In 2017, the Decarceration Project tested innovative bail litigation strategies in a six-month bail pilot project in Manhattan. This report describes our approach, analyzes our results, and advocates for the expanded use of this model to represent the indigent accused as zealously as possible.

A Bail System in Crisis

New York City’s bail system is broken. It disproportionately jails poor people of color before they have been convicted of a crime, robbing them of their constitutional right to the presumption of innocence. In 2017, of the approximately 9,700 people incarcerated in the city’s jails, 75% were still awaiting a trial. The United States Constitution prohibits excessive bail, and New York’s laws only let judges set bail in an amount that will ensure someone returns to court. Despite these protections thousands of New Yorkers cycle through Rikers Island and other jails each year simply because they cannot afford to post their bail.

“New York City jails are disproportionately filled with people of color: 55% of detained people are Black and 34% are Latino—and only 7% are white.”

-Independent Commission on New York City Criminal Justice and Incarceration Reform, 2017

The Legal Aid Society is the nation’s largest and oldest public defender, representing people in every borough of New York City. As public defenders, we know that the most influential factor in a case is not guilt or innocence, but whether the client is in jail or at liberty. Research we conducted last year with the Human Rights Data Analysis Group shows that our clients who are jailed on bail they cannot pay are 34% more likely to plead guilty. Through the Decarceration Project, the Legal Aid Society is seeking to disrupt the link between wealth and justice.
“We, as a society, are coming to realize that our extensive reliance on detention through a bail system which often determines whether a defendant can remain at liberty based primarily on how much money he makes is morally problematic, unduly expensive and counterproductive to both the goals of efficiency and the principles of due process. The degree to which we as judges have relied on monetary bail to incarcerate pretrial detainees must change.”

-Judge Daniel Conviser, Supreme Court, New York County from a landmark litigation win by the Bail Pilot

The Decarceration Project: Forging a Solution

To confront this crisis and aggressively tackle the discriminatory use of monetary bail, the Legal Aid Society launched the Decarceration Project in June 2016. The Decarceration Project is an ambitious city-wide campaign to reduce and eventually eliminate the unnecessary pretrial detention of poor people in New York City. Since 2016, the Decarceration Project has been helping indigent clients challenge unfair bail and navigate the complexities of the City’s broken money bail system. The Project is the first of its kind nationwide, and it aims to shift how public defenders confront pretrial detention. The Project is dynamic—simultaneously reducing the jail population though direct litigation and driving systemic change with education and legislative advocacy.

In March 2017, Decarceration Project staff designed an innovative model for litigation that we believed would directly aid our clients and staff attorneys while fueling systemic change. The idea was simple: if bail means our clients are 34% more likely to be convicted, we must relocate scarce resources to the earliest point in the clients’ case to focus on getting clients released and back to the community. Through this intensive process, we also hoped to find cases to turn into impact litigation and change the dynamics of New York’s bail system forever.

Through the Bail Pilot, we provided bail specialists—attorneys, social workers, and support staff—to a group of thirty attorneys in our Manhattan trial office to see if the increased litigation capacity could get our clients released and drive down detention rates. After six months, our results show we succeeded.
Our ultimate conclusion: Public defense organizations should work with local and state actors, as well as private funders, to secure funding to replicate this model to better serve their clients and restore the presumption of innocence.

Launching the Bail Pilot

The Bail Pilot’s core premise was that bail advocacy must be immediate and interdisciplinary to be effective. More resources were critical to our success. We incorporated a specialized social worker along with additional legal staff in order to make sure that clients who were in need of services got them as soon as possible, and to better present our clients’ full stories to the judges who would determine their freedom.

Types of Assistance

<table>
<thead>
<tr>
<th>Litigation</th>
<th>Social Work</th>
</tr>
</thead>
<tbody>
<tr>
<td>✓ Bail Reviews (1st Trial Court Challenge)</td>
<td>✓ Interviewing Client</td>
</tr>
<tr>
<td>✓ Bail Applications (2nd Trial Court Challenge)</td>
<td>✓ Psychological Report</td>
</tr>
<tr>
<td>✓ Writs of Habeas Corpus (3rd Trial Court Challenge)</td>
<td>✓ Connecting with family and other community ties</td>
</tr>
<tr>
<td>✓ Appeals (Appellate Court Challenge)</td>
<td>✓ Personal History</td>
</tr>
<tr>
<td></td>
<td>✓ Matching with Programming</td>
</tr>
<tr>
<td></td>
<td>✓ Referring to Bail Funds</td>
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</table>

→ New York law provides mechanisms for four judges to review a bail decision after it is initially made. A bail review, a bail application, and a writ of habeas corpus all occur at the trial level. An appeal happens in an intermediate level, one level above the trial courts.

→ Bail funds are charities that post bail for people charged with misdemeanors where bail is $2,000 or less.

Litigation

Our litigation strategy was straightforward: litigate early and often. The Decarceration Project’s staff attorneys come from Legal Aid’s Bronx and Brooklyn trial offices, and we know firsthand the fast pace of a public defender’s work and the institutional obstacles they face in trying to aggressively and quickly litigate bad bail decisions. To be successful we needed to increase litigation capacity. We dedicated one staff attorney, and then a second, to the Pilot, and began to work on getting our clients released and transforming the system for good.
**Social Work**
Similarly, a designated social worker was available to assist trial attorneys and their clients from the outset. Since she specialized exclusively on pretrial release, she could focus on the issues most likely to affect bail right away, like establishing family ties, connecting the client with services in the community, and presenting personal and medical histories to the court.

**Support Staff**
In addition, our staff included two paralegals, legal interns, and a data analyst.

**Implementation**
We paired Pilot staff with a group of thirty lawyers from our Manhattan trial office and trained them on our pilot’s strategies and the resources that would now be available to them. For six months, we worked alongside the trial lawyers to:

- Immediately identify incarcerated clients and offer resources and strategic support, including referrals to charitable bail organizations and supervised release programs
- Involve a specialized social worker to meet with incarcerated clients and connect with their family members and programming
- Draft, file and argue legal challenges when trial lawyers were engaged in other court proceedings

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**BREAKDOWN OF CLIENT SERVICES**

<table>
<thead>
<tr>
<th></th>
<th>Legal Work Only</th>
<th>Both Services</th>
<th>Social &amp; Support Services Only</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage</td>
<td>19%</td>
<td>56%</td>
<td>25%</td>
</tr>
</tbody>
</table>
Our Results:

Our staff served 141 clients during the Pilot. Almost half were released on their own recognizance ("ROR"), were ultimately able to post bail or have bail posted by a bail fund, or saw their case dismissed.

### Pilot Project Bail Challenges & Release Outcomes

<table>
<thead>
<tr>
<th>Advocacy Outcome</th>
<th>ROR by Motion*</th>
<th>ROR by Statute**</th>
<th>Posted Bail</th>
<th>Detained</th>
<th>Grand Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>ROR Granted</td>
<td>13</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>13</td>
</tr>
<tr>
<td>Alternative Bail Granted</td>
<td>-</td>
<td>0</td>
<td>3</td>
<td>2</td>
<td>5</td>
</tr>
<tr>
<td>Bail Reduced</td>
<td>-</td>
<td>0</td>
<td>4</td>
<td>6</td>
<td>10</td>
</tr>
<tr>
<td>Bail Unchanged</td>
<td>-</td>
<td>12</td>
<td>35</td>
<td>66</td>
<td>113</td>
</tr>
<tr>
<td>Grand Total</td>
<td>13</td>
<td>12</td>
<td>42</td>
<td>74</td>
<td>141</td>
</tr>
</tbody>
</table>

*These clients were released when a judge granted the defense’s motion to change bail
**These clients were released when the prosecution failed to meet its burden to continue their detention

### Legal Challenges to Excessive Bail

We brought legal challenges to bail for 60 clients and we challenged bail for many of those clients more than once. These challenges included the three available trial court mechanisms—bail reviews, bail applications and writs of habeas corpus—and appellate challenges to a higher court. Ultimately, 20 of those clients, or 33%, went home—they either were released or had bail lowered to an amount that their families could afford.
Bail reviews resulted in the most people being released, both immediately or because they later posted bail. Since bail reviews are done in Supreme Court—in the same building or across the street from where the case is already pending, and where lawyers spend most of their day—these results emphasize the impact that even a modest influx of resources in the trial office can have on release rates.

**The Impact of Social Work**

Our designated social worker was involved in 65 clients’ cases, **37% of whom were released.** Her involvement ranged from connecting with and documenting community ties, building mitigation packages, and linking clients with appropriate community-based services.

> “After my client was arraigned, the pilot’s social worker quickly put together a letter for a bail review. The judge released my client, and she was able to be present for the birth of her grandson.”

-Trial Attorney

**Driving Systemic Change**

From our litigation efforts, we have three appellate challenges that we hope will result in lasting systemic change. One case challenges a judge raising bail and jailing a client who had already posted bail and who did not pose a risk of fleeing; one challenges the use of a client’s sealed arrest records against him at a bail hearing; and the third challenges excessive bail that was completely beyond the client’s financial reach as violating the Due Process and Equal Protection clauses of the United States Constitution.

**Measuring Our Success**

One way we measured the impact of our additional bail resources was by comparing the total bail advocacy by the Pilot group of trial attorneys in 2016 with the Pilot period in 2017. The number of bail challenges **more than doubled** from 37 in 2016, to 74 in 2017. Of those 74 challenges, Pilot staff were involved in 58.
Bail Filings Year Over Year

<table>
<thead>
<tr>
<th>Year Over Year Bail Filings</th>
<th>2016</th>
<th>2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bail Review</td>
<td>29</td>
<td>40</td>
</tr>
<tr>
<td>Bail Application</td>
<td>8</td>
<td>15</td>
</tr>
<tr>
<td>Writ</td>
<td>0</td>
<td>12</td>
</tr>
<tr>
<td>Appellate Court Challenge</td>
<td>0</td>
<td>7</td>
</tr>
<tr>
<td><strong>Grand Total</strong></td>
<td><strong>37</strong></td>
<td><strong>74</strong></td>
</tr>
</tbody>
</table>

→ Notably, the number of writs (third-level trial court challenges) and appellate court challenges were both zero in 2016.

→ In 2017, we worked with staff to file 12 writs and 5 appellate level proceedings.

Bail Challenge Outcomes

Not only did the number of filings increase substantially from 2016 to 2017, the rate of release after a bail challenge also went up from 35% to 45%.
Mark Valentine had bail set on a nonviolent felony charge despite being eligible for Supervised Release. He had no money to pay it, so he remained in custody and away from his young daughter. We filed a bail review and were denied. We then made a bail application that was denied. Finally, after 23 days in jail, a judge agreed to release him to Supervised Release after we submitted a social worker’s report on Mr. Valentine’s behalf. He remains at liberty and has not missed a single court date. *Mark’s story was featured in a Medium photo essay in collaboration with the National Legal Aid and Defender Association.*

Another client, a military veteran, had bail set on a felony domestic violence case. We secured his release with a bail review. Because he was at liberty, the attorney was able to prepare a successful referral to Manhattan’s specialized Veterans’ Court, where his case will be evaluated in light of his prior military service. He is the first person charged with domestic violence to be accepted. The attorney contacted our staff to say that this result would have been impossible without our help.

“A just for being in jail, I could have lost everything: my job, my money, my housing, all before anything even happened in the case. I couldn’t have even paid my rent from jail. I feel like things wouldn’t have ended as well if I was in jail.”

-Pilot Project Client

The charges against him were ultimately dismissed after his release.

A third client was released after our project helped his attorney prepare for a bail review. He had been arrested for possession of a gravity knife, and because of an old conviction the DA’s office charged it as a felony. Because he was released, he and his lawyer were able to effectively prepare him to testify in the grand jury, which dismissed all the charges against him.
Trial Attorney Reactions

“The bail project has been the most invaluable resource.”
-Trial Attorney

In order for the model we created was scalable and sustainable, we needed to build a collaborative relationship with the trial attorneys. We prioritized their feedback and input to make sure that our resources were helpful and that they built capacity rather than duplicating work they were already doing.

In anonymous surveys, the attorneys described the Pilot’s impact on their work:

→ A majority of survey respondents said that the Pilot provided new legal information that helped them file a bail challenge.

→ Every surveyed lawyer said that working with the Pilot’s social worker had a positive impact, including being better able to negotiate better resolutions for their clients.

→ Over half the respondents reported making a legal challenge or argument for the first time because of the project’s assistance.

→ Two-thirds of attorneys whom we assisted with writs of habeas corpus noted that we drafted, argued, or completed other essential parts of the writ because they were unavailable. When it comes to bail and fighting for someone’s liberty, every day counts. Our staff made sure that bail challenges happened as quickly as possible.

We received feedback in the attorneys’ own words:

☐ It was great having a team reach out to us and support us with the bail process. I definitely did more bail reviews and writs because of the information the social worker was able to gather and the support and assistance from the lawyers.

☐ The resources the bail project provided were invaluable. After arraignments, it is difficult to think of every possible option that will help your client get released and the bail project helped provide insight in areas that I wouldn’t have thought of. I am eager for the bail project to be a permanent resource at Legal Aid.

☐ I really appreciated an email from the bail project asking if they could help put bail packages together shortly after my clients’ first court dates.
The bail project has been the most invaluable resource. This project should really be rolled out society-wide because bail is one of the most important aspects of our clients’ cases and can make or break offers made to our clients.

I think I’d done maybe one bail review before the pilot project started. With the help of the pilot staff I’ve done four bail reviews—including one over a weekend. We need to have bail units in all of the offices.

Conclusions: Looking Ahead

New York’s bail laws may soon change for the better: Governor Cuomo has recently proposed a bill that would overhaul many aspects of the current bail laws that disproportionately jail indigent people of color. But our clients cannot wait for politicians to act. Moreover, under any new law, some of our clients will still be detained and will continue to require enhanced bail advocacy. Undoubtedly, the Bail Pilot proves that public defense organizations across the state and nation need more resources to effectively represent their clients.

The Bail Pilot has proven one thing: traditional funding based on an outdated model for public defense is inadequate, and it must be dramatically expanded to provide additional resources to clients incarcerated pretrial.

Immediate funding needs to be provided for public defenders to scale up their bail advocacy. One bail unit should be assigned to every 20-30 attorneys who carry felony caseloads, and should consist of:

- Dedicated bail attorney to handle trial- and appellate-level cases
- Specialized bail social worker who will quickly identify mitigation and programming
- Trained support staff to handle filings and administrative tasks

The bail crisis can be solved. Our Pilot’s rapid-intervention model secured the release of dozens of clients who otherwise would have remained incarcerated and subjected to an unnecessary increased risk of conviction—simply because of their poverty. With more funding, public defense organizations could drive release rates even higher, and restore the presumption of innocence. We cannot wait any longer to address New York City’s bail crisis—our clients' lives and liberty are at stake.