Center for Court Innovation

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520 Eighth Avenue, New York, NY 10018
p. 646 386 3100
f. 212 397 0985
courtinnovation.org

Courtney Bryan. Director

New York's Amended Bail Statute

Questions and Answers from the Webinar on *Bail Reform Revisited*[1]

On June 9, 2020, the Center for Court Innovation held a webinar on Bail Reform Revisited, our new publication on the 2020 amendments to New York's bail reform law. The original reforms were implemented this past January, and the amendments go into effect in July.

This document responds to questions posed during the webinar. Questions have been edited for length and clarity and, in some cases, combined to group similar topics together. The webinar and an array of related supplemental materials are all available online.

We have organized the Q&A into the following topics:

[1] These answers were prepared by Michael Rempel (rempelm@courtinnovation.org), Krystal Rodriguez (rodriguezk@courtinnovation.org), and Jonathan Monsalve (jmonsalve@nycourts.gov). We are grateful to Tia Pooler for her assistance, and we thank Dipal Shah and Matt Watkins for reviewing an earlier version of our responses, as well as for their help in producing the webinar. Similarly, we are indebted to Michele Guelbart for deftly orchestrating the webinar preparations, and to Liberty Aldrich, Courtney Bryan, Emma Dayton, Bill Harkins, Samiha Amin Meah, and Rob Wolf for their assistance before and after.

A) Legal Clarifications

1. What charges did the 2020 amendments add to the list of "qualifying offenses" remaining eligible for money bail? What other broad categories of offenders (in addition to specific charges) did the amendments make eligible for bail?

Our bench card lists all the charges and categories qualifying for bail at arraignments (see also the full report, pages 2-5). While judges may set bail in qualifying cases, they are not required to do so. The reform law states that even when it is a legal option, the judge should only set bail when there is evidence of a "risk of flight to avoid prosecution" and when finding that bail is the "least restrictive" condition necessary to assure court attendance and compliance with pretrial conditions.

2. Do any of the bail amendments apply to individuals who have already been convicted and are serving a probation sentence?

The sentencing judge and the Department of Probation have full discretion to decide whether someone is detained or re-sentenced for violating probation. The bail statute exclusively governs *pretrial conditions* for pending cases (before a disposition or sentencing). However, if an individual serving a probation sentence is re-arrested on a felony, the fact that they were already on probation makes them eligible for bail *on the new charge* (see page 4 of *Bail Reform Revisited*).

3. Why did the 2020 amendments make "possession of a controlled substance" eligible for bail?

Possession of a controlled substance in the first degree as well as criminal sale in the first degree are Class A felonies that respectively criminalize possession and sales of certain drugs above a certain weight. Those two Class A drug felonies were *not* qualifying offenses in the first iteration of the reform law, passed in 2019. (People charged with other degrees of drug possession and drug sales, including the second through seventh degrees, must be released even under the amendments.)

4. Can judges use the defendant's prior criminal history to determine release conditions? We have been told that only prior warrant history can be used.

Prior criminal convictions specifically (but not prior arrests) represent one of several factors that judges may consider when deciding on a release condition or, if the case is legally eligible for bail, deciding whether to set it. The remaining factors include an individual's activities and history; the current charges; previous youthful offender status or juvenile record; previous flight to avoid prosecution; ability to afford bail (if bail is under consideration); and factors specific to domestic violence (prior violation of an order of protection and prior use or possession of a firearm).

These factors may only be considered in determining whether someone poses a risk of flight and, if so, in deciding on which pretrial conditions will assure court attendance and compliance. New York State law does *not* permit basing release decisions on someone's possible risk to public safety.

5. How does the law provide for considering people's ability to pay? Is there a formula that determines how high a judge can set bail? Or is it still at the judge's discretion?

There is no formula. Where cash bail remains a legal option, the reform law requires judges to consider the individual's financial circumstances and ability to pay the bail amount. Further, when setting cash bail, judges must order an unsecured surety bond or a partially secured surety bond as forms of payment. These forms make bail payment more affordable, as they require an up-front payment of only

between 0 and 10% of the bail amount. (The payer is still responsible for the balance, but only if the individual absconds.)

Beyond these requirements (described on page 4 of our *2019 report* on the original reform law), the statute doesn't prescribe any method of determining ability to pay. There are, however, examples of ability-to-pay tools in the literature, including ones developed by the Vera Institute of Justice and ourselves. Other jurisdictions have implemented ability-to pay-calculators for fines, fees, and other court costs, such as California's Ability to Pay calculator.

6. Can panelists address Governor Cuomo's suggestion that prosecutors should charge a bail-eligible form of burglary in the second degree in the cases of people accused of breaking into stores on the same days when protests were taking place against police violence? Can panelists also discuss Manhattan District Attorney Cyrus Vance's response and, more generally, prosecutors' ethical obligations in charging?

Ethical standards dictate that prosecutors should charge offenses for which there is probable cause, based on admissible evidence, and in the interest of justice (see New York's Rules of Professional Conduct, Rule 3.8.). Overcharging can give prosecutors an advantage in plea bargaining and sentencing, especially if overcharging makes a case bail-eligible, insofar as any pretrial detention that results from bail-setting will make individuals more likely to plead guilty prior to trial. (Research on this topic is reviewed here, see pages 5-6.) Therefore, to hold prosecutors accountable for truth in charging, their charging practices are worth monitoring.

Manhattan District Attorney Cyrus Vance made this point in responding to Governor Cuomo's suggestion that prosecutors make different charging decisions. Instead, D.A. Vance urged Governor Cuomo to change the law, using emergency powers to make more property cases legally eligible for bail in the first place. While we are not privy to information beyond what was made available to the public (and linked above), it appears that both Governor Cuomo and D.A. Vance supported setting bail in more cases, at least on a temporary basis, but they differed in their proposed legal mechanisms.

B) Pre-Reform Statistics

7. What are New York City's rates of failure to appear (FTA) in court? How do they compare to non-NYC rates?

In 2017, the NYC Criminal Justice Agency found that 15 percent of released defendants failed to appear at all of their court dates, and 7 percent both missed a court date and failed to return within 30 days. Results further point to no significant differences by charge, with 16 percent of misdemeanor and 14 percent of felony defendants missing a court date. These statistics are for NYC only. In Monroe County, FTA rates of about 10 percent have been reported for years. The amended reforms require state agencies to regularly report FTA rates statewide; thus, more information will soon become available.

8. What percentage of New York City cases were released at arraignment *before* the reforms went into effect in 2020? What percentage received Supervised Release?

In 2019, 74 percent of NYC cases were released on their own recognizance (ROR) at arraignment. Another 4 percent were ordered to Supervised Release. Previously, many cases were ineligible for Supervised Release. That changed in December 2019, when the Mayor's Office of Criminal Justice (MOCJ) expanded eligibility to all charges one month before bail reform would have required this change.

Release rates in 2019 also varied significantly based on charge severity, with 86 percent of misdemeanors, 50 percent of nonviolent felonies, and 35 percent of violent felonies receiving ROR. On page 9 of *Bail Reform Revisited*, we provided a further breakdown of what NYC judges decided in 2019 for cases that respectively would and would not have been eligible for bail if the original and amended reforms had been in effect.[2]

9. What is the re-arrest rate for people charged with a misdemeanor?

The chart below shows NYC re-arrest rates *within the pretrial period* for people released for at least part of that period and whose cases were disposed in 2018. People initially charged with a misdemeanor had an overall pretrial re-arrest rate of 10 percent and a violent felony re-arrest rate of less than 1 percent. For cases analyzed, the pretrial period lasted an average of 157 days.

After the pretrial period ends and cases are disposed, additional re-arrests may take place. For instance, an older publication of ours points to a 41 percent general re-arrest rate (regardless of the original charge) for NYC defendants over a two-year follow-up. As discussed below, past research indicates that over longer timeframes, pretrial detention tends to further *increase* re-arrest rates, relative to what they would have been if defendants had been released pretrial.

NYC Pretrial Re-Arrest Rates: Defendants with Cases Disposed in 2018

	Total in the Analysis	Pretrial Re-Arrest	Pretrial Violent Felony Re-Arrest
Misdemeanor	74,453	10.0%	0.8%
Felony	24,934	13.9%	1.6%
All Charges	99,387	11.0%	1.0%

Source: New York State Office of Court Administration (data analyzed by the Center for Court Innovation). Technically, the recidivism data used for this analysis includes all new cases filed with the court; therefore, re-arrests that the District Attorney's Office declined to file are omitted.

C) Future Jail Population Projections

10. Which charges and categories of defendants made eligible for bail in 2020 contribute the most to the projected 16 percent increase in the jail population?

On page 14 of our main report, we provided a chart with projected increases in NYC's jail population by charge and category. We found that changes to three charges, burglary in the second degree (second sub-section), criminal possession of a controlled substance in the first degree, and criminal sale of a controlled substance in the first degree, were responsible for almost half (49 percent) of the projected jail increase. As we note in our report, none of these three charges include any elements involving violence, threats, or possession of a weapon.

Another impactful provision applies if both the current and a pending case involve "harm to an identifiable person or property." Although judges will have to interpret which charges involve this type

[2] Data on release decisions in New York City as well as other court data presented in our webinar and in these answers were graciously provided by the New York State Office of Court Administration (OCA). OCA data provided herein does not constitute an official record of the New York State Unified Court System, which does not represent or warrant the accuracy thereof. The opinions, findings, and conclusions expressed in this publication are those of the authors and not those of the New York State Unified Court System, which assumes no liability for its contents or use thereof.

of harm, based on our assumptions of what they are likely to decide, we estimate that this provision will be responsible for close to one-fifth of the jail increase.

From there, the more than two dozen other charges and categories of defendants that the amendments made eligible for bail accounted for a combined one-third of the projected increase. In other words, there were a small number of highly impactful changes that drive the 16 percent bottom-line projection, and a great many other changes unlikely to change the jail population by much.

As we emphasize, our methods assume that, charge-by-charge, where legally an option under the amendments, judges will set bail to the same degree they did in 2019; yet, it is possible that practices will evolve, either across-the-board or with some charges more than others. We intend to analyze what factually happened as more data becomes available.

A detailed technical supplement describes our projection methodology.

11. How are you controlling for the impact of COVID-19 in your projection?

We did not account for COVID-19 in making projections, intentionally choosing snapshots of the jail population that occurred *prior* to COVID-19. This was to ensure that we were isolating and exclusively measuring the impact of each version of the bail statute. Because COVID-19 led to a significant jail reduction, using jail population numbers after COVID-19 was underway would have likely led to an overestimation of last year's bail reform jail reduction and an underestimation of the amendments' potential jail re-increase. COVID-19's impact on all stages of the criminal legal process has been significant: reducing arrest rates, arraignments, and jail admissions, and increasing the number of releases over a relatively short amount of time. Later this summer, we plan to produce an analysis of the impact of COVID-19 on NYC's criminal case processing. It is an open question whether changes brought about by COVID-19 will outlast the pandemic.

D) Evaluating the Impact of Bail Reform on Crime and Other Outcomes

12. Many claim that increases in crime resulted from the effect of the original bail reforms in precluding pretrial detention for many cases. How accurate is this?

Crime rates often fluctuate, but it is spurious to link aggregate crime trends in early 2020 to the new bail law. Some of the profound hazards associated with this type of conclusion are summarized in this *City and State* article.

A rigorous, trustworthy evaluation would start by comparing re-arrest rates among specific individuals who were released due to the bail reforms in 2020 to individuals with matching criminal justice and demographic characteristics who were placed in pretrial detention a year earlier in 2019. Such comparisons would have to be conducted over a long enough follow-up timeframe (at least a year, ideally longer) to yield meaningful conclusions. Any evaluation would also have to implement statistical strategies to carefully disentangle causal effects resulting from the bail reforms and from COVID-19.

As a general expectation, by removing people from their communities and incarcerating them, pretrial detention logically suppresses recidivism in the short-term—an expectation confirmed in past studies of New York City, Miami, and Philadelphia, for example.

However, as we recently explained here (see pages 6-7), research in those same three cities as well as in Pittsburgh, Harris County, Texas, and Kentucky all found that pretrial detention ultimately produces harmful "criminogenic" effects, *increasing* recidivism after people are released. Insofar as most detention stays are short, especially where nonviolent cases are involved that require less case

processing time and that are unlikely to end in a prison sentence, pretrial detention is likely to jeopardize, not increase, public safety in the long run.

If properly analyzed, our hypothesis is therefore that the bail reforms will improve public safety by detaining fewer people and thereby averting the known criminogenic effects of detention—but this hypothesis needs to be tested through a scientifically sound evaluation of New York's reform model. Several research projects are underway to do this.

13. Besides failure to appear and crime, should any other outcomes concern us?

In evaluating New York's reforms, policymakers and researchers are likely to be interested in an array of outcomes, including court attendance; public safety; racial disparities in bail decisions and pretrial detention; consistency of judicial decision-making across similar cases; and rates of bail payment (when bail is set). While the court players must follow the law, we can also reflect on a wider range of goals and outcomes in determining which laws to advocate for now and in the future.

E) The Supervised Release Model

14. Is New York State prepared to reallocate resources to support Supervised Release programs (since clearly the jails will not need as much of the resources)?

Not to our knowledge. While we can't speak for New York State, neither the original nor amended bail reforms allocated funding for the new conditions and requirements ordered by the legislation, including Supervised Release. Particularly as New York State and New York City are reconsidering their budgeting priorities, there may be future opportunities for state officials to financially support the implementation of these unfunded mandates. (Presently, NYC's program has ample city funding, and it is possible that other counties are reallocating resources to fund pretrial services.) The question might be directed to the New York Association of Pretrial Service Agencies (NYAPSA), which represents pretrial agencies statewide.

15. How do defendants learn about the Supervised Release Program?

When feasible, Supervised Release staff attempt to introduce individuals to the program prior to their court appearance. Otherwise, program staff will always provide new participants with an immediate orientation before they leave court (with the caveat that this practice has not been possible under COVID-19 restrictions). In addition, defense attorneys will ideally explain Supervised Release as one of the potential outcomes of an arraignment or other court appearance where they are seeking the individual's release.

16. What is the staff and caseload size in NYC's Supervised Release Program?

In the boroughs where the Center for Court Innovation administers Supervised Release (the Bronx, Brooklyn, and Staten Island), caseloads average about 30 cases per case manager. (CASES administers Supervised Release in Manhattan, and the New York City Criminal Justice Agency does so in Queens.) Depending on the case manager's role (supervisor, youth specialist, etc.), they may have a higher or lower caseload. The Mayor's Office of Criminal Justice (MOCJ) is seeking a caseload of 15 or fewer Tier 2 cases (Tier 2 involves intensive supervision and support), and 50 or fewer Tier 1 cases.

17. Can noncompliance with Supervised Release negatively impact a defendant's case in a way that is more severe than if they had been able to post bail?

Noncompliance information is shared with the court. However, for a missed check-in, staff will seek to reconnect with the participant before reporting is required. Even when noncompliance is reported, our interpretation of the bail statute is that it only permits the judge to order electronic monitoring, bail, or remand in select circumstances (see page 6 of the linked report), mainly involving re-arrests. Thus, missed check-ins are *not* a legally permissible reason to order bail or remand, under the bail statute. (We are aware that some judges have held "willful and persistent" failure to appear hearings in response to missed Supervised Release appointments, but this practice runs contrary to the statutory language, as we understand it.) However, it is worth noting that the amendments to the statute do allow the court to set pretrial conditions that help to assure pretrial compliance. One possible interpretation is that courts can order additional conditions if individual are not compliant throughout the pretrial period.

18. In many jurisdictions, probation officers are involved in Supervised Release and offer the value of doing home visits to check on offenders. What role do they have in NYC?

The NYC Department of Probation provides supervision for young people who have matters pending in the Family Court or Youth Part in Supreme Court, Criminal Term. Probation does not provide a program for adults with pending criminal cases.

In general, NYC's Supervised Release Program may differ from traditional probation approaches. Supervised Release staff do not serve a law enforcement function and are instead trained to emphasize building rapport and helping participants. Staff training includes an introduction to the following elements, supported by meta-analytic findings averaging the effects of many individual studies. (The elements that follow quote from our staff and judicial training PowerPoints, developed in partnership with the Mayor's Office of Criminal Justice towards the end of 2019.)

- Goal Consensus/Collaboration *(e.g., noting that all parties want to see the client return to court & getting needed supports).*
- Empathy *(e.g., acknowledging the client's struggle to find stable housing).*
- Alliance *(e.g., emphasizing that staff is there to help the client succeed).*
- Positive Regard/Affirmation *(e.g., acknowledging/praising the client's consistent appearance on court dates).*

Supervised Release staff also do not conduct investigations or spontaneous home or employment visits or request that a person be held in detention for violating a program condition. However, in practice, probation staff can also operate in an analogous fashion.

F) Risk and Needs Assessment

19. What type of risk assessment tool is used at NYC arraignments? Is a similar tool used in other counties?

The Criminal Justice Agency's Pretrial Release Assessment was developed, validated, and is currently used at NYC arraignments to determine likelihood of court attendance. Please contact CJA for further information. Questions about the tool or research behind it may be directed to researchinquiries@nycja.org, and questions about its implementation in NYC courtrooms may be directed to help@nycja.org. Currently a public safety or re-arrest risk assessment is not used at NYC

arraignments or by supervised release staff. The statute limits what courts can consider in determining pretrial conditions to the likelihood of returning to court and compliance with court conditions.

20. What is the role of the Supervised Release Program's needs assessment?

Once the court decides to release an individual to the Supervised Release Program, our staff use the Criminal Court Assessment Tool (C-CAT) to assess for needs and match participants with suitable voluntary services. (The C-CAT was developed and then validated on a sample of defendants in Brooklyn, as described here, with questions and scoring pertaining to needs also informed by the results of this earlier study.) Under the amended reforms, if a judge should order "mandatory programming," the C-CAT can also help inform the nature of such programming. In Manhattan and Queens, program providers use other assessment tools to similar effect.

21. Can you share the tool you use for needs assessments?

Yes, we are making the electronic version available here. In practice, we note that our organization has incorporated the tool into its computerized case management system, facilitating data entry and reporting. The hyperlinked version is the complete tool, but in most Tier 1 cases, our staff use a shorter screening version, moving on to a full assessment if the screener points to significant needs.

22. Which assessment tool determines the Supervision Tier and Level? Can judges override the recommendation that results from the tool?

Presently, program staff use the guideline below, developed jointly by the Mayor's Office of Criminal Justice (MOCJ) and NYC's nonprofit providers (ourselves, CJA, and CASES). The guideline relies on a combination of the CJA's Release Assessment recommendation and whether the case is bail-eligible (and several possible aggravating factors). For example, if an individual is not recommended for release based on the CJA assessment and is charged with a bail-eligible offense, they would be assigned to Tier 2, Level 5—the highest level of supervision, requiring weekly in-person check-ins.

In addition, the needs assessment is used to determine the level and intensity of voluntary services that would aid the individual. Further, staff may implement or recommend downgrades to the supervision level over time, based on assessed needs and compliance to-date.

Although judges most often defer to this process of Tier and Level assignment, judges, at times, order an individual to a specific Tier and/or Level. In those circumstances, staff will defer to the judge's decision.

G) Special Considerations in Domestic Violence Cases

23. Is it problematic for release to be the default option in cases of domestic violence, where defendants may return to the same home as their victims?

Domestic violence cases can pose unique concerns. As we previously discussed, New York's original bail reform included special protections in these cases, expanded under the amendments. In brief, all criminal contempt cases (e.g., signifying a violation of an order of protection), misdemeanor obstruction of breathing or blood circulation, and the designated nonviolent felony of unlawful imprisonment were made bail-eligible *whenever domestic violence is alleged*; in addition, all domestic violence cases were made eligible for electronic monitoring.

As in all cases, however, the law requires ROR except when the need for supervision is "demonstrated." A presumption of ROR promotes a level of fairness and consistency in decision-making that we think is appropriate for cases in the pretrial stages. New York City's expansion of Supervised Release to intimate

partner violence (IPV) cases in January 2020 represented another effort to chart a measured approach. (Non-IPV domestic violence cases were already eligible.) When a judge determines that a defendant poses a credible risk of flight or noncompliance with other court orders (including an order of protection), Supervised Release can offer the benefit of supervision—without the drawback of what is, in most cases, a pretrial detention period of no more than days or weeks, followed by release without any supervision or services at all.

In New York City, social workers assigned to supervise people facing IPV allegations receive specialized training in power and control dynamics. A judge may also order attendance at a three-hour class, Tactics & Choices, with trained facilitators who administer separate, gender-appropriate curricula respectively for men, women, and LGBTQ+ defendants.

H) Electronic Monitoring

24. Now that New York City has secured 50 electronic monitoring (EM) devices, how many have been used, and why is EM not used more often?

As far as we know, only a small number of people have been assigned EM by a judge, who is the only decision-maker who can set such a pretrial condition. As shown in our bench card, the statute does not permit electronic monitoring in all cases; it is reserved for felonies and select misdemeanors. There are also likely practical barriers to widespread use. For example, a thorough investigation must be conducted by the monitoring agency (in New York City, it is the Sheriff's Office) to ensure an individual's ability to comply with the requirements of electronic monitoring, such as having a stable place to live. Such inquiries can take time to complete.

I) The City's Early Release (6-A) Program

25. Were the statistics presented at the webinar on the early release program citywide?

Yes, the statistics (available here, along with a program description) were for the entire city. We recently updated the numbers, and after exactly three months, only 7 percent of participants were re-arrested during their program participation, with only one person re-arrested on violent felony charges.

J) Closing the Rikers Island Jail Complex

26. Under the plan for new jails in place of those on Rikers Island, is the 3,300-jail population maximum capacity per borough or for all of New York City?

On October 17, 2019, the New York City Council approved a total citywide jail bed capacity of 3,300, sub-divided across four new jails, one per borough excluding Staten Island. The new jails are to be constructed by 2026. The plan presupposes that reforms to our laws, policies, and practices will, in fact, succeed in bringing the daily jail population to 3,300, or less.