

ESSAY

NEW YORK BAIL REFORM: A QUICK GUIDE TO COMMON QUESTIONS AND CONCERNS

Emmanuel Hiram Arnaud & Beulah Sims-Agbabiaka†

INTRODUCTION.....	1
I. BRIEF HISTORY OF BAIL IN NEW YORK	4
II. THE AMENDED BAIL STATUTE.....	8
A. Elimination of Bail for Many Misdemeanor Offenses	9
B. Qualifying Offenses: Violent Felonies, Non- Violent Felonies, and Select Misdemeanors	11
C. Projected Impact.....	13
III. THE DEBATE.....	14
CONCLUSION	24

INTRODUCTION

In New York’s statewide court system, once someone is arrested they typically experience what can be an arduous process. For many, that process may involve time spent in jail, regardless of guilt or a conviction. At the heart of that quandary is the use of cash bail.

For example, let’s say that Tina is a 19-year-old college student in New York City. Tina works a steady job in food service, lives with her mother in government housing, and is arrested for shoplifting a makeup palette. The officers take her

† Emmanuel Hiram Arnaud is a law clerk at the United States Court of Appeals for the First Circuit and former appellate public defender in New York City. He received his J.D. from Cornell Law School and his B.A. from Columbia University, Columbia College.

Beulah Sims-Agbabiaka is a law clerk at the Eastern District of Pennsylvania and former appellate public defender in New York City. She received her J.D. from Columbia University School of Law where she was Editor-in-Chief of the *Columbia Journal of Race and Law*, an Oldham’s Fellow, and an NAACP Legal Defense Fund Earl Warren Scholar. Beulah holds a B.A. in African-American Studies, with honors, and a special concentration in Jazz Studies from Columbia University, Columbia College.

The authors thank Bob Dean, Emilio Estela, and Elizabeth Angeles for their comments and suggestions on earlier drafts of this piece. They also thank the *Cornell Law Review* team for their assistance and careful edits.

down to the precinct, and after her arrest, the arresting officers present information about the case to a district attorney. The District Attorney's Office will then decide whether to file any charges against Tina. If the District Attorney's Office decides to proceed with the charges against her, Tina will see a judge for the first time at her arraignment,¹ a process that typically takes around twenty-four hours to thirty-two hours from the time of arrest, depending on your location.² At this point, Tina will have missed class and work, and her mother may not know where she is.

At arraignment, Tina is taken before a judge and either pleads guilty or not guilty to the charges against her. If she pleads guilty, the court can impose a sentence right then or set a later date to do so. If she pleads not guilty, the court must then make a choice: set bail, or release her on her own recognizance, meaning that the court trusts her to meet future court dates without requiring financial assurance.³ If the court sets bail rather than releasing Tina on her own recognizance, and neither Tina nor her family and friends can afford to pay bail, she will have to wait in jail during the pendency of her case; a process that can take weeks, months, or in some instances, years. As a result, Tina will have to withdraw from or fail her classes, she will lose her job, and upon her eventual release, her mother's public housing may be called into question, all because she could not afford to post cash bail (money paid as a deposit for the release of an arrested person as determined by a judge who sets the price and types of bail the person is eligible for). Although Tina's story is a hypothetical, for many New Yorkers her story is their reality—a reality that the New York state government recently attempted to address on two occasions.

In 2019, New York Governor Andrew Cuomo approved and signed the state's much anticipated budget into law (the "2019 amendments"). The budget⁴ included several watershed

¹ *Criminal Justice Process*, N.Y.C. POLICE DEPT., <https://www1.nyc.gov/site/nypd/services/victim-services/criminal-justice-process.page> [<https://perma.cc/JXA4-7JNM>] (last visited Mar. 9, 2020).

² James C. McKinley Jr., *New York Courts Cut Time Between Arrest and Arraignment*, N.Y. TIMES (Mar. 19, 2014), <https://www.nytimes.com/2014/03/20/nyregion/new-york-courts-meet-elusive-goal-from-arrest-to-arraignment-in-under-24-hours.html> [<https://perma.cc/9AUF-P33Y>].

³ *Criminal Justice Process*, *supra* note 1.

⁴ Neither the state Senate nor Assembly held public hearings on the bail statute because it was included in the budget rather than its own piece of legislation.

provisions, one of the most controversial being “sweeping criminal justice reform legislation” that, among other things, eliminated cash bail and pretrial detention for many misdemeanor and nonviolent felony defendants.⁵ The bail statute was again amended through the budget in April 2020 (the “2020 amendments”), scaling back the 2019 amendments by significantly expanding the offenses eligible for bail and pretrial detention.⁶

The partial elimination of cash bail in New York was not a surprise. Organizations in New York had been advocating for it for some time and Governor Cuomo had stated his support for such a measure in his 2018 State of the State address. He explained at length that “our jails are filled with people who should not be incarcerated. Punishment is supposed to be imposed when one is found guilty. Incredibly 75 percent of the people in New York City jails have not been convicted of any crime. A similar story exists in other jails across the state.”⁷ As a result of situations like Tina’s, Governor Cuomo proposed “reform[ing] our bail system so a person is only held if a judge finds either a significant flight risk or a real threat to public safety.”⁸ The version of the bill he eventually signed into law, however, did not fully mirror his proposal. The law eliminated cash bail as intended, but rejected a public safety exception to release.⁹

⁵ MICHAEL RODRIGUEZ & KRISTAL RODRIGUEZ, CTR. FOR COURT INNOVATION, BAIL REFORM IN NEW YORK: LEGISLATIVE PROVISIONS AND IMPLICATIONS FOR NEW YORK CITY 1 (2019), https://www.courtinnovation.org/sites/default/files/media/document/2019/Bail_Reform_NY_full_0.pdf [<https://perma.cc/QR3Q-6WQH>].

⁶ EXECUTIVE BUDGET FINANCIAL PLAN FY 2020, at 304–05 (2020) <https://www.budget.ny.gov/pubs/archive/fy20/exec/fp/fy20fp-ex-amends.pdf>

⁷ *Video, Audio & Rush Transcript: Governor Cuomo Outlines 2018 Agenda: Realizing the Promise of Progressive Government*, GOVERNOR ANDREW M. CUOMO: STATE OF THE STATE (Jan. 3, 2018), <https://www.governor.ny.gov/news/video-audio-rush-transcript-governor-cuomo-outlines-2018-agenda-realizing-promise-progressive> [<https://perma.cc/CPU6-BCQS>]. The people whom Governor Cuomo referred to here were those presumed innocent but who had been charged with an offense.

⁸ *Id.* Notably, the New York state legislature has on three occasions—in 1970, 2019, and 2020—explicitly rejected the use of public safety, or “preventive detention,” as a factor when setting bail. The main argument is that the tools used for determining whether an accused poses a risk to public safety are riddled with racial and economic biases, and are also inaccurate. CTR. ON THE ADMIN. OF CRIMINAL LAW, PREVENTIVE DETENTION IN NEW YORK: FROM MAINSTREAM TO MARGIN AND BACK 29–33 (2017), https://www.law.nyu.edu/sites/default/files/upload_documents/2017-CACL-New-York-State-Bail-Reform-Paper.pdf [<https://perma.cc/688H-D5T3>].

⁹ Beth Fertig, *Major Bail Reform is Coming to NY Next Month—Here’s What to Expect*, GOTHAMIST (Dec. 11, 2019, 4:00 AM), <https://gothamist.com/news/bail->

The new bail statute has sparked a lively state-wide debate. What is even more interesting, however, is the diminishing frequency in which money bail was used prior to the 2019 amendments to New York bail statute. Indeed, money bail affected a relatively small percentage of those involved in the criminal justice system. The New York City Criminal Justice Agency recently conducted a 30 year analysis of over 5 million pretrial release decisions,¹⁰ and found that “from 1987 to the present, courts have moved further and further away from the use of monetary forms of pretrial release towards release without money.”¹¹ The study showed that New York City reduced its use of money bail by two thirds prior to any legislative reform, and “in 2018 the volume of release without money was more than three times that of money bail. At the same time, [New York City’s] jail population declined, from a high of nearly 22,000 in 1991 to 7,862 at the beginning of 2019.”¹² Between 1987 and 2018, the volume of nonviolent felony cases where money bail was set also dropped from 30,963 to 8,954, and the volume of misdemeanor cases where money bail was set likewise dropped from 17,278 to 11,749. Taken together, over the last 30 years, the percentage of cases in NY in which bail is set has dropped from 48 percent to 23 percent.¹³

Despite this decline, the use of cash bail continued affecting thousands of people across New York, prompting a vigorous state-wide debate. The aim of this essay is to provide a straightforward and digestible explanation of the new bail statute and its projected consequences for practitioners and non-lawyers alike in the midst of that debate. Part I provides

reform-explained-nyc [<https://perma.cc/36BY-73K3>]. After much lively debate among criminal justice reform advocates, representatives of the district attorneys throughout the state, public defenders, and representatives of police departments, the legislature amended the bail statute through the budget in 2020, expanding the number of offenses that are bail eligible. Jeff Coltin, *How New York Changed Its Bail Law*, CITY & STATE N.Y. (Apr. 4, 2020), <https://www.cityandstateny.com/articles/policy/criminal-justice/how-new-york-changed-its-bail-law.html> [<https://perma.cc/2QHW-SD8F>].

¹⁰ AUBREY FOX & STEPHEN KOPPEL, N.Y.C. CRIMINAL JUSTICE AGENCY, PRETRIAL RELEASE WITHOUT MONEY: NEW YORK CITY, 1987–2018 (2019), https://www.nycja.org/assets/CJA_RWM_March_2019.pdf [<https://perma.cc/43QM-CDUC>].

¹¹ *Id.* at 2.

¹² *Id.*

¹³ Eli Hager, *New York City’s Bail Success Story*, THE MARSHALL PROJECT (Mar. 13, 2019, 7:00 AM), <https://www.themarshallproject.org/2019/03/14/new-york-city-s-bail-success-story> [<https://perma.cc/DKV2-GXMB>].

a brief history of bail in the United States and New York State, while Part II provides a plain language explanation of what the new bail statute actually does. Part III discusses several questions arising from the new bill.

I

BRIEF HISTORY OF BAIL IN NEW YORK

One of the most important and fundamental tenets of American criminal law is that an accused person is innocent until proven guilty.¹⁴ What this means, in theory, is that no American can be punished for an alleged wrongdoing without going through the criminal process and either pleading guilty or being found guilty by a jury of their peers. The use of bail is one way in which courts in our country guarantee that an accused person does not suffer punishment before they see their day in court,¹⁵ and for a long time bail in the United States was solely aimed at ensuring that an accused person would return to court after being released from jail.¹⁶

Indeed, the general understanding of bail amongst the courts remained largely unchanged throughout the 19th and mid-20th centuries. The Supreme Court of the United States, for example, summarized in 1951 that the “right to release before trial is conditioned upon the accused’s giving adequate assurance that he will stand trial and submit to sentence if found guilty.”¹⁷ Similarly, the Court of Appeals of New York, New York’s highest court, explained in 1947 that when setting bail, the “amount must be no more than is necessary to guarantee [the accused person’s] presence at the trial.”¹⁸ New

¹⁴ *Kaley v. United States*, 571 U.S. 320, 357 (2014) (Roberts, C.J., dissenting).

¹⁵ See *People ex rel. Lobell v. McDonnell*, 71 N.E.2d 423, 425 (1947) (explaining that as a result of an accused person’s presumed innocence, “[t]he policy of our law favors bail.”).

¹⁶ Insha Rahman, *Undoing the Bail Myth: Pretrial Reforms to End Mass Incarceration*, 46 FORDHAM URB. L. J. 845, 852 (2019) [hereinafter *Undoing the Bail Myth*].

¹⁷ *Stack v. Boyle*, 342 U.S. 1, 3 (1951). Following the *Stack* decision, the national conversation regarding bail diverged significantly from New York’s position. The War on Drugs and crime wave of the 1970s and 1980s led many jurisdictions across the country, including the federal government, to expand their use of bail to also apply to people who judges believed posed a risk to public safety. This type of “preventive detention” was sanctioned by the Supreme Court of the United States in *United States v. Salerno*, 481 U.S. 739 (1987). See CTR. ON THE ADMIN. OF CRIMINAL LAW, *supra* note 8, at 17–22.

¹⁸ *McDonnell*, 71 N.E.2d at 425. The purpose of bail in New York remains unchanged with few exceptions. *People v. Baker*, 188 Misc. 2d 821, 827 (Sup. Ct. 2001) (“The purpose of bail is to insure a defendant’s return to court at all

York's legislature codified this concept in New York's bail statute almost 50 years ago, and its provisions make abundantly clear that "the statutory direction has been to [use bail] for the purpose of securing the defendant's future attendance, not for the purpose of preventive detention."¹⁹

Judicial bodies have guaranteed an accused person's return in various ways. Historically, a person known as a surety could promise the judge that an accused person would return to court. In exchange for that promise, the surety swore to bear the responsibility for the accused person's failure to appear.²⁰ Over time, courts began using pecuniary mechanisms, like bonds and liquid assets, as incentives for an accused person to return to court. The idea was simple: "people must appear for future court dates, and a financial stake in one's case was . . . the best way to guarantee they appear in court."²¹

By the 1960s, New York trial courts' use of bail created an atmosphere eerily reminiscent of our current posture. Thousands of accused people found themselves in jail throughout New York City, not because they were perceived as flight risks, but simply because they could not afford bail.²² Many major figures, including judges and reformers, criticized the practice as undemocratic and unjust.²³ After a groundbreaking experiment and study by the Vera Institute in 1961 found that high bail amounts were unnecessary to

proceedings during the pendency of his or her case."). New York law does permit preventive detention in a few circumstances. For example, the legislature amended the bail statute to permit a judge to consider the accused's prior violation of court protective orders and their history of possession and use of a firearm in their bail determinations. N.Y. CRIM. PROC. LAW § 510.30(2)(A)-(B) (McKinney 2019).

¹⁹ William C. Donnino, Supplementary Practice Commentary, McKinney's Cons. Laws of N.Y., Crim. Proc. Law § 510.30 (2012).

²⁰ Joshua Houy, *State v. Janklow: "Shall" Means Shall*, 50 S. DAKOTA L. REV. 529, 533 (2005).

²¹ Rahman, *supra* note 16, at 853.

²² Rachel Smith, *Condemned to Repeat History? Why the Last Movement for Bail Reform Failed, and How This One Can Succeed*, 25 GEO. J. ON POVERTY L. AND POLY, 451, 455 (2018).

²³ CTR. ON THE ADMIN. OF CRIMINAL LAW, *supra* note 8, at 4. Similarly, major figures have recently advocated for similar bail reform in New York. Among them is the former Chief Judge of the New York Court of Appeals, Jonathan Lippman, who has repeatedly advocated for an end to cash bail. See Jonathan Lippman, *Commit to Making Bail Reform Work: This Is No Time to Lose Our Will on a Vital Criminal Justice Overhaul*, N.Y. DAILY NEWS (Jan. 15, 2020, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-make-bail-reform-work-20200115-ql463pmuhjdvhoebykbakzzksu-story.html> [https://perma.cc/FQ56-GQTC].

ensure a person's return to court, many jurisdictions throughout the country amended their bail statutes to remedy the issue.²⁴

Following suit in 1970, and “troubled by the notion that setting bail in amounts that people could not make was causing them to serve time, even though presumed innocent,” New York enacted the bail statute that was in effect until December 31, 2019.²⁵ In an effort to help get accused people who could not afford their bail out of jail, the legislature substantially expanded the forms of bail, allowing a defendant to post bail in nine different forms including typical options such as cash bail and insurance company bonds, as well as the more manageable unsecured surety bonds and unsecured appearance bonds, which required little to no money down.²⁶ The statute permitted judges to assign two forms of bail, or designate different amounts of bail in varying forms.²⁷ The statute also enumerated seven factors judges must take into consideration when assessing bail determinations—all of which focused on the accused person's ability to return to court.²⁸

Despite the expansion of bail alternatives and the legislature's intent to make it easier for an accused person to await trial outside of jail,²⁹ the statute did not achieve its purpose. As one commentator noted, the bail statute was “drafted to make sure that exactly what is happening today didn't happen . . . The problem is that nobody follows it.”³⁰ As a result of the court's manner of implementing the bail statute (rarely using any types of bail other than cash and insurance bonds and effectively reading a public safety element into the law) thousands of New Yorkers continued finding themselves behind bars simply because they could not make bail.³¹

This problem is not unique to New York. In fact, on any

²⁴ Lauren Kelleher, *Out on Bail: What New York Can Learn from D.C. About Solving a Money Bail Problem*, 53 AM. CRIM. L. REV. 799, 810–12 (2016).

²⁵ Justine Olderman, *Fixing New York's Broken Bail System*, 16 CUNY L. REV. 9, 15 (2012).

²⁶ N.Y. CRIM. PROC. LAW § 520.10(1) (McKinney 2019); KATAL CTR. FOR HEALTH, EQUITY, AND JUST., NEW YORK STATE BAIL CHART 2 (2017), https://d3n8a8pro7vhnmx.cloudfront.net/katal/pages/1963/attachments/original/1546763524/Katal_NYStateBailChart_Factsheet_07.pdf?1546763524 [<https://perma.cc/3NJS-QMBL>].

²⁷ N.Y. CRIM. PROC. LAW § 520.10(1) (McKinney 2019).

²⁸ *Id.* § 510.30(2)(a).

²⁹ Olderman, *supra* note 25, at 16–17.

³⁰ *Id.* at 15.

³¹ *Id.* at 17.

given day nearly half-a-million people are incarcerated in state jails without a conviction across the United States.³² The statistics in New York are equally stark. One study found that between 2010 and 2014, 177,390 people were held in custody without a conviction in eight counties throughout New York State.³³ Sixty percent of people held on bail had only a misdemeanor or violation as their most serious charge and of the 46,651 people who spent one week or more in custody, 20% had bail of \$500 or less.³⁴ The Center for Court Innovation recently explained that on any given day in 2019, more than 22,000 New Yorkers were held in jails without convictions—about 8,000 in New York City and 14,000 in the rest of the state. More than 60% of them were being held pretrial, “usually stemming from an inability to afford money bail.”³⁵

Another study found that in every year nearly 50,000 cases in New York City have a defendant who cannot make bail and that “[n]early half of these defendants stay in detention until disposition of the case.”³⁶ The accused person’s inability to leave jail was related to the bail amount. In non-felony cases where bail was set, for example, the accused person was unable to post bail nearly half the time.³⁷ The mean bail amount in those non-felony cases was only \$1,226.³⁸

Despite New York’s historic attempts at ensuring that people remain in jail only if they cannot return to court, thousands of New Yorkers sit in jail every day simply because they cannot make bail. We now turn to the legislature’s most recent attempts at remedying this issue.

II

³² WENDY SAWYER & PETER WAGNER, PRISON POLICY INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2019 (2019), <https://www.prisonpolicy.org/reports/pie2019.html> [https://perma.cc/Q59E-Q78Y].

³³ N.Y. C.L. UNION, PRESUMED INNOCENT FOR A PRICE: THE IMPACT OF CASH BAIL ACROSS EIGHT NEW YORK COUNTIES 3 (2018). The study reviewed data in Albany, Dutchess, Monroe, Niagara, Orange, Schenectady, Ulster and Westchester counties.

³⁴ *Id.* at 2–3.

³⁵ CTR. FOR COURT INNOVATION, *supra* note 5, at 1.

³⁶ MARY T. PHILIPS, N.Y.C. CRIM. JUST. AGENCY, INC., A DECADE OF BAIL RESEARCH IN NEW YORK CITY 107 (2012) [hereinafter CJA], <https://www.prisonpolicy.org/scans/DecadeBailResearch12.pdf> [https://perma.cc/PQ52-MPCG].

³⁷ *Id.* at 110.

³⁸ *Id.*

THE AMENDED BAIL STATUTE

As opposed to its predecessor, the most recent iteration of the bail statute takes a “charge-based approach,” meaning that the court can impose varying physical restrictions on the accused person depending on what the government alleges she did.³⁹ In New York there are three main categories of criminal offenses relevant to the bail statute: violations, misdemeanors, and felonies.⁴⁰ A violation is defined as an offense other than a traffic infraction for which a sentence to a term of imprisonment of up to 15 days may be imposed.⁴¹ It is the least serious category of prohibited activity and is not a crime. It includes offenses such as harassment, trespass, and disorderly conduct. A misdemeanor is an offense other than a traffic infraction of which a sentence in excess of 15 days but not greater than one year may be imposed.⁴² Misdemeanors are crimes and are grouped into one of three classes with different punishment ranges: Class A, Class B, or Unclassified. Examples of misdemeanors include petit larceny, criminal mischief in the fourth degree, and assault in the third degree. Finally, a felony is an offense for which a sentence to a term of imprisonment in excess of one year may be imposed.⁴³ Felonies are crimes, with five categories and two subcategories ranging from the most to the least serious in terms of severity of offense and degree of potential punishment incurred. Felonies include criminal possession of a weapon, burglary, and many drug charges. An important subcategory of felonies includes those which are characterized by the use of violence and carry significantly longer sentences.⁴⁴ Violent felonies include rape, kidnapping, arson and murder.

At all times, judges must impose the least restrictive set of conditions to ensure that the accused returns to court when required.⁴⁵

³⁹ INSHA RAHMAN, VERA INST., NEW YORK, NEW YORK: HIGHLIGHTS OF THE 2019 BAIL REFORM LAW 9 (2019) [hereinafter HIGHLIGHTS], <https://www.vera.org/publications/new-york-new-york-2019-bail-reform-law-highlights> [<https://perma.cc/MQ7A-Y2DV>].

⁴⁰ *Criminal Justice System for Adults in NYS*, N.Y. STATE OFFICE OF MENTAL HEALTH <https://omh.ny.gov/omhweb/forensic/manual/html/chapter1.htm> [<https://perma.cc/X9UH-3CZK>] (last visited Aug. 11, 2020).

⁴¹ N.Y. PENAL LAW § 10(3) (McKinney 2020).

⁴² *Id.* § 10(4).

⁴³ *Id.* § 10(5).

⁴⁴ *Id.* § 70.02.

⁴⁵ N.Y. CRIM. PROC. § 510.30(1) (McKinney 2020).

A. Elimination of Bail for Many Misdemeanor Offenses

The 2019 and 2020 amendments ensure that many people accused of misdemeanors do not remain in jail. Under the new statute, there is a presumption that a judge must release a person accused of a misdemeanor on their own recognizance.⁴⁶ The statute further provides that a judge can impose non-monetary conditions on the accused person if the judge makes an individualized determination that the accused person poses a flight risk (a risk that they will not return to court).⁴⁷

What will that look like in practice? Take, for example, a person who is involved in a fight and is then accused of taking several dollar bills from the other person without permission. She could ultimately be charged with criminal possession of stolen property in the fifth degree—a Class A misdemeanor.⁴⁸ She is presumed innocent, and by statute she would be allowed to leave jail as she awaits trial. If a judge is not convinced, however, that the accused person will appear at future court appearances, the court could impose travel restrictions or order that the accused person be subject to supervised release, among other non-monetary options.⁴⁹

There are nine exceptions to the elimination of money bail in misdemeanor cases. A judge may set bail if a person is accused of: (1) a sex offense misdemeanor; (2) misdemeanor criminal contempt where there is an underlying allegation of domestic violence; (3) criminal obstruction of breathing or blood circulation; (4) assault in the third degree; (5) endangering the welfare of a child when the accused is a level three sex offender; (6) bail jumping in the third degree; (7) escape in the third degree; (8) a Class A misdemeanor involving harm to an identifiable person or property; (9) and any misdemeanor that is alleged to have caused the death of another person.⁵⁰ In these situations, the judge may release the accused on their own recognizance, under non-monetary conditions, or fix bail.

Another tool being used in lieu of cash bail for many low-

⁴⁶ *See Id.* §§ 510.10(3), 530.20(1).

⁴⁷ *Id.*

⁴⁸ N.Y. PENAL LAW § 165.40 (McKinney 2020).

⁴⁹ CTR. FOR COURT INNOVATION, *supra* note 5, at 5.

⁵⁰ N.Y. CRIM. PROC. § 510.10(4)(e), (h) (McKinney 2020); *id.* § 530.20(1)(b)(v), (viii); FY 2020 N.Y. GOVERNOR EXECUTIVE BUDGET, *supra* note 6, at 304–05. Under the 2019 amendments, only the first two of these categories were eligible for bail. “Criminal contempt” in this context means that a person violated a court order to stay away from a certain person or place.

level misdemeanor offenses and violations is the Desk Appearance Ticket (DAT). Instead of taking a person into custody until the Criminal Court arraignment, officers can issue a DAT which assigns a date in the future for the accused person to appear in court. Because the accused person is released until the arraignment date, they do not need to wait in jail before seeing a judge.

DATs are an alternative to physical incarceration that law enforcement officers have discretion to use in cases involving relatively minor misdemeanor offenses, especially when the accused person lacks a prior criminal record.⁵¹ Under its previous use, research indicated that law enforcement officers issued DATs almost exclusively to low risk populations,⁵² and even those later arrested for failing to appear (perhaps in part due to the 60-90 day wait time in between issuing the ticket and a court date) pose a low risk to the community.⁵³ With the new 2019 amendments to the bail statute, nearly all misdemeanor infractions and some Class E felonies are subject to mandatory DATs.⁵⁴ Police officers retained discretion on whether to issue DATs in several scenarios, including, but not limited to, when the arrested person has one or more outstanding warrants, when they have failed to make required, scheduled appearances in court on cases within the last two years, and when they are unwilling or unable to provide identifying information. Judges may issue a bench warrant if the accused person fails to appear in court on the scheduled arraignment date. DATs continue to be an effective tool in minimizing disruptions to work, and facilitating community support—two reliable markers of pretrial success.

B. Qualifying Offenses: Violent Felonies, Non-Violent Felonies, and Select Misdemeanors

Despite the sweeping changes for misdemeanor pretrial

⁵¹ MICHAEL REMPEL, ASHMINI KERODAL, JOSEPH SPADAFORÉ, & CHRIS MAI, *CTR. FOR COURT INNOVATION, JAIL IN NEW YORK CITY: EVIDENCE-BASED OPPORTUNITIES FOR REFORM* vii (2017) https://www.courtinnovation.org/sites/default/files/documents/NYC_Path_Analysis_Final%20Report.pdf [perma.cc/MK6C-7GRF].

⁵² *Id.* at vi. (“Only 1% of DAT defendants posed a high general risk of rearrest, and only 16% were in the next moderate-high risk category. Further, only 1% were in *either* the high or moderate-high risk categories for a violent felony rearrest—signaling that those who currently receive DATs do not generally pose a danger to the public.”) (emphasis in original).

⁵³ *Id.* at 46.

⁵⁴ N.Y. CRIM. PROC. LAW §150.30 (McKinney 2019).

release, the 2019 amendments preserved bail and remand mechanisms for a wide range of “qualifying offenses.” The 2020 amendments produced the same dynamic, though there are now more qualifying offenses in both misdemeanor and felony categories. Qualifying offenses include all violent felonies, the misdemeanors outlined above, and select non-violent felonies.

Under the statute, bail is still available for some misdemeanors and non-violent felonies as well as all violent felonies. Additionally, a court may remand (order the detention of) any person accused of a qualifying felony offense if a judge determines that no circumstances would guarantee their return to court. The statute specifically enumerates twenty categories for which bail remains an option for judges to use.⁵⁵ Those categories include: (1) all violent felonies with the exception of robbery in the second degree, and burglary in the second degree provided that the accused is not charged with entering the living area of a dwelling; (2) crimes involving witness intimidation; (3) crimes involving witness tampering; (4) Class A felonies with the exception of nearly all controlled substance offenses;⁵⁶ (5) sex trafficking, sex trafficking of a child, felony sex offenses, crimes involving incest; (6) conspiracy in the second degree where the underlying allegation is that the accused person conspired to commit a homicide, manslaughter, or murder-related Class A felony; (7) certain terrorism-related offenses; (8) criminal contempt in the first or second degree and aggravated criminal contempt when a person is accused of violating an order of protection; and (9) a series of sex-related offenses against children; (10) any crime that is alleged to have caused the death of another person; (11) obstruction of breathing or blood circulation, strangulation in the second degree, unlawful imprisonment in the first degree against a member of the accused’s same family or household; (12) aggravated vehicular assault, vehicular assault in the first degree; (13) assault in the third degree, arson in the third

⁵⁵ N.Y. CRIM. PROC. §§ 510.10(4)(a)–(i), 530.20(1)(b)(i)–(viii) (McKinney 2020). The 2019 amendments to the bail statute enumerated nine categories of bail-eligible offenses. The 2020 amendments to the statute expanded the list of bail-eligible offenses to 20 categories. FY 2020 N.Y. GOVERNOR EXECUTIVE BUDGET, *supra* note 6, at 304–05.

⁵⁶ Only A-I controlled substance felonies are bail eligible under the 2020 amendments to the bail statute. FY 2020 N.Y. GOVERNOR EXECUTIVE BUDGET, *supra* note 6, at 304. For example, a person accused of operating as a major trafficker under Penal Law § 220.77 is subject to bail and remand. N.Y. CRIM. PROC. §§ 510.10(4)(d), 530.20(1)(b)(iv) (McKinney 2020).

degree when the offense is charged as a hate crime; (14) aggravated assault upon a person less than 11 years old, criminal possession of a weapon on school grounds; (15) grand larceny in the first degree, enterprise corruption, money laundering in the first degree; (16) failure to register as a sex offender, endangering the welfare of a child where the accused is required to maintain registration and is designated a level three offender; (17) certain crimes involving bail jumping or escaping from custody (18) any felony committed by the accused while serving a sentence of probation or while released on post-release supervision; (19) a felony where the accused qualifies as a persistent felony offender; and (20) any felony or Class A misdemeanor involving harm to a person or property where the conduct occurred while the accused was released for a separate felony or Class A misdemeanor involving harm to a person or property.⁵⁷ If someone is accused of committing any of these qualifying offenses, then a judge may either release them on their own recognizance, release with non-monetary conditions, set bail, or remand the individual.⁵⁸

C. Projected Impact

Several studies analyzed the projected impact of the 2019 amendments to the bail statute.⁵⁹ Had the 2019 bail statute applied in 2018, some estimates projected that an additional 20,000 people would have been released from New York City jails throughout the year.⁶⁰ Another projection found that had the 2019 amendments been in effect on April 1, 2019, 2,138 people would have been released from New York City jails; 43% of pretrial detainees on that day.⁶¹ The impact on jurisdictions outside of New York City is projected to be even greater because

⁵⁷ N.Y. CRIM. PROC. §§ 510.10(4)(a)–(i), 530.20(1)(b)(i)–(viii) (McKinney 2020); FY 2020 N.Y. GOVERNOR EXECUTIVE BUDGET, *supra* note 6, at 304–05. Only the first nine of these categories were qualifying offenses under the 2019 amendments.

⁵⁸ It is important to review the new statute in context. The bail statute works in tandem with existing preventive detention mechanisms that permit judges to hold accused peoples in jail when they are accused of certain types of offenses. See CTR. ON THE ADMIN. OF CRIMINAL LAW, *supra* note 8, at 22–23; N.Y. CRIM. PROC. § 530.60(2), Spiros A. Tsimbinos, Practice Commentary, (McKinney 2020).

⁵⁹ Although anticipated, the eventual language of the 2020 amendments was not made available until very close to the passage of the budget.

⁶⁰ OLIVE LU, QUINN HOOD, ERICA BOND, MAYA TELLMAN, & PREETI CHAUHAN, DATA COLLABORATIVE FOR JUST., ASSESSING POTENTIAL IMPACTS OF 2020 BAIL REFORMS IN NEW YORK CITY 1 (2019), https://datacollaborativeforjustice.org/wp-content/uploads/2019/09/2019_08_20_Bail-Brief-updated_GP.pdf [<https://perma.cc/TYR5-L6K8>].

⁶¹ CTR. FOR COURT INNOVATION, *supra* note 5, at 8.

“many upstate jurisdictions currently detain a greater proportion of misdemeanor defendants during the pretrial period.”⁶² Indeed, the new statute is expected to reduce New York State’s jail population by as much as 40%.⁶³

With the newly expanded list of bail and remand-eligible qualifying offenses stemming from the 2020 amendments, many reform advocates predict that the actual impact of the bail statute will be significantly lower than initial projections of the 2019 statute.⁶⁴

III

THE DEBATE

The history and statutory scheme of the new bail law address many of the issues that proponents and critics have wrestled with. Nevertheless, there are additional widespread questions that deserve attention. We attempt to address those questions below.

Will people really return for their court dates?

Statistics suggest that the vast majority of people will return for their court dates. Prior to the enactment of the new bail law, 86% of people released from jail (after posting bail or on their own recognizance) returned for their court dates in New York City, as opposed to the 75% national average.⁶⁵ Further,

⁶² *Id.* at 9.

⁶³ RAHMAN, *supra* note 39, at 4; Roxanna Asgarian, *The Controversy over New York’s Bail Reform Law, Explained*, VOX (Jan. 17, 2020, 8:30 AM), <https://www.vox.com/identities/2020/1/17/21068807/new-york-bail-reform-law-explained> [<https://perma.cc/HMR7-33BR>].

⁶⁴ NYC Defenders Statement on Legislative Rollback of Bail and Discovery Reforms, BRONX DEFENDERS (Apr. 3, 2020), <https://www.bronxdefenders.org/nyc-defenders-statement-on-legislative-rollback-of-bail-and-discovery-reforms/> [<https://perma.cc/4JVA-WTP6>]; Nick Pinto, *Amid Coronavirus Crisis, Andrew Cuomo Held New York’s Health Care Hostage to Undo Criminal Justice Reforms*, THE INTERCEPT (Apr. 3, 2020, 3:06 PM), <https://theintercept.com/2020/04/03/andrew-cuomo-coronavirus-bail-criminal-justice/> [<https://perma.cc/9QV7-SDD6>].

⁶⁵ Hager, *supra* note 13. The Bureau of Justice Statistics reported in 2017 that nationally, 26 percent of felony defendants released on recognizance failed to appear. PETER WAGNER AND WENDY SAWYER, THE PRISON POLICY INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2018 (2018), <https://www.prisonpolicy.org/reports/pie2018.html> [<https://perma.cc/4A5V-4NQC>]. Whereas that year in New York City, “only 14 percent of defendants released on recognizance failed to appear for even a single court date.” AUBREY FOX & STEPHEN KOPPEL, THE N.Y.C. CRIMINAL JUST. AGENCY, PRETRIAL RELEASE WITHOUT MONEY: NEW YORK CITY, 1987-2018 10 (2019), https://www.nycja.org/assets/CJA_RWM_March_2019.pdf [<https://perma.cc/9PGQ-9TT5>]. Unfortunately, for those whom bail is set that do not want to plead guilty, the amount of time they have to wait for their day in court is extensive and sends ripples throughout their own and their family’s lives.

in New York City, only about 4% of people accused of felonies and 7% of people accused of non-felonies failed to appear within 30 days of their court dates.⁶⁶ This is the category of accused people that raised the most questions and fears in communities wondering how bail reform would impact their lives.

The results from non-profit bail funds are even more promising. For example, the Brooklyn Bail Fund—a non-profit that pays bail for poor people who cannot afford it—reported that an astounding 95% of their clients made all of their scheduled court appearances.⁶⁷ The Bronx Freedom Fund had very similar success with 95% of their almost 3000 clients returning for their court dates.⁶⁸ Across the country, appearance rates are typically even higher for those people accused of serious felonies.⁶⁹

It is also important to keep these statistics in context. The percentage of people who failed to appear in court represents both people who could not appear for a variety of reasons (e.g., sickness or homelessness) as well as those who absconded. In fact, the amount of people who abscond and that can be classified as fugitives is very low.⁷⁰ Many of the people who fail to appear for their court dates are not on the run, but rather simply forget about a court date that is often months away⁷¹ and “are often the most vulnerable people in the criminal justice system: poor, homeless, or mentally ill.”⁷² Indeed, in New York City, a reminder and a MetroCard is usually all that is needed to guarantee a person’s return.⁷³

⁶⁶ Robin Steinberg & David Feige, *The Problem with NYC’s Bail Reform*, THE MARSHALL PROJECT (July 9, 2015, 4:16 PM), <https://www.themarshallproject.org/2015/07/09/the-problem-with-nyc-s-bail-reform> [https://perma.cc/7DLL-A9PK].

⁶⁷ *About Us*, BROOKLYN COMMUNITY BAIL FUND, <https://brooklynbailfund.org/about-us> [https://perma.cc/ZW9B-XT4L]. Since their founding in 2015, the Brooklyn Bail Fund has posted bail for over 4,000 people, at an average amount of \$1,100. *Id.* at *Our Results*.

⁶⁸ Email from Elena Weissmann, Executive Director of the Bail Project, formerly the Bronx Freedom Fund, to author (Mar. 3, 2020, 2:04 PM), on file with author.

⁶⁹ Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 689–90 (2018).

⁷⁰ *Id.* at 689.

⁷¹ See, e.g., Ethan Corey & Puck Lo, *The ‘Failure to Appear’ Fallacy*, THE APPEAL, (Jan. 9, 2019), <https://theappeal.org/the-failure-to-appear-fallacy/> [perma.cc/KA6P-67XP]; Gouldin, *supra* note 69, at 729.

⁷² Corey & Lo, *supra* note 71.

⁷³ PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA (at end of chapter 3) (The New York Press 2017).

The bail statute does, however, include various mechanisms to deal with pretrial noncompliance. For example, if a person accused of a felony is at liberty, a judge may revoke the release and set bail, or remand the defendant if the court “finds reasonable cause to believe the defendant committed” a Class A felony, a violent felony, or intimidated a witness.⁷⁴ Further, this part of the bail statute includes a catch-all provision which permits the court to set bail if any person who was released from jail is found, by clear and convincing evidence, to have willfully failed to appear before the court, violated an order of protection, intimidated a victim or witness, tampered with a witness, or stands charged with a felony and committed another felony while at liberty.⁷⁵ Trial courts have already begun applying these mechanisms.⁷⁶

Will the new bail law release criminals into my community? Having a criminal record means having a record of prior, non-expunged criminal offenses. In New York this list includes arrest history, charges, court judgments/convictions, as well as pending dispositions. There are certainly some people with criminal records released under varying pre-trial conditions, but they are not the majority. Further, having a criminal record does not necessarily mean someone was convicted of a crime. A criminal offense encompasses arrests and charges that were dropped or dismissed. For example, of New York City’s 314,166 misdemeanor and felony arraignments in 2013, individuals with prior arrests accounted for only 38% of the total.⁷⁷

Moreover, in those situations where a person has been convicted of a prior offense and is rearrested and accused of a new crime, it is important to bear in mind that they have already paid their debt to society for their previous wrongdoing and should not be presumed guilty of any new charges based on their criminal history. Bail and pretrial release are only available for people who are accused of a crime, and none of the people released under the bail law have been convicted of the crime that they are accused of.

Granting a greater number of people bail cannot be assumed to guarantee an uptick in crime or criminal activity,

⁷⁴ N.Y. CRIM. PRO. § 530.60(2)(a) (McKinney 2020).

⁷⁵ *Id.* § 530.60(2)(b)(i)–(iv).

⁷⁶ *People v. Chensky*, 67 Misc. 3d 373, 375 (Sup. Ct. Nassau Cnty. 2020) (finding that a defendant’s failure to appear to court dates was willful and persistent under the new bail statute).

⁷⁷ REMPEL, KERODAL, SPADAFORÉ, & MAI, *supra* note 51, at 31.

since not being able to afford bail is not a predictor of likelihood to engage in criminal activity during the pendency of one's case. Counter to that fear, the most accurate predictors of pretrial success (remaining arrest-free during the pretrial period and appearing at scheduled court dates) are: prior convictions and incarceration, prior failures to appear to scheduled court dates, prior supervision revocations (probation or parole revocation), current criminal justice status (an open case), current top charge, and some demographic risk factors with younger people and males classified as higher risk.⁷⁸ Notably, the same reliable predictors of success or failure during the pretrial period have been known since first studied in 1961 when the Vera Center launched The Manhattan Bail Project. The ability to pay bail is not and has never been a strong predictor. As bail rates increased, pretrial failure rates remained steady at 30 percent.⁷⁹

Shouldn't judges be permitted to consider public safety in their bail determinations?⁸⁰ Yes, but only if they can do so accurately. Whether or not judges should consider public safety when making bail determinations has been a point of contention in New York for over 50 years. As previously mentioned, the New York legislature has rejected adding a public safety element to the bail statute on three occasions.⁸¹ Nonetheless, the debate rages on. Recently two prominent judges voiced their support for inclusion of this factor: former Chief Judge of the New York Court of Appeals Jonathan Lippman⁸² and current Chief Judge Janet DiFiore.⁸³

⁷⁸ *Id.* at 23

⁷⁹ RAM SUBRAMANIAN, RUTH DELANEY, STEPHEN ROBERTS, NANCY FISHMAN, & PEGGY MCGARRY, VERA INST. OF JUST., INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 30 (2015), <http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/01/incarcerations-front-door-report.pdf> [<https://perma.cc/G5E5-QH6Y>].

⁸⁰ New York is currently the only state in the country that does not consider whether an accused poses a threat to the community prior to setting bail. Other states which have eliminated cash bail, such as New Jersey, consider whether an accused poses a threat to the community prior to either releasing them or incarcerating them while they wait for trial. Taryn A. Merkl, *New York's Upcoming Bail Reform Changes Explained*, BRENNAN CTR. FOR JUST. (Dec. 10, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-upcoming-bail-reform-changes-explained> [<https://perma.cc/MY2N-M65Y>].

⁸¹ See *supra* note 9.

⁸² Lippman, *supra* note 23.

⁸³ Bernadette Hogan & Carl Campanile, *Campaign Begins to Revise New York's New No-bail Law*, N.Y. POST (Jan. 3, 2020, 9:26 PM), <https://nypost.com/2020/01/03/campaign-begins-to-revise-new-yorks-new-no-bail-law/> [<https://perma.cc/Z7MV-AC25>].

The current modes of determining a person's future dangerousness or the risk they pose to their communities, however, are riddled with inaccuracies. The various existing tools at a judge's disposal tend to have varying rates of accuracy and have come under severe scrutiny for perpetuating racial and socioeconomic biases.⁸⁴ They simply do not work accurately.

Further, many commentators including prominent members of the criminal bar have noted the commonly accepted notion that judges throughout New York have used bail to imprison people who they believed were risks to public safety despite the old bail statute specifically rejecting that consideration.⁸⁵ That application of the previous bail statute resulted in thousands of unconvicted New Yorkers spending weeks and sometimes years of their lives behind bars.⁸⁶

Are some people being released after being accused of serious offenses? Some of the offenses that are no longer eligible for bail are more serious than others. Under the 2020 amendments, the crime of menacing in the third degree, a Class E misdemeanor,⁸⁷ and burglary in the second degree where the accused does not enter the living area of a home, a Class C felony,⁸⁸ are not bail eligible. Even so, the new bail statute seeks to keep bail as an option for crimes that involve violence, that involve sexual abuse, and that involve domestic abuse. Opponents of the law have noted that nonetheless some serious offenses are not eligible for bail.⁸⁹

Does bail reform affect poor people and people of color more than others? Meaningful bail reform impacts poor people and people of color all across New York State, in part

⁸⁴ Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043, 1080–82 (2019); Letter from Over 100 Community & Advocacy Groups Across New York State to Governor Andrew Cuomo 1–3 (November 2017), <http://bds.org/wp-content/uploads/Bail-Reform-Letter.pdf> [<https://perma.cc/BV8W-HCVW>]; Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1133–34 (2018); Michael A. Rosengart, Note, *Justice Reinvestment in Alaska: The Past, Present, and Future of SB 91*, 34 ALASKA L. REV. 237, 282–83 (2017).

⁸⁵ See, e.g., Kelleher, *supra* note 24, at 800; Rahman, *supra* note 16, at 873–74; Olderman, *supra* note 25, at 17–18; CTR. ON THE ADMIN. OF CRIMINAL LAW, *supra* note 8, at 26.

⁸⁶ Olderman, *supra* note 25, at 17.

⁸⁷ N.Y. PENAL LAW § 120.15 (McKinney 2020).

⁸⁸ *Id.* § 140.25.

⁸⁹ New York State Senator Robert G. Ort, *Ortt Calls For Action on Criminal Justice Reform* (New York State Senate, January 7, 2020), <https://www.nysenate.gov/newsroom/press-releases/robert-g-ortt/ortt-calls-action-criminal-justice-reform> [<https://perma.cc/A9T3-T4ML>].

because of the differing rates at which bail is granted for different demographics. People of color are overrepresented in New York's prisons and jails. Black people are 16% of the state's population and 53% of the incarcerated population. Latinx people are 18% of the state's population and 22% of the incarcerated population. White people are 58% of the state's population and 26% of the incarcerated population.⁹⁰ Inevitably, bail reform will impact different demographics in line with their contact with the criminal system.

Though the degrees to which race and racism in the criminal system impact myriad outcomes for accused people can be difficult to measure because of its complexity, pervasiveness, and limited research models, a significant body of research has still been able to illustrate the way cash bail disproportionately harms low income people of color.⁹¹ In researching the impact of pretrial detention on arraignment proceedings in New York City, professors Emily Leslie and Nolan G. Pope found that higher pretrial detention rates among minority defendants explain 40 percent of the black-white gap in rates of being sentenced to prison and 28 percent of the Hispanic-white gap.⁹² Black and Latinx New Yorkers were given DAT custodial arrest diversions seven and six percent less than white New Yorkers in 2013.⁹³ In other major urban areas (Philadelphia County and Miami Dade County) research illustrated:

that defendants with a prior offense, black defendants, defendants who are nonemployed, and defendants from zip codes with below-median incomes are substantially more likely to be initially detained before trial than their respective counterparts. These more disadvantaged defendants also have worse case and labor market outcomes following the bail hearing.⁹⁴

⁹⁰ *New York State Profile*, THE PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/profiles/NY.html> [https://perma.cc/9VSH-PZWR] (last visited August 16, 2020).

⁹¹ LÉON DIGARD & ELIZABETH SWAVOLA, VERA INST. OF JUST., JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION 7 (2019) <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf> [https://perma.cc/BD56-ENTZ].

⁹² Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J. OF L. AND ECON. 529, 531 (2017), http://econweb.umd.edu/~pope/pretrial_paper.pdf [https://perma.cc/85JF-PBE2].

⁹³ REMPEL, KERODAL, SPADAFORÉ, & MAI, *supra* note 54, at 45.

⁹⁴ Will Dobbie, Jacob Goldin, & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly*

Cash bail has historically served to illuminate poverty and harm already vulnerable communities, rather than keep them safer—it's supposed purpose.

What are the collateral consequences of bail reform?

The new bail statute benefits both communities and accused people. New York will save millions of taxpayer dollars by releasing non-violent offenders pending trial. A recent report by the New York City Comptroller Scott Stringer found that the City alone spent a record \$337,524 per incarcerated person during the 2019 fiscal year—that is \$924 per day per person.⁹⁵

Moreover, a person's ability to fight her case from outside of prison leads to more just outcomes for them and the community. From a legal standpoint, being released pretrial leads to less people pleading guilty simply because they want to get out of jail⁹⁶ and people are not forced into a decision that results in a litany of negative consequences.⁹⁷ Pretrial release also allows accused people to exercise their right to go to, and better prepare for, trial, oftentimes leading to more favorable and just dispositions or a trial before a jury of their peers.⁹⁸ For example, in 2016 pretrial detention increased the likelihood of conviction by 7 to 13 percentage points in New York City for misdemeanor and felony convictions respectively, regardless of guilt or strength of the prosecution's case.⁹⁹

More just outcomes in criminal cases also lead to better outcomes for communities. When a person is held in jail pretrial, the consequences are often devastating. A single

Assigned Judges, 108 AM. ECON. REV. 201, 214 (2018).

⁹⁵ Rich Calder, *NYC Spends Record \$337,524 per Inmate in Jail Annually: Report*, N.Y. POST (DEC. 6, 2019, 1:09 PM), <https://nypost.com/2019/12/06/nyc-spends-record-337524-per-inmate-in-jail-annually-report/> [<https://perma.cc/TLB8-BRB2>].

⁹⁶ Paul Heaton, Sandra G. Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 67 STAN. L. REV. 711, 714 (2017).

⁹⁷ A criminal conviction could lead to deportation, loss of government benefits, and inability to find employment, among many others. See Wallace Wade, *Who's Lying Now?*, 38 W. STATE U. L. REV. 1, 5 (2010); Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 705–06 (2002).

⁹⁸ Angel Jackson, *The Unintended Consequences of Money Bail*, BURNS INST. FOR JUST. FAIRNESS & EQUITY BLOG (Apr. 18, 2016), https://www.burnsinstitute.org/blog/the-unintended-consequences-of-money-bail/#_ftn1 [<https://perma.cc/57XJ-SMMC>].

⁹⁹ Emily Leslie and Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J. OF L. AND ECON. (2017) http://econweb.umd.edu/~pope/pretrial_paper.pdf [<https://perma.cc/T4LA-S6XJ>].

mother who is arrested and held in jail because she cannot afford bail, for example, may lose custody of her child.¹⁰⁰ A person who misses their rent payment because they cannot afford to pay bail can be evicted and become homeless.¹⁰¹ People who are held because they cannot afford bail often lose their jobs or suffer from severe trauma and deteriorating mental health.¹⁰²

The punishments people receive without having been convicted of a crime follow them beyond the torture of being in jail. That accused's mother's family is now destroyed. That person who could not make their rent is now homeless and that person whose mental health plummeted as they awaited trial could lead to the unthinkable.¹⁰³

Instead of being subject to premature and possibly unnecessary or unjust punishment, pretrial release also helps accused people continue to be a productive member¹⁰⁴ of society as they await trial. When a person is at liberty pending trial, they can continue working and sustain the important social and family structures that are the backbone of our communities.

Do people commit new crimes when they are released?

Both people who are able to pay bail and those who are released on their own recognizance can commit new crimes while they are free. Indeed, various news outlets have recently reported a few instances in which people who were released committed particularly heinous crimes.¹⁰⁵

¹⁰⁰ Kellen Funk, *The Present Crisis in American Bail*, YALE L. FORUM 1098, 1113 (2019).

¹⁰¹ Scott M. Stringer, *The Human Costs of Cash Bail in NYC*, N.Y. AMSTERDAM NEWS (Mar. 26, 2019, 8:00 AM), <http://amsterdamnews.com/news/2019/mar/26/human-costs-cash-bail-nyc/> [<https://perma.cc/38JB-32TD>].

¹⁰² Dorothy Weldon, *More Appealing: Reforming Bail Review in State Courts*, 118 COLUM. L. REV. 2402, 2424 (2018).

¹⁰³ The story of Kalief Browder of course comes to mind. His story made national headlines when he committed suicide at the age of 22 after spending three years in jail, only to have the charges against him dismissed. He was accused of stealing a backpack. P.R. Lockhart, *New York's Justice System Failed Kalief Browder. Now the City Will Pay His Family \$3.3 Million*, VOX (Jan. 25, 2019, 11:50 AM), <https://www.vox.com/2019/1/25/18196524/kalief-browder-estate-settlement-new-york-rikers> [<https://perma.cc/DU37-J7T5>].

¹⁰⁴ Productivity of a person, of course, is not a litmus test for when we should treat them humanely.

¹⁰⁵ See, e.g., Samantha Michaels, *New York Politicians Are Using Anti-Semitic Attacks to Scare People About Bail Reform*, MOTHER JONES (Jan. 10, 2020), <https://www.motherjones.com/crime-justice/2020/01/new-york-politicians-are-using-the-anti-semitic-attacks-to-scare-people-about-bail-reform/> [<https://perma.cc/S8UC-NSLA>].

Nevertheless, based on the statistics currently available, the vast majority of people who are released pending trial do not commit new offenses. A recent study surveying bail practices in New York City found that nearly two-thirds of misdemeanor defendants posed only a minimal risk of rearrest.¹⁰⁶ The likelihood of people who are released pretrial committing a violent offense is even lower. A study found that, “90 percent of detained defendants with a misdemeanor charge and 78 percent with a felony charge posed only a minimal-to-moderate risk of re-arrest on a violent felony charge.”¹⁰⁷ Another study suggested that based on data from 2001, about 17% of people released pretrial were rearrested, and that only 2% of people released pretrial that were rearrested were accused of a violent felony in New York City.¹⁰⁸

Results from other states are similarly promising. In Kentucky, for example, 90% of people released on their own recognizance or to a supervised release program returned to court and did not reoffend pretrial.¹⁰⁹ At the federal level, a 2012 study by the Department of Justice found that only 4% of people released pretrial reoffended before their court date.¹¹⁰

Accordingly, although there is certainly a likelihood of people reoffending while they are released, the vast majority of people pose a minimal risk of reoffending. The likelihood of someone committing a violent felony while on pretrial release is even smaller.

Further, although it may seem counterintuitive, various studies have shown that when a person is detained prior to the adjudication of his/her innocence, the more likely they are to reoffend. That is, someone who is held in jail and then released pretrial is even more likely to reoffend than someone who was released on their own recognizance arraignment or before.¹¹¹

¹⁰⁶ INDEPENDENT COMMISSION ON NEW YORK CITY CRIMINAL JUSTICE AND INCARCERATION REFORM, A MORE JUST NEW YORK CITY 43 (2017), <https://www.vanalen.org/content/uploads/2017/07/Lippman-Commission-FINAL-4.18.17-Singles.pdf> [<https://perma.cc/M58Z-Y69U>].

¹⁰⁷ *Id.*

¹⁰⁸ Michaels, *supra* note 105.

¹⁰⁹ Smith, *supra* note 22, at 467.

¹¹⁰ Michaels, *supra* note 105.

¹¹¹ Jordan Gross, *Devil Take the Hindmost: Reform Considerations for States with a Constitutional Right to Bail*, 52 AKRON L. REV. 1043, 1090 n.207 (2018) (“Studies also show that people become more likely to reoffend the longer they are detained pretrial. With just two to three days of detention, low-risk defendants are almost 40 percent more likely to commit new crimes before trial than equivalent defendants held less than 24 hours. Low-risk defendants held 8 to 14 days are 51 percent more likely to recidivate within two years than

One study in Pennsylvania found that assignment of money bail caused a 6 to 9 percent increase in recidivism.¹¹² The effect worsens as a person remains in jail for longer periods. Another study found that a person is 74% more likely to reoffend pretrial if they are held in jail for 31 days or more.¹¹³ Therefore, it appears to serve public safety to release people before they lose their jobs, homes, or families.

Will bail reform cause a crime wave? No statistical data has shown any correlation between bail reform and a spike in crime. The limited data that is available shows that New York has been able to decrease its jail population while decreasing crime over the last decade.¹¹⁴ Further, the effects of the COVID-19 pandemic through measures such as court room closures and stay-at-home orders from the spring of 2020 are likely to drastically impact crime rates for the unforeseeable future, further skewing data collection related to the 2019 and 2020 amendments.

Nevertheless, some recent publications have reported that New York City is experiencing a spike in crime since the statute went into effect on January 1, 2020.¹¹⁵ This assertion is premature. As multiple commentators have pointed out, January's crime statistics are not meaningful. Trends in crimes must be studied over large periods of time because crime may spike in one month and fall substantially the next.¹¹⁶ Moreover, no commentator has yet correlated any

equivalent defendants held one day or less.") (quotations and citation omitted); Chief Justice Fischer, *State of the Judiciary*, 75 J. OF THE MO. BAR 78, 80 (2019) ("Though presumed innocent, they lose their jobs, cannot support their families and are more likely to reoffend.").

¹¹² German Lopez, *America's Bail System Punishes Poor People—Even if They're Innocent of Any Crime*, VOX (Aug. 24, 2016, 2:30 PM), <https://www.vox.com/2016/8/24/12415268/bail-jail-prison-innocent-crime>

¹¹³ LAURA AND JOHN ARNOLD FOUND., PRETRIAL CRIMINAL JUSTICE RESEARCH 4 (2013), https://cjcc.doj.wi.gov/sites/default/files/subcommittee/LJAF-Pretrial-CJ-Research-brief_FNL.pdf [perma.cc/HD4Y-FMNX]; Allen, *supra* note 98.

¹¹⁴ NYCLU *Statement on NYPD Press Conference Linking Bail to Crime Stats*, A.C.L.U. (Feb. 4, 2020), <https://www.aclu.org/press-releases/nyclu-statement-nypd-press-conference-linking-bail-crime-stats> [https://perma.cc/F4EK-H5U5].

¹¹⁵ See, e.g., Azi Paybarah, *Crime Spikes. Is Bail Law to Blame?*, N.Y. TIMES (Feb. 5, 2020), <https://www.nytimes.com/2020/02/05/nyregion/nyc-crime.html> [https://perma.cc/STR5-NRE4].

¹¹⁶ Lindsay Beyerstein, *Did Bail Reform Really Cause a Crime Wave? An Honest Look at the Actual Numbers*, CITY & STATE N.Y. (Feb. 17, 2020), <https://www.cityandstateny.com/articles/opinion/commentary/did-bail-reform-really-cause-a-crime-wave.html> [https://perma.cc/2964-2G73]; Adam H. Johnson, *A Lack of Evidence Doesn't Keep the New York Times from Declaring a 'Spike in Crime'*, THE APPEAL (Feb. 10, 2020), <https://theappeal.org/a-lack-of-evidence-doesnt-keep-the-new-york-times-from-declaring-a-spike-in-crime/>

apparent spike in crime with the new bail statute. Although an apparent crime “spike” occurred in January, New York had been implementing the new bail statute since November of 2019 without any perceived increase in crime.¹¹⁷

Commentators and experts should be tracking and closely studying the effects of the new bail statute in order to guarantee that it is being effective while protecting our communities. Up to this point, however, no such study has shown a correlation between the bail statute and any crime surge.¹¹⁸

CONCLUSION

Bail reform in New York is far from over. Governor Cuomo recently signed the 2020 state budget which included amendments to the statute, significantly expanding the qualifying offenses eligible for bail or remand—a move perceived as a significant rollback by reformers. Republican and Democratic legislators have begun pushing amendments through the assembly and senate.¹¹⁹ In the judiciary, at least one trial court struck down the new statute as unconstitutional because it curbed a judge’s discretion in fashioning bail.¹²⁰

Like any other statute, New York’s new bail statute is by no means perfect, but it makes huge strides towards promoting economic equality in the pretrial phase. The statute also attempts to squarely remedy the issue it was meant to fix: the inability of people to afford bail. Although there are serious concerns about the bill as outlined above, on balance it appears that the statute may aid economically disadvantaged New Yorkers if given the right amount of attention.¹²¹ The data that is currently available shows that generally people who are released from jail awaiting trial return for their court dates and

[<https://perma.cc/U8HP-RNEJ>].

¹¹⁷ Rebecca Rosenberg & Bruce Golding, *Nearly 900 City Inmates May Be Freed Even Before Bail-reform Law Takes Effect*, N.Y. POST (Nov. 3, 2019, 6:30 PM), <https://nypost.com/2019/11/03/nearly-900-city-inmates-may-be-freed-even-before-bail-reform-law-takes-effect/> [<https://perma.cc/9DJ6-GS7Y>].

¹¹⁸ Judge Lippman recently commented that “[w]e have been down this road before. As the Rockefeller Drug Laws were repealed, some raised the specter of increased crime. As the NYPD ended its stop and frisk policy, critics claimed we would be less safe. Crime has decreased and doomsayers have been proven wrong.” Lippman, *supra* note 23.

¹¹⁹ *Id.*

¹²⁰ *People v. Johnston*, 2020 NYLJ LEXIS 287, at *6 (City Ct. N.Y., Westchester Cnty. Feb. 3, 2020).

¹²¹ RAHMAN, *supra* note 39, at 14–15.

typically do not reoffend before they stand trial. Nevertheless, some do reoffend or do not return to court, and all three branches of government must work together to balance the risk to the community with the inescapable reality that holding a person in jail without a conviction can oftentimes destroy their lives.

The future of bail reform in New York is unknown. As we await new battles in Albany and courts throughout the state, the words of former Chief Judge Lippman are instructive: “Bail [] reform is a much-needed effort to change the justice system for the better. Rather than fearing what the future will bring, policymakers should stay focused on making the new laws work.”¹²²

¹²² Lippman, *supra* note 23.