

March 2020

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ISSUE BRIEF

REFORMING NEW YORK'S BAIL REFORM: A PUBLIC SAFETY-MINDED PROPOSAL

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Executive Summary

After enacting a sweeping bail reform, New York lawmakers have drawn the ire of constituents who are troubled by the many stories of repeat and serious offenders—some with violent criminal histories—being returned to the street following their arrests. In the state’s biggest city, the public’s growing concerns are buttressed by brow-raising, if preliminary, crime data, amplifying calls for amending or repealing the bail reform. The operative provisions of New York’s bail reform severely limit judicial discretion in pretrial release decisions, increasing the number of pretrial defendants who are being released, often without conditions and without allowing judges to consider the risk that a defendant poses to the public. New York is now the only state that does not allow judges to consider public safety in any pretrial release decisions.

This brief begins with an overview of New York’s pre-2020 bail law and the reforms that took effect on January 1. It then highlights the reform’s shortfalls and ends by proposing three changes intended to address the public’s legitimate safety concerns while preserving the spirit of the reform effort and addressing some of the inequities and inefficiencies inherent in a system that is heavily reliant on the use of monetary pretrial release conditions.

The proposed changes include:

- Empowering judges to assess the public safety risk posed by pretrial defendants, and setting out a process that allows them to detain dangerous or chronic offenders;
- Allowing judges to revoke or amend release decisions in response to a pretrial defendant’s rearrest; and
- In the intermediate term, setting aside additional funds or diverting existing funds to reduce the time a defendant stands to spend in jail if remanded to pretrial detention.

Bail: The Old Way

When an individual is arrested and charged with a crime in the Empire State, he is typically brought before a judge who will, among other things, make a decision about whether, and under what conditions, the defendant will be allowed to await trial outside of jail. Prior to January 1, 2020, the options before judges included requiring defendants to post bail, defined as “a security such as cash or a bond ... required by a court for the release of a prisoner who must appear in court at a future time,”¹ in order to secure pretrial release. Such release decisions in New York were—and today, still are—to be based solely on an assessment of a defendant’s risk of flight, not a defendant’s risk of reoffending during the pretrial period.

Defendants who had bail imposed could pay the court in cash—which would be held in escrow and returned to the defendant upon his return to court—or secure a bail bond, usually by paying a bail bondsman a percentage of the bail amount.² However, defendants who were financially unable to post bail or secure a bail bond would be held in jail as their cases proceeded through the adjudicative process. At least in the state’s largest city, however, this was a relatively rare occurrence.

Only about 10% (26,350) of the more than 250,000 individuals arrested by NYPD in 2018 went to jail after failing to make bail at their initial court appearance.³ Of those defendants who entered jail, 70% (approximately 18,445) made bail within a week, and another 17% (approximately 4,479) made bail within a month.⁴ In other words, just over 3,100 defendants spent more than 30 days in pretrial detention in 2018 (**Figure 1**).⁵

FIGURE 1.

Before Bail Reform, Few Who Were Subject to Bail in NYC Remained in Jail

May 2019

Jail: Who is in on bail?

OF THOSE WHO HAVE BAIL SET

13% make bail at their first court appearance

Bail set, made at first court appearance (3,940)

87% do not make bail at their first court appearance, resulting in at least some time in jail



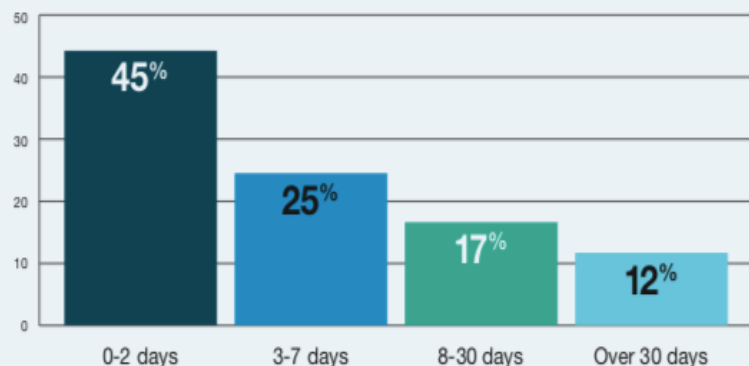
Bail set, not made at first court appearance (26,350)

KEY
● = 10,000 people

45% OF THE PEOPLE WHO PAY BAIL AFTER ENTERING JAIL DO SO WITHIN 2 DAYS AND 70% WITHIN A WEEK

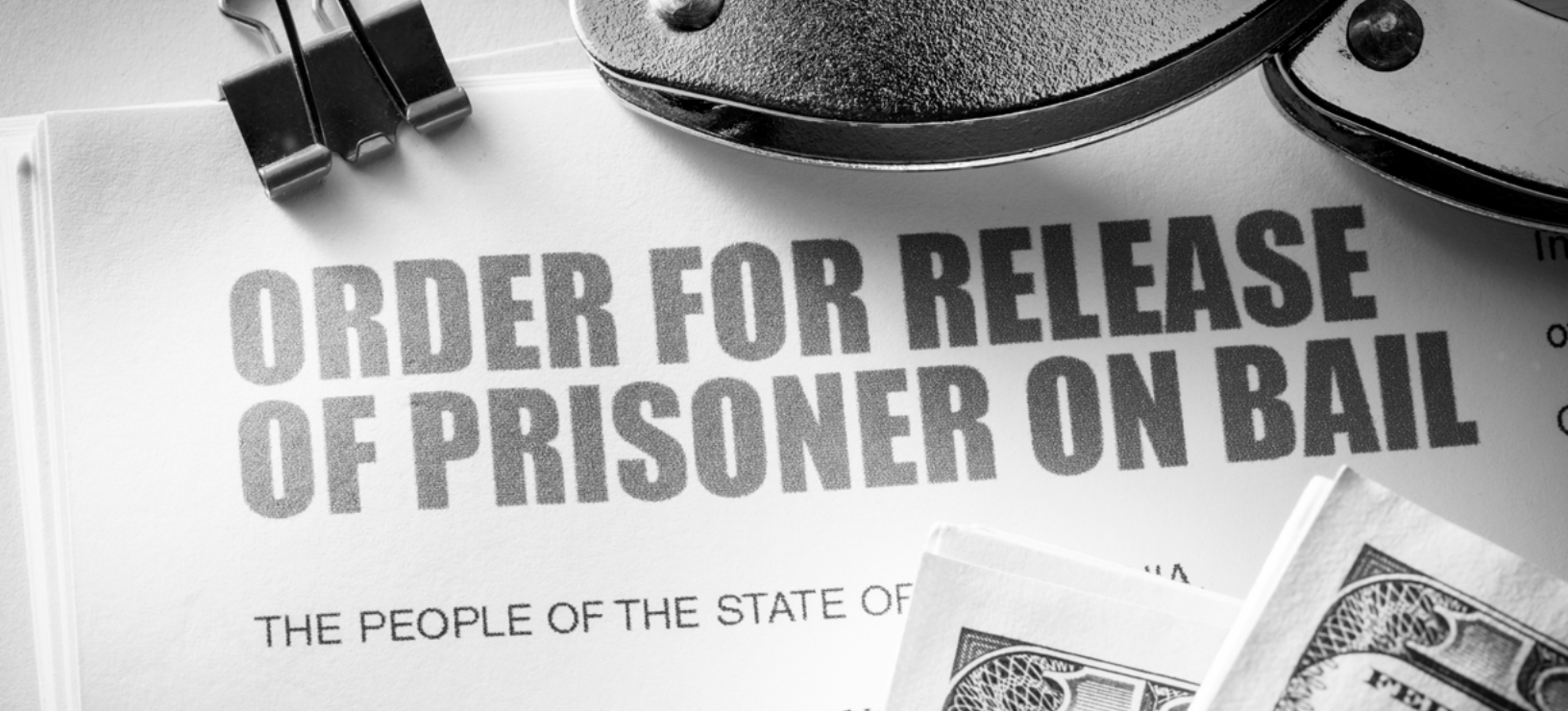
If every person who left jail within a week in 2018 never entered, it would have prevented 40%* of the admissions to jail, but would only have reduced the average daily jail population by 130 people because their jail stays are so short.

*all discharges leaving for any reason



Source: Mayor's Office of Criminal Justice, "Jail: Who is in on Bail?" May 2019

In rare cases, defendants deemed extremely likely to flee justice were remanded to pretrial detention to be held without bail. But even before the state's bail reform was passed in April 2019, its biggest city had already undertaken a number of efforts to decrease pretrial detentions. As reported by the Mayor's Office of Criminal Justice in March 2019,⁶ New York City had seen significant increases in instances of supervised releases, releases on recognizance, and diversion of younger defendants to its "Youth Engagement Track," which Mayor Bill de Blasio recently vowed to expand.⁷



ORDER FOR RELEASE OF PRISONER ON BAIL

THE PEOPLE OF THE STATE OF

The 2020 Bail Reform

Though most criminal defendants in New York were released pretrial—on their own recognizance or after making bail—many criminal-justice reform advocates remained critical of the bail system. One of their most persuasive arguments: a dangerous but well-off defendant could secure his release, while a poor but harmless defendant might spend an extended period in pretrial detention simply because he could not afford to make bail.⁸

In line with the national push among many criminal-justice reform advocates to cut the nation’s incarceration rate (in jail and prison), a push to curtail cash bail with the hope of depopulating the Empire State’s jails gained steam in the mid-2010s—particularly after the tragic case of Kalief Browder came to represent the alleged injustices inherent in the state’s pretrial detention policies.⁹

On April 1, 2019, Governor Andrew Cuomo and state lawmakers in Albany reached a deal on the state’s budget. Like most “budget deals” in Albany, it encompassed far more than just mundane matters of fiscal health—in this case, including far-reaching criminal-justice reforms, like the near-elimination of cash bail.¹⁰ The new bail regime, set out in Article 500 of New York’s Criminal Procedure Law,¹¹ places new limits on judicial options regarding pretrial defendants. Among other measures, the legislation drastically shrank the scope of criminal cases in which judges are allowed to require defendants to post bail or remand them to pretrial detention.¹² The new law also places limits on the conditions that judges may impose (such as electronic monitoring and check-ins) on a given defendant’s release, restricting options to those that constitute the least restrictive means of securing a given defendant’s return to court. The law also requires judges to articulate, on the record, their rationale for imposing conditions.

The core provisions of New York’s bail reform law achieve the following:

1. Cash bail is prohibited

- a. for all but two types of *misdemeanor* defendants (those facing misdemeanor sex offense or criminal contempt charges); and
- b. for almost all *non-violent felony* defendants (among the few exceptions: felony witness intimidation, witness tampering, specific instances of felony criminal contempt, money laundering to further terrorism, and operating as a “major drug trafficker”).

2. Remand is prohibited

- a. for all misdemeanor defendants, without exception; and
- b. for almost all *non-violent felony defendants* (exceptions listed in 1b, above).

3. Both cash bail and remand remain options

- a. for most violent felony defendants (the two exceptions to this rule are two specific types of second-degree burglary and robbery);
- b. for certain sex-related and criminal contempt misdemeanors, per 1a, above (*applies to cash bail only*); and
- c. for defendants facing a select handful of non-violent felony offenses (see exceptions set out in 1b, above).

4. Judges must release defendants on their own recognizance

- a. unless a given defendant poses a risk of flight.

5. In addition to bail, judges may impose the following conditions on eligible defendants:

- a. supervised release;
- b. travel restrictions;
- c. electronic monitoring (restricted to felony defendants and certain misdemeanor defendants (set out in 1a, above); and
- d. restrictions on firearms possession.

6. Any conditions imposed must be

- a. the “least restrictive” option to reasonably assure a defendant’s return to court; and
- b. explained on the record or in writing by the judge.

The combined immediate effect of New York’s new criminal-procedure laws regarding pretrial defendants—particularly in the context of the state’s preservation of the prohibition on judicial considerations of the public safety risk posed by pretrial defendants—has been to increase the number of criminal defendants who will now await the disposition of their cases on the street, as opposed to in jail as pretrial detainees.¹³ The Vera Institute conservatively estimated that the state’s bail reform would result in a 40% reduction in the statewide pretrial jail population.¹⁴

New York: An Outlier

Perhaps more notable than what is in the new law is what is absent from it—namely, any provision empowering judges to base *any* decisions regarding a defendant’s pretrial release on the public safety risk that he poses. The new restrictions on cash bail and conditional releases adopted in New York are similar to those adopted in a number of jurisdictions that have undertaken to reform their bail systems in recent years. However, *New York State is the only jurisdiction to enact bail reform without allowing judges to consider a defendant’s public safety risk when deciding whether or under what conditions to release him pretrial* (see table, pp. 7–8).

Pretrial Release and Public Safety: New York Stands Alone

STATE	Allows Judges to Deny Release to Some/All Defendants Posing Public Safety Risk	Allows Judges to Consider Public Safety Risk When Setting Monetary/ Nonmonetary Conditions on Release in Some/All Cases	SOURCES
Alabama	✓	✓	AL Judiciary, Cr. P. Rule 7.2(a)
Alaska	✓	✓	AK Stat. § 12.30.011(b) , (d)
Arizona	✓	✓	16A A.R.S. Rules Cr. P., Rule 7.2(a)(2) , (b)(2)(C)
Arkansas	✗	✓	AR Judiciary, Cr. P. Rule 9.3
California	✓	✓	CA Pen. Code § 1320.17-18
Colorado	✓	✓	CO Rev. Stat. § 16-4-101(b)
Connecticut	✗	✓	CT Rev. Stat. § 54-63b(b)
D.C.	✓	✓	Code of the District of Columbia § 23-1322(a)(2) , (b)(1)-(2)
Florida	✓	✓	FL Stat. § 907.041(3) , (4)(c)(4)-(5)
Georgia	✓	✓	O.C.G.A. § 17-6-1(e)(2)-(4)
Hawaii	✓	✓	HI Rev. Stat. § 804-3(b)(3)-(4) , (d)
Idaho	✗	✓	ID Rev. Stat. § 19-2904(4)
Illinois	✓	✓	725 ILCS §§ 5/110-5(a) & 5/110-4(a)
Indiana	✗	✓	IC § 35-33-8-3.2(a)
Iowa	✗	✓	IA Code § 811.2(1)(a)
Kansas	✗	✓	KS Stat. Ann. § 22-2802(1) , (8)
Kentucky	✓	✓	KY. Rev. Stat. Ann. § 431.066(2) , (5)(b)(2), (6)
Louisiana	✓	✓	LA Code Cr. P. Art. 313(A)(3)(b) , (B)
Maine	✓	✓	ME Rev. Stat. § 1027(3)(B)
Maryland	✓	✓	MD Rules, Rule 4-216(c)-(e)
Massachusetts	✓	✓	MA Gen. Stat. Ch. 276 §§ 57 , 58A(1)
Michigan	✗	✓	MI Code Cr. P. § 765.6(1)(b)
Minnesota	✓	✓	MN Rev. Stat. § 629.715(1)(a)-(b)
Mississippi	✓	✓	MS Rules Cr. P., Rule 8.2(a) ; 8.4(b)
Missouri	✓	✓	MO Supreme Court Rules Cr. P. § 33.01(c)-(d)
Montana	✓	✓	MT Code Ann. § 46-9-109(2)(c)
Nebraska	✓	✓	NE Rev. Stat. § 29-901(1)
Nevada	✓	✓	NV Rev. Stat. § 178.4851 ; see also Order Adopting Statewide Use of the Nevada Pretrial Risk Assessment , Nevada Courts (March 21, 2019)
New Hampshire	✓	✓	NH Court Rules, Ch. 12 Guidelines for Issuing Bail and Criminal Protective Orders Pending Arraignment (specifically note Protocol 12-4)
New Jersey	✓	✓	Glenn A. Grant, "Criminal Justice Reform 2018 Report to the Governor and the Legislature," New Jersey Judiciary, April 2019)
New Mexico	✓	✓	NM Court Rule 5-409(A)-(B)
New York	✗	✗	New York State Senate, Criminal Procedure Law (CPL), Article 530.40
North Carolina	✓	✓	NC Gen. Stat. § 15A-533(d)-(g)

STATE	Allows Judges to Deny Release to Some/All Defendants Posing Public Safety Risk	Allows Judges to Consider Public Safety Risk When Setting Monetary/Nonmonetary Conditions on Release in Some/All Cases	SOURCES
North Dakota	✗	✓	ND Court Rule 46(a)(2), (i)
Ohio	✓	✓	OH Rev. Code § 2937.222(B)-(C)
Oklahoma	✓	✓	OK Stat. § 22-1105.3(B)-(F)
Oregon	✓	✓	OR Rev. Stat. §§ 135.240(4); 135.245(3)
Pennsylvania	✓	✓	243 PA Code Rule 523(A) (to be read in conjunction with 243 PA Code Rule 526(A)(5))
Rhode Island	✓	✓	RI Gen. L. § 12-13-1.3(b), (c)(7), (d)
South Carolina	✗	✓	SC Code §§ 22-5-510(C); 17-15-10(A); 17-15-30(A)
South Dakota	✓	✓	SD Codified Laws § 23A-43-2; § 23A-43-4
Tennessee	✗	✓	TN Code § 40-11-118(b) (to be read in conjunction with § 40-11-144)
Texas	✗	✓	TX Code Cr. P. Art. 17.40
Utah	✓	✓	UT Code Cr. P. § 77-20-1(2)(c), (3)(d)
Vermont	✓	✓	13 V.S.A. §§ 7553a; 7554(a)(2)
Virginia	✓	✓	VA Code § 19.2-120(A)(2), (E)
Washington	✓	✓	WA Cr. Court Rule 3.2(a)(2)(a), (d)
West Virginia	✓	✓	WV Code Ann. § 62-11F-5 (1)-(6)
Wisconsin	✓	✓	WI Rev. Stat. §§ 969.03(e); 969.035(3)(c), (4)-(10)
Wyoming	✓	✓	WY R. Cr. P. § 46.1(b), (c)(1)

Bail Reform's First Impression: Not a Good Look

Even before New York's bail reform officially took effect on January 1, news outlets noted instances of repeat offenders being released without bail—and, in many cases, without nonmonetary conditions—pursuant to, or in anticipation of, the new policy, setting the public on edge. Three of the most prominent such cases involved a woman accused of multiple anti-Semitic assaults in Brooklyn,¹⁵ a serial bank robber,¹⁶ and a man with 24 prior arrests¹⁷ who punched a cop. In the first two of those cases, the defendants were rearrested for similar offenses just days or hours after their releases.

Those cases, it turned out, were far from anomalous. Within a month of taking effect, New York's bail reform led to the release of a number of dangerous defendants, many of whom were later rearrested for offenses committed while awaiting the disposition of their cases. Among those defendants was Arjun Tyler, who allegedly tried to rape a woman in Brooklyn after being released from pretrial detention pursuant to New York's bail reform.¹⁸ Then there was Jordan Randolph, who was released after a January 1 arrest on charges relating to drunk driving. Apparently while awaiting the disposition of that open case, he is alleged to have rear-ended the vehicle of a recent college graduate, Jonathan Maldonado, while intoxicated. Maldonado was killed. Randolph allegedly taunted officers on the scene of the fatal crash, per news reports, telling them, "I'll be out tomorrow."¹⁹ He was released the next day. Another case: in defiance of the state's bail reform, one Long Island judge refused to release an alleged bank robber, Romell Nellis, without bail. His decision was promptly overturned by another judge who released Nellis on an electronic monitor—only to have Nellis cut off the monitor and abscond shortly thereafter.²⁰

The steady stream of troubling releases has been accompanied by a sharp uptick in New York City crime—an uptick that Police Commissioner Dermot Shea publicly linked to the state's bail reform law.²¹ Through February 16, 2020, New York City has seen increases in a variety of offenses: Robbery (32.3%), Felony (6.8%) and Misdemeanor (2.8%) Assault, Burglary (21.1%), Grand Larceny (13%), Grand Larceny Auto (64.3%), Shooting Incidents (21.3%), as well as both Transit (36.2%) and Housing (3.6%) crime.²²

It is, of course, too early to definitively state whether (and if so, to what degree) these upticks are related to the bail reform. Yet there is at least one other data point that provides some preliminary circumstantial evidence that the reform is one factor potentially behind the city's rough start to 2020. In January alone, NYPD officials reported that 143 individuals committed at least 230 crimes—ranging from robbery, burglary, and felony assault to criminal mischief, grand larceny, and drug offenses—after being released pretrial.²³

The offenses committed by defendants out on release highlight one of two potential mechanisms through which the city's bail reform might contribute to additional crime: less incapacitation. Under the city's new pretrial release guidelines, fewer defendants stand to spend any time in pretrial detention, which logically translates into more opportunities to reoffend. The other mechanism is the erosion of any deterrent effect that pretrial detention (or the pecuniary loss associated with posting bail) might have had on potential offenders. A large body of research shows that immediacy is one of the most important determinants of a given sanction's deterrent effect.²⁴ Because pretrial detention and the financial impact of having to post bail are the most immediate consequences associated with an arrest, and because bail reform rendered those consequences much less likely to result from an arrest, the cost associated with certain criminal activity may be perceived as lower by criminal actors, who, in turn, may now be less likely to be deterred by the prospect of an arrest.

Front-page stories and increased crime have combined to undermine support for New York's bail reform. A Siena poll in January²⁵ found a dramatic shift in public opinion, with 49% saying that the reform is bad for the state, up from 38% in April 2019, when the law was passed. The same poll reported that support for the reform as being good for the state declined from 55% to 37%. According to a more recent Siena poll, support is down to 33%, with the percentage of respondents saying that the law is bad for the state up to 59%.²⁶ Notably, the drop-off in support for the new law is pronounced among African-Americans, Latinos, and political independents.

The bail reform's shaky first impression in New York has many officials who vocally supported reform expressing openness to revisions, including Governor Andrew Cuomo,²⁷ Senate Majority Leader Andrea Stewart-Cousins,²⁸ New York City mayor Bill de Blasio,²⁹ and New York Democratic Party chairman Jay Jacobs.³⁰ But what changes should lawmakers consider most?

Reforming the Reform: Three Main Goals

1. Allow judges to consider the danger to the community in pretrial release decisions.

Under current law, New York judges may not order defendants held pretrial on the basis of the risk that they pose to the public's safety. Nor may judges consider public safety in deciding what sort of nonmonetary conditions (if any) to attach to a defendant's release. While this has long been the rule in New York State, the risks associated with this prohibition are likely exacerbated by the increase in the number of pretrial defendants who will await the dispositions of their cases on the street.

As such, judges in New York should be empowered to remand high-risk defendants to pretrial detention, irrespective of the charges they may be facing.³¹ They should also be empowered to mitigate the risks posed by a given defendant by imposing the nonmonetary pretrial release conditions—such as electronic monitoring—that

they deem appropriate on the basis of a defendant's danger to the community.³² Importantly, shifting the focus from a defendant's ability to pay to the danger posed by his potential release (a question that is answerable without regard to his wealth) serves the primary end of New York's bail reform: addressing the injustice of jailing defendants on what essentially amounts to the basis of their wealth.

However, judicial assessments of public safety risks should not be done in a vacuum.

The justice system has the capacity to scientifically inform judicial assessments of risk through the use of an algorithmic risk assessment tool (RAT). New York City courts already make use of algorithmic assessments of defendants' flight risks conducted by the New York City Criminal Justice Agency (NYCCJA).³³ And there is already some existing research published by NYCCJA³⁴ and the Center for Court Innovation³⁵ on how a RAT might be incorporated in the Big Apple, using existing data on defendants in New York City courts. In particular, the study published by the Center for Court Innovation shows that the pilot tool developed for application to NYC defendants was able to "effectively classif[y] risk irrespective of race,"³⁶ which addresses one of the concerns expressed by defenders of the city's current bail reform law—that an algorithmic risk assessment would perpetuate or exacerbate racial disparities in the system.³⁷ To be clear, it is possible, because of how heavily many RATs weigh criminal history, that an assessment of "erroneous"³⁸ classifications would reveal that black defendants (who tend to have more extensive criminal histories compared with white defendants)³⁹—*when misclassified*—are more likely to be misclassified as high-risk than defendants of other races.

Implementing an algorithmic RAT to inform judicial assessments of the dangers that defendants pose to their communities will provide judges with an objective framework to aid them in their pretrial release decisions.

Pretrial release decisions should also be informed by case-specific evidence that both the prosecution and the defense could present pursuant to the normal rules of evidence. Judicial decisions regarding pretrial release should be based on the totality of such evidence, which would include an algorithmic assessment of flight risk and public safety risk.

2. Empower judges to revoke releases on the basis of a defendant's rearrest or violation of conditions.

As noted above, more than 140 pretrial defendants had been rearrested by NYPD in just the first month after the state's bail reform initiative took effect. Nationally, data collected on violent felons in large urban counties have shown that 12% of such offenders committed serious crimes—such as robbery, aggravated assault, and murder—while awaiting the disposition of pending cases.⁴⁰

In New York, 199 of the 230 new charges brought against previously released pretrial defendants who were rearrested in January were for offenses ineligible for bail or remand. But as an NYCCJA study showed,⁴¹ the currently pending charges do not provide a particularly useful picture of the risk that a particular defendant poses to public safety; many defendants facing or convicted of relatively minor charges (such as drug possession) can and do go on to commit much more serious offenses (including murder). For example, of the 118 murder suspects identified by police in Baltimore in 2017, 70% had a prior drug offense on their record.⁴²

In addition to capturing defendants who may not otherwise have been deemed high-risk, empowering judges to revoke releases in response to new criminal charges (limiting that ability to cases where there is strong evidence of guilt—a standard that commonly appears in criminal-procedure laws in jurisdictions around the country)—would also raise the transaction costs of reoffending, which could function as an effective deterrent.

It should be noted that this sort of provision was included in New Jersey's 2014 bail reform. On prosecutorial motion, judges in New Jersey revoked 1,000 pretrial releases in 2018 because of a defendant's rearrest or violation of conditions.⁴³

3. Secure funding to enhance the capacity of the state's criminal-justice system to process cases in a more timely manner.

What must be recognized in discussions of pretrial justice is that most of the problems cited by those advancing bail reform around the country stem from the amount of time that a given defendant stands to spend in pretrial detention should he be deemed, for whatever reason, ineligible for release. The tension between the presumption of innocence (which, as the U.S. Supreme Court held in *U.S. v. Salerno*, 481 U.S. 739 (1987) was not violated by a defendant's pretrial detention on public safety grounds) and pretrial detention is very real. Minimizing that tension is a public policy problem that, unlike most policy issues, is almost purely a matter of resource allocation. Simply put, a better-funded criminal-justice system—whether the funding comes from new sources of revenue or the reallocation of existing revenues—can afford more prosecutors, public defenders, investigators, and judges. This is the most direct route to shortening pretrial detention periods, as well as to ensuring that the Constitution's guarantee of a speedy trial is fulfilled in all cases.

Notably, New Jersey's bail reform capped the pretrial detention period at 180 days and set aside funding for 20 new superior-court judgeships to help move cases along.⁴⁴

A real effort by the state legislature to assess how much capacity needs to be added to speed up the resolution of cases is the first step toward a long-term solution to many of the problems in New York's criminal-justice system—including those problems unrelated to bail. An illustration of how pressing this need is can be found in the recent announcement by Manhattan district attorney Cyrus Vance Jr., in an e-mail to the borough's prosecutors, that the office is considering a policy of non-prosecution for whole classes of cases—a decision necessitated by the added compliance burdens associated with New York's recent discovery reforms.⁴⁵

Conclusion

Like many public policy issues, bail reform is complex. Many of those who supported and pushed for the bail reforms in New York sought to address real problems worthy of serious consideration. Addressing these problems, however, involves trade-offs and calls for a balancing of legitimate concerns about justice with equally legitimate concerns about public safety. Based on the preliminary and foreseeable effects of New York's reform, a strong case can be made that the Empire State's current bail regime creates an imbalance in favor of criminal defendants, to the detriment of the public's safety.

By laying out the contours of the pre- and post-reform environment, this paper outlines and provides evidentiary support for three overarching goals (to be pursued in the immediate and intermediate terms) that should inform reforming New York's bail reforms. Adopting proposals in line with the recommendations made herein will not eliminate all the risks associated with increasing the rate at which criminal defendants are released pretrial. Even with provisions that preserve or grant judicial discretion to remand defendants to pretrial detention or impose release conditions on public safety grounds, jurisdictions that have adopted bail reforms have endured hundreds of violent acts committed by pretrial defendants.⁴⁶ The stakes involved in these sorts of criminal-justice policy decisions demand that, whatever changes are made to New York's current bail laws, policymakers and analysts continue to assess whether, how, and to what extent bail policy is affecting the public's safety.

The reforms in this paper may not satisfy all supporters or opponents of New York's bail reform, but they are offered as a potential compromise that will help mitigate at least some of the risks inherent in the laws governing pretrial release today.

Endnotes

- ¹ Bryan A. Garner, ed., *Black's Law Dictionary*, 9th ed. (St. Paul: West, 2009), p. 160.
- ² A bail bond is essentially a guarantee to return the defendant to court made by a defendant's surety, backed by the surety's assumption of financial liability to the court should the defendant fail to appear. See *ibid.*, p. 200.
- ³ "Jail: Who Is in on Bail?" New York City Mayor's Office of Criminal Justice, May 2019, found that of the more than 257,865 individuals whose arrests were captured by this report, 43% (110,915) of defendants were released on their own recognizance at their initial hearing, and 1.8% (4,720) were released under supervision. Another 42.7% (110,110) of the total had their cases resolved (either through dismissal or a plea) soon after their arrests (prior to the opportunity to have bail set); and 1.5% (3,940) of defendants made bail at their initial appearance. Of the remaining 11% (28,180)—representing defendants who entered jail—0.7% (1,830) were ordered held without bail; and 10.3% (26,350) entered jail as a result of not making bail at their initial court appearance.
- ⁴ *Ibid.*
- ⁵ *Ibid.*
- ⁶ See "Supervised Release Quarterly Scorecard," New York City Mayor's Office of Criminal Justice, March 2019.
- ⁷ Rafael A. Mangual, "De Blasio's Bail Reform Bid for 'Woke' Cred Puts You at Risk," *New York Post*, May 30, 2019.
- ⁸ See, e.g., "Addressing the Poverty Penalty and Bail Reform," Fair and Just Prosecution: "The money bail system ... often means that wealthier defendants get released while poor defendants have to stay in jail"; "Moving Beyond Money: A Primer on Bail Reform," Criminal Justice Policy Program at Harvard Law School, October 2016: "The core critique of money bail is that it causes individuals to be jailed simply because they lack the financial means to post a bail payment."
- ⁹ For background on the Browder case and the role it played in driving support for bail reform in New York, see Jesse McKinley and Ashley Southall, "Kalief Browder's Suicide Inspired a Push to End Cash Bail. Now Lawmakers Have a Deal," *New York Times*, Mar. 29, 2019. Browder, after being arrested for an alleged robbery, was held on Rikers Island for three years, without being tried on the robbery charges. While many bail critics portrayed his extended jail stay as a function of his inability to post bail at his initial hearing, readers should note that Browder was given the option to post bail in error. Moreover, his family was able to acquire the money to post the bail amount originally set by the judge in his case; but by then, it was discovered that Browder was ineligible for release on bail, and was held for a violation of his probation for a prior conviction.
- ¹⁰ New York State, "Governor Cuomo Announces Highlights of FY 2020 Budget," Apr. 1, 2019.
- ¹¹ New York State Senate, Criminal Procedure Law (CPL), Article 530.40 et seq.
- ¹² Michael Rempel and Krystal Rodriguez, "Bail Reform in New York: Legislative Provisions and Implications for New York City," Center for Court Innovation, April 2019.
- ¹³ See, e.g., Rebecca Rosenberg and Bruce Golding, "Nearly 900 City Inmates May Be Freed Even Before Bail-Reform Law Takes Effect," *New York Post*, Nov. 3, 2019; Kristin Thorne, "Dozens Released from Long Island Jails Under New State Bail Reform Law," ABC7NY.com, Dec. 31, 2019; Douglass Dowty, "Bail Reform Causes a Big Drop—100 Inmates—in Syracuse Jail. Reason Might Surprise You," *Syracuse.com*, Jan. 10, 2020.
- ¹⁴ Insha Rahman, "New York, New York: Highlights of the 2019 Bail Reform Law," Vera Institute of Justice, July 2019.
- ¹⁵ Tina Moore and Kenneth Garger, "Woman Accused of Assaulting 3 Jewish Women Arrested Again Day After Release," *New York Post*, Dec. 29, 2019.
- ¹⁶ Ralph R. Ortega, "Thief Who Robbed Four Banks Is FREED on New York's No-Bail Policy—Then Knocks Over Another Bank 24 Hours After Shouting 'I Can't Believe They Let Me Out,'" *Daily Mail*, Jan. 11, 2020.
- ¹⁷ Ruth Weissmann and Jorge Fitz-Gibbon, "Man Who Sucker-Punched Cop in Brooklyn Is Back on His Old Turf," *New York Post*, Dec. 29, 2019.
- ¹⁸ Rocco Parascandola and Thomas Tracy, "Suspect Busted in Brooklyn Subway Station Assault Was Freed Through State's New Bail Reform Laws," *New York Daily News*, Feb. 2, 2020.
- ¹⁹ Kevin Sheehan and Jorge Fitz-Gibbon, "Fatal DWI Suspect Bragged About Bail Reform: 'I'll Be Out Tomorrow,'" *New York Post*, Jan. 30, 2020.
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- ³¹ See Jerome E. McElroy, "Predicting the Likelihood of Pretrial Failure to Appear and/or Re-Arrest for a Violent Offense Among New York City Defendants: An Analysis of the 2001 Dataset," New York City Criminal Justice Agency (NYCCJA), January 2009. Interestingly, this study found: "The likelihood of FTA [failure to appear] and/or re-arrest for a violent offense was lower among defendants initially arrested for felony-level violent and property offenses. In contrast, the odds of pretrial misconduct were higher among defendants initially arrested for all types of misdemeanor or lesser offenses, with the exception of those arrested for violent offenses." This is relevant insofar as the current bail reform law preserves cash bail and remand as an option for defendants facing violent felony offenses. That preservation likely reflects a belief among the drafters of New York's bail reform that these defendants pose an elevated risk of pretrial misbehavior. However, the data presented in this particular study seem to show that the severity of the instant offense is not usually an indication of likelihood to reoffend during the pretrial period.
- ³² Neither of these proposed changes should be taken as suggesting that any adjustments to the current bail reform law involve the curtailment of existing options regarding pretrial detention and cash bail in cases involving most violent felonies.
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- ³⁸ Two illustrations of "erroneous" classifications would be: a defendant classified as low-risk is rearrested during the observation period; and a defendant classified as high-risk makes it through the observation period without being rearrested. With respect to the latter, it is important to keep in mind that the absence of an arrest does not necessarily mean that the defendant did not reoffend, given the reality that many offenses go unreported or are not cleared (solved) by law enforcement.
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