that time, the judge hears from prosecutors and defense attorneys regarding disposition of the case (e.g., dismissal or a plea bargain) and makes decisions regarding release or bail and whether other orders are required (for example, orders of protection in domestic violence cases). The sheer number of cases forces all the professionals involved—judges, prosecutors, defense attorneys—to value speed and efficiency over individualized justice, giving arraignments a “conveyor belt quality.”¹⁰⁸ A substantial proportion of the judges interviewed by Human Rights Watch said they felt a strong institutional pressure to move cases rapidly; if more time were taken in each case, the courts might not be able to arraign every defendant within 24 hours, as they try to do.

Judges—as well as prosecutors and defense counsel—do the best they can under difficult circumstances. As New York City Judge Obus told Human Rights Watch, the “hardest thing is to sit in arraignments and make decisions regarding bail after just a couple of minutes.”¹⁰⁹ Careful consideration of the nature and significance of factors enumerated in the bail statute in the thousands of run-of-the-mill misdemeanor cases is not possible.

Judges have limited information available to them at arraignment: the defendant's criminal record (rap sheet), the complaint, the results of the pre-arraignment interview by the New York Criminal Justice Agency and its release recommendation based on its assessment of

¹⁰⁸ Martha Rayner, “Conference report: New York City's Criminal Courts: Are We Achieving Justice?” *Fordham Urban Law Journal*, vol. 31 issue 4 (2004), p. 1055.

¹⁰⁹ Human Rights Watch interview with Judge Michael J. Obus, New York City, April 13, 2010.

the statistical likelihood the defendant will fail to appear at future court proceedings and any additional information that may be provided by defense counsel and prosecutors during the brief hearing. Defense counsel may not have much to add as they typically meet with their clients for the first time just moments before standing up before the judge; prosecutors similarly may be reviewing their files for the first time moments before the case is called. Some of the information that might be relevant to a bail decision may not be available, for example, regarding the defendant's mental health history. Information regarding defendants' financial resources is limited to what the defendant says, and is rarely verified. Although the CJA will attempt before arraignment to verify a defendant's residence and employment, this is not always possible.

Lack of information alone, however, cannot be blamed for all the setting bail in a form and at amounts that defendants cannot provide. Judges usually have enough information in misdemeanor cases to make an educated guess: they can safely assume, for example, that someone unemployed and accused of stealing food will not be able to make bail set as \$1,000 cash or a \$5,000 bond. It is also striking, as noted above, that judges typically set bail in fixed amounts, e.g., \$500 or \$1,000, which suggests the judges have not tried to tailor bail amounts to defendants' actual resources. Although it happens, it is rare for a judge to discuss finances with a defendant and then set bail at, for example, \$180, because that is an amount he could afford and can get to the court immediately to prevent detention.

Some judges may recognize a defendant is poor and will not set bail at, say, \$10,000, but they may not realize—or they may be indifferent to—the difficulty poor defendants have in coming up with \$500 bail, an amount that may to the judges seem quite affordable. As attorney Leah Horowitz of the Bronx Defenders explained, “people struggling to find and keep employment, housing, simply don't have \$500 in available funds...even working families live paycheck to paycheck and don't have \$500 free with which to post bail.”¹¹⁰ A New York City judge told Human Rights Watch that he realized that even \$250 or \$500 bail could be too much for some defendants. As he pointed out, “they can't just go to an ATM machine and get the money.”¹¹¹ For low income or indigent defendants, there is a huge difference in affordability between bail of \$250 and \$1,000, yet judges are more likely to set bail at the latter than the former, and they almost never use unsecured bonds that do not condition pretrial freedom on financial resources. As shown in Table 1, among the 19,137 cases of defendants arrested in 2008 on nonfelony charges with bail set at \$1,000 or less,

¹¹⁰ Human Rights Watch interview with Leah Horowitz, New York City, February 1, 2010.

¹¹¹ Human Rights Watch interview with New York City judge (name withheld), New York City, March 8, 2010.

bail was set at less than \$500 in only 739 cases, compared to 8,016 cases with bail at \$1,000.¹¹²

Of course, some judges do make bail decisions taking into account what the defendant can pay. As one New York City judge told Human Rights Watch, “I will not keep someone in jail because he doesn’t have \$500. That’s just penalizing someone for being poor.”¹¹³

Defense attorneys rarely appeal the amount of bail set at arraignment. The public defenders who typically represent misdemeanor defendants lack the staff resources to seek review of thousands of cases of unaffordable bail. Even when review is sought, judges are reluctant to overturn bail decisions absent markedly changed circumstances following the initial bail decision,¹¹⁴ and it is extremely difficult to prevail in a habeas corpus proceeding arguing the judge abused his or her discretion in setting bail.¹¹⁵

The New York City Criminal Justice Agency’s Release Recommendations

If a defendant is free in the community pending trial, there is a risk that he may fail to return to court. The New York City Criminal Justice Agency assesses that risk using information which its research has shown to have a strong empirical relationship with the likelihood that defendants will appear for scheduled court dates. It classifies defendants into one of four categories: recommended for release on recognizance (ROR); moderate risk for ROR; not recommended for ROR; and no recommendation. The CJA makes no recommendations regarding bail amount.

The CJA classification is based on information collected in the pre-arraignment interview CJA personnel conduct with defendants who after arrest have been held in custody until arraignment¹¹⁶ and information the CJA obtains from the defendants’ official criminal history.

¹¹² Unpublished data provided to Human Rights Watch by New York City Criminal Justice Agency, June 2010. Data on file at Human Rights Watch.

¹¹³ Human Rights Watch interview with New York City judge (name withheld), New York City, March 14, 2010.

¹¹⁴ Under New York Criminal Procedure Law, sec. 530.30, if bail was denied or, if the bail was excessive, the superior court judge “may vacate the order of [the] local criminal court and release the defendant on his own recognizance or fix bail in a lesser amount or in a less burdensome form.”

¹¹⁵ A defendant can bring a petition for a writ of habeas corpus seeking a judgment granting him bail—if bail had been denied—or reducing bail, but the scope of review of an order denying or fixing bail is extremely narrow, and is limited to determining whether “it appears that the constitutional statutory standards inhibiting excessive bail or the arbitrary refusal of bail [have been] violated.” *People ex rel. Klein v. Krueger*, 25 N.Y.2d 497, 499 (1969).

¹¹⁶ CJA does not interview defendants who were not subjected to custodial arrests, such as those who are arrested and given desk appearance tickets notifying them that they must appear in court on a future date in connection with the arrest charges.

The current recommendation system, which began in 2003, includes four measures of community ties: 1) does the defendant report a NYC address; 2) does the defendant have a working telephone or cell phone; 3) is the defendant employed, in school, or in a training program full time; and 4) does the defendant expect someone, such as a friend or relative, to attend the arraignment. CJA obtains this information from defendants and it tries to verify their phone numbers, addresses, and work/employment. The CJA also looks at two aspects of the defendant's criminal history: has the defendant ever had a prior bench warrant and does he or she have any current open cases. Points are assigned or deducted according to the responses, with positive points assigned, for example, for evidence of community ties and negative points assigned, for example, for the absence of such ties and the existence of a bench warrant or another pending case. The total score, which can range from -12 to + 12, is used to determine the CJA's release recommendation. In 2008, the CJA recommended 32 percent of all adult defendants citywide for release on recognizance; 18 percent were categorized as a moderate flight risk; 46 percent were not recommended for release, and 4 percent had no recommendation.¹¹⁷

CJA research shows that defendants it has recommended for release and who are in fact released have lower failure-to-appear rates than those released despite a negative CJA recommendation. For example, in 2008 released defendants who had been recommended for release by CJA had a failure-to-appear rate of 9 percent, compared to a 24 percent failure to appear rate of defendants who had not been recommended.¹¹⁸

Judges take CJA recommendations into consideration, but they are not the decisive factor in judicial decision-making.¹¹⁹ Some judges told Human Rights Watch that they pay more attention to the facts ascertained by the CJA (such as whether the defendant is employed) than to its release recommendations. Although defendants recommended for release by CJA are more likely to be released than those CJA did not recommend,¹²⁰ judges also grant release on recognizance far more frequently than CJA recommends. Judges released defendants in 73 percent of misdemeanor cases citywide in 2008 that continued past arraignment even though CJA had recommended release in only 35 percent of those cases.¹²¹

¹¹⁷ New York City Criminal Justice Agency, "2008 Annual Report," December 2009, p. 14, Exhibit 7; Qudsia Siddiqi, New York City Criminal Justice Agency, "CJA's New Release-Recommendation System," Research Brief No. 5, April 2004, <http://www.cjareports.org/reports/brief5.pdf> (accessed October 26, 2010).

¹¹⁸ New York City Criminal Justice Agency, "2008 Annual Report," p. 27, Exhibit 18.

¹¹⁹ Phillips, "Factors Influencing Release and Bail Decisions in New York City," p. 2, p. 19, pp. 24-32.

¹²⁰ New York City Criminal Justice Agency, "Annual Report 2008," p. 19, Exhibit 12. ROR was granted in 81 percent of the cases in which the CJA had recommended it, compared to 43 percent of the cases in which it had not recommended it. The cases include defendants with felony and nonfelony charges.

¹²¹ Percentages extrapolated from data contained in *ibid.*, p. 19, Exhibit 12; and p. 18, Exhibit 11.

Some judges suggested to Human Rights Watch that release on recognizance is granted more frequently than recommended by CJA because the CJA criteria are too stringent. For example, the CJA will not recommend a defendant for release if he has ever received a bench warrant for failure to appear in court in a previous case, regardless of how long ago that happened, what the reasons were for the prior failure to appear, or whether he voluntarily returned to court the next day after missing a scheduled proceeding.¹²² Judges also noted that the CJA’s point system penalizes poor people, particularly those who do not have full time jobs or go to school full time and those who do not have working telephones. While the CJA’s statistical research demonstrates such factors are empirically correlated with risk of failure to appear, it appears that in many cases judges are reluctant to let mere poverty—in the absence of other factors—be the deciding factor in release decisions.

Role of Prosecutor

According to research by the CJA, the prosecutor’s bail request is the strongest predictor of judicial decisions on both release on recognizance and bail amount, outweighing the CJA recommendations, the nature of the offense, and the defendant’s criminal history.¹²³ The CJA found it very unusual for a judge to set bail if the prosecutor consented to release on recognizance (i.e., indicated that release was acceptable). Judges can and do order release on recognizance when the prosecutor has asked for bail to be set (see box below), but the higher the bail amount requested by the prosecutors, the lower the likelihood the judge will grant release.¹²⁴ With regard to bail, the amount requested by the prosecutor is “the *only* important factor” in the amount set by judges.¹²⁵ Prosecutor requests “establish parameters” for the ultimate bail decision: judges rarely set bail higher than that requested by the prosecutor and although they often set it lower, the amount they set rises “in tandem” with prosecutors requests, i.e., the higher the request by the prosecutor, the higher the judge’s bail amount is likely to be.¹²⁶

¹²² The information CJA has on prior bench warrants is taken from the official criminal history of each defendant prepared by the New York State Department of Criminal Justice Services. That history will not contain the reasons for the prior failure to appear and may not reflect the fact that the defendant subsequently returned to court.

¹²³ Phillips, “Factors Influencing Release and Bail Decisions in New York City,” pp. 39-41.

¹²⁴ Phillips, “Factors Influencing Release and Bail Decisions in New York City,” p. 23.

¹²⁵ Phillips, “Factors Influencing Release and Bail Decisions in New York City,” p. 39.

¹²⁶ *Ibid.*, p. 40. According to the CJA analysis, the median amount of bail set rose as the amount of bail requested by prosecutors rose, although the difference between the prosecutor’s request and the bail set increased as the bail amount requested increased. The median bail set was \$2,500 in both Manhattan and Brooklyn when bail requests were between \$5,000 and \$9,999; when requested bail amounts were \$50,000 or more, the median bail amount set was \$38,000 in Brooklyn and \$35,000 in Manhattan. *Ibid.*, p. 23.

Sam D., age 26, was arraigned on charges of stealing \$22 of food (some sugar, a piece of chicken, and a cake) which he said he stole because he had no money and it was his girlfriend's birthday. He lives with her and their one-month-old child on unemployment insurance of \$140 a week. He had no prior convictions although another shoplifting case was pending. Although the prosecutor asked for \$500 bail, the judge released Sam on his own recognizance.¹²⁷

Although prosecutors have great influence on judicial release and bail decisions, they are in fact relatively poor at predicting failure to appear by defendants. When the CJA undertook an analysis of prosecutor's bail requests in light of released defendant's actual record with regard to returning to court, it could find no consistent pattern. Prosecutors had not requested higher bail for defendants who did not return to court and they had not consented to release for defendants who did return to court. "Among released defendants, those for whom prosecutors had consented to [release on recognizance] failed to appear at the same rate as those for whom the prosecutor had requested over \$5,000 bail."¹²⁸ CJA believes that "arraignment judges would have a better chance of making an accurate assessment of risk of flight if they gave more weight to the CJA recommendation than to prosecutors' requests."¹²⁹

If judges are heavily influenced in their release and bail decisions by what the prosecutor requests, what influences the prosecutors? According to the CJA's analyses, prosecutors' stances on bail or release are influenced by charge severity, criminal history, and whether the offense was violent or involved a weapon. The existence of a prior bench warrant and the existence of open cases strongly increased the likelihood that prosecutors would not consent to ROR.¹³⁰ However, the CJA's analyses only went so far, accounting for less than half the variance in the prosecutor's consent to ROR.¹³¹ Charge severity was the predominant factor influencing the bail amount requested by prosecutors.¹³²

Prosecutors we interviewed were unwilling to say whether they had formal or informal guidelines regarding when to consent to release on recognizance. They insisted their positions depended on the specifics of each case, taking into account the defendant's criminal history, strength and severity of the case, and the CJA's recommendation, among many other factors. But they acknowledged they lack the time and information to make truly

¹²⁷ Human Rights Watch attended the arraignment of Sam D. (not his real name) in Manhattan on May 5, 2010.

¹²⁸ Mary T. Phillips, New York City Criminal Justice Agency, "Prosecutors' Bail Requests and the CJA Release Recommendation," Research Brief No. 9, August 2005, <http://www.cjareports.org/reports/brief9.pdf> (accessed October 26, 2010), p. 7.

¹²⁹ *Ibid.*, p. 2.

¹³⁰ Phillips, "Factors Influencing Release and Bail Decisions in New York City," p. 28.

¹³¹ *Ibid.*, p. 6.

¹³² *Ibid.*, p. 31.

individualized decisions. As noted above, prosecutors' positions on release and bail are poorly correlated with whether defendants fail to appear in court. There may be an inherent predisposition among prosecutors against consenting to release, as reflected in the fact that prosecutors consent to release on recognizance in only about 21 percent of criminal cases.¹³³ As one judge explained to Human Rights Watch, even though prosecutors have become more used to release without bail (they no longer "choke" on it as they used to), many still have a bias against it.¹³⁴

Prosecutors may know from past experience that a judge is likely to grant release in a particular case, but will ask for bail anyway to send a message to the defendant and his counsel that they take his case seriously and will be prosecuting it vigorously. One New York City prosecutor told Human Rights Watch, "I was told always to ask for at least \$750...because less suggests you really don't care if [release on recognizance] is granted."¹³⁵ A judge with many years on the bench agreed that a prosecutor who requests a low bail amount is signaling to the court that release is okay, although the prosecutor is not willing to acknowledge that publicly.¹³⁶ Because there is always a risk that a defendant released pretrial will commit a crime that lands the case on the front page, prosecutors find it safer "politically" to ask for bail, and let the judges take the heat for having released the defendant without bail.

A New York City prosecutor told Human Rights Watch that the most important factors influencing prosecutors' consent to release are "whether there is a victim at risk and whether there is an existing bench warrant."¹³⁷ This prosecutor also emphasized the importance of proportionality between the likely sentence for the crime and pretrial detention: "if we're not offering a plea bargain that includes incarceration, then we are not going to ask for bail."

Prosecutors will also typically ask for bail for defendants who fall into Operation Spotlight, a citywide program of the mayor and the New York City Office of the Criminal Justice Coordinator that was initiated in 2002 to target persistent misdemeanor recidivists who engage in quality-of-life offenses.¹³⁸ According to a New York City prosecutor: "These [Operation Spotlight]

¹³³ The CJA study was done in Brooklyn and Manhattan only, not citywide. Results for prosecutors in other boroughs might be very different. Mary T. Phillips, New York City Criminal Justice Agency, "Release and Bail Decisions in New York City," Research Brief No. 6, August 2004, <http://www.cjareports.org/reports/brief6.pdf> (accessed October 26, 2010), p. 6.

¹³⁴ Human Rights Watch interview with New York City judge (name withheld), New York City, March 8, 2010.

¹³⁵ Human Rights Watch interview with New York City prosecutor (name withheld), New York City, April 16, 2010.

¹³⁶ Human Rights Watch interview with New York City judge (name withheld), New York City, March 18, 2010.

¹³⁷ Human Rights Watch telephone interview with New York City prosecutor (name withheld), New York City, January 8, 2010.

¹³⁸ Freda F. Solomon, New York City Criminal Justice Agency, "Operation Spotlight: Year Four Program Report," November 2007. In the program's fourth full year, there were 20,149 docketed Spotlight program cases. Defendants who are targeted by Operation Spotlight have been arrested for a misdemeanor, have at least two other arrests within the previous twelve months, at least one of which must have been a misdemeanor as the top arrest charge, and must have two or more misdemeanor convictions, at least one of which must have occurred within the last 12 months. Defendants meeting Operation Spotlight criteria are

defendants face one year of incarceration, therefore we usually recommend bail at arraignment because of all appropriate factors connected with a chronic recidivist and generally one not compliant with a previous sentence obligation or other court order.”¹³⁹

Release on recognizance is granted in less than a quarter of Operation Spotlight cases, a low rate for defendants charged with misdemeanors.¹⁴⁰

There is little statistical data on the amount of bail prosecutors request in misdemeanor cases. Using a sample of felony and nonfelony cases from 2002 and 2003, CJA found that prosecutors in Manhattan and Brooklyn asked for bail of \$500 or less in 12.4 percent of the cases, \$501 to \$1,000 in 16.1 percent, \$1,001 to \$5,000 in 26.8 percent, and over \$5,000 in 18 percent.¹⁴¹ In the CJA’s analysis of the factors influencing bail amounts requested by prosecutors, charge severity was far and away the most important factor, with the nature of offense (i.e., whether violent) and criminal history considerably less important.¹⁴²

In interviews with Human Rights Watch, prosecutors shed little light on how they come up with the dollar amounts they request as bail. Robert Johnson, the Bronx district attorney, insisted to Human Rights Watch that bail is “not a science...there is no formula for determining bail requests. It is a human system...subjective...there are so many variables.”¹⁴³ A New York City prosecutor told Human Rights Watch that bail requests in misdemeanor cases typically range from \$500 to \$1,000. “When we ask for \$1,000 it’s a case where we believe the defendant will do jail time if convicted and therefore is more likely to flee.”¹⁴⁴ He said that in his office they never ask for bail of \$250, but would just consent to release in such a case. But when pressed about the importance of bail being affordable and tailored to defendant’s financial means, the prosecutor pointed out that prosecutors lack verified

automatically identified on rap sheets produced by New York State’s Division of Criminal Justice Services. As the Bronx District Attorney’s office notes, all such flagged cases receive “enhanced prosecutorial attention” (see <http://bronxda.nyc.gov/fcrime/initiatives.htm#spotlight>). Most of the Spotlight defendants are charged with nonviolent crimes. For example, in the period October 1, 2005 through September 30, 2006, 32.7 percent were charged with drug possession, 17.8 percent with petty larceny, and 8.2 percent with theft of services (turnstile jumping). Only 4.1 percent were charged with crimes involving harm to persons, e.g. assault. Solomon, “Operation Spotlight,” p. 11.

¹³⁹ E-mail communication from a New York City prosecutor (name withheld) to Human Rights Watch, August 25, 2010.

¹⁴⁰ Solomon, “Operation Spotlight: Year Four Program Report,” November 2007, p. 10, Table 4A. According to CJA’s analysis, 65 percent of Operation Spotlight defendants were a high risk of failing to appear because of their lack of community ties and another 12.5 percent had prior bench warrants. *Ibid.*, p. 5.

¹⁴¹ Percentages calculated from Phillips, “Prosecutors’ Bail Requests and the CJA Release Recommendation,” Figure 2. Data based on defendants arraigned in Criminal Court in Brooklyn and Manhattan between September, 2002 and March, 2003.

¹⁴² Phillips, “Factors Influencing Release and Bail Decisions in New York City,” p. 30. Other than charge severity, the other factors that had a significant impact on the amount of bail prosecutors requested were mostly related to the nature of the offense, and, to a lesser extent, to criminal history.

¹⁴³ Human Rights Watch telephone interview with Robert T. Johnson, district attorney, Bronx County, New York City, February 24, 2010.

¹⁴⁴ Human Rights Watch interview with New York City prosecutor (name withheld), New York City, May 25, 2010.

information on which to assess defendant's ability to afford bail. "You never really know if a person can make bail...except if obviously homeless." He continued, "How should a prosecutor decide how much? How do we find out a defendant's income and assets? There are no verified sources available when we make the bail request. We take into account what we can, but info, even from the CJA, is limited and not verified." District Attorney Johnson insisted it is "very subjective how to gauge economic means."¹⁴⁵

Given the influence prosecutors bail requests have on judges' decisions, prosecutors have a responsibility to try to tailor their bail requests to the defendants' resources, even if they do so with admittedly limited and mostly unverified information. If they have enough information to request \$500 or \$1,000 bail rather than \$10,000, they have enough to know the defendant has scant financial resources and to request less, or to suggest unsecured bonds rather than cash bail. According to the National Prosecution Standards of the National District Attorneys Association, prosecutors should "take steps to gather adequate information about the defendant's circumstances and history to request an appropriate bail amount" that will ensure the defendant appears at all required court proceedings, and, where allowed by law, does not pose a danger to others or to the community.¹⁴⁶ The amount requested should not be "greater than necessary to ensure the safety of others and the community and to ensure the appearance of the defendant at trial."¹⁴⁷ In addition, prosecutors "should recommend bail decisions that facilitate pretrial release rather than detention to the extent such release is consistent with the prosecutor's responsibilities..."¹⁴⁸

Judges and defense attorneys interviewed by Human Rights Watch did not believe that prosecutors are greatly concerned with making sure the amount of bail they request is no more than necessary to ensure defendants return to court. Several prosecutors interviewed by Human Rights Watch did not seem particularly disturbed that nonfelony defendants were being held in pretrial detention solely because they could not afford bail. Nor did they see it as their responsibility to help avoid such detention. In their view, it is for the defense attorneys to gather and present to the judge information about defendants' finances and it is the judges' responsibility to make sure bail is set at amounts that do not force defendants into pretrial detention just because they are poor. Quoting District Attorney Johnson again: "It's the defense attorney's job to get defendants out of jail or to get a low enough bail that

¹⁴⁵ Human Rights Watch telephone interview with Robert T. Johnson, New York City, February 24, 2010.

¹⁴⁶ National District Attorneys Association, *National Prosecution Standards 3rd edition*, 2010, Standard 4-4.12 and 4-4.2.

¹⁴⁷ *Ibid.*, Standard 4-4.2.

¹⁴⁸ *Ibid.*, Standard 4-4.4.

they can meet.”¹⁴⁹ Kings County District Attorney Charles Hynes told Human Rights Watch that in theory he agrees that defendants should not be incarcerated because they are too poor to make bail, but he insisted that defense counsel should provide the zealous representation of their clients necessary to make sure that does not happen.¹⁵⁰

Public Safety

Federal law and the law in many states permit pretrial detention of criminal defendants in order to protect the safety of the community or specific individuals as well as to secure their appearance in court.¹⁵¹ While the New York State legislature has not passed a law that authorizes pretrial detention on grounds of public safety, there is little doubt that considerations of public safety influence release and bail decisions in New York City.

Bail in New York City is sometimes deliberately set at a level that will ensure the pretrial detention of defendants deemed dangerous.¹⁵² Considerations of dangerousness most typically and obviously arise in cases in which the defendant is charged with a violent crime—particularly if the defendant has a prior record of violence—and/or in cases in which the defendant has demonstrated through his actions a likelihood of injuring a possible witness against him. During the CJA’s research on factors influencing judges’ release and bail decisions in Manhattan and Brooklyn, judges acknowledged public safety does play a role in some cases. But because the law does not authorize detention on safety grounds, there is no open and full evaluation at the arraignment of the strength of the evidence supporting or undercutting public safety concerns. A defendant may lose his liberty because the judge fears he may be dangerous, but that loss of liberty is not the result of a hearing devoted expressly to the question of whether public safety requires his detention.

Judges are also well aware of the risks to themselves professionally from releasing without bail a defendant who might prove dangerous. As one judge said, “judges set bail knowing they will never be criticized publicly for putting someone in jail, only for letting someone out without bail who then commits a crime.”¹⁵³ The judicial nightmare, acknowledged by almost

¹⁴⁹ Human Rights Watch telephone interview with Robert T. Johnson, district attorney, Bronx County, New York City, February 24, 2010.

¹⁵⁰ Human Rights Watch interview with Charles J. Hynes, district attorney, Kings County, New York City, May 10, 2010.

¹⁵¹ *United States v. Salerno*, 481 U.S. 739, 750 (1987). The U.S. Supreme Court has upheld the constitutionality of such “preventive detention” on public safety grounds.

¹⁵² American Bar Association, *ABA Criminal Justice Standards: Pretrial Release*, Standard 10-1.4(e), Commentary. Financial bail should serve “only as an incentive for released defendants to appear in court and not as a subterfuge for detaining defendants.”

¹⁵³ Human Rights Watch interview with New York City judge (name withheld), New York City, March 14, 2010.

every judge we interviewed for this report, is to end up on the cover of the *New York Post* for releasing without bail a defendant who then murders someone.

Prosecutors acknowledged to Human Rights Watch that they are likely to ask for bail when the charged misdemeanor offense involves domestic violence or in other assault cases in which the complaining witness might be in danger if the defendant is not detained pending trial.¹⁵⁴ As one prosecutor explained, in cases involving violence, the prosecutor cannot and should not ignore the importance of protecting a complaining witness. Asking for bail in such cases is often a deliberate effort to secure the defendant's detention. "Pretrial detention is warranted when the defendant is not going to return otherwise or when the case involves violence and the vulnerability of a witness."¹⁵⁵ Other prosecutors expressed same view: "Any case where there is a civilian victim, we take a hard look, even if not in the statute, because we want to protect the victim. We cannot ignore safety issues."¹⁵⁶

Human rights law accepts the legitimacy in principle of pretrial detention of criminal suspects who are considered too dangerous to be released (see discussion below). If the New York legislature decided to incorporate public safety as a basis for pretrial detention, a full hearing consistent with due process guarantees that determines whether public safety in fact requires pretrial detention in a particular case would be consistent with the right to liberty and the presumption of innocence. It would also be consistent with the pretrial standards of the American Bar Association. Under current law and practice, however, New York City nonfelony defendants lose their liberty because of bail decisions that ostensibly are made only to secure their future appearance in court.

Race

Pretrial punishment in the form of detention because of inability to post bail is endured primarily by blacks and Hispanics. The disproportionate pretrial detention of minorities does not appear to arise from the influence of race in bail setting so much as from the disproportionate rates of minority arrests. The high percentage of "quality-of-life" misdemeanor arrests (along with "stop and frisks" that do not lead to arrests) that occur in heavily minority and poor neighborhoods are themselves cause for great concern, raising

¹⁵⁴ Felony charges that involve violence or mention of a weapon significantly affect prosecutorial willingness to consent to release, in Brooklyn tripling the odds against consent to release and in Manhattan the odds against consent were 17 times greater. Phillips, "Factors Influencing Release and Bail Decisions in New York City," p. 29.

¹⁵⁵ Human Rights Watch interview with New York City prosecutor (name withheld), New York City, May 25, 2010.

¹⁵⁶ Human Rights Watch interview with New York City prosecutor (name withheld), New York City, June 22, 2010.

questions about the fairness and legitimacy of New York City’s racially disparate policing strategies.¹⁵⁷

Although blacks and Hispanics combined constitute only 51 percent of the New York City population, they comprise 82.4 percent of all misdemeanor arrestees.¹⁵⁸ Many of the misdemeanor arrests are not based on victim complaints and because of the nature of the offenses are discretionary, the police could for example, give a warning to someone seen smoking marijuana rather than making an arrest. Because there is no citywide data on misdemeanor offense rates we do not know whether higher black and Hispanic rates of arrests reflect higher rates of engaging in offending conduct. Such data as is available suggests maybe not. As noted above, a large percentage of arrests and arraignments in New York City are for smoking marijuana in public. Blacks and Hispanics account for 87.3 percent of arrests for misdemeanor possession of marijuana in public view,¹⁵⁹ even though drug use surveys indicate that whites use marijuana as much if not more than minorities.¹⁶⁰ Given the high correlation between minority status and income in New York City, it is perhaps not surprising that, as shown in Figure 5, blacks and hispanics constitute 89 percent of all pretrial detainees held on bail of \$1,000 or less (blacks 58 percent and Hispanics 31 percent).

¹⁵⁷ There is extensive literature on law enforcement in New York City minority neighborhoods, particularly since the New York City police initiated “zero tolerance” and “quality of life” policing. The striking racial disparities in the “stop and frisks” as well as quality of life arrests have been well documented and are subject of much controversy. Do they have unwarranted disparate impact on communities of color from racially disparate policing that targets poor people in poor neighborhoods or are they a legitimate and necessary means of keeping crime rates down and protecting minority as well as other communities? See, for example, Delores Jones-Brown, Jaspreet Gill, and Jennifer Trone, Center on Race, Crime and Justice, John Jay College of Criminal Justice, “Stop, Question & Frisk Policing Practices in New York City: A Primer,” March 2010; Jeffrey Fagan and Garth Davies, “Street Stops and Broken Windows: Terry, Race, and Disorder in New York City,” *Fordham Urban Law Journal*, vol. 28 (2000), p. 457; Jeffrey Fagan et al, “Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City,” in Stephen K. Rice and Michael D. White, eds., *Race, Ethnicity and Policing: New and Essential Readings* (New York: New York University Press, 2009); K. Babe Howell, “Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing,” *New York University Review of Law and Social Change*, vol. 33 (2009), p. 271; Andrew Golub, Bruce D. Johnson and Eloise Dunlap, “The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City,” *Criminology and Public Policy*, vol. 6 (2006), p. 131; Harry G. Levine and Deborah Peterson Small, New York Civil Liberties Union, “Marijuana Arrest Crusade: Racial Bias and Police Policy in New York City, 1997-2007,” 2008, http://www.nyclu.org/files/publications/nyclu_pub_marijuana_arrest_crusade.pdf (accessed October 25, 2010).

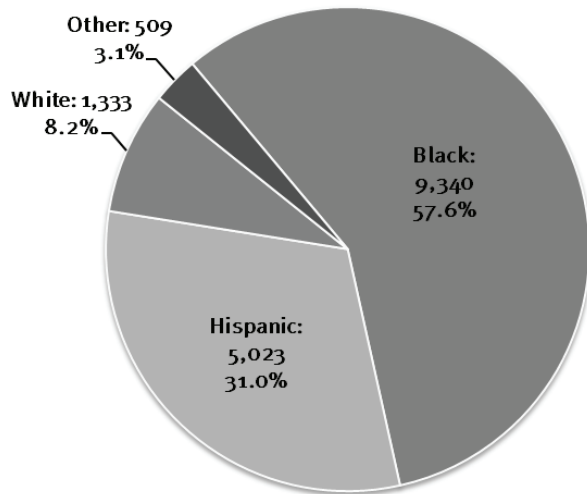
¹⁵⁸ According to unpublished data on NYC misdemeanor arrests in fiscal year 2009 provided to Human Rights Watch by the New York State Division of Criminal Justice Services, whites constituted 12.9 percent of the misdemeanor arrestees, blacks constituted 48.9 percent, Hispanics constituted 33.6 percent, and other/unknown/missing persons constituted 4.6 percent. Data on file at Human Rights Watch.

¹⁵⁹ Unpublished data on the racial composition of New York City persons arrested for misdemeanor possession of marijuana in public view in fiscal year 2009 provided to Human Rights Watch by New York State Division of Criminal Justice Services. Data on file at Human Rights Watch.

¹⁶⁰ Levine and Small, New York Civil Liberties Union, “Marijuana Arrest Crusade”; Golub, Johnson, and Dunlap, “The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City,” *Criminology and Public Policy*.

Figure 5

Pretrial Jail Admissions by Race, on Bail of \$1,000 or Less



Source: New York City Department of Correction
Note: Includes nonfelony and felony Cases, Calendar Year 2009

In an analysis of factors influencing bail decisions in Manhattan and Brooklyn, the CJA found that race did not have a statistically significant effect on release decisions for misdemeanor defendants in either borough.¹⁶¹ Among nonfelony cases in which the defendant was arrested in 2008 and either given bail under \$1,000 or released on their own recognizance, black defendants were somewhat less likely to be released on recognizance than white (86 percent versus 93 percent), as shown in Table 5. Among misdemeanor defendants recommended for release by the CJA, however, this racial disparity essentially disappears (see Table 6).

¹⁶¹ Phillips, “Factors Influencing Release and Bail Decisions in New York City,” Appendix B. When the results of the logistic regression models for misdemeanor and felony cases are combined, ethnicity had a statistically significant impact in Manhattan (being white increased the likelihood of ROR), but not in Brooklyn.

Table 5

Release on Recognizance & Bail under \$1,000 for Nonfelony Defendants, by Race/Ethnicity				
Defendant's Race/Ethnicity	ROR	Bail < \$1,000	Total	Percentage Receiving ROR
Black	40,009	6,394	46,403	86.2%
Hispanic	30,911	3,403	34,314	90.1%
White	13,480	1,054	14,534	92.7%
Other	5,688	260	5,948	95.6%
*data not available	517	10	527	98.1%
Total	90,605	11,121	101,726	89.1%

Source: New York City Criminal Justice Agency

Note: Includes cases of New York City defendants arrested in 2008 on nonfelony charges with bail set less than \$1,000. Cases with bail set at \$1 excluded.

Table 6

Release on Recognizance and Bail Amount for Nonfelony Defendants By Race/Ethnicity with Defendant Recommended by New York City Criminal Justice Agency for Release on Recognizance						
Category	Black	Hispanic	White	Other Ethnicity	Ethnicity Not Known	Total
ROR	13,823	11,608	5,303	2,519	5	33,258
	96.4%	96.5%	97.2%	97.6%	100.0%	96.7%
Bail < \$1,000	518	416	150	62	0	1146
	3.6%	3.5%	2.8%	2.4%	0.0%	3.3%
Total	14,341	12,024	5,453	2,581	5	34,404

Source: New York City Criminal Justice Agency

Note: Includes cases of New York City defendants arrested in 2008 on nonfelony charges with bail set less than \$1,000. Cases with bail set at \$1 excluded.

The Myth that Released Defendants Evade Justice

Judges who set bail at levels that defendants will not be able to make in order to ensure their appearance at subsequent court proceedings may not be aware that it is relatively rare for released defendants to miss scheduled court proceedings.

In New York City, 84 percent of criminal defendants who are not in pretrial detention attend all their scheduled court proceedings.¹⁶² Sixteen percent miss an appearance, but most of

¹⁶² New York City Criminal Justice Agency, "2008 Annual Report," p. 26, Exhibit 16.

those return to court voluntarily within 30 days.¹⁶³ It is unlikely that defendants who return to court within 30 days of missing a scheduled appearance are trying to avoid justice.¹⁶⁴ Only 6 percent miss an appearance and do not return to court within 30 days.

Many prosecutors and judges assume that misdemeanor defendants are likely to avoid court—even if they have never done so in the past—if they have prior criminal convictions and hence are likely to face longer jail sentences if convicted again. This belief is not new: charge severity and extensiveness of prior criminal record were historically the principal determinants of release decisions by judges. It may be this historical legacy remains embedded in current judicial culture. While the belief has a certain logic to it, extensive research by the CJA has demonstrated that far better predictors of the risk of failure to appear are lack of community ties, prior failure to appear, and the existence of another open case.¹⁶⁵ The empirical evidence suggests that seriousness of charge or prior criminal history may not significantly affect showing up in court. For example:

- Felonies are more serious crimes than misdemeanors and typically are punished with harsher sentences. Following the logic outlined above, one would assume that people accused of felonies would be more likely to flee than those accused of misdemeanors. But in New York City, defendants charged with felonies have essentially the same failure-to-appear rates (16 percent) than those charged with misdemeanors (17 percent).¹⁶⁶ That is, charge severity does not seem to have much of an impact on failure to appear.
- CJA analyses demonstrate that prior failure to appear and open cases are strong predictors of the failure of released New York City defendants to appear in court, overshadowing other aspects of criminal history including prior convictions. Indeed, prior convictions are not significant predictors of failure to appear when prior failure to appear and open cases are taken into account.¹⁶⁷

¹⁶³ *Ibid.*, p. 28, Exhibit 20.

¹⁶⁴ It is notable that almost all (94 percent) defendants successfully contacted by CJA's Failure-to-Appear Units because they missed a scheduled court hearing voluntarily returned to court within 29 days. New York City Criminal Justice Agency, "2008 Annual Report," pp. 33-34, Exhibit 25. The Failure-to-Appear Units, which operate in Brooklyn and Queens, attempt to contact defendants who missed scheduled court appearances to persuade them to return to court voluntarily.

¹⁶⁵ CJA's research underlying its release recommendation system and reasons for the changes in it are discussed in Qudsia Siddiqi, New York City Criminal Justice Agency, "Assessing Risk of Pretrial Failure to Appear in New York City," November 1999; Siddiqi, New York City Criminal Justice Agency, "CJA's New Release-Recommendation System"; Qudsia Siddiqi, New York City Criminal Justice Agency, "Pretrial Failure Among New York City Defendants," Research Brief No. 19, January 2009, <http://www.cjareports.org/reports/brief19.pdf> (accessed October 26, 2010).

¹⁶⁶ New York City Criminal Justice Agency, "2008 Annual Report," p. 27, Exhibit 17; and p. 40, Exhibit 30.

¹⁶⁷ If prior convictions had an independent influence on the likelihood a defendant would fail to appear at subsequent proceedings (above and beyond the influence of prior instances of failure to appear and open cases), then prior conviction variables would have been statistically significant in CJA's research, but they were not. See Qudsia Siddiqi, New York City Criminal Justice Agency, "Predicting the Likelihood of Pretrial Re-Arrest Among New York City Defendants: an Analysis of the 2001 Dataset," June 2003, revised October 2005, Table 11. Prior research regarding the impact of criminal histories on pretrial

- A recent statistical analysis of pretrial misconduct nationwide found that whether or not felony defendants have prior criminal convictions makes scarcely any difference in the probability they will appear in court after being released pending trial.¹⁶⁸

Our interviews suggest that defendants' failure to return to court for a scheduled appearance is more typically the result of difficult, stressful, and disorganized lives or of irresponsible behavior rather than an intentional effort to avoid adjudication.

Defendants, lawyers, judges, prosecutors, and staff of CJA Failure-to-Appear Units told us that defendants miss court proceedings for countless reasons: they lose the piece of paper with the date, they cannot afford to forgo earnings from missed work (defendants may have to spend better part of a day waiting in court before their case is called), they cannot find care for the children at home, they do not have the money for bus or subway fare, they have an exam, they do not understand they cannot just go on a different day, they show up in court on the scheduled day but leave before their case is called. Many defendants lead chaotic, unstructured lives in which keeping track of commitments is difficult. For some, mental illness or drug addiction cuts into their willingness and ability to show up in court on specified days. Some of the defendants who do not show up simply cannot be bothered to do so; they do not "respect the system." Some are just young and irresponsible.

No doubt some misdemeanor defendants who do not make court appointments have engaged in a calculated effort to avoid the possibility of conviction and punishment, and they are most likely included among the 6 percent of defendants who miss a court proceeding and do not return to court within 30 days of doing so. They may know there is little likelihood of the police picking them up on the bench warrant for their arrest the court issues when they do not show up. The failure to appear in court may be prosecuted, however, if the defendant is subsequently arrested for another offense and the criminal records check uncovers the prior bench warrant.

Research by the CJA indicates that defendants who have previously missed court proceedings are more likely to miss future ones. It may well be that the reason or reasons that led to the first missed appearance persist in defendants' lives. Lives made difficult by

failure to appear in other jurisdictions has yielded mixed results. See Qudsia Siddiqi, New York City Criminal Justice Agency, "Predicting the Likelihood of Pretrial Re-Arrest for Violent Felony Offenses and Examining the Risk of Pretrial Failure among New York City Defendants: an Analysis of the 2001 Dataset," November 2006, pp. 20-21 for a brief review. An earlier CJA study in 1999, based on data from 1989, found that prior violent felony convictions were a significant predictor of failure to appear among at-risk defendants whose cases were prosecuted in criminal court.

¹⁶⁸ Thomas H. Cohen and Brian A. Reaves, Bureau of Justice Statistics, "Pretrial Release of Felony Defendants in State Courts," November 2007, p. 10. The predicted probability of a released felony defendant being charged with failure to appear is 22 percent with no prior convictions, 21 percent with prior misdemeanors, and 23 percent with prior felony convictions.

poverty and mental illness, for example, do not suddenly change. People who have no respect for the legal system or who believe the benefits of not showing up in court exceed the risks may continue to ignore court orders.

When defendants fail to show up, hearings for which defense counsel, prosecutors, and the courts have prepared must be postponed, putting burdens on them and reducing the efficiency of the already strained court system.¹⁶⁹ The risk assessments conducted by the New York City Criminal Justice Agency help the courts identify objectively which defendants are statistically more likely to fail to appear in future court hearings if released on their own recognizance. Whether judges follow the CJA recommendation or rely on other factors to determine risk of failure to appear for court proceedings, the question is what to do with nonfelony defendants at the high end of the risk spectrum who cannot afford bail.

Judicial Training

New judges in New York state, including in New York City, receive two weeks of training from the New York State Judicial Institute. While that training includes some material on release and bail decision-making, relatively little attention is paid to the nature and significance of the differing bail forms authorized by statute, how to reasonably calculate bail amounts, or how to assess the likelihood that a defendant will not make scheduled court appearances.

According to Judge Juanita Bing Newton, dean of the Judicial Institute, in addition to classroom type learning, training for new judges includes a week at the bench watching a sitting judge handle arraignments.¹⁷⁰ New judges are thus exposed to the long-ingrained practice of relying on cash bail and commercial bond. It is not surprising then that they do the same.¹⁷¹ Judges interviewed by Human Rights Watch also suggested that their training by the Judicial Institute provided them with little understanding of how to assess a defendant's risk of failure to appear or to calibrate bail amounts; they learn what amounts of bail may be appropriate to secure a defendant's appearance in particular cases primarily through experience. One judge told us that the only guidance regarding bail she recalled from her judicial training a couple of years earlier was that bail should never be set lower than \$500.¹⁷² If her recollection was accurate, such guidance would be contrary to New York and human rights law.

¹⁶⁹ A separate question is whether the system could be modified to reduce the number of hearings defendants have to attend while their cases proceed, or to reduce the amount of time they spend in court waiting for their hearing.

¹⁷⁰ Human Rights Watch interview with Judge Juanita Bing Newton, dean, New York State Judicial Institute, White Plains, New York, August 3, 2010.

¹⁷¹ Training for new judges at the Judicial Institute includes training on bail, but little attention is paid to the different possible forms of bail or their significance for low income defendants.

¹⁷² Human Rights Watch interview with New York City judge (name withheld), New York City, June 7, 2010.

IV. An Alternative to Pretrial Detention: Pretrial Supervision

New York City can and should develop a way to avoid sending indigent defendants to jail who cannot post bail and who are deemed too much of a flight risk to be released on their own recognizance. Judges should have an alternative to the existing choice of release on recognizance or money bail. That alternative should be supervised pretrial release.

Although New York City had the first pretrial services program in the country—the Manhattan Bail Project, created by the Vera Institute of Justice in 1961, which subsequently spun off the New York City Criminal Justice Agency—the focus from the start has been assisting judges make informed release decisions based on objectively assessed risk factors. New York City has lagged behind other jurisdictions in developing supervised pretrial release programs that would enable criminal defendants ineligible for release on their own recognizance to remain free in the community on non-financial conditions until the conclusion of their case.

According to the Pretrial Justice Institute, 97 percent of surveyed pretrial services programs¹⁷³ that exist nationwide provide supervision of defendants released pending adjudication.¹⁷⁴ Defendants in these programs are typically released on their promise to adhere to certain court-ordered, non-financial conditions, such as reporting in-person on a regular basis. Pretrial services or other criminal justice staff supervise the release of the defendant and enforce compliance with release conditions through methods such as telephone calls or in-person meetings, referrals to substance abuse treatment and/or mental health treatment programs, drug testing, electronic bracelets, reminding defendants of court dates, and reporting to the court.

Pretrial services in New York City have traditionally been limited to CJA interviews with persons subjected to custodial arrests and the presentation of results of the interview with

¹⁷³ Pretrial services programs are operated by a range of different entities, including courts, jails, probation departments, independent government agencies, and non-profit organizations providing services under a contract. See generally, Pretrial Justice Institute, “2009 Survey of Pretrial Services Programs,” August 11, 2009, <http://www.pretrial.org/Docs/Documents/PJI's%20Survey%20of%20Pretrial%20Programs%202009.2.pdf> (accessed October 25, 2010).

¹⁷⁴ *Ibid.*, p. 46. For a review of efforts to identify evidence-based practices and factors promoting success, see generally, Marie VanNostrand, Crime and Justice Institute and National Institute of Corrections, “Legal and Evidence-Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services,” (2009), <http://nicic.org/Library/022398> (accessed October 25, 2010); National Institute of Corrections, “Topics in Community Corrections 2008: Applying Evidence-Based Practices in Pretrial Services,” <http://nicic.gov/Library/022904> (accessed October 25, 2010); David Levin, “Examining the Efficacy of Pretrial Release Conditions, Sanctions and Screening with the State Court Processing Statistics Dataseries,” Paper Prepared for the Presentation of the Annual Meeting of the American Society of Criminology, Atlanta, GA, November 14-16, www.pretrial.org/Docs/Documents/ASCo7.pdf (accessed October 25, 2010).

the agency's release recommendations to the judge, prosecutor, and defense counsel at the defendant's arraignment. The CJA also attempts by telephone or letter to notify all released defendants of their scheduled court appearances in an effort to reduce failure to appear rates.¹⁷⁵ In a promising and important expansion of its services, the CJA recently initiated a pilot supervised pretrial release program in Queens for certain nonviolent felony defendants. Participants are monitored through frequent face-to-face and telephone contact with program staff and may engage in outside services according to an individualized plan.¹⁷⁶ The program has been extremely successful from a flight risk perspective; although CJA had categorized two-thirds of the more than 200 participants to date as moderate or high risk for failure to appear in court, there have been only a handful of cases in which courts have ordered defendants expelled from the program for failure to appear at scheduled court dates.

The nation's experience with pretrial supervision programs indicates that when pretrial supervision is performed effectively, unnecessary pretrial detention is minimized, costly jail services are avoided, public safety is increased, and the equity of the pretrial release process is enhanced because there is less discrimination on the basis of income. All the judges, defense counsel, and prosecutors as well as other criminal justice experts interviewed by Human Rights Watch for this report supported the concept of supervised pretrial release for misdemeanor defendants who are not granted release on recognizance and who cannot afford bail. While most had questions concerning the details of such a program (e.g., what types of supervision services would be available, how courts would avoid expanding supervised release to those who would otherwise be released on recognizance,¹⁷⁷ and how communication between courts and pretrial release program personnel would be ensured they all recognized that supervised release program would provide an important alternative to the current choice of release without financial conditions or jail secured through the indirect mechanism of bail. Where financial conditions would truly not be enough to ensure the defendant's appearance, or where defendants are too poor for bail to have any meaning other than as a ticket to jail, judges would have the option of ensuring defendants return to court by placing them in a supervised release program.

¹⁷⁵ The CJA also operates a bail expediting program to assist certain defendants with raising money needed to post bail.

¹⁷⁶ Human Rights Watch telephone interview with Mari Curbelo, associate director of Court Programs, New York City Criminal Justice Agency, New York City, June 29, 2010. At its most intensive, the supervision consists of two meetings a week and one phone call; the frequency diminishes over time when such intensive supervision is not deemed necessary any longer. Program staff tries to be flexible setting the schedules so that timing works for the defendants.

¹⁷⁷ The concern regarding net widening is that judges may be less likely to grant ROR if they know there is a supervised release program, thus subjecting defendants who do not pose serious risk of failure to appear to unnecessary restrictions on their liberty.

“[Pretrial defendants] are not proven guilty. They may be innocent. They may be no more likely to flee than you or I. But they must stay in jail because, bluntly, they cannot afford to pay for the freedom....[Pretrial services programs] have generated new techniques for releasing accused persons prior to trial, without hampering law enforcement, without increasing crime, and without prompting defendants to flee. These techniques have fiscal value. They can help to increase the efficiency of police forces and they can save communities from the substantial costs of unnecessary detention....

But even more significant, in a land which has put the quality of justice ahead of the cost of justice, these techniques have social value. They can enable courts to tailor bail decisions to the individual. They can enable lawyers to do a better job of representing their clients. And, most important of all, they can save countless citizens from needlessly or unjustly spending days or weeks or even months in jail.”

—Address by Attorney General Robert F. Kennedy, National Conference on Bail and Criminal Justice, May 29, 1964

Pretrial Supervision: Avoiding the Expense of Detention

Pretrial detention is an expensive practice. According to the New York City Department of Correction, the average daily cost per inmate in New York City jails is \$202.65, based on expenditures that are part of the department’s operating budget.¹⁷⁸ If the full costs associated with New York City jails are used, the average cost is \$399.61 per inmate per day.¹⁷⁹ It defies common sense, much less fiscal prudence, to incarcerate someone at an average daily cost of nearly \$400 because they cannot afford bail of \$500 or \$1,000.

Of course, the average daily cost of incarceration is not the cost that would be avoided if the jail population were reduced by one inmate. Many of the costs remain—for buildings, heat, staff—until there is a significant inmate reduction. The Department of Correction estimates

¹⁷⁸ E-mail communication from Robert Maruca, Department of Correction, to Human Rights Watch, May 11, 2010. The figures are for fiscal year 2009.

¹⁷⁹ *Ibid.* In addition to direct operating costs of the Department of Correction (DOC), costs associated with incarceration include debt service on DOC capital projects, DOC pension and fringe benefits, legal services performed on behalf of DOC by the city law department, legal lawsuits, judgments and claims related to DOC operations paid by the city, healthcare costs for inmates that are borne by the Department of Health and Mental Hygiene and the New York City Health and Hospital Corporation, the expenses of the New York City Board of Correction, and the costs expended by the City Department of Education for adolescents and other inmates entitled to educational services.

that if the jail population were reduced by 800 or more inmates, the cost savings would be \$161 per inmate per day.¹⁸⁰ If misdemeanor defendants who could not make bail were kept out of jail, the cost savings would obviously be quite significant. For example, as discussed above, 16,649 misdemeanor defendants arrested in 2008 and unable to post bail of \$1,000 or less spent an average of 15.7 days in pretrial detention. Using the \$161 per inmate per day figure, it cost the city an average of \$2,527 to incarcerate each of these pretrial defendants. If the city had not incarcerated any of them it would have saved more than \$42 million.

Pretrial community-based supervision of men and women accused of crimes would unquestionably be far less expensive than housing, feeding, and caring for them round-the-clock in jail. In the CJA supervised release pilot program in Queens for certain nonviolent felony defendants, the approximate cost is \$23 to \$31 per day per defendant, far less than the cost of jail.¹⁸¹ According to the Pew Center on the States, nationwide one day in prison costs more than 10 days on parole or 22 days on probation. Among probation agencies in the US, the average daily cost per offender to provide probation services is \$3.42, with the high figure at \$7.89.¹⁸² In New York state, probation services cost an average \$4,000 per probationer per year,¹⁸³ a fraction of the \$76,229 annual cost per inmate per year in New York City jails.¹⁸⁴

¹⁸⁰ Ibid.

¹⁸¹ Telephone interview with Jerome McElroy, executive director, New York City Criminal Justice Agency, New York City, August 10, 2010. The total cost per defendant for a median participation period of three to four months is \$2,864.

¹⁸² Pew Center on the States, "One in 31: The Long Reach of American Corrections," March 2009, p. 13.

¹⁸³ Task Force on the Future of Probation in New York State, "Report to the Chief Judge of the State of New York," February 2007, p. 1.

¹⁸⁴ City of New York, "Mayor's Management Report, September 2010," p. 150, http://www.nyc.gov/html/ops/downloads/pdf/2010_mmr/0910_mmr.pdf (accessed October 25, 2010).

V. Applicable Constitutional and Human Rights Law

The pretrial incarceration of defendants who cannot afford bail implicates the constitutionally protected fundamental right to pretrial freedom as well as the constitutional guarantee of equal protection of the laws. Pretrial detention because of poverty also violates internationally recognized human rights to liberty and equality under the law.

Constitutional law

Right to Liberty

Criminal defendants in the US are considered innocent until proven guilty; this presumption of innocence is intimately tied to the “fundamental right” of pretrial release under reasonable conditions. The Eighth Amendment to the US Constitution, which states that “excessive bail shall not be required,” does not establish a constitutional guarantee that bail in some form or amount will be available to all defendants.¹⁸⁵ However, that amendment and the Due Process clause of the Fifth Amendment,¹⁸⁶ under which a defendant has a liberty interest in pretrial release,¹⁸⁷ give constitutional undergirding to the “tradition in this country...that one charged with a crime is not, in ordinary circumstances, imprisoned until after a judgment of guilt.”¹⁸⁸ The US Supreme Court has recognized the harms of pretrial detention:

The wrong done by denying release is not limited to the denial of freedom alone....In case of reversal, [the defendant] will have served all or part of a sentence under an erroneous judgment. Imprisoned, a man may have no opportunity to investigate his case, to cooperate with his counsel, to earn the money that is still necessary for the fullest use of this right to appeal.¹⁸⁹

¹⁸⁵ *United States v. Salerno*, 481 U.S. 739, 750 (1987) (the Eighth Amendment “says nothing about whether bail shall be available at all.”). In *Salerno* the Supreme Court ruled that the Federal Bail Reform Act of 1984, which authorized pretrial detention for dangerous defendants, did not violate the Eighth Amendment nor the Due Process Clause of the Fifth Amendment to the US Constitution.

¹⁸⁶ The Fifth Amendment of the U.S. Constitution provides: “No person shall...be deprived of life, liberty, or property, without due process of law.” The government may not interfere with rights that are “implicit in the concept of ordered liberty,” that is, rights, that while not expressly affirmed in the Constitution, are “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Ibid.*, p. 751.

¹⁸⁷ *Ibid.*, p. 750.

¹⁸⁸ *Bandy v. United States*, 81 S. Ct. 197, 197-98 (1960).

¹⁸⁹ *Ibid.*

Although pretrial release is a fundamental right, it can be restricted by a compelling government interest.¹⁹⁰

The constitutional prohibition on “excessive” bail does not mean financial conditions for release must be affordable. According to the Supreme Court, “the only arguable substantive limitation of the Bail Clause is that the Government’s proposed conditions of release or detention not be ‘excessive’ in light of the perceived evil,” such as the risk the defendant will not return to court.¹⁹¹ Bail should not be more than necessary to achieve the government’s interests. Bail may be set at a figure a defendant cannot pay, but it will not be constitutionally “excessive” as long as the amount is “reasonably calculated” to achieve its purpose.¹⁹²

Like the US Constitution, the New York State Constitution does not establish a right to bail, but protects defendants against “excessive bail” when it is provided.¹⁹³ Excessiveness is not determined in relation to the defendant’s financial means, but by whether the bail amount exceeds that necessary to achieve its purpose, which under New York law is limited to ensuring the defendant’s appearance in court.¹⁹⁴ As New York courts have noted, “the presumption of innocence accorded every criminal defendant militates strongly against incarceration in advance of a determination as to guilt. For this reason, bail may not be set in an amount greater than necessary to ensure court attendance.”¹⁹⁵ Another court noted, “Since bail is a security device, it must be fixed only in an amount that is both sufficient and necessary to guarantee the defendant’s appearance.”¹⁹⁶ The amount of bail is to be determined on a case by case basis, balancing the factors that suggest likelihood of failure to appear with the “right to freedom from unnecessary restraint before conviction.”¹⁹⁷

¹⁹⁰ *United States v. Salerno*, 481 U.S. 739, 750-751 (1987) (while acknowledging the “fundamental nature” of the pretrial right to liberty, “this right may, in circumstances where the government’s interest is sufficiently weighty, be subordinate to the greater needs of society.”).

¹⁹¹ *Ibid.*, p. 754.

¹⁹² *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (bail is not excessive if “reasonably calculated” to assure defendant’s presence.).

¹⁹³ The Constitution of the State of New York, art. I, sec. 5 states: “Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.”

¹⁹⁴ *People v. Torres*, 446 N.Y.S.2d 969, 972 (1981) (bail should be fixed in an amount “sufficient and necessary to guarantee the defendant’s appearance.”). *People v. Mohammed*, 653 N.Y.S.2d 492 (1996) (a defendant’s financial capacity is not a factor in deciding excessiveness of bail.). *People v. Saulnier*, 492 N.Y.S.2d 897 (1985). *People ex rel. Klein v. Krueger*, 307 N.Y.S.2d 207 (1969).

¹⁹⁵ *People ex rel. Benton v. Warden*, 499 N.Y.S.2d 738, 740 (1986). *People ex rel. Lobell v. McDonnell*, 296 NY 109, 111 (1947).

¹⁹⁶ *People v. Torres*, 446 N.Y.S.2d 969, 972 (1981).

¹⁹⁷ *People v. Maldonado*, 407 N.Y.S.2d 393, 394 (1978); *People ex rel. Lobell v. McDonnell*, 71 N.E. 2d 423, 425 (1947) (because reasonable judges can and will vary widely with bail amounts, it is rare for their decisions to be overturned as unconstitutionally excessive.). See *In the matter of Henry r. Bauer*, 818 N.E.2d 1113 (NY 2004) for an extreme and unusual case in which the State Commission on Judicial Conduct decided to remove a judge from office for a range of misconduct, including setting excessive bail amounts, e.g., 26 instances of bail set between \$10,000 and \$50,000 for defendants charged with petty crimes or violations. In one case, bail was set at \$25,000 for a defendant who was charged with riding a bike at night on a sidewalk without appropriate lights.

Equal Protection

The Eighth Amendment may not require affordable bail, but does the Equal Protection Clause? Does conditioning pretrial freedom on one's financial resources violate constitutional guarantees of equal protection? Years ago, the criminal law scholar Caleb Foote wrote about the "incredible failure of the Supreme Court, courts in general and lawyers, to do anything about what has become the most pervasive denial of equal justice in the entire criminal justice system," the setting of money bail for indigent defendants.¹⁹⁸

Low socioeconomic status is not generally considered a class meriting special protection under the Equal Protection Clause of the US Constitution. Nevertheless, the courts have recognized that in the criminal justice arena, access to fundamental rights should not be conditioned on the basis of an individual's ability to pay. Thus, the Supreme Court has held that although the constitution does not guarantee defendants a right to appeal, the denial of trial transcripts for appellate purposes to indigent defendants who could not pay for them was "invidious discrimination" that should have no place "in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."¹⁹⁹

The Supreme Court has found equal protection violated by laws that require the imprisonment of defendants too poor to pay a fine. In one case, the Supreme Court confronted a state law under which indigent defendants unable to pay state fines would be imprisoned beyond the statutory maximum to "work off" the fines. The court ruled that statute constituted "invidious discrimination" in violation of the Equal Protection Clause because:

[The statute] exposes only indigents to the risk of imprisonment beyond the statutory maximum. By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment.²⁰⁰

¹⁹⁸ *Pugh v. Rainwater*, 572 F.2d 1053, 1068 (5th Cir. 1978)(Simpson, J. dissenting).

¹⁹⁹ *Griffin v. Illinois*, 351 U.S. 12, 17-19 (1956).

²⁰⁰ *Williams v. Illinois*, 399 U.S. 235, 242 (1970).

In another case, the court ruled that it was a denial of equal protection to limit punishment for traffic offenses to payment of a fine for those who are able to pay it, but to convert the fine to imprisonment for those who are unable to pay it.²⁰¹

In these two cases, the court rejected imprisonment solely because of indigency, finding that the “Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status.”²⁰² The court has continued to look askance at laws that lead to incarceration for poor but not wealthy defendants, finding equal protection violations where the law “punish[es] a person for his poverty.”²⁰³ As one commentator has recently concluded:

Together, these cases stand for the proposition that unequal access to a fundamental right in the criminal justice system violates the Equal Protection Clause if such discrimination is invidious, squalid, and unreasonable. These ambiguous terms, read in the context of the cases, express the Court’s sense of moral revulsion when the criminal justice system egregiously discriminates on the basis of wealth. In particular, the Court is disinclined to allow defendants to be split into two categories, such that poorer defendants are incarcerated while wealthier defendants are released.²⁰⁴

The US Supreme Court has never ruled on whether incarceration because of inability to post bail violates equal protection. “The entire concept of bail, it could be argued, conditions the fundamental right of pretrial release upon a defendant’s wealth.”²⁰⁵ But different bail amounts in different cases does not necessarily mean illegitimate discrimination: if bail determinations are tailored on a case by case basis to a defendant’s resources and closely tied to the purpose for which bail is sought (e.g. securing the defendant’s appearance in court or protecting public safety), defendants “are treated equally with regard to their relative ability to pay and are thus charged a relatively equal price for their liberty.”²⁰⁶ But because the poor may have no money, they “may have nothing to offer as security for their presence at trial other than their personal liberty, [they] may in effect have to pay a higher

²⁰¹ *Tate v. Short*, 401 U.S. 395 (1971).

²⁰² *Ibid.*, at 399.

²⁰³ *Bearden v. Georgia*, 461 U.S. 660, 671 (1983).

²⁰⁴ Jonathan Zweig, “Extraordinary Conditions of Release under the Bail Reform Act,” *Harvard Journal on Legislation*, vol. 44, pp. 570-71. Zweig’s note addresses the inequity of wealthy defendants being able to buy pretrial release by creating, in essence, private jails in their own homes.

²⁰⁵ *Ibid.*, p. 574.

²⁰⁶ Laurence Tribe, *American Constitutional Law* (Mineola: The Foundation Press, 1988, 2nd ed.), p. 1634.

price than their solvent counterparts.”²⁰⁷ Money bail creates in practice two classes of defendants: those who can buy their pretrial freedom and those who cannot.

The US Court of Appeals for the Fifth Circuit directly confronted the constitutionality of imprisoning an indigent defendant prior to trial solely because he could not afford to pay money bail.²⁰⁸ A panel of the court ruled that the Equal Protection Clause of the Fourteenth Amendment was violated when an indigent defendant was condemned to pretrial imprisonment for no other reason than his poverty and the bail system did not contain a presumption against money bail in the case of indigents. The court noted that while the Florida law at issue did not discriminate on its face, in practical operation it discriminated impermissibly because a “man of means can secure his pretrial freedom while the indigent has no choice but to remain in jail. A basic principle of equal protection is that ‘a law nondiscriminatory on its face may be grossly discriminatory in its operation.’”²⁰⁹ To satisfy equal protection a judge must consider less financially onerous forms of pretrial release before imposing money bail.²¹⁰ Although the full Court of Appeals *en banc* overturned the panel decision on technical grounds,²¹¹ it agreed that “incarceration of those who cannot [afford money bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements.”²¹²

New York courts have never closely examined whether jailing indigent defendants because they are too poor to afford bail violates state equal protection guarantees. In the one class action case raising an equal protection challenge to New York’s bail system, the court held that challenges to the bail statute could not be made by class action lawsuit because bail decisions are inherently case-specific. The court brushed aside plaintiffs’ equal protection concerns without directly confronting whether imprisonment because of inability to meet bail violated the Equal Protection Clause.²¹³

²⁰⁷ *Ibid.*, p. 1634, fn.7.

²⁰⁸ *Pugh v. Rainwater*, 557 F.2d 1189 (5th Cir. 1977), *rev’d en banc*, 572 F.2d 1053 (5th Cir. 1978).

²⁰⁹ *Ibid.*, 557 F.2d at 1196, quoting from *Williams v. Illinois*, 399 U.S. 235, 242 (1970).

²¹⁰ “We hold that equal protection standards are not satisfied unless the judge is required to consider less financially onerous forms of release before he imposes money bail. Requiring a presumption in favor of non-money bail accommodates the State’s interest in assuring the defendant’s appearance at trial as well as the defendant’s right to be free pending trial, regardless of his financial status. *Ibid.*, 557 F.2d at 1201, *rev’d en banc*, 572 F.2d 1053 (1978).

²¹¹ It did so primarily on grounds that revision of the bail rule that took place during pendency of appeal mooted the district court’s decision and requires abstention from consideration of the rule of mootness and belief that federal court should abstain from ruling on a new law that came into force during pendency of case.

²¹² *Pugh v. Rainwater*, 572 F.2d. 1053, 1057 (5th Cir. 1978). The court also noted, “We have no doubt that in the case of an indigent, whose appearance at trial could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint.” *Ibid.*

²¹³ *Bellamy et al. v. Judges*, 342 N.Y.S.2d 137 (1973), *aff’d* 346 N.Y.S.2d 812 (1973).

International Human Rights Law

In any given year, about 10 million people worldwide will spend time in pretrial detention. Indeed, one in three people behind bars is in pretrial detention.²¹⁴ In the United States, 62 percent of the nation's jail population are pretrial detainees.²¹⁵ Outside the United States, the proportion of the incarcerated population that consists of pretrial detainees is considerably lower, varying from 47.8 percent in Asia to 20.5 percent in Europe.²¹⁶

International human rights law permits the use of bail and other conditions of pretrial release and it also permits pretrial detention. But any pretrial restrictions must be consistent with the right to liberty, the presumption of innocence, and the right to equality under the law.²¹⁷ Pretrial detention imposed on criminal defendants accused of low level offenses solely because they cannot afford bail is inconsistent with those rights.

Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992, codifies the right to liberty: "Everyone has the right to liberty and security of person."²¹⁸ A person's liberty may not be curtailed arbitrarily, either through arbitrary laws or through the arbitrary enforcement of the law in a given case.²¹⁹ To comply with Article 9, "deprivation of liberty must be authorized by law" and "must not be manifestly unproportional, unjust or unpredictable."²²⁰ In reviewing the case of a Dutch solicitor held in custody for nine weeks in the course of a criminal investigation, the United Nations Human Rights Committee stated "'arbitrariness' is not to be equated with 'against the law,' but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but also reasonable in the circumstances. Further, remand in

²¹⁴ Martin Schönleich, "The Scale and Consequences of Pretrial Detention around the World," *Justice Initiatives: Pretrial Detention* (Open Society Justice Initiative), Spring 2008, pp. 11-14.

²¹⁵ Todd D. Minton, Bureau of Justice Statistics, "Jail Inmates at Midyear 2009-Statistical Tables," June 2010; Thomas H. Cohen and Tracey Kyckelhahn, Bureau of Justice Statistics, "Felony Defendants in Large Urban Counties, 2006," May 2010.

²¹⁶ *Ibid.*

²¹⁷ International human rights standards regarding pretrial detention are predicated not only on the fundamental rights, they are also grounded in recognition of the stress and suffering detainees may endure from being confined in jail. In addition to the emotional impact of confinement, detainees are separated from family, friends, and community, are uncertain as to their future, worry about their legal position, and are anxious about their economic future and that of their family. See Centre for Human Rights, Crime Prevention and Criminal Justice Branch, *Human Rights and Pre-trial Detention: A Handbook of International Standards relating to Pre-trial Detention* (New York and Geneva: United Nations, 1994), p.8.

²¹⁸ Article 9(1), International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States on June 8, 1992.

²¹⁹ ICCPR, art 9(1). Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Arlington: N P Engel Publisher, 1993), p. 172.

²²⁰ *Ibid.*, p. 173.

custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.”²²¹

Pretrial detention also implicates the presumption of innocence, affirmed in Article 14 of the ICCPR as one of the necessary guarantees for a fair trial: “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”²²² According to the United Nations Human Rights Committee, the presumption of innocence is fundamental to the protection of human rights.²²³ No one should be prejudged or treated as if assumed to be guilty, regardless of the likelihood of conviction.

Article 9(3) of the ICCPR explicitly addresses pretrial detention:

It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

Article 9(3) authorizes pretrial release dependent on guarantees, which may be in the form of money bail or other assurances. Indeed, Art. 9(3) has been interpreted as establishing a presumption that detainees not be held when they could be released on bail.²²⁴ According to the United Nations Centre for Human Rights:

Offenders should be released with the minimum controls necessary to ensure their return to stand trial. Factors which indicate that a person is likely to return even when released on his own recognizance are stable family and social circumstances, current employment, and past conduct, including lack of a criminal record or a history of complying with conditions in past criminal

²²¹ *Van Alphen v. the Netherlands*, Human Rights Committee, No. 305/1988, §5.8, U.N. Doc. CCPR/C/39/D/305/1988 (1990).

²²² ICCPR, art. 14(2).

²²³ “[B]y reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.” UN Human Rights Committee, General Comment No. 13, Equality before the courts and the right to a fair and public hearing by an independent court established by law (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.9 (vol. I)(2008), p. 185, para. 7.

²²⁴ Sarah Joseph, Jenny Schultz and Melissa Castan, ed., *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd ed. (New York: Oxford University Press, 2005), p. 330.

proceedings. When these factors are present to a lesser extent...supervised release is appropriate.²²⁵

International treaty bodies and authoritative interpretations of Article 9(3) are uniform in the view that while pretrial detention may be permissible under certain circumstances, it should be an exception and as short as possible.²²⁶ The maximum length of pretrial detention should be proportionate to the maximum potential sentence.²²⁷ Of critical importance is the limitation on imposing pretrial detention for offenses which are not punished with custodial sentences. “If imprisonment is not to be expected as punishment for a crime, every effort should be made to avoid pre-trial detention.”²²⁸ Indeed, according to the United Nation’s Centre for Human Rights, certain crimes may be “so lacking in severity that pre-trial detention may be inappropriate.”²²⁹ Pretrial detention may not be imposed arbitrarily and must be based on grounds and procedure established by law. It should be limited “to essential reasons, such as danger of suppression of evidence, repetition of the offence and absconding, and should be as short as possible.”²³⁰ Seriousness of a crime is not in and of itself justification for pretrial detention.²³¹ Moreover, when concerns about flight risk or safety require some conditions on pretrial release, to the extent possible non-custodial measures should be used rather than pretrial detention; pretrial detention should be “a means of last resort.”²³²

The jurisprudence of the European Court of Human Rights with regard to Article 5.3 of the European Convention on Human Rights, which parallels ICCPR Art 9(3), is instructive. The level of bail set should not be set too high and should be aimed to ensure the presence of the accused.²³³ The amount of the guarantee to be furnished by the detained person must be assessed principally in reference to him and his assets,²³⁴ and a court’s failure to assess the

²²⁵ Centre for Human Rights, *Human Rights and Pre-trial Detention*, p. 15.

²²⁶ See for, example, UN Human Rights Committee, General Comment No. 8, Right to liberty and security of persons (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.9 (vol. I)(2008), p. 179, para. 3: “Pre-trial detention should be an exception and as short as possible.” United Nations Standard Minimum rules for Non-custodial Measures (The Tokyo Rules), G.A. res. 45/110. “Pre-trial detention shall be used as a means of last resort in criminal proceedings...alternatives to pre-trial detention shall be employed at as early a state as possible. Pretrial detention shall last no longer than necessary.”

²²⁷ Centre for Human Rights, *Human Rights and Pre-trial Detention*, p. 18

²²⁸ Centre for Human Rights, *Human Rights and Pre-trial Detention*, p. 16.

²²⁹ *Ibid.* p. 79.

²³⁰ Nowak, *UN Covenant on Civil and Political Rights*, p. 177.

²³¹ Centre for Human Rights, *Human Rights and Pre-trial Detention*, p. 15.

²³² United Nations General Assembly, Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), resolution 45/110, U.N. Doc. A/45/49 (1990), rule 6.1. See generally, Centre for Human Rights, *Human Rights and Pre-trial Detention*, p. 14 (Substitutes for Confinement).

²³³ Karen Reid, *A Practitioner’s Guide to the European Convention on Human Rights*, 3rd ed. (London: Sweet & Maxwell, 2008), p. 460.

²³⁴ *Neumeister v Austria*, European Court of Human Rights, 1936/63 [1974] ECHR 1, May 7, 1974, para. 14; *Can v Austria*, European Court of Human Rights, 9300/81 [1985] ECHR 10, September 30 1985, para. 69.

detainee's ability to provide bail constitutes a violation of the right to pretrial release.²³⁵ As the fundamental right to liberty is at stake, the authorities must take as much care in fixing appropriate bail as in deciding whether or not the accused's continued detention is indispensable.²³⁶

Equality among all people has been deemed "the most important principle imbuing and inspiring the concept of human rights."²³⁷ The affirmation of equality and the prohibition of discrimination are set forth in two provisions of the ICCPR.²³⁸ Article 26 of the ICCPR establishes that all persons are equal before the law and entitled to equal protection of the law. ICCPR Article 2(1) prohibits discrimination in the context of the rights and freedoms enumerated in the convention, such as the right to liberty, and specifically identifies "property" as prohibited grounds for discrimination.²³⁹

Concern abounds in human rights commentary and analysis about discrimination against members of low income groups that prevents them from enjoying their fundamental rights.²⁴⁰ Particular attention has been paid to discrimination in the criminal justice system, and to the fact that such discrimination frequently targets groups characterized not only by poverty but also by being members of racial or ethnic minorities.²⁴¹ Whatever the formal equality in criminal justice system, "in practice access to the law and access to justice are fundamentally

²³⁵ *Toshev v Bulgaria*, European Court of Human Rights, 56308/00 [2006] ECHR 723, August 10, 2006, para. 68.

²³⁶ *Islwańczuk v Poland; Bojilov v Bulgaria*, European Court of Human Rights, Commission's report 1980, Decisions and Reports 23, p. 196, para 171.

²³⁷ Nowak, *UN Covenant on Civil and Political Rights*, p. 458.

²³⁸ Equality and nondiscrimination operate as positive and negative statements of the same concept. Anne F. Bayefsky, "The Principle of Equality of Non-Discrimination in International Law," *Human Rights Law Journal*, vol. 11 no. 1 (1990).

²³⁹ ICCPR, Article 2(1) states: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." See also, Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976; General Conference of the United Nations Educational, Scientific and Cultural Organization, Convention against Discrimination in Education, 429 U.N.T.S. 93, Art. 1. "For the purpose of this convention, the term 'discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education..." Joseph, Schultz and Castan, ed., *The International Covenant on Civil and Political Rights*, p. 532.

²⁴⁰ See, for example, UN Committee on Economic, Social and Cultural Rights, "Non-Discrimination in Economic, Social and Cultural Rights," General Comment No. 20, UN Doc. E/C.12/GC/20, para. 35. "Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal or unequal access to the same quality of education and health care as others as well as the denial or unequal access to public places."

²⁴¹ See, for example, UN Committee on the Elimination of Racial Discrimination, General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, UN Doc. A/60/18 (2005); Jamie Fellner, "Race, Drugs, and Law Enforcement in the United States," *Stanford Law and Policy Review*, vol. 20 issue 2 (2009).

unequal. The reasons may be social, economic or cultural, or the persons concerned may suffer from social segregation or deep-seated discrimination.”²⁴² The monitoring committee of the International Convention on the Elimination of All Forms of Racial Discrimination urges state parties to ensure that the “requirement to deposit a guarantee or financial security in order to obtain release pending trial is applied in a manner appropriate to the situation of persons in vulnerable groups, who are often in straitened economic circumstances, so as to prevent the requirement from leading to discrimination against such persons.”²⁴³

Discrimination can occur even in the absence of overtly discriminatory laws; the test is whether the nondiscrimination and equality guaranteed by human rights law are actually enjoyed in practice. Prohibited discrimination can also occur in the absence of the intent to discriminate. A law or practice may not have a discriminatory purpose, but will run afoul of human rights law if it has an unjustifiable disparate impact adverse to the protected group. Prohibited discrimination includes any distinction, exclusion, restriction, or preference which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.²⁴⁴

Not every difference in treatment will constitute prohibited discrimination, and the enjoyment of rights and freedoms on an equal footing does not mean identical treatment in every instance.²⁴⁵ A distinction among various persons or groups of persons is permissible when the criteria for differentiation are reasonable and objective, and where the aim is to achieve a legitimate purpose under human rights law.²⁴⁶ International and regional human rights bodies have also suggested that there must be a reasonable relationship of proportionality between the legitimate aim and the means employed to attain it.²⁴⁷ Due regard for rights of liberty and to be free of discrimination mandate that the poor should not be uniquely vulnerable to loss of liberty simply because they cannot afford bail that is set without due regard to their financial ability to pay. The poor, like the rich, have a right to liberty, and pretrial release should be equally available to both. The equal right of the

²⁴² Leila Zerrougui, special rapporteur, “Administration of Justice, Rule of Law and Democracy: Discrimination in the Criminal Justice System, Interim Report to the Commission on Human Rights,” UN Doc. E/CN.4/Sub.2/2005/7, para. 18.

²⁴³ Committee on the Elimination of Racial Discrimination, General Recommendation XXXI, para. 26.

²⁴⁴ UN Human Rights Committee, General Comment No. 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.9 (vol. I)(2008), p. 197, para. 7.

²⁴⁵ *Ibid.*, para. 6.

²⁴⁶ *Ibid.*, para. 13.

²⁴⁷ See, for example, *Relating To Certain Aspects Of Laws On Use Of Languages In Education In Belgium - 1474/62; 1677/62; 1691/62* [1967] ECHR 1 (9 February 1967), paras. 11-12; *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984), p. 172, para. 56; Bayefsky, “The Principle of Equality or Non-Discrimination in International Law,” p. 14.

indigent to pretrial liberty should be upheld by ensuring bail is not be set at an excessively high figure which might preclude a detainee from being able to raise it.²⁴⁸

If New York City had no other options than cash bail or secured bonds for ensuring the appearance of poor people (who are primarily black and Hispanic) at court proceedings, the human rights considerations might be different. But judges have the authority and tools for setting bail that is within reach of persons of limited means and consistent with the goal of ensuring their appearance in court. Supervised release would protect the liberty of poor defendants while ensuring their appearance in court. It would be a far more proportionate response than pretrial detention to the risk of flight for offenses which are rarely punished with imprisonment.

In 1689, the English Bill of Rights prohibited excessive bail, understood as an amount that was more than the accused could pay, or deployed to impose indefinite imprisonment.²⁴⁹ The legal conception of “excessive bail” in many common law jurisdictions today remains true to that definition. Bail must not be fixed at a figure so large as to lead to inevitable imprisonment.²⁵⁰ New York City should return to that original and still compelling, even if not constitutionally required, notion of “excessive.”

²⁴⁸ Yoram Dinstein, “The right to life, physical integrity, and liberty,” in Louis Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), p. 134. See also, Karen Reid, *A Practitioner’s Guide to the European Convention on Human Rights*, p. 460 (“The level of bail should not be set too high, interpreting Art. 5.3 of the European Convention on Human Rights, entitling detainee to release pending trial and release may be conditioned by guarantees to appear for trial.”).

²⁴⁹ Laurence Claus, “Methodology, Proportionality, Equality: Which Moral Question does the Eighth Amendment Pose?” *Harvard Journal of Law and Public Policy*, vol. 31, p. 37.

²⁵⁰ *The People v. Roger O’Callaghan*, Supreme Court of Ireland [1966] 1 I.R., p.518; *DPP v. Broderick*, Supreme Court of Ireland [2006] IESC 34.

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The Price of Freedom

Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City

Thousands of defendants in New York City accused of minor crimes are held in pretrial detention each year solely because they cannot afford to pay even small amounts of bail. *The Price of Freedom*—based on scores of interviews with defendants, family members, judges, prosecutors, and defense attorneys, and a trove of new data—analyzes why this is happening and what can be done to ensure greater equity in the bail process.

Previously unpublished data made available to Human Rights Watch by the NYC Criminal Justice Agency (CJA) shows that in 87 percent of cases of nonfelony defendants arrested in 2008 in which bail was set at \$1,000 or less (the most recent year for which such data is available), the defendants were not able to post bail at arraignment. On average, such individuals spent some 16 days in pretrial detention. Almost three out of four such individuals were accused of nonviolent, non-weapons related crimes such as shoplifting, turnstile jumping, smoking marijuana in public, or trespassing.

The Price of Freedom recommends that New York City develop a pretrial supervised release program to allow more nonfelony defendants to remain free while awaiting trial. This approach would honor the presumption of innocence but cost far less than housing, feeding, guarding, and providing medical care to inmates confined round the clock in jail. The report also calls for reforms requiring judges to more carefully tailor their bail decisions to defendants' financial resources, including wider use of unsecured appearance bonds for those accused of misdemeanors.

*Otis Bantum Correctional Center,
a New York City Department of
Correction facility on Rikers Island
that houses detained adult men.*

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