Reform in Action: Reducing Reliance on Bail

Initial Findings on Implementing Bail Reform in New York State

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This is the third in a series of fact sheets that unpacks different provisions of the New York Criminal Justice Reform (NYCJR) Act. These fact sheets are derived from findings that are part of a larger research project conducted by the CUNY Institute for State & Local Governance (ISLG), with support from Arnold Ventures, that seeks to understand the development and implementation of the 2020 laws across the state.[1]

Introduction

In New York, bail is used to ensure a person returns to court until their case is resolved—but, until 2020, it had evolved into a de-facto jail sentence for many who could not afford it. When a person makes their first court appearance, known as arraignment in New York, a judge determines whether their case will be dismissed, resolved, or continues on in the court process—and, if it does, whether the person will await the outcome in jail or in the community. Though bail money is used to incentivize court appearances, as it is returned if all appearances are met, bail is often set out of reach for most New Yorkers. In fact, in 2019, individuals were unable to post bail at arraignment 85 percent of the time.[2]

Like many other parts of the criminal legal system, the ability to post bail is skewed racially and socio-economically. Often, it results in different pretrial outcomes for people facing the same charges—one person is able to await the resolution to their case at home because they had the means, while another person remains behind bars because they could not. In both instances, the person has not yet been convicted of the accused crime: an overwhelming majority of the jail population, 70 percent, is pretrial.[3] The harms caused by pretrial incarceration,[4] such as loss of housing and employment, are well-documented and most concentrated among low-income and communities of color.

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In an effort to create a fairer, more equitable system, New York State enacted legislation in 2020 that

1. An overview of the project and related briefs can be found at http://www.islg.cuny.edu/case-study-bail-reform-in-new-york

2. Rodriguez, Krystal, Michael Rempel, and Matt Watkins, *The Facts on Bail Reform and New York City* (New York: 2021, Center for Court Innovation) https://www.courtinnovation.org/publications/bail-crime-nyc

3. *Jail Inmates in 2020* (Washington, DC: 2021, US Department of Justice) https://bjs.ojp.gov/content/pub/pdf/ji20st.pdf

4. Dobbie, Will, Jacob Golden, and Crystal S. Yang,"The Effects of Pre-Trial Detention on Conviction,Future Crime, and Employment: Evidence fromRandomly Assigned Judges," American EconomicReview 108, no. 2, Feb 2018: 201-240

reflected a national shift in the goals of the criminal legal system. This legislation included not only a shift away from the use of cash bail but also changes to different parts of the pretrial process such as custodial arrests, discovery, and pretrial services. Though NY's legislation included provisions beyond the bail decision, the sweeping reforms have come to be widely known as "bail reform" across the state given bail's frequent and recognizable links to inequities in the criminal legal system. The CUNY Institute for State & Local Governance (ISLG), with support from Arnold Ventures, is conducting a process evaluation assessing implementation across various components of the legislation—including appearance tickets, bail, pretrial services, and discovery— through a combination of interviews, focus groups, document reviews, and data analyses with criminal legal system stakeholders. This third brief details our findings related to bail specifically, gathered from our first round of data collection which spanned summer 2020 through summer 2021.

How did the legislation change bail practice?

Judges have the discretion to consider four options regarding release status at arraignment. These four options remained the same even after the passage of the 2020 legislation, though that discretion is now bound by charge-based parameters:[5]

PRETRIAL RELEASE OPTION	OUTCOME	OFFENSE ELIGIBILITY
Remand	Held in jail until the case is resolved with no option for release	Primarily violent felonies; some exceptions for specific drug and non-violent felonies; used sparingly
Set Bail	Held in jail if and until bail is posted; if unable to post bail, individual will remain detained	Primarily violent felonies and gun felonies; some misdemeanor and non-violent felonies also qualify *Prior to Act, any charge was eligible for bail*
Release with conditions or under supervision:	Release home with certain conditions (surrender of passport, drug programming, etc.) or under supervision where an individual has to meet with a case manager to facilitate court appearance until the case is resolved	All offenses *Prior to Act, limited to misdemeanors and lower-level felonies*
Release on recognizance (ROR):	Release home with no conditions or supervision (often based on ties to the community), to return to court at their next scheduled hearing	All offenses

[5] For a more complete list; see: https://www.courtinnovation.org/sites/default/files/media/document/2020/BenchCard_Pretrial_Bail_Reform_06252020.pdf

The legislation required major changes and standardizations to how bail can be set, restricting its use around certain charges and putting parameters on pretrial decisions that leaned towards a "presumption of release." More specifically, these changes included:

- **Eliminating bail** for nearly all misdemeanor and non-violent felonies.
- **Adding in a consideration of ability to pay**: In cases when bail is set, a judge must take the individual's financial situation into consideration to ensure they can afford the bail amount specified. This includes a requirement that judges set three forms of bail, including one that is less onerous.
- **Requiring 'least restrictive' conditions be set to ensure an individual returns to court:** If a judge determines that an individual cannot be released on their own recognizance, they may then choose from a range of options, from release with conditions to bail (or remand, in rarer and more significant circumstances).

These requirements, taken together, aimed to limit the number of individuals held pretrial. This proved true on the ground, as jurisdictions saw an increase in release and a decline in the jail population as reforms were implemented leading up to, and continuing throughout, the first half of 2020. Early projections about how the law would impact bail setting suggested that of the 2019 cases in NYC where bail or remand was set, only 55 percent would be eligible for bail under the 2020 Act.[6]

[6.] Rempel, Michael and Krystal Rodriguez, *Bail Reform Revisited: The Impact of New York's Amended Bail Law on Pretrial Detention* (New York: 2020, Center for Court Innovation) https://www.courtinnovation.org/publications/bail-revisited-NYS

Indeed, in 2020, bail setting dropped from 24 percent to 15 percent of cases,[7] resulting in 19,000 fewer cases detained on bail or remand.[8]

What were stakeholders' initial reactions?

Across the board, there was broad support from criminal legal stakeholders on the primary goals of the legislation and a general acceptance that reform was needed; however, opinions differed widely on whether the legislation itself, and its implementation, was the right approach. Public defenders reacted with excitement and enthusiasm for the many benefits the bail statute offered their clients, and pretrial service providers saw the prospect of reaching more individuals. For instance, in reaction to the new bail statute, one public defender remarked that "having people out of custody is tremendously helpful to the whole system; people will lose less jobs, lose less relationships, loose less stability; all the reasons why this passed are absolutely true."

Law enforcement and prosecutors, however, had more mixed reactions. Fueled by the expectations that these changes would lead to increased crime, particularly with regard to "repeat offenders," law

[7.] Lu, Olive, Erica Bond, Preeti Chauhan, and Michael Rempel, *Bail Reform in Action: Pretrial Release Outcomes in New York State, 2019-2020* (2022: New York, Data Collaborative for Justice) https://datacollaborativeforjustice.org/work/bail-reform/bail-reform-in-action-pretrial-release-outcomes-in-new-york-state-2019-2020/

[8.] Data Collaborative for Justice, "Before and After: Data on the Impact of Bail Reform," (webinar from DCJ, New York, Sept 21, 2022) https://datacollaborativeforjustice.org/event/webinar-before-and-after-data-on-the-impact-of-bail-reform/

enforcement and prosecution expressed real concern about potential impacts on safety and felt their voices were not heard as the legislation was written. Both before and after January 2020, there were numerous media accounts spotlighting similar concerns, often citing anecdotes about the new laws not being in the best interests of community safety and well-being. With the increase in media attention, legislators convened to pass amendments in April 2020, just three months after implementation.

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April 2020 Amendments

- Additional offenses added to the bail eligible list, including Burglary II and any crime that resulted in the death of an individual
- Judges can set bail not only solely based on if an offense is eligible, but also if the individual is charged with another crime while out on probation, post-release supervision, or eligible to be sentenced as a "persistent offender"
- Judges can consider release conditions, including mandatory treatment and programming

How did changes to bail affect stakeholders in the pretrial process?

While the bail provisions required more minimal changes to operations, personnel, or resources compared to other aspects of the laws, they did require quite a dramatic culture shift for judges, defense, prosecutors, and other court stakeholders due to the reorientation towards a presumption of release—affecting judge's decision-making, pretrial detention, and case outcomes. Once planning began, stakeholders' expectations about how the bail provision would impact their work, their clients, and the community differed widely. While not all of their expectations were realized, many felt justified once implementation began. Themes around expectations, and how they played out, are explored below.

MORE STANDARDIZATION AND LIMITATIONS AROUND JUDICIAL DISCRETION

EXPECTATION

The standardizing of the bail setting process meant who is eligible and who is not was now primarily dependent on their charge. This meant that judges who previously had relatively expansive discretion would now be more limited—which was seen as a benefit or a challenge, depending on which stakeholder group was asked. For defense and pretrial service providers, limiting judicial discretion was a crucial step in achieving the legislation's proposed goals of reducing racial disparities and "leveling the playing field," removing the potential for bias in bail-setting and requiring judges to consider an individual's ability to pay. Prior to the reforms, defense attorneys said they had often seen judges use discretion in ways that

perpetuated already stark racial and ethnic disparities.

Law enforcement and prosecution, on the other hand, expected limiting judicial discretion to negatively impact community safety. Some of the specific concerns revolved around the original list of bail-eligible offenses, pointing out what they saw as obvious oversights. Many of these were later added to the list in the 2020 amendments, such as burglary II, which can involve someone breaking into a person's home, vehicular assault, and any crime resulting in death. The other major concern was less about the specific charges, but about a population of individuals categorized as "career offenders." Law enforcement and prosecution stakeholders repeatedly remarked on the importance of discretion in judicial decision-making when it came to release, particularly with respect to prior criminal history and failure-to-appear (FTA), both of which these stakeholders believed were necessary to preserve community safety. The sense from these stakeholders was that the legislation was a "tremendous governmental overreach" that limited the ability of officers, prosecutors, and judges to use case-by-case judgement and detain individuals who posed a risk to community safety or simply a risk to public order, and that these changes would have a direct effect on crime, recidivism, and loss of public trust.

EXPERIENCE

When it came time for implementation, reports of a rocky start in the courtroom abounded. Defense and prosecution stakeholders both thought that the language in the legislation itself was vague, which led to varied interpretations and inconsistency from judges. In interviews, some stakeholders voiced that judges did not seem to have a strong foundational knowledge of the legislation and often leaned on prosecutors for their recommendations—particularly in town and village courts where magistrates are not required to be lawyers. This lack of consistency was compounded by vague, confusing, and sometimes conflicting language within the statute along with a lack of state guidance and bench education.

While ISLG researchers were unable to speak to judges at this stage of the research,[9] stakeholders shared that there was a general sense that judges, navigating a learning curve, may have felt unclear about all aspects of the changes and limited in their decision-making. On the ground, public defenders interviewed observed some judges setting bail for clients that would have typically been released prior to 2020. In other words, some judges were setting bail for any bail eligible charge, regardless of the circumstances. Additionally, public defenders expressed concern that judges seemed to be ignoring the section of the bail statute that required them to consider an individual's financial situation when setting bail, including acknowledging an individual's ability to pay and the use of partially secured or unsecured surety bonds.[10] While judges were required to use these less onerous forms of bail, public defenders suggested some judges were setting the partially secured bond at significantly higher amounts,

[9] Unfortunately, at this time, OCA has declined to be interviewed.

[10] Partially secured bond means that an individual must put down 10 percent of the bond amount. An Unsecured Bond means that no money is required at the time; however, it is a guarantee that the bond will be paid if the individual does not return to court.

making it equally as cumbersome. Similarly, some public defenders outside NYC expressed concerns that judges were finding ways to make bail more onerous, including requiring multiple sureties or having to produce onerous financial documents. Initial findings from partners based on court observations suggest that they rarely witnessed any mention of ability to pay.[11] Indeed, data shows that for eligible charges, cash bail amounts increased after legislation was implemented along with the percent of individuals unable to pay.[12]

FEWER PEOPLE HELD BEHIND BARS

EXPECTATIONS

Many participants from defense and pretrial service agencies felt the legislation "leveled the playing field" for individuals in the criminal legal system by removing economic barriers to release and allowing them to remain in the community while they fought their case. One service provider remarked that $100 bail may as well be $1 million if someone doesn't have the means, that "the whole concept of cash bail is inherently flawed, because it penalizes the folks who lack resources." There was a general sense of jubilation with the announcement of these reforms from public defender organizations who had long been advocating for changes. In their view, this legislation had the power to greatly improve the lives and outcomes of their clients. According to early projections, changes to the bail statute would result in a 43 percent decline in the pretrial population in NYC.[13] This was a significant decline, expected to have large implications for public defenders and prosecutors, particularly with regards to case outcomes, and to individuals experiencing the system. By limiting the number of individuals incarcerated pretrial, the legislation limited the collateral consequences associated with even short stays in jail, including loss of employment, housing, custody, etc., as well as the longer-term consequences, such as increased likelihood of pleading guilty and harsher sentences.[14]

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EXPERIENCE

In the months leading up to implementation, pretrial populations in NYC declined by 16 percent and by 24 percent in counties outside NYC, as stakeholders worked to release individuals that, come January, could no longer be held.

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11. Kim, Jaeok, Cherrell Green, Alex Boudin, et al, *A Year of Unprecedented Change* (New York: Vera Institute of Justice, 2022) https://www.vera.org/downloads/publications/a-year-of-unprecedented-change-bail-reform-covid-19-five-new-york-counties.pdf

12. NYS Division of Criminal Justice Services, "Supplemental Pretrial Release Data Summary Analysis: 2019 - 2021" (webinar from DCJS, New York, Sept 21, 2022) https://datacollaborativeforjustice.org/wp-content/uploads/2022/09/FINAL-DCJS-Public-Briefing-on-Supplemental-Pretrial-Release-Data-9-21-22.pdf

13. Rempel, Michael and Krystal Rodriguz, *Bail Reform in New York: Legislative Provisions and Implications for New York City* (New York: 2019, Center for Court Innovation) https://www.courtinnovation.org/publications/bail-reform-NYS

14. Subramanian, Ram, Léon Digard, Melvin Washington II, and Stephanie Sorage, *In the Shadows: A Review of the Research on Plea Bargaining* (New York: Vera Institute of Justice, 2020) https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf

Pretrial populations continued to decline throughout the summer, accelerated by COVID. The percentage of individuals released on recognizance (ROR) or on non-monetary release in NYC increased marginally post-reform from 80 to 83 percent, with ROR declining and release under supervision increasing. However, outside the city, the increase in release was more pronounced, going from 59 to 77 percent,[15] with the percent of ROR and release under supervision increasing. On the ground, many public defenders anecdotally reported better case outcomes for their clients, better plea offers, and increased dismissals from district attorney's offices on lower-level misdemeanors. However, while the legislation was intended to decrease racial disparities, this has not been the case so far. In fact, the trend is heading in the opposite direction, with disparities increasing from 2019 to 2020.[16] As such, while pretrial detention and its costs have declined, the benefits have not been equally dispersed among racial and ethnic groups.

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15. "Supplemental Pretrial Release Data Summary Analysis: 2019 - 2021"

16. Kim, Jaeok, Quinn Hood, and Elliot Connors, *The Impact of New York State Jail Population Brief, January 2019-December 2020* (New York: Vera Institute ofJustice, 2022) https://www.vera.org/downloads/publications/new-york-state-jail-populationbrief-2019-2020.pdf

LESS DETENTION-BASED LEVERAGE

EXPECTATIONS

Though not an intentional mechanism of the legal system, stakeholders noted that detention held some unintended practical utility towards system efficiency, making it easier for prosecutors and other stakeholders to communicate with people during their case, which meant finding ways to come to resolution more quickly. For example, given that they were motivated to get back to their lives in the community, those detained were more likely to negotiate pleas quicker and/or voluntarily enroll in treatment programming. On the other hand, what might be seen as efficient for prosecutors can also be seen as coercive for individuals going through the system. Indeed, many public defenders, advocates, and those with lived experience described the potentially coercive influence being in jail has on the plea-bargaining process—i.e., individuals may be more likely to take a guilty plea to get home to their families, taking with them the ramifications of a criminal record.

Prosecutors expressed concern that the 2020 reforms would create instability with respect to efficiency of the system as a whole, largely because people would no longer weigh detention as a factor in whether or not to take an offered plea. Prior to the reforms, in New York, 99 percent of misdemeanors and 96 percent of felonies were disposed through a plea rather than going to trial.[17] Prosecutors were concerned that the number of pleas would decline, with a corresponding increase in the amount of open cases that may then drag on or resolve more slowly as they progressed through the court system. Similarly, detention was described by prosecutors, pretrial service providers, and public defenders outside NYC

17. Fontier, Alice, Christopher W. Adams, Jennifer L. Van Ort, Norman L. Reimer, The New York State Trial Penalty (Washington, DC: National Association of Criminal Defense Lawyers, 2021) https://www.nacdl.org/Document NewYorkStateTrialPenaltyRighttoTrialUnderAttack

as the only mechanism to get people who needed services, whether for mental health issues or substance use, into treatment programs.

EXPERIENCE

After the reforms passed, stakeholders suggested pleas were slowing and cases were stagnating. Specifically, that new cases were coming in but existing ones were not getting resolved at the same pace. Indeed, in NYC, the percent of cases still pending final case resolution increased from 5 percent in 2019 to 15 percent over the first nine months of 2021, with time to disposition increasing dramatically during the onset of COVID, but showing signs of coming down. As of late 2022, whether this increase in stagnating cases is due entirely to court shutdowns and timeline pauses caused by COVID, or in part by effects of bail reform, is not entirely clear. However, prosecutors noted that they felt many of their cases could have been resolved in a plea much earlier in the process had the individual been in jail and that defense attorneys had little incentive to agree to initial plea deals, something echoed by public defenders, especially now that they have access to all the discovery and their client is in the community.

As for getting individuals into treatment, prosecutors—and some defense and pretrial providers outside NYC—suggested that it became more difficult to engage individuals in mental health or drug treatment programs without the leverage of detention. Concerns rose during the pandemic, heightening the feeling that those who needed help weren't accessing it. While prosecution and many service providers believed it necessary in some cases to leverage detention, public defenders in the city opposed coercive or forced treatment. In the 2020 amendments, additional options for non-monetary release to potentially address this were added, including the option for court-mandated treatment and programming.

[18] "Supplemental Pretrial Release Data Summary Analysis: 2019 - 2021."

About the Research Methods

CUNY ISLG reached out to 129 relevant agencies by phone and email to assess interest in participating, aiming to obtain both leadership and line staff perspectives from a variety of stakeholder groups across a diverse range of counties. To date, ISLG researchers have interviewed 202 participants in 28 agencies in 13 counties from different regions—including a mix of rural, urban, and suburban.

In the first round of interviews, questions focused on planning efforts, operational or policy changes, shifts in staffing, expectations early in the process, and experiences implementing the reforms. During the follow up period, which began in spring 2022 and will continue through the end of the year, questions are focused on how implementation has been going a minimum of one year since researchers last spoke to them, and what stakeholders have done, if anything, to combat some of the challenges mentioned in their initial interviews. Read more about the methodology on the blog at https://islg.cuny.edu/blog/reform-in-action-methods.

Beyond the Interviews: Reform & Public Safety Data

The concerns laid out by law enforcement and prosecution regarding increases in FTA and recidivism have so far not come to fruition. Prior to implementation, citing the pretrial release of more individuals under the new legislation, some feared that FTA rates would skyrocket; however, FTA has declined in NYC from 15 percent in 2019 to 9 percent in 2021,[19] while remaining stable outside of NYC. Once implementation began, a frequently expressed frustration among law enforcement interviewed was the idea of a "revolving door of criminals." They felt that the same individuals were repeatedly being arrested, released pretrial, and then rearrested, leading to public frustration. They said the public—and other officers—see this as increased crime, less accountability, and a waste of limited resources on arresting and rearresting the same people. Many participants attempted causal claims between bail reform and an increase in some violent crimes in NYC, despite data that shows that rearrest for people released pretrial remained stable at 19 percent and 20 percent, from 2019 to 2021, including for violent felonies, at around 4 percent.[20] Others, however, take a wider view of the causes of the uptick, citing COVID-19 and social unrest as the major contributing factors. At this stage, research is being conducted to determine the impact of bail reform on long-term outcomes, including crime and safety.

With public pressure mounting, Governor Kathy Hochul, with broad support from Mayor Eric Adams, passed amendments in the 2022 budget to include:

- Expansion of the repeat offender provision which allows bail to be set for people charged with a new crime while released on an appearance ticket, even if the charge is not bail eligible
- Additional bail-eligible offenses, including possession of a weapon and sale of a firearm to a minor
- Expanded factors that judges can consider when making pretrial release decisions

19. Ibid.

20. Ibid.

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