

# ON THE ROAD TO FREEDOM

An Abolitionist Assessment  
of Pretrial and Bail Reforms

**CRITICAL  
RESISTANCE** 

COMMUNITY JUSTICE EXCHANGE

**JUNE 2021**

# Acknowledgements

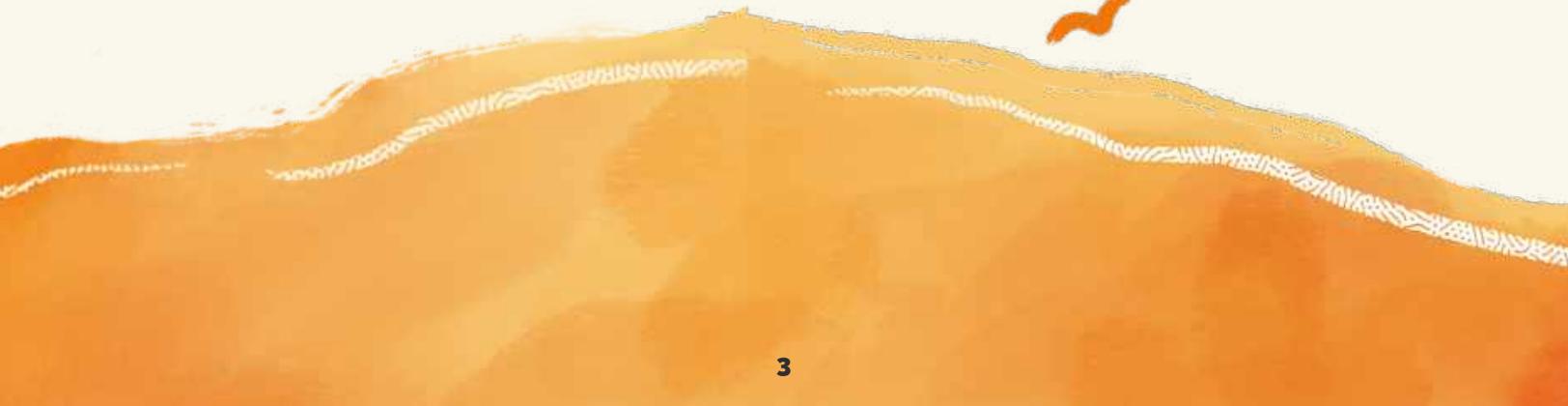
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# INTRODUCTION

Words highlighted in [yellow](#) throughout this document will redirect to the [glossary](#) definitions.

Every year across the United States, over 10 million people are booked in city and county jails, with [nearly half a million incarcerated while awaiting trial](#). Many are caged because they cannot afford to pay a [money bail](#). It is in large part for this reason that organizers across the country have targeted money bail: in most places, it is a primary driver of pretrial incarceration. Like all other parts of the criminal punishment system from policing to parole, money bail is also racist and anti-Black: Black people make up only 12% of the total U.S. population but [comprise 43% of the people in U.S. jails while awaiting trial](#).

The term “criminal punishment system” is used instead of “criminal justice system” throughout this piece. The term “criminal justice system” implies that the system actually does “justice,” when, in fact, the system is primarily concerned with administering punishment, and is built on, reinforces and exacerbates white supremacy and all forms of structural oppression.

In addition, it’s easy for people learning about the criminal punishment system to understand how unfair and unethical it is for someone’s freedom to depend on access to money. Other parts of the criminal punishment system that determine pretrial incarceration may be obscured from public view and thus less accessible. For these reasons, the campaign to #EndMoneyBail has become a common one across the country, taken up by people and organizations of many political backgrounds, from prison industrial complex abolitionists and progressives to liberals and conservatives.

**Unaffordable money bail, however, is not the only reason people are jailed while awaiting trial.** Some people are denied release entirely and ordered jailed (often referred to as preventive detention) because a judge believes they are a risk to “public safety”<sup>1</sup> or will miss court; others are jailed pretrial due to violations of probation, parole, or other pretrial conditions; still others are jailed as a result of holds from other federal or state agencies, such as ICE. While unpaid money bails have been appropriately identified as a major driver of pretrial jailing, the harms we seek to prevent are caused by incarceration itself. **As a result, for abolitionists, the target must be pretrial incarceration — no matter its cause — and the goal must be its elimination.**

Reforms to the money bail system that create new pretrial supervision structures, implement risk assessment tools, and abolish the use of money bail for only “low-level” charges<sup>2</sup> can all result in increased surveillance and supervision by the criminal punishment system. They also further the idea that there are some people who deserve to be incarcerated and some people who don’t, and fail to result in actual decarceration. It is also possible for reforms to the bail system to decrease the number of people in physical cages, but increase the size, scope, and resources of the prison industrial complex.<sup>3</sup> A reform can result in decarceration without getting us closer to abolition.

**As organizers, our target has always been the entire carceral system. Although many of us have focused our work on pretrial incarceration and supervision, our analysis understands money bail as one tool that allows the criminal punishment system to cage someone.** The public now understands the concept and harms of money bail. The system has responded by shifting around resources, such as apportioning funding for location-tracking ankle-shackles; but not by relinquishing power over the

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1 We put “public safety” in quotation marks because when system stakeholders or politicians use this term, the public they are referring to is a small segment of the overall population: middle- to upper-class white people who own property. These are the people whom policing and imprisonment were always meant to protect. If the concern was about the entire public’s safety, then there would be a conversation about the systemic danger and violence perpetrated by policing, imprisonment, and criminalization (not to mention capitalism and white supremacy), specifically against BIPOC, disabled, poor, trans and queer folks, but that never seems to be considered in the conversation around public safety.

2 “Low-level”, like “serious” or “non-serious”, are subjective terms often used in the policy reform space. We use them in this document as short-hand and to capture the actual language used by advocates and electeds, but we do not endorse any view that the severity of criminal charges reflects anything beyond the power to punish.

3 Following Critical Resistance we use the term prison industrial complex (PIC) “to describe the overlapping interests of government and industry that use surveillance, policing, and imprisonment as solutions to economic, social and political problems.”

people it harms, by arresting fewer people or releasing people from jail during the global pandemic. Many organizers have pivoted to the next phase of pretrial advocacy, pushing past the simple call to #EndMoneyBail toward a vision of expanded pretrial freedom for all, moving us closer to a future in which we do not respond to social problems or harm with cops, courts, and cages.

The popularity of the call to #EndMoneyBail among elected officials and, in some cases, the co-optation of the phrase by the very architects of mass criminalization and the people responsible for jailing should give us pause. While ending money bail is non-negotiable for our movement, our goal is to weaken the state's power to jail, surveil, and punish. Swapping out money bail as one mechanism for pretrial jailing with a different one — whether it is preventive detention or onerous conditions of release<sup>4</sup> — is unacceptable.

Our movement must be clear in our larger goals and our specific demands: We seek to shrink the power, scope, and resources of the prison industrial complex. We fight not to replace money bail with “fairer” forms of jail or with electronic and financial punishments, but for pretrial freedom, an end to state violence and policing, and community control of resources.

We hope that this document will enable our movements to differentiate between reforms and policy changes that can move us closer to liberation and abolition, and those that re-legitimize and re-shape existing, oppressive systems of control. **This assessment is not a blueprint or substitute for strategic decisions made within local campaigns by grassroots abolitionist organizers. The conditions in a specific place matter immensely.**

In this document, we look at recent examples of bail reform from around the country and evaluate them according to a set of abolitionist questions:

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<sup>4</sup> These conditions can range anywhere from weekly phone check-ins with pretrial “services” to curfews to drug or alcohol testing to electronic shackling or home detention, depending on the judge and jurisdiction.

**1**

***Does the reform weaken the system's power or means to jail, surveil, monitor, control, or otherwise punish people?***

**2**

***Does the reform challenge the size, scope, resources, or funding of the PIC?***

**3**

***Does the reform maintain protections for everyone and resist dividing people into categories of "deserving" and "undeserving"? Does the reform maintain or expand existing paths to freedom for all people?***

**4**

***Does the reform shrink parts of the PIC, industries that profit from the PIC, and/or the power of elected officials who sustain the PIC?***



These guiding questions draw extensively from resources created by Critical Resistance, Survived and Punished NY, the Movement 4 Black Lives Policy Table, and other abolitionist thinkers and organizers.<sup>5</sup> The analysis in this assessment mirrors that used in the reformist reforms vs. abolitionist steps to end policing and imprisonment tools from Critical Resistance, and the grassroots abolitionist assessment of New York reforms from Survived and Punished NY. We hope to build off this lineage of abolitionist analysis so that we can identify and fight for reforms that move us closer to abolition.

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<sup>5</sup> The resources referenced include: "Challenges and Pitfalls to Reform," a document compiled by Mariame Kaba which includes questions by Erica Meiners, Dean Spade, and Peter Gelderloos; the "Radical Policy Checklist" compiled by Movement 4 Black Lives Policy Table and Law for Black Lives; "Preserving Punishment Power: a grassroots abolitionist assessment of New York reforms" by Survived and Punished NY; "Reformist Reforms vs. Abolitionist Steps in Policing" and "Reformist Reforms vs. Abolitionist Steps to End Imprisonment" by Critical Resistance; and "Police 'Reforms' You Should Always Oppose" by Mariame Kaba.

We focus here on whether particular reforms shrink the size, scope, and power of the prison industrial complex. **We know, however, that the transformative potential of reforms is often less about the reform itself, and more about how power is built during the struggle over the reform.** Once the reform is won, have we increased the size and strength of our abolitionist movements? Is our base able and willing to continue the fight to move us even closer to abolition? This assessment does not take up these questions, but we encourage you to ask them as you develop your organizing strategy.

Knowing the limits of any one-size-fits-all approach, we offer this assessment to continue a dialogue about the role of reform, identify lessons learned, and provide grounding for people who are new to the movement to abolish money bail, pretrial detention, and the prison industrial complex as a whole. We welcome your feedback, corrections, and additions. Please contact us at [info@communityjusticeexchange.org](mailto:info@communityjusticeexchange.org). We look forward to hearing from you!

# A SPECTRUM FROM REFORMIST REFORMS TO ABOLITIONIST REFORMS

This spectrum illustrates common demands made by communities in resistance, and reforms offered by the state around pretrial detention from the most abolitionist and liberatory to the most reformist and harmful. It is important to note that these specific policy changes often are employed simultaneously. For instance, a jurisdiction might adopt legislation that gets rid of money bail while simultaneously expanding preventive pretrial detention for certain charges while using a risk assessment tool. This would mean the end of wealth-based pretrial jailing and freedom for some and the persistence and even expansion of pretrial incarceration for others.

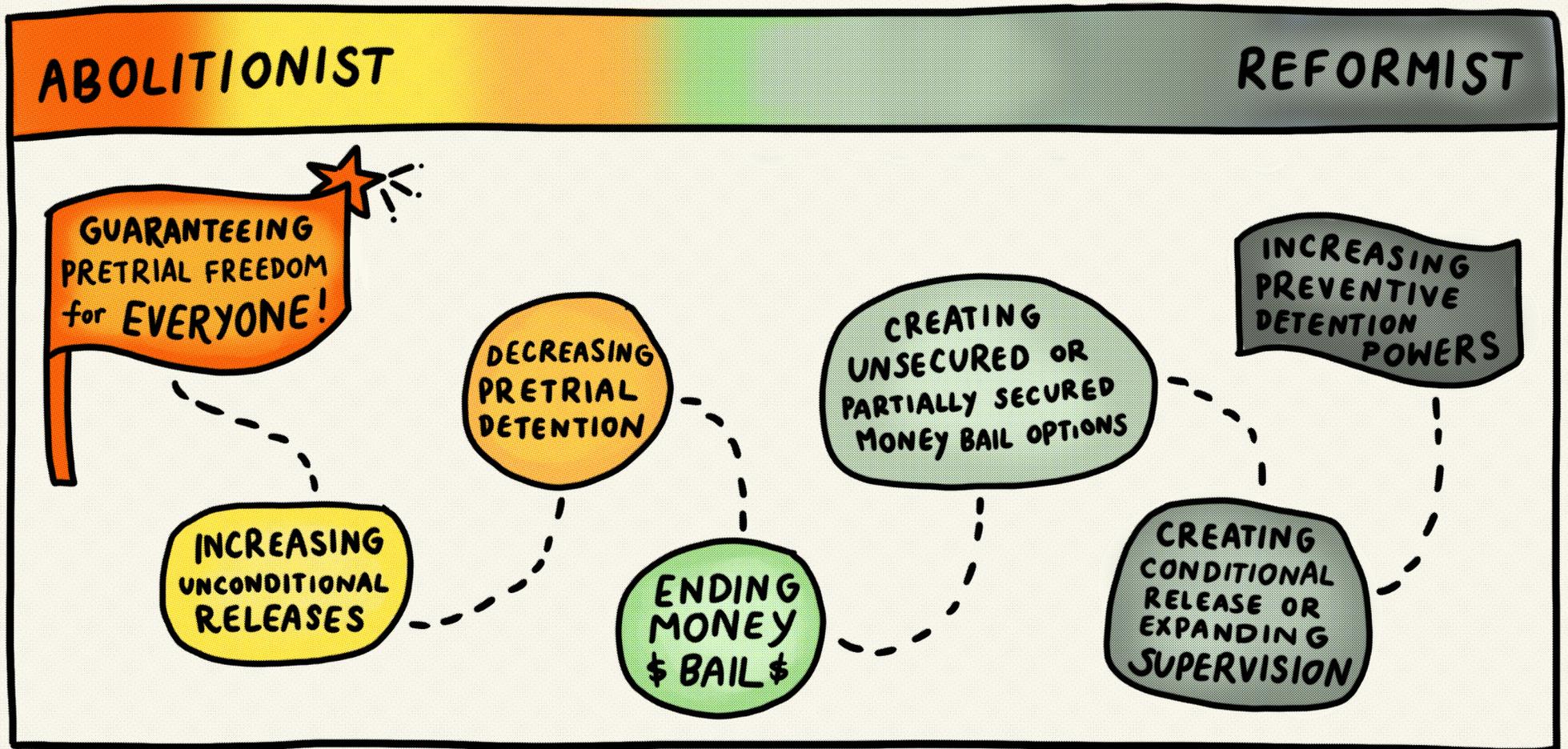
We understand that in abolitionist organizing, our “winning” campaigns won’t often or immediately reach the abolitionist end of this spectrum. The state will offer concessions to our demands for pretrial freedom. Abolitionists should always strive to completely end the caging of communities, pretrial or otherwise, while acknowledging that the relative power we hold means that we must often think about and decide which shorter-term reforms are strategic for the longer-term fight. These choices will look different depending on the local context, balance of forces, and how much power abolitionists are able to build.

In the following pages, we provide a visual guide that situates common demands for pretrial and bail reform in a spectrum from the most abolitionist and liberatory to the most reformist and harmful. The visual guide is followed by detailed explanations of each demand type.

# ON THE ROAD TO FREEDOM

A Spectrum from Reformist Reforms to Abolitionist Reforms

This visual guide illustrates common demands made by communities in resistance, and reforms offered by the state around pretrial detention from the most abolitionist and liberatory to the most reformist and harmful.



# A Spectrum from Reformist Reforms to Abolitionist Reforms

*The following are detailed descriptions of the demands that make up the visual spectrum on the previous page.*

## **Guaranteeing Pretrial Freedom for Everyone!**

Guaranteeing that all people are free without the threat of incarceration, supervision, or surveillance during the pretrial period.

## **Increasing Unconditional Releases**

Expanding pretrial release without conditions of supervision or surveillance. This would include both reducing the overall capacity for pretrial incarceration, while also increasing the possibility of release without conditions for more people.

## **Decreasing Pretrial Detention**

Eliminating the possibility of an accused person being jailed pretrial. Without specific protections, this could lead to more people being subjected to supervision or other conditions, possibly expanding the funding and/or reach of the PIC.

## **Ending Money Bail**

Getting rid of money bail as a way to reduce pretrial detention. This reform can go either way depending on whether it is focused on ending pretrial detention (abolitionist) or replacing unpaid money bail with other mechanisms of pretrial detention (not abolitionist). \*Note: Ending money bail by itself sometimes becomes focused on ending for-profit bail bondsman. Ending bail profits does not automatically lead to getting people free. We must address the root of the issue, which is ending pretrial detention.

## **Creating Unsecured or Partially Secured Money Bail Options**

Creating new options for release through unsecured or partially secured money bail (where an individual can be released without paying money or paying only a portion of the total money bail amount). This reform may increase release for some individuals but also maintains the money bail system overall. Because of the existence of the full money bail in the background, violations of conditions of release under unsecured or partially secured bails can lead to orders to pay the full monetary amount in addition to the threat of pretrial incarceration or increased restrictions.

### **Creating Conditional Release or Expanding Supervision**

Creating new and conditional barriers to release and/or increased punitive supervision that are themselves forms of pretrial detention and surveillance. These types of “substitution” reforms do not create more freedom and can lead to increased re-arrest because they create new possibilities for violations punishable by incarceration or increased restrictions. They often expand the PIC through increased resources and staff for the pretrial supervision system. In addition, expanded pretrial supervision pretrial supervision can actually lead to arrests of additional people who are caught in the web of expanded surveillance (i.e via home visits, etc.). It also often introduces or increases monetary penalties and expenses for the individual.

### **Increasing Preventive Detention Powers**

Creating new or increased eligibility for or mechanisms of “preventive” pretrial detention. Even though these types of reforms are often described as “only” being for a small or limited group, any reform that expands the system’s power to incarcerate people pretrial will ultimately block pretrial freedom from larger and larger groups.

### ***Risk Assessment Tools***

Increasingly, different pretrial reforms include the adoption or continuation of the use of pretrial Risk Assessment Tools (RATs) as a way to determine whether someone should be released and if so, what conditions of release should be imposed. Most often, money bail is used in addition to (or in spite of) the use of a pretrial RAT, and sometimes RATs are used only for certain categories of charges in a pretrial system with or without money bail. You can [read more here about pretrial RATs in decarceration campaigns](#). These “tools” deeply and inherently reproduce the same racial biases present at every step of the prison industrial complex and are part of a huge expansion in pretrial supervision and surveillance. While the adoption and use of RATs should be fought by abolitionists, they show up at almost every point in the spectrum (except for pretrial freedom!) and should be viewed as an intrinsic part of the project to end pretrial detention and not the target itself.

### ***Procedural Protections***

Increased procedural protections can make it more onerous for prosecutors and judges to incarcerate people who are awaiting trial or impose conditions on their release (such as electronic monitoring). Making it more procedurally difficult to restrict people’s liberty may have a decarceral impact.



# CASE STUDIES

We created the spectrum so that even very specific organizing strategies that organizers create for their localities and states can be situated in critical dialogue with other abolitionist efforts. In the following examples, we evaluate a number of recent pretrial reforms using the core questions outlined in the introduction.

We chose a cross-section of examples from the last several years that have consistently become touch points for comparison in national conversations around bail reform, many of which were led, in part, by movement organizers.

We hope that the process of case study evaluation can provide readers with a basis to interrogate whether money bail and pretrial reform efforts are moving us closer to PIC abolition.

# CASE STUDY #1:

## *New Jersey - 2014 State Legislative Reform*

*This comprehensive state-wide reform package approached pretrial reform through virtually eliminating money bail and the expanding use of pretrial RATs and supervision.*

### CONTEXT

#### *What was the bail law before the reform?*

As in most other states, a significant percentage of the people in jail in New Jersey are awaiting trial; in 2012, it was 73%. Studies by advocacy groups, led by the Drug Policy Alliance (DPA), showed that more than one-third of the people in pretrial detention in county jails across the state were locked up solely because of their inability to pay money bail. This analysis spurred a conversation on the role of money bail, racial justice, and the private bail bond industry in the state.

After years of advocacy by DPA and partners including the ACLU of New Jersey, the New Jersey legislature passed bail reform legislation (the New Jersey Criminal Justice Reform Act) that was championed and signed by then-Governor Chris Christie in August 2014. Voters then approved the legislative change to the state constitution via a ballot question in November 2014. The legislation took full effect on January 1, 2017, with some changes rolled out earlier, in 2016.

# GENERAL SUMMARY OF THE REFORM

The New Jersey Criminal Justice Reform Act codifies that all individuals in the state, other than those facing charges that come with the possibility of life imprisonment, are entitled to the presumption of pretrial release. Prior to these reforms, New Jersey did not have preventive detention because its state constitution included an absolute right to bail except for capital cases. Judges who wanted to incarcerate someone pending trial used a workaround: they set very high money bails they did not think would be paid. Legislative reforms, which only went into effect after voters approved a constitutional amendment by referendum, created the legal authority for preventive detention and thus outright denial of pretrial release.

The Act also created a Pretrial Services Program Review Commission to oversee and assist with the new law, which eliminated money bail in most cases and created a system where Arnold Venture's Public Safety Assessment (PSA)<sup>1</sup> risk assessment tool (RAT) is used to recommend detention or release, as well as conditions of release. The law requires that in order to detain someone, there must be a hearing where the charged individual is represented by an attorney and can call and cross examine witnesses.

Additionally, pretrial incarceration can only happen upon a prosecutor's motion, avoiding unilateral actions by judges. Finally, the Act also expanded the citation and booking process.

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<sup>1</sup> The Pretrial Safety Assessment, commonly known as the "PSA," and developed by Arnold Ventures (previously referred to as the Laura & John Arnold Foundation) is one of the most widely used pretrial risk assessment tools. Arnold Ventures provides funding and technical assistance to jurisdictions to get them to use the tool via its Advancing Pretrial Policy & Research arm. Kay Whitlock and Nancy Heitzeg have written about the reach and effects of Arnold Ventures-backed reforms.

# ABOLITIONIST EVALUATION OF THE REFORM

1

## ***Does the reform weaken the system's power or means to jail, surveil, monitor, control, or otherwise punish people?***

Overall, no. The reform both removed and added carceral tools to the state's arsenal. New Jersey maintains money bail as an option, but requires it be set in "affordable amounts" and in very limited cases<sup>2</sup>. In 2019, only 43 money bails were ordered in the entire state. Since unaffordable and unpaid money bails were a significant driver of pretrial incarceration before reforms, the significant limitations on money bail did remove a tool judges used to detain people. The reform also led to an expanded system of citations in lieu of arrest and defined some charges as ineligible for detention. Both of these changes helped to decrease the number of people in New Jersey jails overall. However, the citation system also facilitated more seamless and expanded surveillance by the police. The reform also gave judges the ability to detain people outright. It increased judicial discretion to set a variety of pretrial conditions of release, including GPS location tracking, supervision, and house arrest. The law also introduced and normalized the usage of RATs into New Jersey's courts, which has expanded the imposition of pretrial supervision conditions.

<sup>2</sup> The implementation of the New Jersey law's rules on detention and bail is defined via directives from the state Attorney General.

## 2

### ***Does the reform challenge the size, scope, resources, or funding of the PIC?***

No. Although the 2017 reform legislation has resulted in a net decrease in the number of people in pretrial detention, it maintained the possibility for pretrial jailing, further entrenched detention for some charges, and has expanded the use of location monitoring via ankle shackles. In addition, the reform created the power to preventively detain people via the constitutional amendment, something that did not previously exist.

The 2017 legislation's reliance on the Arnold PSA RAT has meant that charges and the use of a racist algorithm largely determine pretrial detention. Despite Arnold Ventures' attempts to smooth over criticism of its RAT by suggesting that it only be used to recommend "release conditions" and not be used to recommend detention, as of February 2021, New Jersey explicitly uses the RAT to recommend either release or detention in addition to conditions of release.

There has been an increase in the proportion of people who are incarcerated pretrial with no possibility for release, despite the overall decrease in the total number of people in jail while awaiting trial. In addition, the 2017 legislation has not changed the racial disparities in New Jersey's jails.

The 2017 legislation added significant resources to the state's pretrial services system, including creating an entire department to oversee the new law and hiring new Superior Court judges to implement it. In 2018, the state's new pretrial services department had to seek additional state funding beyond the court filing fees that had originally been designated to cover its budget.

**3**

***Does the reform maintain protections for everyone and resist dividing people into categories of “deserving” and “undeserving”? Does the reform maintain or expand existing paths to freedom for all people?***

No. Because this reform created preventive detention in New Jersey, some people who would previously have had money bails set and the option for release will now be denied release entirely. In addition, the reform’s reliance on the pretrial RAT creates and reinforces inequities in how individuals with different charges and backgrounds are treated.

**4**

***Does the reform shrink parts of the PIC, industries that profit from the PIC, and/or the power of elected officials who sustain the PIC?***

Yes and no. The dramatically reduced use of money bail has eliminated the predatory private bail bonds industry in New Jersey, which may have also reduced the industry’s power and influence nationally. The increased use of cite-and-release at the time of an arrest has increased the number of people who can fight their case from a place of pretrial freedom. The increased use of GPS ankle monitoring and other supervision programs by the system, however, has resulted in expanded power for the state. The reforms also created a new set of judicial positions who are nominated by the Governor and confirmed by the State Senate, creating additional layers of a growing PIC. In addition, an extensive pretrial services department was resourced and continues to expand.

A horizontal orange banner with a white, hand-drawn style border. The text is centered in white, bold, uppercase letters.

## TAKEAWAY FOR ORGANIZERS

Due to its “bipartisan” nature and the leadership of court system actors (including judges and prosecutors) in the process of developing the new laws, the ability to incarcerate people pretrial was taken for granted as a necessary part of the reforms advanced in New Jersey. Because New Jersey did not previously allow preventive detention, there was a clear expansion of state power to incarcerate some people awaiting trial (those accused of more serious charges) as part of the compromise developed to require release of others (accused of “less serious” charges). The narrative around reform thus continued to emphasize that pretrial freedom should not be available for all and that incarceration is a needed part of pretrial reforms. As organizers, how do we push our demand for pretrial freedom for all as the starting place and the “north star”?

## **CASE STUDY #2:** ***Atlanta, GA - 2018 Municipal Ordinance***

*This local city ordinance limits money bail for some ordinance and misdemeanor charges.*

### **CONTEXT**

#### ***What was the bail law before the reform?***

The City of Atlanta has two jails. The Atlanta City Detention Center, a municipal jail, detains people charged with “low-level” offenses, which are mostly municipal ordinance violations. A second jail, the Fulton County Jail, detains people accused of mid- and high-level offenses. Prior to 2018, Atlanta’s municipal jail detained approximately 1,100 people per night in its 1,300-capacity facility. The majority of people were awaiting trial, and approximately 150 people at any time were in ICE custody.

Municipal code violations such as public drunkenness and trespassing are highly discretionary charges that are disproportionately used to target marginalized people, including people experiencing homelessness, trans and gender-non-conforming people, sex workers, and Black people. In Atlanta, people arrested and accused of these charges would commonly be ordered to pay money bail and detained in the municipal jail if they could not. As part of a larger, multi-pronged campaign to close the Atlanta municipal jail and repurpose it into a Center for Wellness & Freedom, organizers with [Women on the Rise](#) and the [Communities Over Cages: Close the Jail ATL Coalition](#) strategically fought to end money bail for the charges that led to people being jailed there while awaiting trial.



## GENERAL SUMMARY OF THE REFORM

In February 2018, the Mayor of Atlanta signed an ordinance that eliminated money bail for city ordinance violations. The reform created a system in which people accused of a certain set of city ordinance violations would be released immediately after they were processed by the city jail on “recognizance bonds” without money bail being set. People accused of other charges, however, could still be subjected to money bail, and there were exceptions (also known as “carve outs”) in the ordinance that excluded people with open warrants, people facing charges deemed “violent,” and people on probation or parole. Those people could still be subjected to money bail or be detained outright. The ordinance also did not stop existing policy that allowed people to be transferred from the city jail to the county jail.

After the city ordinance took effect, there was a rapid decline in the number of people held in the city jail, from over 1,000 to 94 people in the first year of the reform and eventually just 30 people by summer 2020. In addition to bail reform, some of that decrease may have been the result of the reclassification of marijuana possession, the expansion of a pre-arrest diversion program, and the end of the contract with ICE.

Unfortunately, there have been attempts to roll back the bail reform ordinance. In November 2020, the Atlanta City Council voted to add more charges to the list of those that can be ordered to pay money bail or be detained. In addition, there have been ongoing challenges of people being charged under Fulton County law to bypass the City ordinance as well as transfers to the city jail from the county jail because of overcrowding there. This evaluation focuses on the original 2018 reform that was a part of the jail closure campaign.

# ABOLITIONIST

## EVALUATION OF THE REFORM

1

***Does the reform weaken the system's power or means to jail, surveil, monitor, control, or otherwise punish people?***

Yes, in a limited way. Many people who used to be charged with certain “low-level” offenses, who would then end up at the city jail, were no longer subjected to money bail. This led to a significant decrease in the number of people locked up at the city jail, and that in turn, put pressure on politicians and jail operators to close that facility. Money bail can still be imposed on people, however — even those in the limited category of “low-level” charges — if other conditions are met, and judges can send people to other jails in the area.

2

***Does the reform challenge the size, scope, resources, or funding of the PIC?***

Yes, in a limited way. It removes the possibility of money bond being imposed on a relatively small portion of accused people. This was a city-level reform so could only affect ordinance violations. Therefore, people accused of the vast majority of criminal charges, could still have money bond imposed or may be detained outright. This reform did not change the law for those people, so made it neither worse nor better for them.

3

***Does the reform maintain protections for everyone and resist dividing people into categories of “deserving” and “undeserving”? Does the reform maintain or expand existing paths to freedom for all people?***

Not exactly. This reform focused exclusively on “less serious” charges that were municipal ordinance violations while leaving “more serious” charges to be handled under the preexisting system. The ordinance did not create new obstacles for those with “more serious” charges, but it also did not provide them with the same protections. The ordinance also included a set of carve-outs within the category of people with “less serious” charges that would not benefit from the reforms.

4

***Does the reform shrink parts of the PIC, industries that profit from the PIC, and/or the power of elected officials who sustain the PIC?***

Yes. The reform shrunk the number of people in the municipal jail, denying commissary, phone call, and other revenue for the jail and any contractors profiting off people inside and their loved ones.



## TAKEAWAY FOR ORGANIZERS

In places where we see steps forward in bail and pretrial reform that come in part because of growing power from grassroots community organizations, we also see backlash in immediate and constant rollbacks. In Atlanta, there have been continued attempts, through fear mongering and spreading misinformation, to both undo the city ordinance, as well as stop the transformation of the old city jail into a community center. How do we adjust our organizing to prepare for and protect from rollbacks?

## **CASE STUDY #3:** ***California - 2019 Legislative Reform***

*This legislative reform attempted to end money bail while adopting pretrial risk assessment tools, expanding probation control, and expanding preventive detention.*

### **CONTEXT**

#### ***What was the bail law before the reform?***

California has long had some of the highest average money bail amounts. The median bail amount in California is \$50,000, more than five times the median amount in the rest of the United States. High money bails have contributed to increased pretrial incarceration rates and have also forced families and communities to rely on the for-profit commercial bail bond industry in order to free their loved ones. As just one example, the Million Dollar Hoods Project mapped that in Los Angeles County alone, between 2012-2016, more than \$19 billion in bail money was imposed on individuals, resulting in people paying over \$17 million in cash to the court and over \$193 million lost in nonrefundable payments to bail bond companies. Organizers across the state have been working for decades to end pretrial detention and money bail. The legislation evaluated below was part of a multi-year strategy to end money bail beginning in 2012.

# GENERAL SUMMARY OF THE REFORM

After at least five years of multiple statewide working groups and legislation that never moved forward, Senate Bill 10 (the California Money Bail Act) was introduced in the California legislature in 2017. Originally, the bill was a collaboration between the legislative sponsors and a wide range of community-based organizations across the state working as community co-sponsors. The original draft of the bill would have eliminated money bail and made pretrial release the presumption for most individuals. The original draft was also problematic in that it mandated the use of a standardized, risk assessment tool (RAT) at the pretrial stage. Previously, RATs were not mandated and were often used only in an advisory role. In the original draft of SB10, however, the potential harm of RATs was limited because they were to be used only to determine conditions of release — rather than to determine whether someone would be detained.<sup>1</sup>

Despite a year of working together on the specific bill and years of work prior to the bill introduction, SB10 was ultimately gutted with a completely new framework by the legislative sponsors at the last-minute in August 2018. The “new” version of SB10 replaced money bail with other forms of carceral control such as preventive detention and supervision and was heavily influenced by a report that had been released by the California Judicial Council. Despite opposition from several of the original sponsoring community organizations, the bill was passed in a rapid-fire, four-day process with no public hearings. Before SB10, county probation departments in California had power over people being released from jails, but the new law expanded their scope to include administering the newly mandated risk assessment tools to determine release and monitoring massive amounts of people who were not yet convicted. The final version of SB10 also mandated all local jurisdictions use a pretrial risk assessment tool.

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<sup>1</sup> The distinction of whether a RAT will propose only conditions of release or propose options between the binary of release/detain is a central point of distinction in how pretrial RATs have been implemented.

After it passed in August 2018, SB10’s implementation was put on hold when the private bail bond industry qualified a ballot referendum question to overturn it, and Proposition 25 was put on the November 2020 ballot. In the meantime, the State of California provided resources to counties to begin implementing pieces of the bill such as the use of pretrial RATs<sup>2</sup> and different pretrial services through pilot demonstration project grants. The November 2020 ballot initiative succeeded in overturning SB10 as it was passed in 2018 due to opposition from grassroots organizing and the private bail bond industry. Pretrial “reform” in California is now being approached through a mixture of county-specific pilot programs, attempts at new state legislation, and ongoing litigation.

On the next page, we evaluate SB10 as it was passed in 2018, both because it is still often held up as a positive example of “reform” (despite being ultimately eliminated by the 2020 ballot question) and because of its elimination of money bail.

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<sup>2</sup> Combined with counties that already used pretrial RATs, the majority of all California counties now use a pretrial RAT.

# ABOLITIONIST EVALUATION OF THE REFORM

1

***Does the reform weaken the system's power or means to jail, surveil, monitor, control, or otherwise punish people?***

No. While it removed the carceral tool of money bail, SB10 replaced money bail with other expanded tools and technologies such as pretrial RATs, pretrial supervision, and surveillance. It created more opportunities for detention instead of pretrial release.

2

***Does the reform challenge the size, scope, resources, or funding of the PIC?***

No. The legislation eliminated the use of money bail but gave judges enhanced discretion to detain, further normalized the use of RATs to determine pretrial detention or release, and increased funding to probation departments for increased surveillance and to administer risk assessments and determine pretrial release. This reform also increases the use of "preventive detention," which gives courts and prosecutors yet another opportunity to argue for someone's continued pretrial detention.

**3**

***Does the reform maintain protections for everyone and resist dividing people into categories of “deserving” and “undeserving”? Does the reform maintain or expand existing paths to freedom for all people?***

No. The new system under SB10 relied heavily on entrenching algorithmic risk assessment tools, which uses a scoring system based on classist and racist measurements like whether someone has housing or a previous criminal record to determine whether someone is recommended for release. As awful as the system of money bail is, money bail does provide a pathway to release if people can pay their bail. SB10 would have dismantled the potential pathway for release for anyone who is detained pretrial. Additionally, increasing reliance on and legitimizing risk assessment tools entrenches the categories of “deserving” and “undeserving” of freedom within the realm of pretrial decision-making.

**4**

***Does the reform shrink parts of the PIC, industries that profit from the PIC, and/or the power of elected officials who sustain the PIC?***

Yes and no. The elimination of money bail under SB10 would have destroyed the powerful and predatory private bail bond industry. The increased power and money that would have gone to pretrial supervision and RAT administration, however, would expand state power and most likely would have most benefited companies that provide electronic shackles, drug testing, and other surveillance tools.



## TAKEAWAY FOR ORGANIZERS

Overemphasizing “money” and “profit” in arguments to eliminate money bail actually made it easier for the state and non-abolitionist advocates to deflect attention away from the other, more substantial forms of violence inherent in California’s systems of pretrial detention and surveillance. When we advocate for pretrial reform, our movements must assess whether we are targeting where the state derives its specific power. Does a reform target a tangential or parasitic element of the prison industrial complex — in this case, the bail bonds industry — in ways that don’t actually shrink state power or carceral capacity?

# CASE STUDY #4:

## Colorado - 2019 State Legislative Reform

*This statewide legislative reform eliminated money bonds<sup>1</sup> for some ordinance violations and certain misdemeanors.*

### CONTEXT

#### *What was the bail law before the reform?*

Like most states, the majority of people in Colorado jails are awaiting trial. Before the 2019 reforms, state law required the court to release a person charged with a class 3 misdemeanor, petty offense, or unclassified offense on a personal recognizance bond unless certain conditions existed. While these conditions were theoretically narrow (such as the arrested person failing to identify themselves or being deemed a risk to “public safety” or missing court), they were frequently used by the court as justification for setting money bond. As a result, people with these very “low-level” charges often had money bonds imposed, and people were regularly jailed for \$100 or less.

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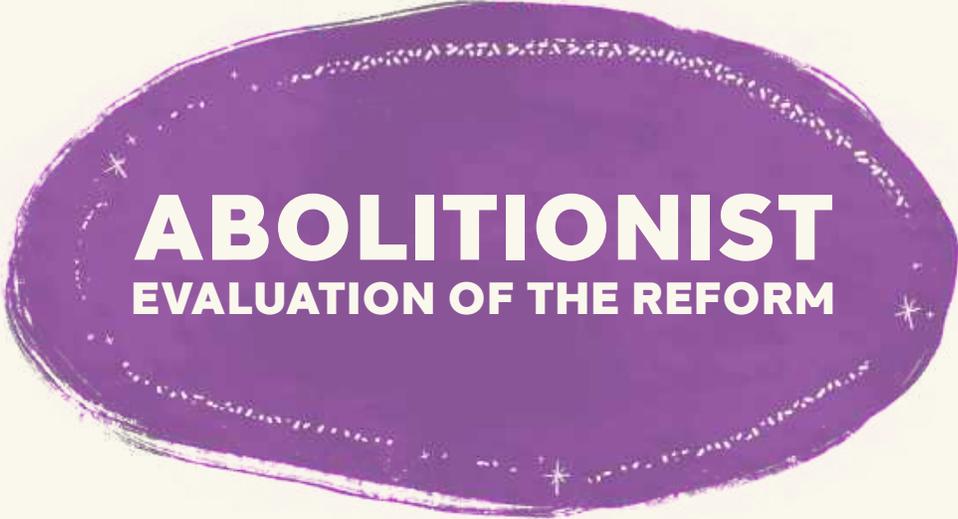
<sup>1</sup> “Bond” is used interchangeably with “bail” in Colorado, as it also is in many other places.



## GENERAL SUMMARY OF THE REFORM

In April 2019, a bill developed and supported by the Colorado Freedom Fund and the ACLU of Colorado was passed by the state legislature and signed into law. The changes eliminated the possibility of money bond for almost all petty offenses, traffic offenses, and municipal offenses that didn't have a state misdemeanor corollary — even if the previous conditions that facilitated the imposition of a money bond were present. The bill mandated personal recognizance bond upon initial arrest and also for any failure to appear at any future point in the case. Prior to the law's changes, failures to appear could result in money bond or incarceration. The new law does still have exceptions, such as for people charged with eluding a police officer, circumventing an interlock device, any traffic offense involving death or bodily injury, or a municipal offense with substantially similar elements to a state misdemeanor offense.

Throughout their advocacy for the bill, local advocates were clear that it was merely a "first step," and that they would be back to eliminate money bond for people accused of all charges in the future.



# ABOLITIONIST EVALUATION OF THE REFORM

1

***Does the reform weaken the system's power or means to jail, surveil, monitor, control, or otherwise punish people?***

Yes, in a limited way. It removes the option of money bond for particular “low-level” offenses. That said, money bond can still be imposed on people even in this limited category of charges in some situations.<sup>2</sup> And of course people charged with “more serious” crimes may still be ordered to pay money bond.

2

***Does the reform challenge the size, scope, resources, or funding of the PIC?***

Yes, in a limited way. It removes the possibility of money bond being imposed on and resulting in the jailing of a relatively small portion of accused people. In places where petty offenses constitute the significant portion of arrests, the impact of the legislation was likely substantial. People accused of the vast majority of criminal charges, however, may still have money bond imposed or may be detained outright. This reform did not change the law for those people, so made life neither worse nor better for them.

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<sup>2</sup> For example, advocates behind the bill chose to allow money bonds to be set as part of warrants in order to allow people to pay them and secure their freedom immediately rather than having to wait potentially days between arrest and a bond hearing at which the judge would be forced to release them on a personal recognizance bond.

3

***Does the reform maintain protections for everyone and resist dividing people into categories of “deserving” and “undeserving”? Does the reform maintain or expand existing paths to freedom for all people?***

Not exactly. This legislation does not protect everyone equally since it applies to only a small subset of charges, but it also does not divide people into deserving or undeserving categories. In particular, there is no distinction because “violent” and “non-violent” charges within the categories that are protected from money bail. Local organizers and advocates felt that eliminating money bail for petty offenses would not prevent them from passing future legislation eliminating money bail for other charges in the future, and they consistently and explicitly said that it was their intention to do so.

4

***Does the reform shrink parts of the PIC, industries that profit from the PIC, and/or the power of elected officials who sustain the PIC?***

Yes. The reform led to a reduction in the number of people in local jails in Colorado, reducing the profits made from commissary, phone calls, and other predatory industries. The law did not likely have any impact on the private bail bonds companies in Colorado, as the money bails previously imposed for these “low-level” charges were too low to involve the industry. It is possible that the successful elimination of money bond for some charges will lessen the power of elected officials and law enforcement’s arguments that it is necessary for other charges.

Notably, the law also did not seek to replace money bond with any other forms of surveillance, control, or financial investments in the courts or jails. There was no additional funding for pretrial supervision or RATs.



## TAKEAWAY FOR ORGANIZERS

The reform in Colorado was able to guarantee pretrial freedom for a limited — but not insignificant — number of people targeted by criminalization without impacting anyone else negatively. Throughout the process, organizers in Colorado stressed that it was a “first step” and that they would be back to further expand pretrial release (and indeed in 2021 are attempting to pass further pretrial reform). However, the idea of a reform being a “first step” is often used to further marginalize abolitionist criticisms of reforms that will stop momentum for systemic change or create the next PIC institution to be torn down. How can these abolitionist questions help us decide whether any alleged “first step” is in fact something we can support and build on rather than something that will create barriers to longer term abolitionist efforts?

# **CASE STUDY #5:**

## ***Harris County, TX - 2019 Federal Lawsuit Settlement***

*This federal court order is the result of a settlement from a lawsuit that challenged the pretrial detention of people accused of misdemeanors resulting from unpaid money bails.*

### **CONTEXT**

#### ***What was the bail law before the reform?***

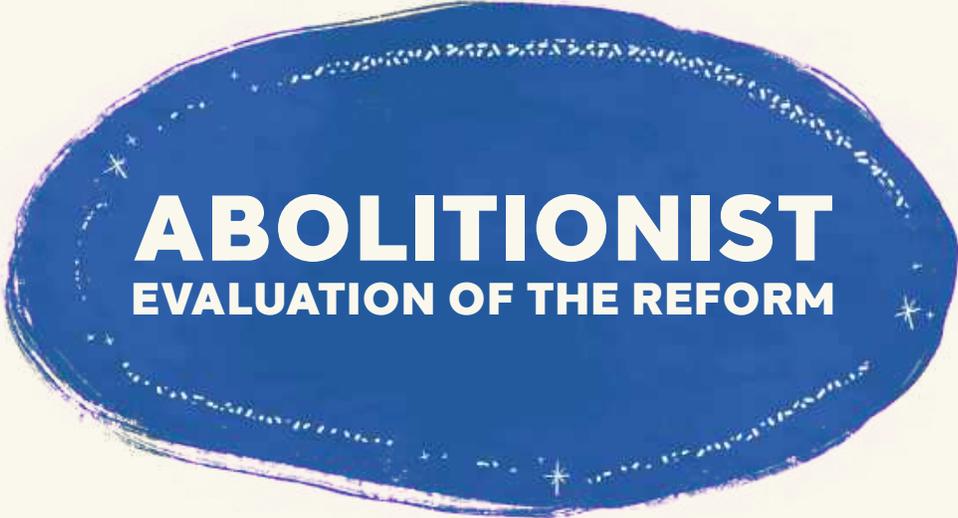
Harris County, TX, which includes Houston, had one of the highest per capita pretrial incarceration rates in the country. Money bail was set via a bail schedule, and judges had discretion to impose higher bail amounts.

In 2016, a federal lawsuit was filed challenging the county's money-based misdemeanor bail system. During the more than three years that it took for the lawsuit to settle and achieve court-enforced policy changes, "bail reform" also became a flashpoint in local political races.

In 2019, a lawsuit over the felony bail system in Harris County was also filed, but it remains unsettled as of March 2021.

# GENERAL SUMMARY OF THE REFORM

The lawsuit filed in federal in 2016 and ultimately settled in the summer of 2019 only addresses people accused of misdemeanor charges. The settlement establishes that secured money bond is no longer required for most misdemeanor charges, so that release is prioritized and people are given unsecured or “no-cash” bonds upon release. There is a significant exception, however, for a group of “carve out” misdemeanor charges (under Local Rule 9) that require a first appearance hearing and can have money bail, GPS surveillance, and other forms of pretrial supervision ordered. The carve-out misdemeanor categories include charges related to drunk driving, domestic violence, any past violations of bond or supervision conditions (including “failure to appear”), and new arrest while on pretrial release.



# ABOLITIONIST EVALUATION OF THE REFORM

**1**

***Does the reform weaken the system's power or means to jail, surveil, monitor, control, or otherwise punish people?***

Yes, in a limited way. The increase in pretrial release for people accused of the majority of misdemeanors does weaken some of the system's power. However, judges still have the discretion to add and increase supervision conditions for people accused of many misdemeanor charges, particularly for the exceptions category. District Attorneys have the ability to upcharge and add enhancements to circumvent the release categories as well. Since the vast majority of people in the jail are awaiting trial on felony charges, the reform did change the law for those people, so made life neither worse nor better for them.

**2**

***Does the reform challenge the size, scope, resources, or funding of the PIC?***

Overall, no. Although the 2019 lawsuit settlement has led to fewer people jailed on misdemeanor charges, and increased release options for many people accused of some misdemeanors, the jail population has increased overall. The reform leaves the money bail system intact and further legitimizes pretrial detention and supervision through monetary and non-monetary forms, such as GPS monitoring. The "no cash bond" system still imposes money bail as punishment if supervisory conditions, such as reporting check-ins, are not met. The lawsuit settlement also added funding to the PIC to create and oversee the new release and supervision system.

**3**

***Does the reform maintain protections for everyone and resist dividing people into categories of “deserving” and “undeserving”? Does the reform maintain or expand existing paths to freedom for all people?***

Overall, no. Under the 2019 settlement, people accused of “more serious” charges will still be subject to pretrial incarceration based on the amount of money they have. People accused of particular misdemeanor charges defined in the settlement’s Rule 9 exceptions are not eligible for the “no-cash bond” release. In a more fundamental way, the lawsuit only addressed misdemeanors and left behind all the people accused of felonies.

**4**

***Does the reform shrink parts of the PIC, industries that profit from the PIC, and/or the power of elected officials who sustain the PIC?***

No. The changes to the misdemeanor system provided increased funding for the PIC, including new and expanded pretrial services, surveillance and staffing. As a result, there has been a net increase in the state’s carceral budget.



## TAKEAWAY FOR ORGANIZERS

Although the reform in Harris County was able to expand the possibility of pretrial freedom for some people, the system created to achieve the reform actually expanded the PIC. In any reform effort, including litigation, we must analyze what infrastructure the reform demands and how resource demands may increase the scope of the PIC (and/or lead to failure of the reform if no additional infrastructure is built). As organizers, how do we create demands and conditions that do not condition reform on building additional PIC infrastructure and thus increasing the resources and power of the PIC?

## CASE STUDY #6: *New York - 2019 State Legislative Reform*

*This state legislation retained the money bail system for some charges and barred it for others, while promoting pretrial supervision conditions, including electronic monitoring. Our assessment here builds off Survived and Punished NY's 2020 report "Preserving Punishment Power: a grassroots abolitionist assessment of New York reforms."*

### CONTEXT

#### *What was the bail law before the reform?*

The push for bail reform in New York grew out of long standing fights to shut down Rikers Island jail and intensified after the 2015 death of Kalief Browder, a teenager who was jailed pretrial for three years for the inability to pay his \$3,000 bail, and due to a punitive probation hold. His case was ultimately dismissed, but the abuse he suffered while incarcerated on Rikers Island ultimately contributed to his suicide not long after his release, setting off a state-wide call to end the use of money bail. Following years of organizing, money bail reform was very much on the table for the 2019 legislative session. Even New York Governor Andrew Cuomo voiced his support for eliminating money bail entirely. New York state's pretrial laws had been largely untouched since 1971.

In 2018, the average number of people in jail in New York state was slightly less than 24,000 on any given day. Almost 70% of the people in jail were detained pretrial, charged with a mix of misdemeanors and felonies. Before bail reform passed in 2019, there was a growing effort to expand pretrial supervision as a way to reduce jail populations, however this was mostly limited to New York City and electronic monitoring in particular was rarely imposed across New York state.

New York is one of only four states that does not allow for preventive detention based on a definition of “dangerousness,” meaning that no one can be detained in New York state solely because they are believed to pose a risk to “public safety.” Legally, the only thing that can be considered in bail determinations is the person’s likelihood of returning to court for future hearings. This made the negotiations around reforms in New York somewhat unique from other states.

As negotiations around the 2019 bail reform began, some legislators and Governor Cuomo wanted to add “dangerousness” as a consideration for preventive detention in exchange for getting rid of money bail entirely, or even just partially. Advocates, who were trying to pass their own bail reform bill that eliminated money bail for everyone, strongly pushed back against this attempt to add “dangerousness,” given the loaded and inherently racist concept of “public safety” as used by prosecutors and judges. The result of this back and forth was the 2019 bail reform legislation. While advocates succeeded in keeping a new “dangerousness” standard out of the final 2019 bail reform legislation, the result was a reform in which money bail remained an option for people accused of certain “more serious” charges.

# GENERAL SUMMARY OF THE REFORM

On April 1, 2019, New York state adopted a bail reform law (along with bills reforming speedy trial and discovery laws) that eliminated money bail and traditional pretrial jailing for people charged with most misdemeanors and non-violent felonies. However, it also codified “release under non-monetary conditions” (i.e. conditions of supervision, which includes electronic monitoring<sup>1</sup>) into the law as a newly defined category of release. Although electronic monitoring and other supervision conditions were allowable before the 2019 reform, they were rarely used. The law also established a mandatory Desk Appearance Ticket (DAT) category: for most misdemeanors (with significant carve outs), police officers must issue tickets instead of arrests, which allows the person to be released without any conditions except a future court date. Many people saw the 2019 bail reforms as a historic win that would change the landscape of pretrial incarceration in the state, resulting in many fewer people being locked up. In the first four months of implementation, the numbers of people jailed pretrial in New York state did decrease by 40%.

In April 2020, however, despite the fact that the 2019 reform was still in the process of being implemented — and in the midst of a global pandemic that particularly endangered people in jails — legislators, with the governor’s support, pushed through new bail legislation as part of a last-minute, back-room deal to pass the New York state 2020-2021 budget. The amended legislation identified more than two dozen charges (mostly non-violent felonies) as being permitted, once again, for money bail and

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<sup>1</sup> Electronic monitoring can come in many forms, some more restrictive than others. The monitoring itself can happen through GPS or radio-frequency tracking. The device can look like an ankle shackle or a smart phone application. The bail reform legislation did not specify what kind of electronic monitoring should be used, opening up the possibility for any form to be used.

detention. The legislation also created new ways to categorize accused people by charge and history that could subject them to money bail and detention. For example, someone with an existing case involving “harm to an identifiable person or property,” who is charged with a new case, may now have money bail imposed on them — even if the two charges separately would require mandatory release. The 2020 expansion of pretrial detention represents the victory of law enforcement and tough-on-crime politicians.

This below assessment evaluates the 2019 legislation as it existed before the 2020 amendments. The 2020 amendments, labeled by advocates as “bail reform rollbacks,” were viewed by reformists and abolitionists alike as a harmful expansion of pretrial detention and surveillance. We look at the 2019 reform because it is often understood and marketed by many as a “win” for the bail reform movement. We hope that an abolitionist examination of the 2019 legislation will show how even decarceral reforms can lead to expansions in pretrial carceral control and detention.

# ABOLITIONIST

## EVALUATION OF THE REFORM

1

### *Does the reform weaken the system's power or means to jail, surveil, monitor, control, or otherwise punish people?*

Yes and no. The 2019 reforms did ensure mandatory release for people charged with certain misdemeanors and non-violent felonies, removing judicial discretion to cage large swaths of people. In this way, the legislation expanded the numbers of people guaranteed to be released pretrial and in the first four months of implementation of the reform, the numbers of people jailed pretrial did decrease by 40 percent. However, while “release on own recognizance” (i.e. release without supervision conditions) was the default for a sub-set of charges, if the judge decided that the accused person may not return to future court dates, they could still impose non-monetary supervision conditions.

The reform promoted the use of pretrial supervision conditions, including GPS-enabled ankle shackling, drug testing, curfews, and mandatory check-ins, in other ways as well. These supervision conditions had always been technically available and the reform did introduce limitations on the charges specifically eligible for electronic monitoring. However, before the 2019 reform, supervision conditions were not defined and described within the law, and were rarely used in practice. After the legislation passed, judges received guidelines and training on how to implement these conditions, and cities and counties across the state had to commission vendors, whether non-profit or for-profit, to supply and administer electronic monitors.

The 2019 reform legislation also left the money bail system intact and further legitimated the use of pretrial detention and supervision through both monetary and non-monetary forms. Pretrial detention and wealth-based detention were not challenged, they were merely refined.

2

***Does the reform challenge the size, scope, resources, or funding of the PIC?***

Overall no. The reform created mandatory release for a subset of charges, which had a decarceral effect across the state. However, by detailing and describing scenarios for administering non-monetary conditions, including electronic monitoring with limitations, within the law itself, it promoted and facilitated their use. While New York City had pretrial supervision programs before the 2019 reform, most other counties across the state did not. Because “release under non-monetary conditions” is now baked into state law, counties that previously only used ROR and bail will need to create pretrial supervision programs, and some counties will likely rely on existing supervision programs like probation.

Public data - supposedly forthcoming in July 2021 - cannot yet confirm or deny the full scope of the pretrial surveillance and supervision apparatus. While the number of people incarcerated in jail is regularly reported and shared publicly, this surveillance and supervision system is a shadow carceral state likely expanding outside public view.

3

***Does the reform maintain protections for everyone and resist dividing people into categories of “deserving” and “undeserving”? Does the reform maintain or expand existing paths to freedom for all people?***

No. The 2019 bail reform legislation created different rules for different people based on their charges. Judges retained the option to set money bail or order pretrial incarceration outright for people accused of a number of charges, including misdemeanor and felony sex offenses, misdemeanor and felony criminal contempt in domestic violence cases, so-called violent felonies, and more. People charged with these crimes were still subject to pretrial incarceration based on their access to money. This setup laid the groundwork for additional charges to be carved out, and thus eligible for money bail, in the 2020 amendments.

**4*****Does the reform shrink parts of the PIC, industries that profit from the PIC, and/or the power of elected officials who sustain the PIC?***

Yes and no. The reform led to a significant reduction in the number of people locked up in local jails in New York state — reducing the profits made by commissary, phone calls, bail bond premiums, and other predatory industries. Nonprofits and government-contracted agencies, however, will now receive funding from cities and counties to conduct pretrial supervision, including location-tracking ankle shackles. The organizations that benefit from these contracts will become even more powerful, status-quo-oriented obstacles to future efforts to shrink the PIC.

After years of pressure from advocates and the general public, Governor Cuomo and Democratic legislators needed to prove that they could take action on bail reform. The passage of the 2019 legislation secured their credentials as reformers and insulated them against calls for genuinely decarceral legislation. When the bail reform backlash arrived in the form of fear-mongering media and lobbying pressure, those same government officials capitulated within a year and expanded the pretrial system's options for carceral control.

A red brushstroke banner with a textured, hand-painted appearance. The text is centered in white, bold, uppercase letters.

## TAKEAWAY FOR ORGANIZERS

Instead of providing people with housing or mental health support, New York State has provided cages, hiding away social issues rather than resolving them. By ensuring conditional release for people accused of most misdemeanors and “non-violent” felonies, it is likely that the 2019 bail reform will take jail off the table as a (poorly conceived) intervention for a myriad of social issues opening political space for more appropriate responses (albeit while leaving behind people who had more serious charges). However, no additional resources were invested by the State into housing, health care or harm reduction resources. Instead, a few months after bail reform passed in 2019, New York City Council voted to spend \$8.7 billion building four new jails and gave millions of dollars to prosecutors to implement reforms. What kinds of cross-movement collaborations and power building strategies are necessary so that our fights for decarceral reforms, which remove jail as the intervention for most arrests connected to obvious other unmet needs, are paired with community-based wins in the areas of housing, healthcare, living wages, and so on? How do we ensure that resources are given directly to people and communities and not through programs designed to extend state supervision, surveillance, and social control?

# CASE STUDY #7:

## *San Francisco, CA - 2020 District Attorney bail policy*

*This bail policy of an elected local prosecutor's office prevents prosecutors from requesting money bail, places limits on the prosecutors' ability to seek pretrial detention, and relies on a risk assessment tool for determining pretrial supervision conditions.*

## CONTEXT

### *What was the bail policy before the reform?*

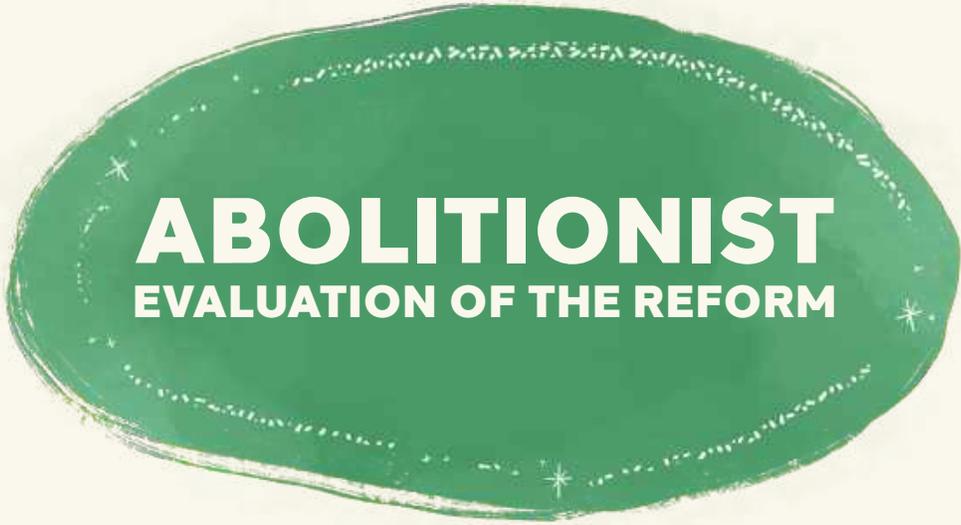
San Francisco long had a system where money bail was set according to a bail schedule and used alongside the Arnold PSA risk assessment tool; the current version of the tool recommends detention as an option and lists charges which it “flags” for supervision or detention. San Francisco’s pretrial system administers the PSA and coordinates diversion and supervision programs. In the past several years, there have been lawsuits in San Francisco as well as California about the affordability of money bail and the use of bail schedules. In late 2019, the [Buffin lawsuit settlement](#) established that San Francisco could no longer use a bail schedule, and that the recommendations of the PSA would be used as the central basis for release decisions with very specific time limits required for release decisions<sup>1</sup>. In order for this to be possible, the San Francisco Pretrial Services department has received additional funding to pay for additional staff members and staffing presence 24-hours a day.

<sup>1</sup> The Buffin decision requires that the PSA risk assessment be administered within eight hours of an individual being confirmed in the jail; that a release decision must be made within 18 hours of being confirmed in the jail, with a process for law enforcement extending that release decision timeframe by 12 hours.



# GENERAL SUMMARY OF THE REFORM

In January 2020, then-newly elected San Francisco District Attorney Chesa Boudin released a policy preventing prosecutors from requesting money bail at arraignments in San Francisco, as follow-through on his campaign promise to end the use of money bail. The policy states that the District Attorney's Office would never seek money bail at arraignments, but will instead seek pretrial detention or supervision conditions as necessary to "protect public safety and reasonably ensure the defendant's return to court." The policy does include limitations for requesting pretrial detention and states that pretrial jailing can be sought only for people facing charges of certain violent felonies. Money bail can still be imposed by judges, however, and release decisions still rely heavily on the Arnold PSA risk assessment tool per the Buffin decision.



# ABOLITIONIST EVALUATION OF THE REFORM

1

*Does the reform weaken the system's power or means to jail, surveil, monitor, control, or otherwise punish people?*

No. The policy seemingly removes one carceral tool at the District Attorney's disposal: requesting money bail. Judges, however, can still impose money bail, and so the system as a whole retains this power. While the prosecutor's request is often influential, judges make the final bail decision and can still order someone to pay money, regardless of the prosecutor's office policy. Boudin's policy does not reject the recommendations or dominant role of the PSA risk assessment tool, which ties charges to levels of supervision as well as release recommendations. Under Boudin, prosecutors' requests in lieu of money bail include additional conditions of surveillance and supervision.

Importantly, the policy also does limit when a prosecutor can seek pretrial detention. The accused person must be facing one of a specific subset of charges and there must be convincing evidence ("convincing" as determined by the prosecuting office, however) that the accused person will be a source of bodily harm to other people in the future or is a risk of flight. As with money bail, judges can still decide to preventively detain someone if they feel it is necessary.

2

***Does the reform challenge the size, scope, resources, or funding of the PIC?***

No. During the first year that Boudin’s policy was implemented, the number of people jailed while awaiting trial in San Francisco did decrease. It is impossible to untangle, however, whether this was because of releases due to COVID-19 — and specifically the state judiciary’s emergency \$0 bail policy — or due to decreased money bail and pretrial detention requests from prosecutors. In fact, now that fewer COVID-related release initiatives are in effect, the number of people in jail has been increasing again, inching towards its pre-pandemic level.

Additionally, the use of GPS location monitoring and other forms of pretrial supervision and surveillance have increased. The policy itself did not lead to a decrease in funding or resources for the prosecutor’s office itself, the judiciary or courts, or pretrial services.

3

***Does the reform maintain protections for everyone and resist dividing people into categories of “deserving” and “undeserving”? Does the reform maintain or expand existing paths to freedom for all people?***

No. While the policy prevents district attorneys from seeking money bail and provides protections against pretrial detention, it also prescribes and designates pretrial detention as necessary and allowable for people charged with specific “violent” charges and who are deemed “risky” of future violence or flight. The policy also heavily relies on the PSA risk assessment tool for determining pretrial freedom, supervision conditions, and pretrial detention, which further entrenches bias.

4

***Does the reform shrink parts of the PIC, industries that profit from the PIC, and/or the power of elected officials who sustain the PIC?***

Yes and no. As discussed above, this policy may have contributed to an initial decrease in people jailed while awaiting trial. As pretrial supervision and location-tracking devices replaced money bail for some, however, the companies and nonprofits that provided these “services” benefited from contracts and grants from the city, county, or state, or private philanthropy. Additionally, Boudin, an elected District Attorney, received national attention and praise for “ending cash bail” in San Francisco, contributing to his reputation as a “progressive prosecutor.” This ultimately strengthens the power of the prison industrial complex and the ability of system actors to co-opt abolitionist slogans and reformist positions in order to expand their size, scope, and resources.



## TAKEAWAY FOR ORGANIZERS

It is true that prosecutors have a disproportionate amount of power in the criminal legal system and that they have a significant influence on pretrial release decisions. However, in many jurisdictions, like in San Francisco, they do not ultimately make the final bail decision — judges do. As PIC abolitionists, we must also be wary of savior narratives that position elected officials as “the” solution, particularly when those electeds are, ultimately, members of law enforcement. How do organizers make decisions about where to invest organizing energy for pretrial reform so that our targets are the ones that have the power to meet our campaign demands?

# CASE STUDY #8:

## *Illinois - 2021 State Legislative Reform*

*This is a statewide legislative reform that eliminates money bond in its entirety and completely restructures the pretrial decision making system in Illinois with the goal of decarceration, effective 2023.*

### CONTEXT

#### *What was the bail law before the reform?*

More than 250,000 people are incarcerated in Illinois' 92 county jails every year while awaiting trial, and a majority of them are incarcerated only because they can't afford to pay a money bond. Illinois' constitution has a broad "right to bail" with eligibility for "no-bond" pretrial incarceration limited to certain "serious" charges. The Illinois Supreme Court, however, has previously held that judges have broad power to govern the proceedings before them and can in fact detain anyone without bond, regardless of charge. Illinois statutes also limit secured money bond to amounts that are "not oppressive" and "considerate of the financial ability of the accused [person.]" In reality, however, judges in Illinois have imposed unaffordable money bonds for decades as a way to incarcerate people pretrial with little effective oversight or even opportunity for appeal by the individuals impacted. Money bond also provides a major source of revenue for the court system itself. Since Illinois does not have a private bail bonds industry, all money bonds are paid directly to the court, which then keeps millions of dollars annually in processing fees alone.

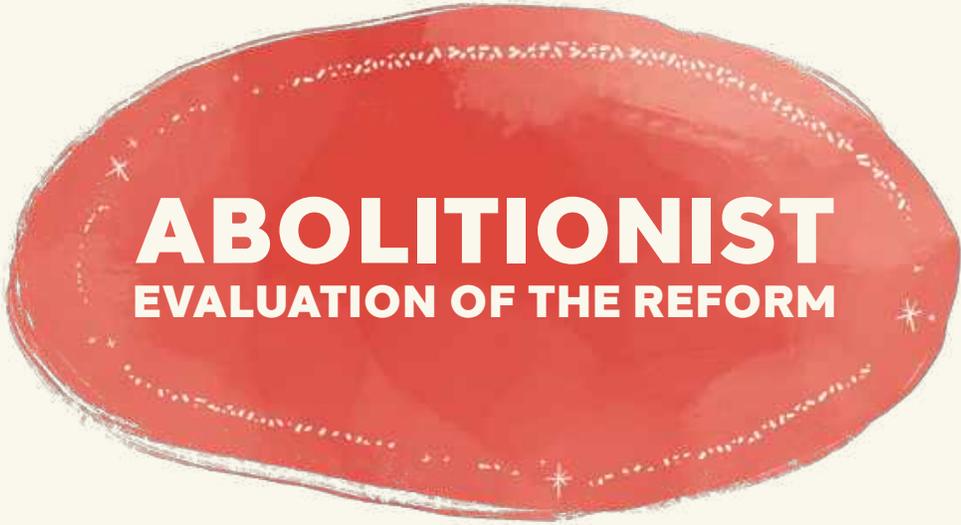
Since spring 2016, the Coalition to End Money Bond has been working to eliminate wealth-based pretrial jailing in Illinois. After a 2016 civil rights lawsuit arguing that it is unconstitutionally arbitrary for judges to deny someone their pretrial liberty solely because they lack the money to pay their bond, they succeeded in making major (but insufficient) progress in Cook County. In 2019, the Coalition expanded its work statewide and launched the Illinois Network for Pretrial Justice.

# GENERAL SUMMARY OF THE REFORM

The Coalition to End Money Bond had been introducing legislation to end money bond statewide since 2017. In February 2021, after nearly five years of organizing, Illinois Governor JB Pritzker signed the [Pretrial Fairness Act](#) into law as part of the omnibus criminal justice reform bill passed by the Illinois Legislative Black Caucus the month before. The Pretrial Fairness Act was written by advocates and organizers in the Coalition to End Money Bond and the Illinois Network for Pretrial Justice and supported by [more than 100 other organizations](#).

In addition to completely eliminating money bond, the law establishes a limited eligibility for pretrial detention and raises the standards for preventive detention orders, mandates ticketing instead of arrest for certain charges, authorizes release directly from police custody, decreases penalties for violations of pretrial release conditions, [ensures sentencing credit and movement for people on GPS and radio-frequency monitoring](#), and makes it harder to charge people on house arrest with “escape.” The Pretrial Fairness Act also reforms the warrant process, [regulates the use of risk assessment tools \(RATs\)](#), and requires centralized county-level data collection and publication. The law also creates a new definition of “willful flight” as a corrective to the old focus on punishing “failure to appear” in court and addresses the use of mere appearance in RATs. A complete summary of reforms written by advocates and organizers in Illinois can be viewed [here](#).

The abolition of money bail and its replacement with the new pretrial decision-making process will take effect on January 1, 2023, along with the changes to law enforcement’s ability to issue citations for misdemeanors and the sentencing reforms. The electronic monitoring changes go into effect on July 1, 2021.



# ABOLITIONIST EVALUATION OF THE REFORM

1

***Does the reform weaken the system's power or means to jail, surveil, monitor, control, or otherwise punish people?***

Yes, by eliminating money bail entirely, the Pretrial Fairness Act (PFA) takes away the easiest and most common tool judges use to incarcerate people pretrial: unaffordable money bonds. It also makes people accused of most misdemeanors, ordinance violations, and petty offenses ineligible for arrest, requiring police to “cite and release” them with something like a traffic ticket instead unless additional conditions are met. Many other people charged with misdemeanors and lower-level felonies may still be arrested but cannot be ordered detained pretrial due to their arrest alone. Some people arrested on lower-level charges could be subject to detention if they have other pending cases, warrants, or other holds, but the PFA also increases the standards that must be met before anyone can be arrested or ordered detained. The PFA also decreases the possible sentences for and makes it harder to charge people with new crimes for alleged violations of their pretrial release conditions, including house arrest and location monitoring.

**2*****Does the reform challenge the size, scope, resources, or funding of the PIC?***

Yes. The Pretrial Fairness Act dramatically reduces the state's power to jail people who are awaiting trial and will eliminate millions of dollars of revenue annually that was taken from criminalized communities in the form of money bond and used to fund the courts and even law enforcement. By guaranteeing decarceration, the bill will also reduce the size and scope of the PIC in Illinois. The bill was passed without any related budget allocations for increased pretrial services, which are opposed by the advocates in the Coalition and Network, but it is expected that the court system will demand more funding both to increase pretrial "services" and because the elimination of money bond will dramatically decrease revenue for many county court systems.

**3*****Does the reform maintain protections for everyone and resist dividing people into categories of "deserving" and "undeserving"? Does the reform maintain or expand existing paths to freedom for all people?***

Yes, the bill makes it harder for judges to detain everyone by raising the standards used to justify pretrial detention across the board. (It is also important to understand that Illinois law already allowed for preventive detention of everyone regardless of charge and allowed judges to detain people who were determined to be, broadly, a risk to "public safety." And of course, unaffordable money bonds allowed judges to detain many people for no stated reason at all while pretending to "release" them by setting a bond.) The PFA does not, however, treat everyone equally regardless of charge. People accused of most misdemeanors and the majority of "low-level" felonies are ineligible for preventive detention absent an existing violation or some other hold, whereas people accused of "more serious" charges may still be ordered jailed without bond at their initial hearing if the judge determines that the new, higher standards are met. That said, everyone across all charges is either guaranteed release or will have a stronger legal argument for release than under previous Illinois bail laws.

3

***Does the reform shrink parts of the PIC, industries that profit from the PIC, and/or the power of elected officials who sustain the PIC?***

Yes. It is anticipated that the Pretrial Fairness Act will significantly reduce pretrial incarceration in Illinois and thus shrink these systems. Police, prosecutors, and judges will have lost some of their power to arrest and jail people under the new law by no longer being permitted to arrest and jail some people and having to meet higher standards for others. By reducing the number of people in jails, there is less money generated for companies that contract with jails to profit from commissary and phone calls. Ending money bail also reduces income to the courts and some law enforcement line items, but that may be replaced by state funding.



## TAKEAWAY FOR ORGANIZERS

The Pretrial Fairness Act is a comprehensive restructuring of Illinois's pretrial system that ultimately succeeds only in taking power away from the state. At the same time that it ends money bond, the law succeeds in mandating release for the majority of people arrested and in reducing penalties for violations of pretrial release conditions. The ability to pass this decarceral legislation was made possible only by five years of coalition work consistently building statewide people power and, ultimately, by the added pressure of the 2020 Black Lives Matter uprisings. How do we sustain the long, multi-year campaigns that build the power necessary for winning systemic changes?

# CONCLUSION

As the case studies we've included illustrate, the context in which pretrial reforms occur is different in every place. As we work towards abolishing jails and other systems of pretrial surveillance and control, our ultimate goal is clear. What ultimately differentiates reformist reforms from abolitionist steps, however, will be determined by both the substance of the policies themselves and the local political conditions and power analysis. **In many ways, our movement is exceedingly clear on the policies we want, and the question we must actually ask is how we will build the power we need to win them.**

As abolitionists, we know our end goal lies in ending pretrial incarceration and building a world where everyone has what they need to safely thrive. We may take different paths to get there based on the overall strength of our movement, local organizing capacity, existing laws and practices, and grassroots power, but we can and must commit to advocating for truly abolitionist steps.

As we formulate our immediate demands, we must make strategic decisions about what policy changes help criminalized communities now while shrinking the size, scope, and power of the prison industrial complex. We must also consider what approaches will build or weaken our movement. After a particular campaign or reform is successful, can we protect the changes we have won from pushback and attempts to weaken their liberatory potential? Did our organizations and grassroots movements gain power and strength from these efforts? Did the organizing center and strengthen the leadership of those most targeted by the state?

These case studies cannot encompass a complete survey of the organizing environment in which different policy proposals were developed or in which changes were won, but we encourage you to center movement-building as you develop your own organizing strategy.

Finally, we must remember that hope is a discipline and despair is a tool of our enemies. Professional policy advocates are trained to push for what can be passed now, but organizers can change what is politically feasible. Sometimes, the abolitionist approach requires us to continue building our base of power before pushing for a policy change in a forum where our power was insufficient to win truly liberatory changes. At the same time, opportunities arise that we cannot always predict. After the uprisings against police violence in summer 2020, an unprecedented public conversation about abolition began, and legislatures and other policymakers were forced to accept more progressive reforms than would have been possible mere months before. Ultimately, the policies we are able to win depend on how much power abolitionists are able to build.

As we fight for pretrial freedom, we hope this assessment helps provide a basis for organizers as you develop pretrial reform proposals and evaluate the promises and drawbacks of proposed changes.

# GLOSSARY

***Abolition or Prison Industrial Complex (PIC) Abolition:*** From Critical Resistance: “PIC abolition is a political vision with the goal of eliminating imprisonment, policing, and surveillance and creating lasting alternatives to punishment and imprisonment. From where we are now, sometimes we can’t really imagine what abolition is going to look like. Abolition isn’t just about getting rid of buildings full of cages. It’s also about undoing the society we live in because the PIC both feeds on and maintains oppression and inequalities through punishment, violence, and controls millions of people. Because the PIC is not an isolated system, abolition is a broad strategy. An abolitionist vision means that we must build models today that can represent how we want to live in the future. It means developing practical strategies for taking small steps that move us toward making our dreams real and that lead us all to believe that things really could be different. It means living this vision in our daily lives. Abolition is both a practical organizing tool and a long-term goal.”

***Bail or bond:*** Bail is the process used by the state to release someone who is charged with a crime while they await trial. Conditions of bail/release may be imposed, such as an order to not contact someone, avoid a location, not get re-arrested, or not leave the state. The bail or bond condition that people are most familiar with is having to pay money before being released — which is why many people use the term “bail” to specifically refer to money bail (described below). Note that in some places, “bail” and “bond” are used interchangeably, while in others the two words have distinct legal meanings. It is important to understand how these terms are used in the place where you are advocating for policy changes.

## ***Types of Bail/Bond***

» **Release on your own recognizance (ROR):** This is when an accused person is released without having to pay money first. ROR is sometimes called a “signature bond,” or a “recognizance bond.” The person must still attend future court dates and abide by any other conditions of release.

» **Money bail or cash bail:** A dollar amount set by a judge, magistrate, or bail commissioner that is required in order to secure an accused person’s pretrial release.

“Secured money bail” requires that some amount of money be paid before the person is released and can require full or partial payment. Secured money bail is what people often mean when they talk about “bail” and “money bail.” Theoretically, this money is an assurance that the accused person will return to court, but there is no evidence this is effective.

“Unsecured money bail” allows for an accused person’s release without having to pay any money up front — but they can be ordered to pay if they miss court or otherwise violate conditions of their release. “No-cash bonds” are a form of unsecured money bail.

People who pay a money bail (often the loved ones of the accused person) often do not get their money returned even after a case closes; in certain situations, their money may be taken by the court to pay for others costs, fines, and fees.

» **Insurance bail bond:** A system where family or friends of an accused person (the “indemnitor”) pays a percentage of the total bond amount to a for-profit company who guarantees the entire bail amount to the court. The fee paid (often around 10%) is not refundable, and the indemnitor typically also must produce collateral, which is refundable at the end of the case if all goes well. If the accused person misses court and the bail is forfeited, the indemnitor(s) must then pay the bail bond company the full amount. Most, but not all, states have private bail bonds industries.

» **Pretrial conditions:** Conditions of surveillance and supervision that are set by a judge or magistrate as a requirement for pretrial release. These can range anywhere from weekly phone check-ins with pretrial “services” to GPS-enabled ankle shackling or home detention, depending on the judge and jurisdiction.

**Bail schedule:** A list that sets the amount of money bail that an accused person is required to pay, based on the charged offense. A judge may have discretion to set a different amount. Not every jurisdiction has a bail schedule, and many courts have declared them unconstitutional because they deny accused people their right to individualized hearings.

**Criminal punishment system (also referred to as “criminal legal system”):** We use the term “criminal punishment system” instead of “criminal justice system” throughout this piece. The term “criminal justice system” implies that the system actually does “justice,” when, in fact, the system is primarily concerned with administering punishment — and is built on, reinforces, and exacerbates white supremacy and all forms of structural oppression.

**E-Carceration:** From Challenging E-Carceration: “E-Carceration is the use of technology to deprive people of their liberty. Electronic monitors combined with house arrest represent the most obvious and likely the most punitive form of E-Carceration. Typically the state, usually via the criminal legal system, enforces E-Carceration. But corporations are also getting into the act by charging fees for repressive regimes of parole and probation which often include monitors. If we don’t resist, E-Carceration may be the successor to mass incarceration as we exchange prison cells for being confined in our own homes and communities. E-Carceration also includes a range of technologies that gather information about our daily lives that can curb our liberty. These technologies include: license plate readers, Stingrays, facial recognition software and metadatabases which house information gathered from all these sources of surveillance.”

**Failure to Appear (FTA):** FTA is a term used by courts to describe when an accused person is recorded as not being present for their court appointment. In some places, showing up late, or missing community service, a check-in with pretrial services, or a court-mandated program can also constitute “failure to appear.” From “The ‘Failure to Appear’ Fallacy”: “FTA is also calculated differently in different jurisdictions at different times, and by various agencies. Some agencies calculate the total number of court appointments missed — so that one person who missed 10 court dates would generate 10 FTAs. Other jurisdictions count the number of individuals who failed to appear at any point during the lifetime of a case — so whether a person misses one or 10 court dates, for example, that person would be recorded as one FTA.”

**Felony:** A felony is a criminal charge that is punishable by one year or more of incarceration. People convicted of felonies are likely to serve time in state prison, though felony sentences can also include probation and other non-prison terms.

**“Low-level”:** “Low-level”, like “serious” or “non-serious”, are subjective terms often used in the policy reform space. We use them in this document as short-hand and to capture the actual language used by advocates and electeds, but we do not endorse any view that the severity of criminal charges reflects anything beyond the power to punish.

**Misdemeanor:** A misdemeanor is a criminal charge that is punishable by less than one year of incarceration. People convicted of misdemeanors are likely to serve time in city or county jails, though misdemeanor sentences can also include probation and other non-custodial terms like community service.

**“Public Safety”:** We use quotations around the “public safety” that judges or prosecutors invoke during pretrial decision making, or that is used by policy makers and the media. Often, the “public” that they refer to is white, middle- and upper-class, able-bodied and otherwise privileged. This particular community is whom the police and prison industrial complex was created to protect. Judicial determinations of “public safety” risk tend to be loaded with racialized and biased assumptions.

**Pretrial:** The pretrial period starts at the moment when someone is arrested, and continues until their case ends (either because it is dismissed, or they plead or are found “guilty” or “not guilty”).

**Preventive detention:** Referred to as “remand” in some places, such as New York state, preventive detention is when an accused person is denied release entirely and jailed indefinitely without the ability to pay a money bail or otherwise secure their freedom.

**Prison Industrial Complex (PIC):** From Critical Resistance: “the prison industrial complex (PIC) is a term we use to describe the overlapping interests of government and industry that use surveillance, policing, and imprisonment as solutions to economic, social and political problems. Through its reach and impact, the PIC helps and maintains the authority of people who get their power through racial, economic and other privileges. There are many ways this power is collected and maintained through the PIC, including creating mass media images that keep alive stereotypes of people of color, poor people, queer people, immigrants, youth, and other oppressed communities as criminal, delinquent, or deviant. This power is also maintained by earning huge profits for private companies that deal with prisons and police forces; helping earn political gains for “tough on crime” politicians; increasing the influence of prison guard and police unions; and eliminating social and political dissent by oppressed communities that make demands for self-determination and reorganization of power in the US.”

**Reformist:** From Critical Resistance's Abolishing Policing Toolkit: "While "reform" simply means a change, reformist refers to a kind of liberal political leaning that maintains the current oppressive system by insisting the system is broken and just needs to be fixed. Claiming the PIC (or any of its tools) is broken supports it continuing to exist. Reformist reforms, or reformist change, are about improving institutions so that they can work better. But when an institution is rooted in oppression historically and is designed in order to maintain powerlessness and inequity, making that system work better will increase its ability to inflict harm and violence. If the job of a system is racialized social control, then fixing it to do its job better will improve how it carries out racialized social control. The system needs to be completely uprooted and dismantled in order to end its oppressive power over our lives."

**"Right to bail":** This is the right of accused people (often with certain charges excepted) to be released pending trial.

**Risk Assessment Tool (RAT):** From "An Organizer's Guide to Confronting Pretrial Risk Assessment Tools in Decarceration Campaigns": "We use the term "RAT" (Risk Assessment Tools) to refer both to sophisticated mathematical formulas, run by computers, as well as straightforward scoring guides for questions on checklists that are asked by a court officer before bail hearings. Algorithmic RATs are statistical tools that use hundreds or thousands of criminal records to try and predict future behavior — in this case, an accused person's probability, based on their apparent statistical similarities to others in the past, of showing up for court dates or being arrested for a new "violent" charge (as defined by the criminal legal system) if released. Not every RAT is an algorithmic tool, however. A jurisdiction may use a decision-making rubric that is meant to be predictive but is not necessarily informed by data. These proto-RATs are still risk assessment tools and may appear as an assessment form used by a pretrial services department, a score card used by a judge, or any formulaic decision-making rubric that the system uses to judge a person and then make a detention or release decision." Studies have shown RATs to be racist in design and impact.

