

Strategies for Reducing Pretrial Detention: Models for Reform

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Presented at the RISE19, National Harbor, MD on July 15, 2019

Today's Agenda

1. Backdrop: National & Statewide Incarceration Trends

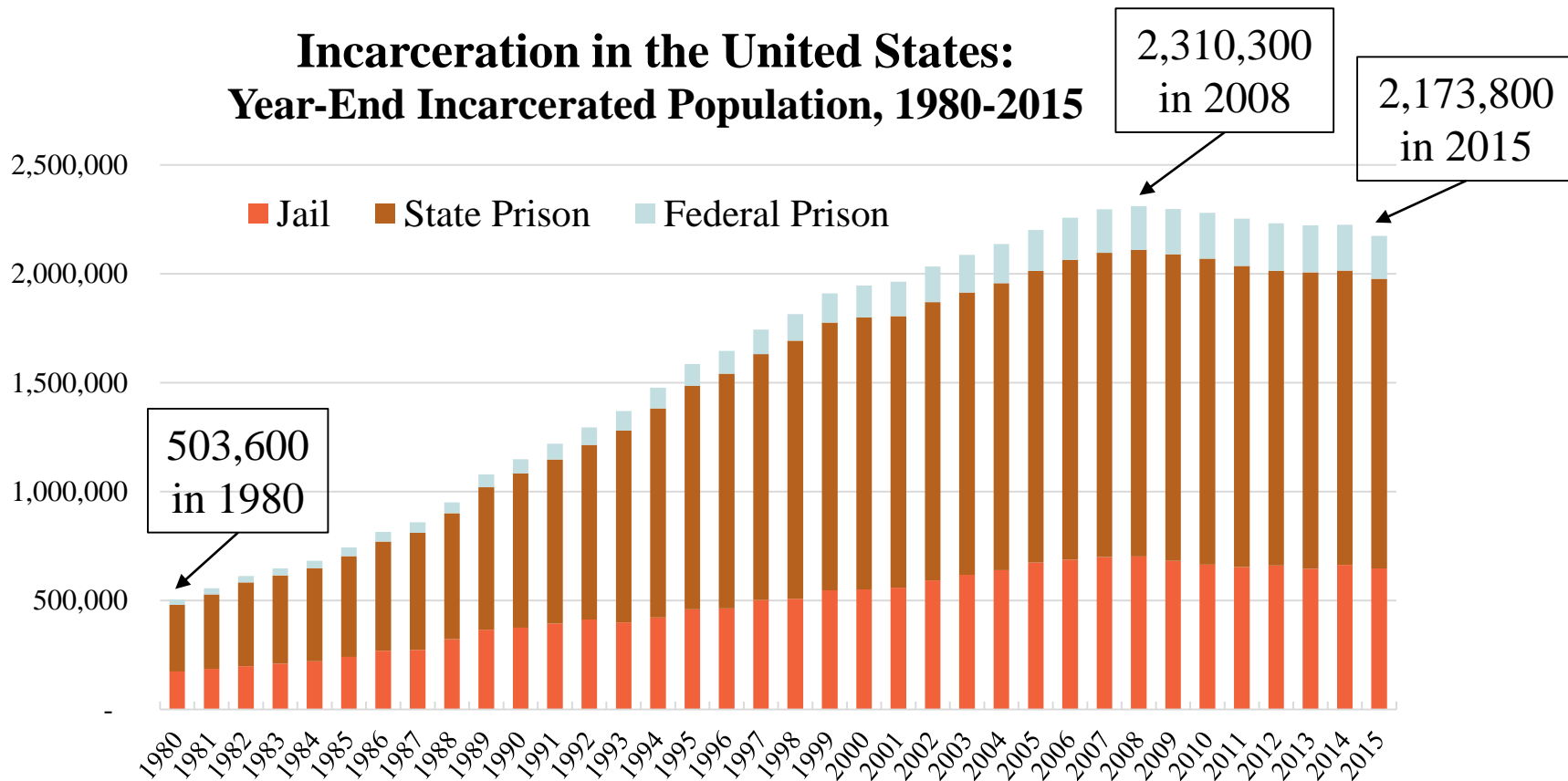
2. Perceived Harms of Bail

3. Bail Reform in New York:

- Current Statutory Framework
- State Legislation

National Incarceration Trend, 1980-2015

(More than fourfold increase peaking in 2008)

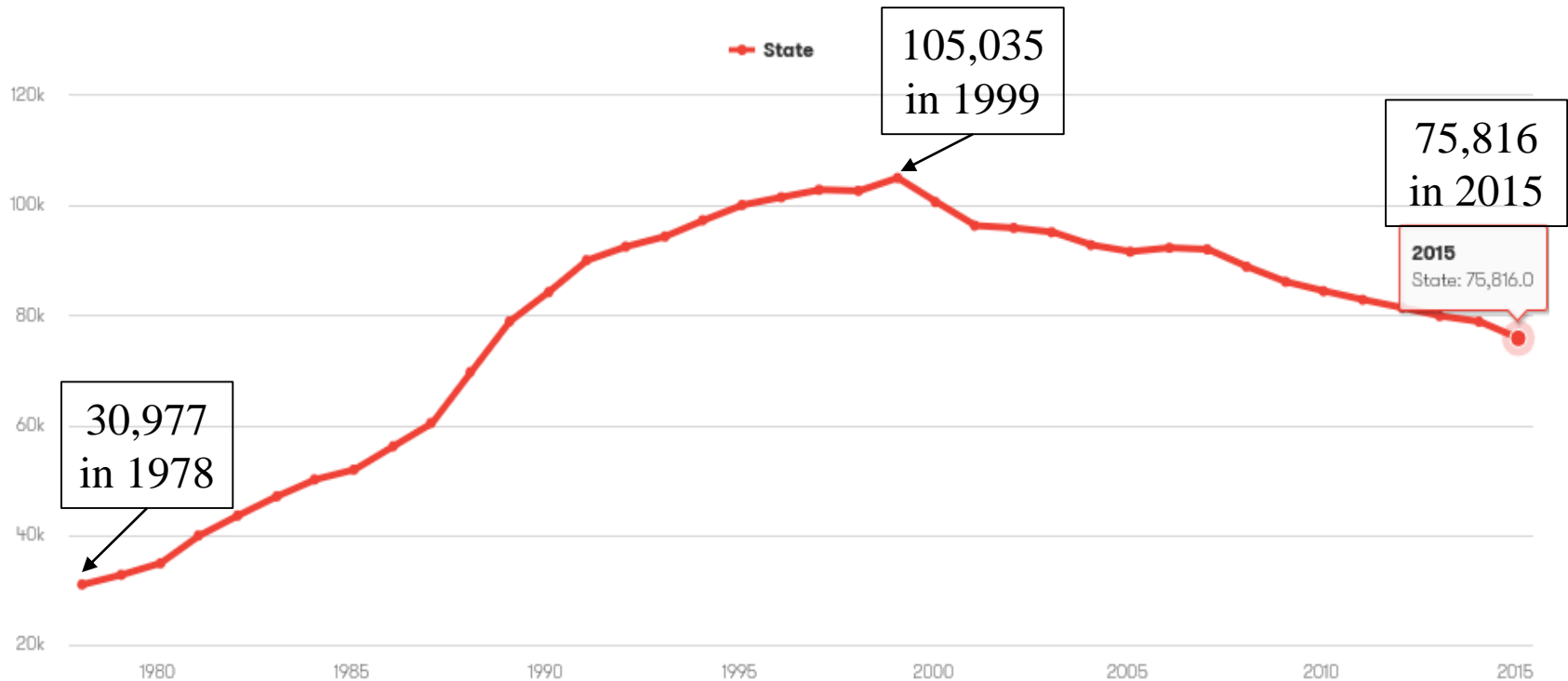


Sources: Bureau of Justice Statistics, Annual Probation Survey, Annual Parole, Survey, Annual Survey of Jails, Census of Jail Inmates, and National Prisoner Statistics Program, 1980-2015. In this chart, state prisoners held in local jails are counted in the prison sub-totals.

NYS Incarceration Trend, 1978-2015

(More than threefold increase to 1999; then 28% drop)

Combined Jail & Prison Population in New York State, 1978-2015



Source: Vera Institute of Justice. Incarceration Trends. Chart downloaded on 9/6/18 from <http://trends.vera.org/rates/new-york?incarcerationData=all&incarceration=count&prison=count&prisonjail=count>.

Current National Incarceration Levels

▶ **Incarcerated Population in 2015 = 2,173,800:***

- ▶ Local Jail Population: 30% in local jails*
- ▶ State Prison Population: 61% in state prisons
- ▶ Federal Prison Population: 9% in federal prisons

▶ **Annual Admissions in 2016 = 11,206,000.**

- ▶ Local Jail Admissions: 95% Average Jail Stay = 25 Days
- ▶ State Prison Admissions: 5%
- ▶ Federal Prison Admissions: < 1% (0.4%)

Source: U.S. Bureau of Justice Statistics (Carson 2018; Zeng 2018).

* The state and federal prison populations were based on a 1-day snapshot on December 31, 2015. The jail population was based on a one-day snapshot as of June 30, 2015.

Who is Incarcerated in Local Jails?

▶ **Charge Severity** (December 31, 2016):

- ▶ Felony: 69.7%
- ▶ Misdemeanor: 25.4%
- ▶ Other (typically lesser): 4.9%

▶ **Case Status** (December 31, 2016):

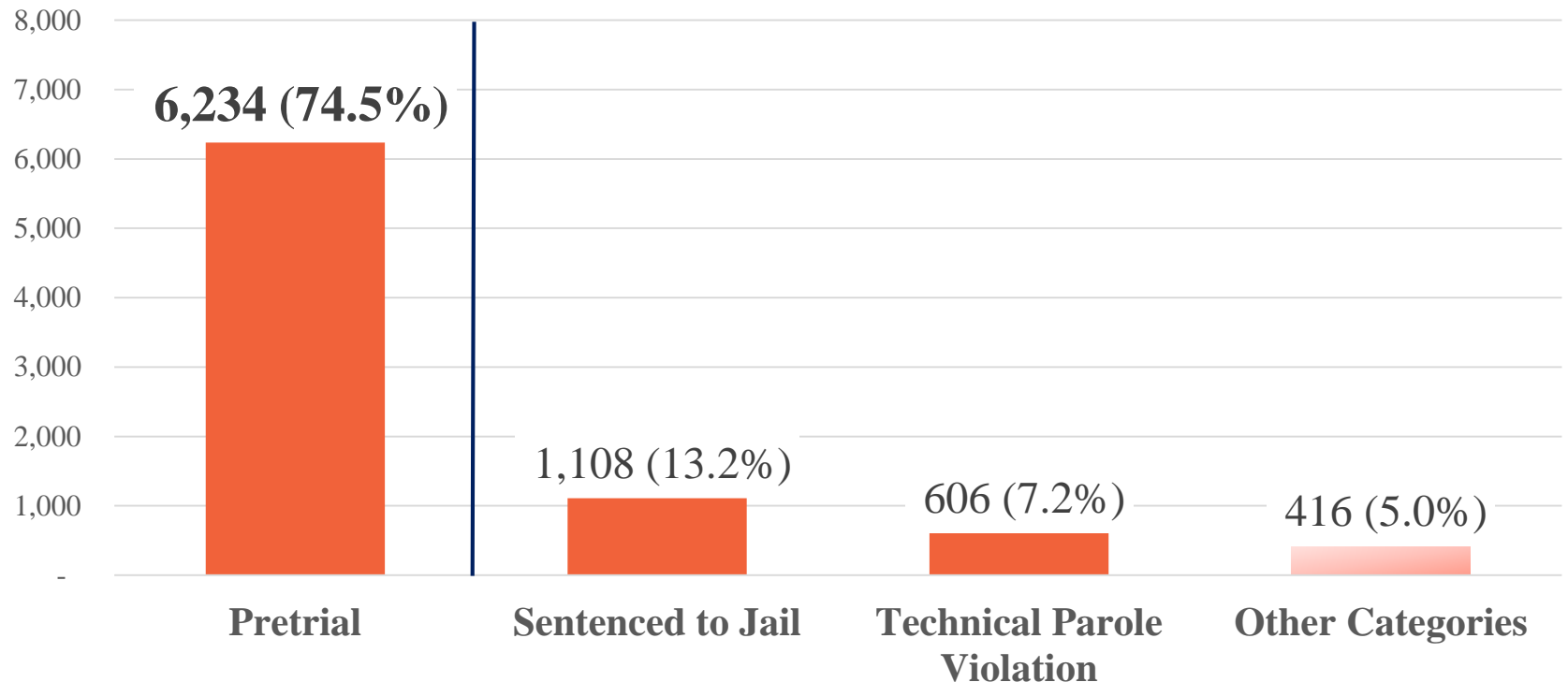
- ▶ Pretrial: 65.1%
- ▶ Convicted: 34.9%

72.4% Pretrial in NYS

The New York City Jail Population

(Three-quarters held pretrial)

NYC Jail Population on July 9, 2018:
Total = 8,240 (35% of the NYS Jail Population)

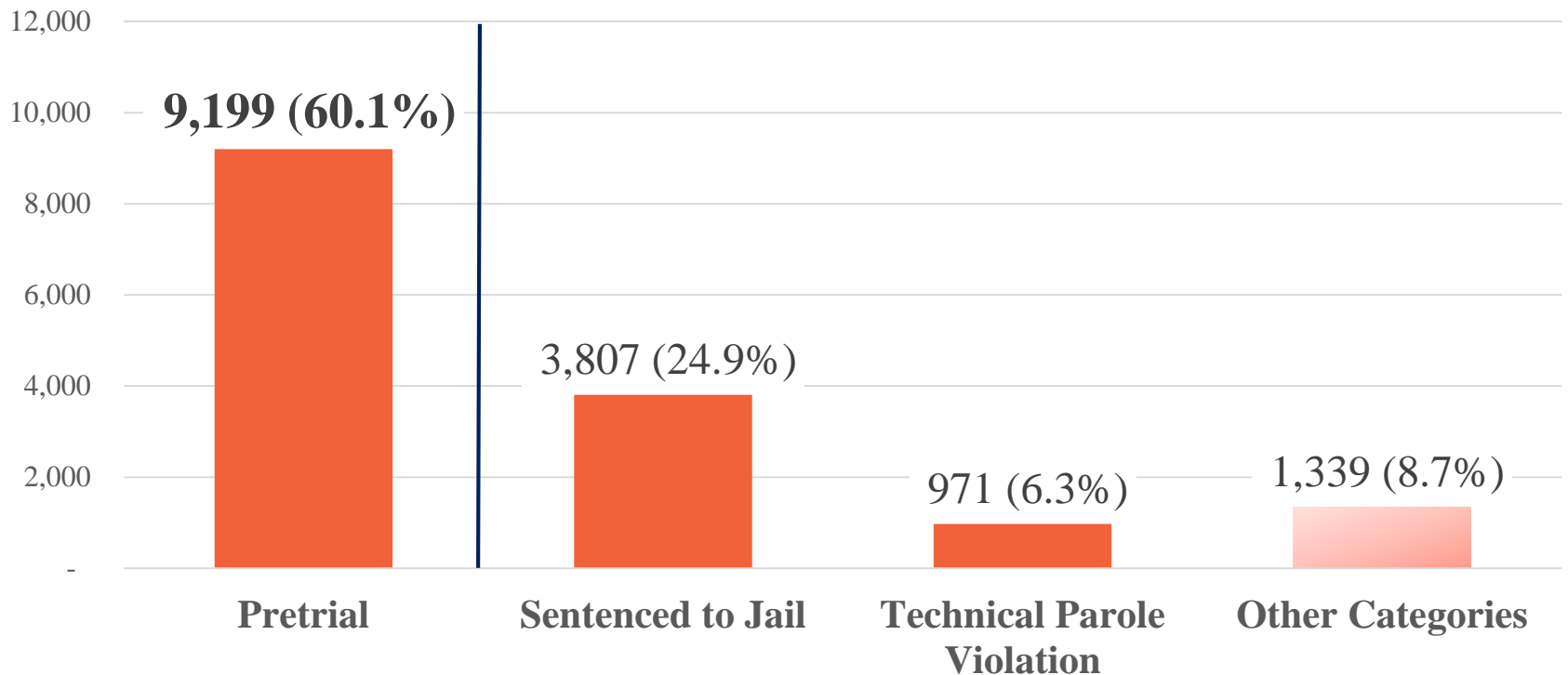


Source: New York City Department of Correction data via NYC Open Data (analysis by the Center for Court Innovation).

The Upstate Jail Population

(6 in 10 held pretrial)

**Average Daily Jail Population in Non-NYC Counties
in 2017: Total = 15,316 (65% of the NYS Jail Population)**



Source: New York State Division of Criminal Justice Services, *New York State Jail Population 10-Year Trends: 2008-2017*.

The Jail Population in the 7th Judicial District *(54% held pretrial)*

County	Average Daily Jail Population in 2017	Percent Pretrial
Cayuga	170	47%
Livingston	143	41%
Monroe	1,206	57%
Ontario	176	54%
Seneca	79	41%
Steuben	209	56%
Wayne	89	48%
Yates	42	48%
Total	2,114 (9% of the Total NYS Jail Population)	54%

Source: New York State Division of Criminal Justice Services, *New York State Jail Population 10-Year Trends: 2008-2017*.

Goals of Bail Reform

- **Reduce pretrial detention:**
 - ✓ **Reduce bail-setting** (where appropriate).
 - ✓ **Make bail more affordable** (when it is set).

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Historic Rationale for Bail

- 1. Secure Court Attendance:** Money bail incentivizes court attendance (to avoid forfeiting bail money).
- 2. Protect Public Safety:** Money bail (or direct remand) can reduce pretrial re-offense for high risk defendants.
- 3. Balance Rights of the Accused:** In lieu of remand, bail makes pretrial release possible (once the bail amount is paid).

New York State's Bail Statute

- 1. Secure Court Attendance:** Money bail incentivizes court attendance (to avoid forfeiting bail money).
- 2. Protect Public Safety:** Money bail (or direct remand) can reduce pretrial re-offense for high risk defendants.
- 3. Balance Rights of the Accused:** In lieu of remand, bail makes pretrial release possible (once the bail amount is paid).

... the court must consider the kind and degree of control or restriction that is necessary to secure ... court attendance when required. (New York CPL § 510.30.2)

Federal & State Limits on the Use of Bail

☒ Excessive Bail:

- U.S. Constitution: “*Excessive bail shall not be required, nor excessive fines imposed, nor cruel and inhuman punishments inflicted.*” (Amendment VIII)
- New York State Constitution: “*Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.*” (Article I, §5)

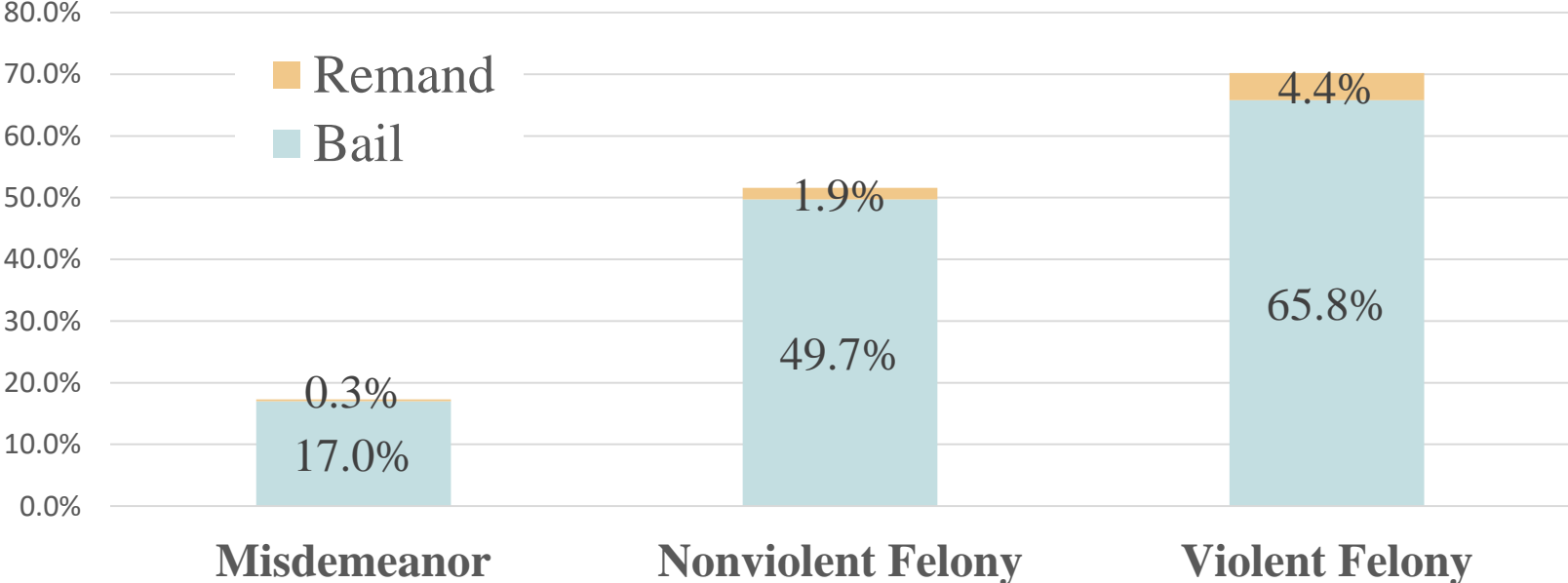
☒ **Use of Bail to Detain:** The purpose of bail is to secure court attendance (i.e., by incentivizing defendants not to skip court and risk forfeiting their bail money). (*People ex rel. Mordkofsky v. Stancari*, 93 A.D.2d 826 (1983))

Potential Problems with Bail

- ▶ ***Lack of face justification in most cases (clear in NYC):***
 - ▶ Failure to appear (FTA) rate among released NYC defendants:
 - ▶ Misdemeanors: 15%
 - ▶ Felonies: 12%
- ▶ ***Relative overuse of bail in felony cases*** (over half—55.7%—of NYC felonies must make bail, despite low FTA rate).
- ▶ ***Outsized impact of charge severity, generally.***

Potential Problems with Bail

Impact of Arraignment Charge Severity on the Use of Bail in New York City in 2017



Source: New York State Office of Court Administration data, analyzed by the Center for Court Innovation.

Potential Problems with Bail

- ▶ ***Low rates of bail payment, leading bail too often not to incentivize court attendance—but to detain.***
 - ▶ NYC: 12.6% made bail at arraignment in 2017.
 - ▶ Monroe County: Of bail cases from 2010-2014:
 - ▶ 10.5% made bail at arraignment.
 - ▶ 47.2% spent 1-6 days in pretrial detention.
 - ▶ 42.3% spent 7+ days in pretrial detention.

Source for NYC data: New York State Office of Court Administration data, analyzed by the Center for Court Innovation.

Source for Monroe County data: NYCLU 2018 (based on an analysis of 27,923 bail cases in Monroe County from 2010-2014).

Potential Problems with Bail

▶ ***Inequities in payment rates, based on socioeconomic status*** (basis of recent court decisions in Harris County, TX, San Francisco, CA, & Dutchess County, NY).

▶ Dutchess County, NY: Kunkeli v. Anderson:

▶ Ruling on 1/31/18: Hon. Maria Rosa, NYS Supreme Court:

It is clear to this court that a lack of consideration of a defendant's ability to pay the bail being set at an arraignment is a violation of the equal protection and due process clause of the Fourteenth Amendment and of the New York State Constitution.

ORDERED AND ADJUDGED that when imposing bail the court must consider the defendant's ability to pay and whether there is any less restrictive means to achieve the State's interest in protecting individuals and the public and to "reasonably assure" the accused returns to court.

Potential Problems with Bail

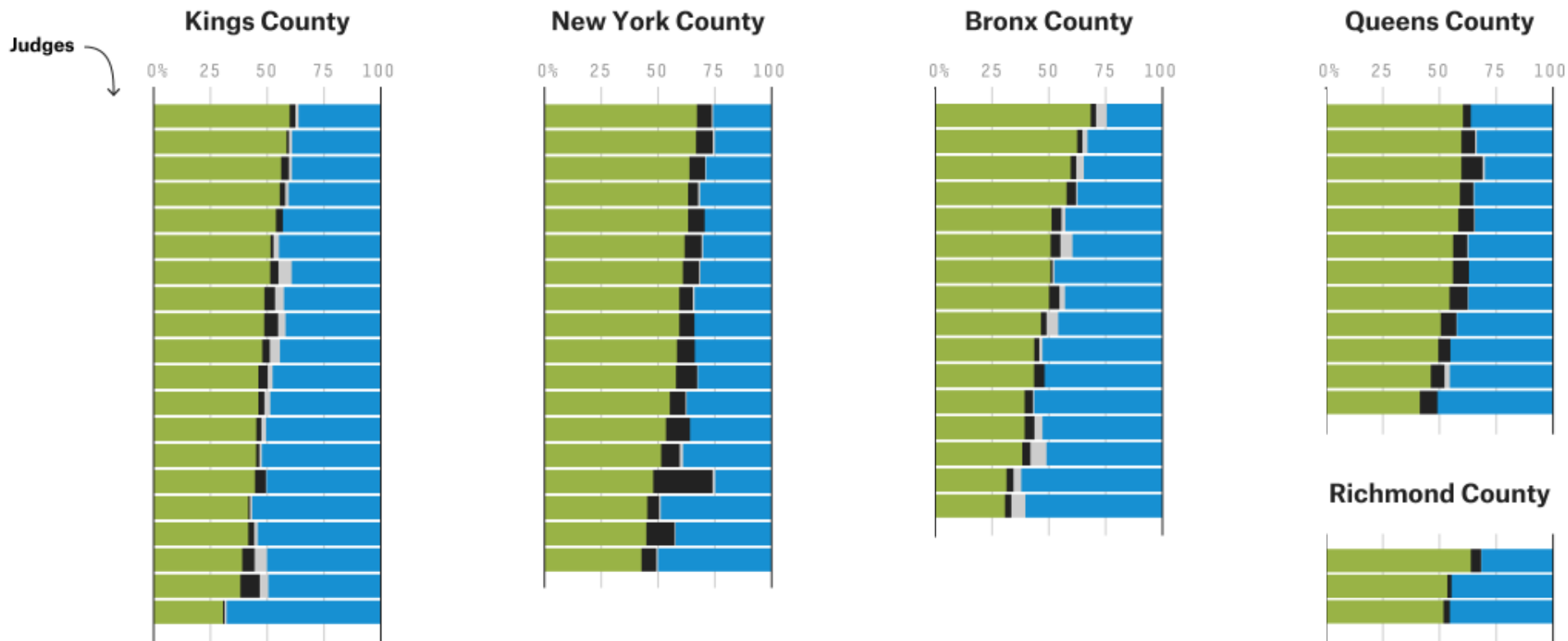
- ▶ ***Leverages guilty pleas & jail or prison sentences when defendants are unable to pay*** (Dobbie et al. 2016; Hahn 2016; Lowenkamp et al. 2013; Phillips 2012; Rempel et al. 2017).
- ▶ ***Counter-productive impact on public safety:***
 - ▶ Kentucky: 48 hours+ in detention *increased* post-release recidivism, especially for low risk defendants (Lowenkamp et al. 2013b).
 - ▶ Philadelphia & Miami-Dade: Detention reduced pretrial re-arrest but *increased* re-arrest over 2- & 4-year follow-up (Dobbie et al. 2016).
 - ▶ Key Explanation: Jail stays are too short to reduce recidivism (average = 25 days)—but long enough to increase criminality due to daily interaction with others who are criminally involved:
 - ▶ *Monroe*: 47% of those held on bail spent < 7 days in jail (NYCLU 2018)

► *Inconsistent decisions in otherwise similar cases.*

Bail-setting practices for felonies vary widely by judge in New York City

Among felony arraignments handled by The Legal Aid Society in New York City in 2017, share that resulted in each outcome, categorized by county and judge

■ Bail greater than \$1 ■ Remanded (held without bail) ■ Released without bail or bail of \$0 ■ Other or incomplete data



Data includes all cases where the first appearance in court is a regular arraignment before a judge who heard at least 100 cases for that county in our data set. Cases where bail was set at \$1 are categorized as "other" because this amount is generally used to reflect an accounting tool that credits defendants for jail time served when they have multiple cases open at the same time.

Chart imported from: Barry-Jester, A. M. (2018). *You've Been Arrested. Will You Get Bail? Can You Pay It? It May All*

Depend On Your Judge. FiveThirtyEight. Retrieved at: <https://fivethirtyeight.com/features/youve-been-arrested-will-you-get-bail-can-you-pay-it-it-may-all-depend-on-your-judge/>.

SOURCE: THE LEGAL AID SOCIETY

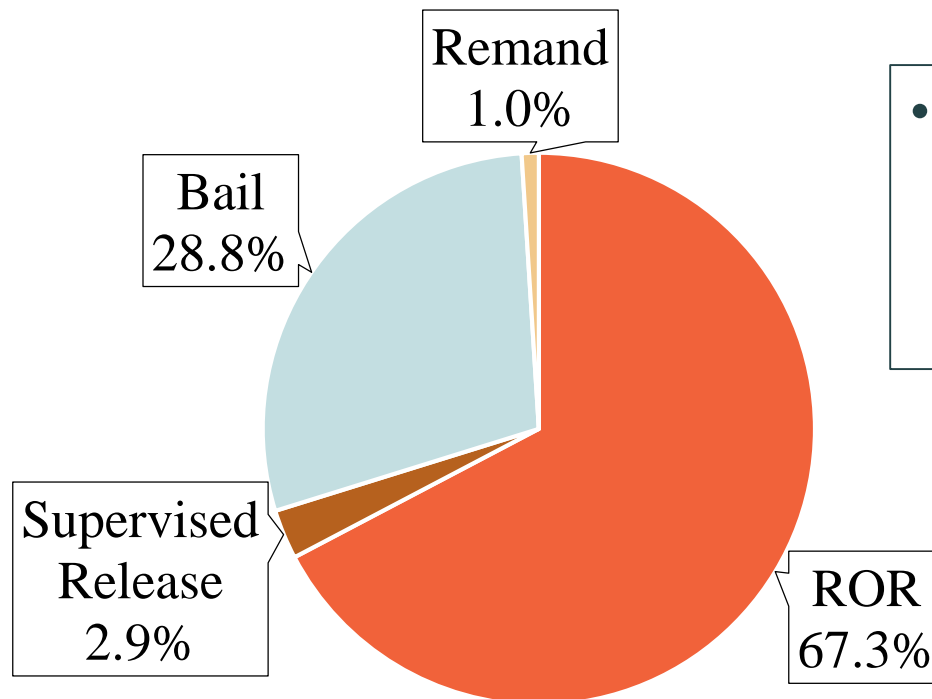
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Current Statutory Framework

- ▶ ***Offer judges more options besides ROR and bail:***

**Release Decisions at Arraignment in
NYC in 2017 (N = 148,715)**



- *96.1% of release decisions in NYC in 2017 involved ROR or money bail.*

Supervised Release 101:

Key Program Characteristics

1. Clear Eligibility Criteria:

- ▶ Washington, D.C.: All defendants (if not given ROR).
- ▶ NYC: Most misdemeanors & nonviolent felonies, excluding DV & excluding cases assessed as “high risk” of felony re-arrest.
- ▶ Other Options: To NYC criteria, add high risk misdemeanors & nonviolent felonies? Add select VFOs (assault, burglary, robbery)?

2. Universal Pre-Arrest Screening *(to increase volume)*

3. Risk Assessment: Defendants classified based on failure to appear &/or public safety risk using an empirically-based tool.

- ▶ Note: In NYS, *only FTA risk* can be shared with the judge—but staff can use public safety risk (e.g., to assign to supervision tiers).

Supervised Release 101

4. Supervision Tiers based on Risk:

- a. Intake appointment & court date reminders only.
- b. Phone &/or in-person contacts—with varying required frequency of contact: weekly, biweekly, monthly, etc.
- c. Reasonable treatment/service participation as release condition.
- d. Electronic monitoring (EM)—problematic in high-density areas.

5. Graduated Sanctions & Incentives (e.g., tier upgrades or downgrades, with efforts to avoid adverse “supervision effects”).

6. Net Widening Safeguards: Procedures to use supervised release as an alternative to bail, not to ROR.

7. Judicial Discretion: Supervised release is an option.

Decision-Making Guidelines

(Goal: Increase consistency while maintaining discretion)

	Misdemeanor	Nonviolent Felony	Violent Felony
Low Risk			
Moderate Risk			
High Risk			
Sanction for Failure to Appear or Pretrial Re-Arrest			

Just One Possible Solution...

	Misdemeanor	Nonviolent Felony	Violent Felony
Low Risk	ROR	ROR	ROR
Moderate Risk	ROR	Supervised Release	Supervised Release with Treatment Conditions or EM (<i>Less Serious VFOs</i>) OR Bail
High Risk	Supervised Release	Supervised Release with Treatment Conditions	Bail
Sanction for Failure to Appear or Pretrial Re-Arrest	Supervised Release (potentially with tier upgrade)	Supervised Release (potentially with tier upgrade)	Bail; or Remand if VFO re-arrest

Variations in the Approach

- ▶ ***Suggest bail in more or fewer cells?***
- ▶ ***Include finer risk variations*** (e.g., 5 instead of 3 categories)?
- ▶ ***Include finer charge variations:***
 - ▶ Place domestic violence (DV) in its own column?
 - ▶ Place sex offenses in their own column?
 - ▶ Distinguish VFO assault, burglary, & robbery from other VFOs?
 - ▶ Remove VFOs altogether from the guideline given the greater stakes and, thus, greater need for case-by-case decisions?

Try it in Your Court: Adjust to Local Court Culture & Community Values

	Misdemeanor	Nonviolent Felony	Violent Felony
Low Risk			
Moderate Risk			
High Risk			
Sanction for Failure to Appear or Pretrial Re-Arrest			

What Can Change When Setting Bail?

▶ *Offer judges more options besides ROR and bail:*

▶ *When still setting bail, reform how bail is used:*

▶ *Shift to alternative forms of bail.*

▶ *Explicitly integrate defendants' financial resources.*

Permissible Forms of Bail in NYS

▶ **Nine Forms of Bail** (see CPL § 520.10.1):

1. Cash bail.
2. Insurance company bail bond.
3. Secured surety bond.
4. Secured appearance bond.
5. Partially secured surety bond.
6. Partially secured appearance bond.
7. Unsecured surety bond.
8. Unsecured appearance bond.
9. Credit card.

Most often set & most difficult to pay

▶ **Methods of Fixing Bail** (see CPL § 520.10.2): Judges must set at least 2 forms of bail.

Key Alternative Forms of Bail

▶ Credit Card:

- ▶ Eases Payment: Increases bail payment at arraignment & reduces days to payment for those initially detained (Phillips 2014).
- ▶ No Effect on FTA: No change relative to cash or bond (Phillips 2014).
- ▶ Logistics for Courthouse Payment: Obtain credit card machines from a statewide third-party contractor (OCA can help).
- ▶ Multi-Party Payment: In NYC, up to 3 credit cards (& up to 3 card holders) can be charged for portions of the bail amount.
- ▶ Administrative Fee: NYC charges 3% to pay in the courthouse or 2.49% to pay online—but the statute (§ 520.10.1.i) merely allows but *does not require* such fees.

Alternative Forms of Bail

- ▶ **Partially Secured Bond:** Up to 10% paid up front & balance owed if FTA OR **Unsecured Bond:** No up-front payment:
 - ▶ Partially Secured as Fairer Version of Insurance Company Bond: Same 10% up front without a for-profit fee to the company.
 - ▶ Secures Court Attendance: In NYC, partially & unsecured bonds yielded similar FTA & re-arrest rates as cash bail (Rahman 2017).
 - ▶ Implementation Logistics (NYC Example):
 - ▶ *Payment on Court Date:* Defense attorney completes 1-page form; judge swears in surety (who promises to pay the balance if FTA).
 - ▶ *Payment Between Dates:* Court clerk completes 1-page form; then judge swears in the surety (but defendant need not be present); then Department of Correction is notified & releases the defendant.

Explicit Consideration of Financial Resources

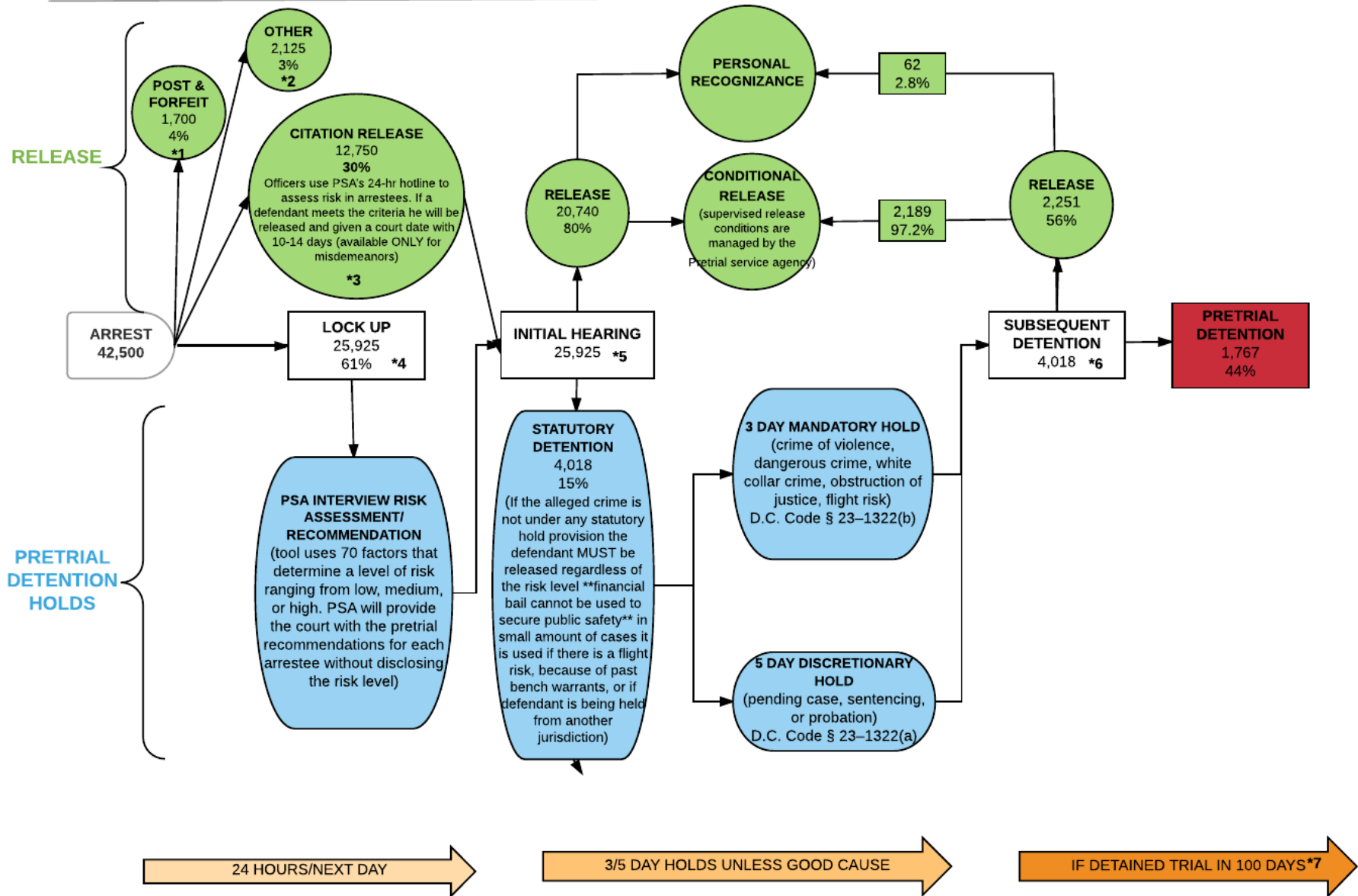
- ▶ **Statutory Language:** CPL § 510.30.2.a identifies 9 factors that should inform bail decisions, including “employment and financial resources” (CPL § 510.30.2.a.ii).
- ▶ **Practical Methods of Incorporating Financial Resources:**
 - ▶ Discursive: Routinely inquire into defendants’ ability to pay bail (to inform either whether to set bail or the amount)?
 - ▶ Actuarial: Implement a formal *ability-to-pay* tool (e.g., *Vera Bail Calculator*) & assess defendants on the tool prior to a decision?
 - ▶ Implications of Considering Financial Resources:
 - ▶ Adjust bail amounts to defendants’ financial resources?
 - ▶ Use non-monetary conditions if indigent (cannot pay any amount)?

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Bail Reform Legislation

- ▶ **Elimination of Money Bail** (all or only some cases)
- ▶ **Supervised Release** (expanded to more cases)
- ▶ **Preventive Detention** (allowed in some or many cases)
- ▶ **Due Process** (formal hearings on preventive detention)
- ▶ **Risk-Based Decision-Making** (formal risk assessment tools inform in/out decisions, supervision tier, both, or neither)



Bail Reform Legislation: *Washington, D.C. (Passed 1992)*

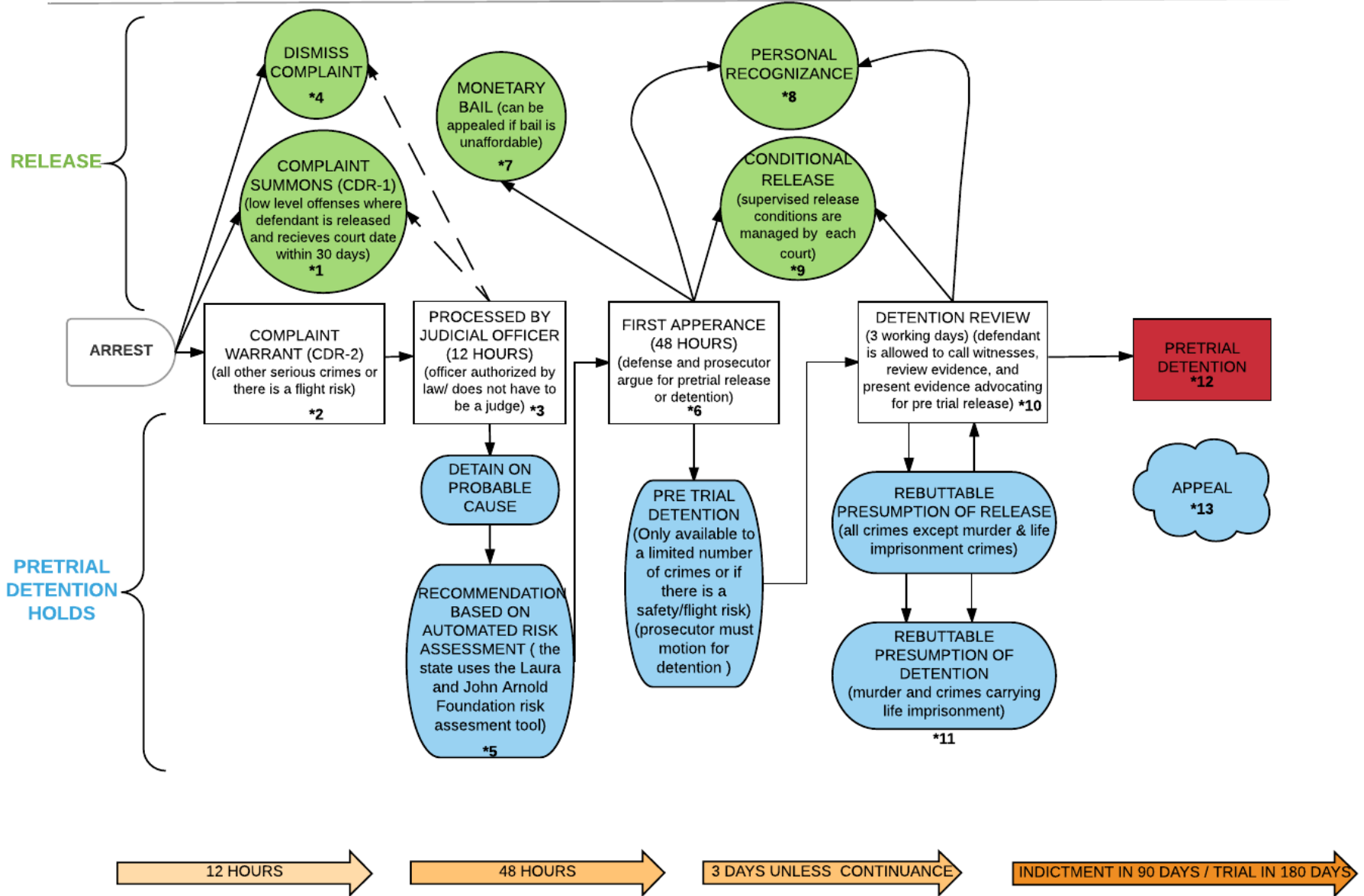
- ▶ **Elimination of Money Bail:** All charges. (Bail allowed only if defendant can pay & is reviewed if detained > 24 hours; used < 4%).
- ▶ **Supervised Release:** Default option. (~97% of released cases).
- ▶ **Preventive Detention:** Limited. (Only violent charges & select other circumstances, e.g., open case. If detained, right to trial within in 100 days of arrest except for “good cause.”)
- ▶ **Due Process:** Multiple hearings. (Detention at arraignment based on “clear & convincing” evidence; additional hearing in 5 days, with presumption of release except for crimes of violence.)
- ▶ **Risk-Based Decision-Making:** Supervision tier only. (Risk tool recommends a level of supervision, never detention.)

Bail Reform Legislation: *New Jersey (Implemented 2017)*

- ▶ **Elimination of Money Bail:** All charges. (Bail allowed only if defendant can pay & no other condition can prevent FTA; rare).
- ▶ **Supervised Release:** Most common option. (~ 2/3 statewide).
- ▶ **Preventive Detention:** Allowed. (DV, weapons, sex crimes, other serious violence, 2+ prior serious violence, or **serious risk of FTA, danger, or obstruction of justice.** If detained, trial within 180 days of indictment, excluding “reasonable” delays.)
- ▶ **Due Process:** Multiple hearings. (Detention based on “clear & convincing” evidence, with presumption of release except for murder or crimes with a potential life imprisonment sentence.)
- ▶ **Risk-Based Decision-Making:** Detention & supervision tier. (Risk tool recommends ROR, a supervision tier, or detention.)

ARRESTS IN NEW JERSEY

| July 28, 2017



Bail Reform Legislation: *California (Passed August 2018)*

▶ **Elimination of Money Bail:** All charges.

▶ **Supervised Release:** Required option.

▶ **Preventive Detention:** Allowed. (Violence, weapons, on parole or probation, current open felony, witness/victim intimidation, or “**substantial reason to believe**” no non-monetary condition will secure court attendance or assure public safety.)

▶ **Due Process:** Multiple hearings with presumption of detention in many cases (presumed if violent felony OR assessed high risk to public safety & 1 of several conditions, e.g., on probation or parole).

▶ **Risk-Based Decision-Making:** Detention & supervision tier. (Risk tool = 1 of multiple factors to inform any pretrial decision.)

Bail Reform in New York (2018 Proposals)

Component	Governor Cuomo	State Senate	State Assembly
Elimination of Money Bail	Misdemeanors & nonviolent felonies (except Class A).	Complete elimination.	Misdemeanors (except sex offenses), nonviolent felonies, robbery 2, & burglary 2. <i>Bail remains an option if OP violation, "willful" FTA, or felony re-arrest on an initial felony.</i>
Use of Bail (if allowed)	3+ forms; rehearing after 5 days if still detained.	N/A	3+ forms; rehearing after 5 days if still detained.
Supervised Release	OCA certifies agency in each county.	Same as Gov. Cuomo; for-profits disallowed.	Same as Gov. Cuomo; for-profits disallowed.
Preventive Detention	<i>Key Categories:</i> DV, Class A felony, "serious violence," response to "willful" FTA, or re-arrest.	<i>Key Categories:</i> Felony with intent to cause serious injury, 2 prior VFOs, & response to "willful & persistent" FTA.	<i>Select Felonies, including:</i> Class A, sex offenses, terrorism offenses, intent to cause serious physical injury or death.

Bail Reform in New York (2018 Proposals)

Component	Governor Cuomo	State Senate	State Assembly
Due Process	Detention hearing after 5 working days; presumption of detention for select cases, including DV & “serious violence.”	Detention hearing after 2 working days; extensive discovery pre-hearing; “clear and convincing” evidence of high FTA risk.	Detention hearing at arraignment & rehearing after 5 days; extensive discovery pre-hearing; “clear and convincing” evidence of high FTA risk.
Risk-Based Decision-Making	No explicit discussion.	No explicit discussion.	Any risk algorithm must be public, validated, & free of racial bias.

Questions?
