
Reducing Pretrial Detention in New York City

Data-Driven Strategies for Decarceration

By Michael Rempel and Tia Pooler

Originally published as:

La reducción del uso de la prisión preventiva en Nueva York: estrategias para la excarcelación basadas en datos. (2020). *Sistemas Judiciales*. Revista nº 23, pp. 124-137.

Available in English with permission from the Justice Studies Center of the Americas

 Center
for
Court
Innovation

Reducing Pretrial Detention in New York City

Data-Driven Strategies for Decarceration

Abstract

This article describes a set of strategies that New York City is adopting to address the well-documented harms of pretrial detention. Significantly reducing pretrial detention is an urgent policy imperative in New York City, which must close its notorious and inhumane jails on Rikers Island, build smaller new jails, and reduce the total number of people held in jail by more than half in the next six years. The documented harms of pretrial detention in New York City include: holding people in jail even when there is little evidence that they would miss their court dates if they were released; penalizing people without money through the overuse of bail; and increasing recidivism due to the counter-productive effects of pretrial detention on people's likelihood of committing crimes in the future. Strategies recently adopted in New York include: (1) state legislative reforms in 2020 that ban money bail and pretrial detention in nine in ten criminal cases; (2) strict new legal criteria for precisely when it is permissible to detain someone in jail even in the remaining cases where detention was not completely banned; and (3) expansion of Supervised Release, a promising, data-driven program that allows defendants to be released pretrial, while providing supervision intended to ensure that they appear in court.

Authors' Note: We wish to express our profound gratitude to Natalie Reyes and Krystal Rodriguez at the Center for Court Innovation for their feedback on an earlier version of this paper. We also thank Leonel González, Training Director at the Justice Studies Center of the Americas, for encouraging us to submit this paper to *Sistemas Judiciales* as well as for granting permission to publish it in English as well as Spanish. For correspondence, please contact Michael Rempel (rempelm@courtinnovation.org) or Tia Pooler (poolert@courtinnovation.org) at the Center for Court Innovation.

Introduction

As a potential model for other jurisdictions, this article describes a set of strategies that New York City is adopting to address the well-documented harms of pretrial detention. Significantly reducing pretrial detention has become an urgent policy imperative in New York City, which must comply with a new law requiring a reduction by more than half in its total jail population over the next six years. Since three-quarters of the City’s jail population is held pretrial—before guilt or innocence has been established—compliance with this law is unfeasible absent a major investment in pretrial reform.

The first section of this article briefly introduces the policy context for why New York City must dramatically reduce its jail population in the next six years. The second section cites relevant data and literature indicating both the magnitude and the deleterious effects of pretrial detention in the United States and, specifically, in New York City. The third section describes several legal and policy strategies that New York State and New York City have recently put into place. In brief, New York State passed a new law that went into effect in January 2020, eliminating both money bail and pretrial detention for nearly all nonviolent charges. New York City also recently implemented Supervised Release, a pretrial supervision program that provides a “middle” alternative to straight release on one hand and pretrial detention on the other.

The New York City Context: Closing the Jails on Rikers Island

On October 17, 2019, the New York City Council voted to shut down all 11 operating jails in the City before the end of the year 2026. Eight of these 11 jails are located on Rikers Island, a small island that is physically disconnected from the rest of the City and whose sole purpose is to serve as a penal colony for incarcerating people. For decades, the jails on Rikers have been known, locally in New York and throughout the United States, as places of horrifying violence and cruelty.¹ Besides the eight jails on Rikers, three other jails located in

¹ An extensive literature documents the brutal conditions at the Rikers Island jail complex. For example, see Lippman, J., Aborn, R. M., Cartagena, J. et al. (2017). *A More Just New York City*. New York, NY: Independent Commission on New York City Criminal Justice and Incarceration Reform. Available at: <https://static1.squarespace.com/static/5b6de4731aef1de914f43628/t/5b96c6f81ae6cf5e9c5f186d/1536607993842/Lippman%2BCommission%2BReport%2BFINAL%2BSingles.pdf>; Martin, S. J., Dedel, K., Friedberg, A. E., et al. (2019). *Eighth Report of the Nunez Independent Monitor* (Document 332, Filed 10/29/19). Available at: <https://www.documentcloud.org/documents/6531580-NunezEighthReport.html>; Stringer, S. M. (2019). *FY 2020 Agency Watch List: Department of Correction*. New York, NY: New York City Comptroller Scott M. Stringer. Available at: <https://comptroller.nyc.gov/wp-content/uploads/documents/Watch-List-DOC-2019-FINAL.pdf>; United States Attorney, Southern District of New York. (2014). *CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island*. New York, NY: U.S. Department of Justice. Available at: <https://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/SDNY%20Rikers%20Report.pdf>; Winerip, M. & Schwirtz, M. (2014). “Rikers:

different boroughs of New York City are considered to have even more decrepit physical conditions and are no less characterized by a culture of brutality (sayegh 2019).

New York City officials have until 2026 to close all 11 jails and replace them with four new ones for which plans have already been drawn up, based on state-of-the-art environmental design and jail safety principles (NYC Criminal Justice 2019). Each one of the new jails will be located close to the criminal courthouses in a different borough of the City. Rikers Island will no longer hold any jails at all and will be repurposed for more productive public uses (see Lippman et al. 2017).

Importantly, the planned daily capacity of the four new jails will be far smaller than the current jails. The new jails will be built to hold no more than 3,300 people combined on an average day (or 825 per jail). By comparison, in 1991, the City's jails held over 20,000 people per day (Lippman et al. 2017). Since 1991, crime, arrests, and incarceration have all sharply declined (Chauhan et al. 2016; Fox & Koppel 2019; Patten et al. 2018); yet, the daily jail population was approximately 7,300 throughout the month of October 2019, when City legislators voted to build new jails capped at just 3,300; less than half the current population.

The Magnitude and Harms of Pretrial Detention

After briefly summarizing the basic organization of prisons and jails in the United States, this section explores the prevalence and harms of pretrial detention, specifically.

The Structure of Incarceration in the United States

The United States has three correctional systems: federal prisons, state prisons, and local jails (e.g., city jails such as Rikers Island). On an average day in 2016, just under 2.2 million people were incarcerated nationwide, 9% in a federal prison, 61% in a state prison, and 30% in a jail (Kaeble & Cowhig 2018). Federal and state prisons mostly incarcerate people who have been convicted of a felony (i.e., generally crimes that are punishable by a year or more of incarceration) and are serving long sentences often as many as five, ten, or 20 years, or even longer. Local jails, however, mostly incarcerate people serving short sentences of one year or less as well as people held pretrial.

While the average prison stay can be measured in years, the average jail stay is a few months or less: just 26 days nationwide (Zeng 2019) and 75 days in New York City (NYC Department of Correction 2019). Because people cycle in and out of local jails far more quickly than prisons, even though only 30% of the country's incarcerated population on any day are held in a jail, 95% of annual admissions are to a jail. In other words, far more people who experience incarceration, even if for only for a short time, experience it in a jail than in a

Where Mental Illness Meets Brutality in Jail.” *New York Times* (July 14, 2014). Available at: <https://www.nytimes.com/2014/07/14/nyregion/rikers-study-finds-prisoners-injured-by-employees.html>.

prison—making jails an extremely impactful, and potential damaging, institution in the U.S. incarceration complex.

When further breaking down the jail population, 65% nationwide consists of people held pretrial, while awaiting the outcome of their court case (Zeng 2019). In New York City, the pretrial share of the jail population is even higher at 75% (Lippman et al. 2016; Rempel & Rodriguez 2019).

The Problems of Pretrial Detention in New York City

In recent years, researchers, legislators, and criminal justice practitioners in New York City have increasingly concluded that pretrial detention is exceedingly overused. The reasons mirror many of the same concerns held by people across the United States, and internationally.

Low Rates of Failure to Appear in Court. For decades, New York State law has allowed only one legal justification for imposing pretrial conditions of release or outright detaining people: a concern that they may not return for future court appearances.² However, empirical evidence in New York City makes clear that few defendants pose a meaningful risk of failing to make their court dates. Only 15% of those released in 2017 missed at least one court date; and only 7% both missed a court date and failed to return within 30 days (New York City Criminal Justice Agency 2019a).

Disproportionate Detention of Felony Defendants. As shown below in Table 1, pretrial release decisions in New York City vary significantly based on the severity of the charge.³

In 2018, 85% of defendants charged with a misdemeanor, compared to only 44% charged with a nonviolent felony and 33% charged with a violent felony were released on their own recognizance (ROR)—involving straight release without any conditions. Conversely, as shown at the bottom of Table 1, 11% of misdemeanor, 41% of nonviolent felony, and 59% of violent felony defendants were sent to pretrial detention after their first court appearance,

² See New York Criminal Procedure Law 510.30(2)(a). Prior to 2020, this section of the law read, “With respect to any principal, the court must consider the kind and degree of control or restriction that is necessary to secure his court attendance when required.” Effective 2020, as discussed later in this article, the language was strengthened, while retaining an exclusive focus on considerations related to return to court.

³ In New York, and throughout much of the United States, “misdemeanors” are relatively low-level charges. By comparison, nonviolent felonies include more serious charges, like drug sales, possession of a large quantity of drugs, property crimes where the worth of the stolen property is substantial, or forgery—but where no violence against another person has been alleged; and violent felonies are crimes such as murder, rape, arson, kidnapping, robbery, serious assaults, and gun possession—where violence is alleged.

known as the arraignment. Further shown in the table, pretrial detention resulted either from an inability to pay a court-ordered monetary bail amount or from straight detention.

The sizable weight placed on the charge in determining pretrial detention status mirrors common practice across the Americas under the traditional inquisitorial system, where certain charges almost always triggered detention (Duce, Fuentes, & Riego 2015). In New York City, however, the evidence does not support this heavy reliance on charge severity; felony defendants are no more and, in fact, somewhat less likely than misdemeanor defendants, to miss a court date. In 2017, of those who were released, a virtually identical 16% of misdemeanor and 14% of felony defendants missed at least one appearance (New York City Criminal Justice Agency 2019a). Additional analysis indicates that defendants charged with a violent felony are the *least*, not the most, likely charge-based subgroup to fail to appear in court (New York City Criminal Justice Agency 2019b).

Table 1. Pretrial Release Decisions in New York City in 2018

| Pretrial Release Outcomes | Misdemeanor | Nonviolent Felony | Violent Felony ¹ | Total |
|---|---------------|-------------------|-----------------------------|----------------|
| # Continued at Arraignment in 2018 | 99,069 | 23,517 | 15,393 | 137,979 |
| Judicial Release Decisions | | | | |
| Release on Recognizance (ROR) | 84.9% | 43.8% | 32.9% | 72.1% |
| Supervised Release | 2.0% | 11.3% | 0.8% | 3.5% |
| Money Bail | 10.1% | 42.3% | 61.6% | 21.3% |
| Pretrial Detention ² | 2.9% | 2.6% | 4.7% | 3.1% |
| Total | 100.0% | 100.0% | 100.0% | 100.0% |
| Pretrial Detention Outcomes | | | | |
| Detained due to Inability to Pay Bail | 7.8% | 38.0% | 54.1% | 18.1% |
| Pretrial Detention ² | 2.9% | 2.6% | 4.7% | 3.1% |
| Total Detained at Arraignment | 10.7% | 40.7% | 58.8% | 21.1% |

Source: New York State Office of Court Administration (data analyzed by the Center for Court Innovation).

¹ As of 2018, most violent felony charges were ineligible for Supervised Release.

² Judges order some cases *directly* to pretrial detention. In addition, many defendants are also sent to pretrial detention in cases where the judge orders money bail and the defendants are unable to pay the bail amount.

Inequities Stemming from the Use of Money Bail. The use of money bail is rare across the Americas but is a common feature of pretrial justice in the United States. According to the U.S. Supreme Court, judges may require defendants to pay money up front to secure their pretrial liberty—but only as an incentive for defendants to appear in court (since they would risk losing their bail money if they failed to appear in court). The court’s

decision means that the purpose of bail is to serve as a condition of pretrial release, not to detain people.⁴

However, the practical reality is that the setting of money bail has long been the most common cause of pretrial detention in the United States. Furthermore, the use of a bail-based system means that people with fewer financial resources have a lesser ability than wealthier people to secure their liberty. In response to this class-based inequity, state courts in California, Maryland, Massachusetts, New York, and Texas, and a federal court in Louisiana, have all ruled that a defendant's financial resources must be assessed and considered before a judge sets bail.⁵

Difficulties Paying Bail Regardless of Wealth. Somewhat lost in the above discussion of the inequities of bail is that, even for people with money, bail payment systems in the United States are often extraordinarily difficult to navigate, leading even people with financial resources to spend time in jail while waiting for their friends or family to figure out how to successfully pay their bail. In New York City, for example, research uncovered a byzantine bail payment process that poses significant obstacles to defendants and their families from all social classes. For example, even in many cases when a friend or family member was available and had the resources to pay bail, if the defendant was transferred to the custody of the jail (even though still physically located in the courthouse), the friend or family member could not pay the bail until the defendant completed the intake process at the jail, causing several hours of delay (White et al. 2015). Moreover, in 2018, 85% of defendants who paid bail in New York City were unable to do so in time to avoid a jail stay. Thus, even though bail produces even higher pretrial detention rates and longer lengths of stay for those who lack money, bail often leads to jail to some extent irrespective of ability to pay. This is not to reject that those who lack wealth are disadvantaged; they are. The point is that in bail payment system's like New York City's, there are inherent inefficiencies faced by everyone.

The Adverse Impact of Pretrial Detention on Conviction and Sentencing Outcomes. When people are incarcerated pretrial, this deprivation of liberty gives them an extra incentive to plead guilty quickly, even if it means accepting an unfavorable case outcome—and, sometimes, even if it means pleading guilty to a crime that they believe they did not commit. This reality has been shown in studies of the impact of pretrial detention in the state of Kentucky (Lowenkamp et al. 2013a), the cities of Philadelphia and Miami (Dobbie, Goldin, & Yang 2016), and in New York City (Hahn 2016; Phillips 2012; Rempel et al. 2017). One study in New York City found that, after controlling for defendant and case

⁴ See the Supreme Court decision in Stack v. Boyle 342 U.S. 1 (1951).

⁵ For example, in California, see In re Humphrey, 19 Cal. App. 5th 1006, (2018) (decided: 1/25/2018); in Maryland, see Bradds v. Randolph, 239 Md. App. 50 (2018) (decided 2/20/18); in Massachusetts, see Brangan v. Commonwealth, 477 Mass. 691 (2017) (decided 8/25/2017); in New York, see: People ex rel. Desgranges v. Anderson, 59 Misc. 3d 238 (Sup. Ct. 2018) (decided 1/31/18); in Louisiana, see Caliste v. Cantrell, No. 17-6197, 2018 U.S. Dist. LEXIS 43338 (E.D. La. Mar. 16, 2018); and, in Texas, see Daves v. Dall. Cty., 341 F. Supp. 3d 688 (N.D. Tex. 2018) (decided 9/20/2018).

characteristics, pretrial detention independent of other factors resulted in an increase in the conviction rate of 10% in misdemeanor and 27% in felony cases; an increase in jail sentences by 40% in misdemeanor cases; and an increase in state prison sentences by 34% in felonies (Rempel et al. 2017).

The Criminogenic Effects of Detention. Unlike many other states in the U.S. and countries throughout the Americas (Duce et al. 2015), New York State does not allow judges to base their pretrial decisions on an individual’s perceived danger to public safety. However, to the extent that public safety remains a latent, unacknowledged consideration that is always on the minds of judges, the evidence suggests that detaining someone, especially in inhumane jails such as those on Rikers Island, can be criminogenic—*increasing* rather than decreasing future recidivism.⁶ A study in Kentucky found that as little as 48 hours in jail during the pretrial period *increased* post-release recidivism, especially among defendants who pose a low or moderate risk of recidivism, based on the results of a risk assessment tool administered at the time of arrest (Lowenkamp et al. 2013b). Similarly, a study in Philadelphia and Miami found that pretrial detention reduced recidivism during the immediate pretrial period—as an inevitable result of incapacitation in jail—but over longer-term two-year and four-year follow-up periods, detention ultimately produced more, not less, recidivism (Dobbie et al. 2016).

These findings make an especially strong case for avoiding pretrial detention for two specific subgroups: (1) people who pose only a low or moderate risk of recidivism at baseline; and (2) people who are unlikely to be detained for much time, given that detention can only suppress recidivism for as long as people are incapacitated. However, both subgroups have often been detained in New York City. Of defendants detained pretrial in the City, research found that 64% who are charged with a misdemeanor and 59% who are charged with a felony posed only a minimal-to-moderate risk of recidivism based on information known at the time of their initial arrest (Rempel et al. 2017). Research also found that when misdemeanor defendants are held pretrial, their average length of stay is only 17 days; and

⁶ There are several theories for why jail increases recidivism. The most common explanation is a “contagion effect.” The theory is that incarceration removes people from their families and neighbors, isolating them from mainstream social influences in their lives and placing them, instead, in close proximity to others who may be criminally involved; daily interaction with other individuals who may have involvement in criminal activity can, in turn, lead to “cross-contagion” effects, spreading anti-social attitudes and normative support for crime and violence as a solution to everyday problems (Listwan et al. 2013; Spohn 2007). A second explanation focuses on the socioeconomic ramifications of incarceration, which can lead people to lose their jobs, income, and housing (e.g., if they fail to report to work or miss rent while imprisoned), creating known economic risk factors for future criminality that did not previously exist (Freudenberg et al. 2005). A third explanation focuses on the dehumanizing and psychologically traumatizing effects of incarceration, especially in jails known for violence and maltreatment, such as Rikers Island in New York. As this explanation continues, traumatic experiences in jail can both create new or worsen existing drug or mental health problems in ways that can impede everyday functioning in the future, leading individuals to further illegal drug involvement or other criminal behavior (Lippman et al. 2017; Subramanian et al. 2015). It is not hard to imagine how each of these criminogenic consequences might be magnified in jail settings such as Rikers Island.

for nonviolent felonies, the average stay is 57 days (Lippman et al. 2017). These brief detention periods, while barely long enough to produce a meaningful incapacitation benefit, are easily long enough to exert a counter-productive criminogenic effect (Lowenkamp et al. 2013b).

For this reason, in the end, it may be prudent to take the seriousness of the charge into consideration when determining whether to detain someone: Whereas pretrial detention should not be overused with those charged with a violent felony, there is, in addition, a solid empirical argument that it should be barely used at all with those charged with nonviolent offenses—because the resulting periods of incarceration may be too short to provide any meaningful public safety value. Furthermore, as discussed above, for people facing all charges, jail can have criminogenic effects that increase rather than decrease recidivism and that, therefore, jeopardize rather than promote public safety.

Inconsistent Decisions and Resulting Due Process Considerations. In 2018, a widely publicized analysis was released by the website, FiveThirtyEight, finding that otherwise similar defendants in New York City routinely received different pretrial decisions based on the identity of the judge who was randomly assigned to hear the case (Barry-Jester 2018). In the Bronx, for example, one specific judge was found to release only 25% of felony defendants, while another Bronx judge released over 60% of felony defendants. This raises fundamental legal questions in the United States context. Potentially, it could be argued that judicial power is being applied arbitrarily and capriciously if similarly situated defendants can receive disparate outcomes based on which judge happens to be assigned to preside at the arraignment. This could raise a concern that “due process,” as required by the Fifth and Fourteenth Amendments of the U.S. Constitution, was not provided.

Strategies to Reduce Pretrial Detention

Over the past five years, policymakers at both the City and State levels in New York have taken a series of steps to curtail pretrial detention. In the remainder of this article, we focus on three important developments: (1) A legislative ban on pretrial detention for about 90% of criminal cases; (2) New legal criteria that limits the use of detention even in the remaining cases; and (3) Expansion of pretrial supervision as an *intermediate alternative* to both release with no conditions on the one hand and detention in jail on the other hand.

Legislative Ban on Pretrial Detention in Most Cases

In January 2020, New York State implemented a new reform law eliminating both money bail and pretrial detention in nearly all misdemeanor and nonviolent felony cases (Rempel & Rodriguez 2019). As shown in Table 2, judges are no longer allowed to order money bail or pretrial detention in more than 90% of all cases within New York City. Using 2018 data to illustrate the impact of this law, the results in Table 2 indicate that money bail remains permissible in only 2% of all misdemeanor cases (involving sex offenses or criminal contempt cases involving domestic violence). For nonviolent felonies, bail and detention are

permitted in just 7% of cases (virtually all involving domestic violence). By comparison, all options continue to be permissible most violent felonies; the results shown below indicate that, under the new law, bail and detention continues to be allowed in 88% of violent felony cases.

Table 2. Eligibility for Bail and Pretrial Detention Under the Reform Law

| Bail and Pretrial Detention Eligibility | Misdemeanor or Lesser | Nonviolent Felony | Violent Felony | Total |
|---|-----------------------|-------------------|----------------|----------------|
| All New Criminal Cases in 2018 | 166,306 | 24,232 | 15,588 | 206,126 |
| Mandatory Release (<i>no bail or detention</i>) | 97.6% | 93.1% | 12.2% | 90.6% |
| Money Bail Permitted, Not Detention | 2.4% | | | 2.0% |
| Both Bail & Pretrial Detention Permitted | | 6.9% | 87.8% | 7.4% |
| Total | 100.0% | 100.0% | 100.0% | 100.0% |

Source: New York State Office of Court Administration (data analyzed by the Center for Court Innovation).

In effect, by implementing a hard ban on detention for nine in ten cases, overall, elected legislators took discretion out of the hands of judges, perhaps alleviating some of the criminogenic effects raised above, ensuring that none of the many harms of detention can materialize for most defendants. Along with Washington, D.C. and New Jersey, New York is only the third jurisdiction in the United States to implement such far-reaching legislative action. Research has estimated that the state’s action will reduce the pretrial detention population in New York City by 43% and will single-handedly remove over 3,000 people from the City’s daily jail population (Rempel & Rodriguez 2019).

Strict Legal Criteria for Ordering Pretrial Detention

For the approximately 10% of cases where money bail or pretrial detention remain legally permissible, the same 2020 legislative reforms also established a series of new standards that must be met before judges can detain someone—and, for that matter, before judges can order any other pretrial outcome besides release on recognizance.

1. *The legislature established that all defendants must be released on their own recognizance (without any conditions) unless a judge finds that the available evidence demonstrates a “risk of flight to avoid prosecution.”*⁷ Language requiring a “risk of flight” suggests that it is insufficient to find that a defendant might accidentally miss a court date, only to remember the oversight and appear voluntarily several days later (as often happens in New York City). A judge must find that the defendant poses a risk of

⁷ See New York Criminal Procedure Law 510.10(1), as it reads after the passage of the 2020 reforms.

fleeing from the court with an intent to “avoid prosecution,” a more specific standard. In effect, New York State established a new “presumption of release on recognizance” for all defendants, regardless of the charge. The practical impact will be to curtail the overuse of pretrial detention and promote release without any conditions except where clear evidence exists to justify conditions.

2. ***Even where risk of flight is demonstrated, the new law requires judges to order the “least restrictive” condition that “will reasonably assure the principal’s return to court.”***⁸ Thus, even in the fraction of cases where pretrial detention and bail are not banned entirely, judges are still obligated to determine whether other, less restrictive conditions, such as court date reminders or pretrial supervision, will be sufficient to control the individual’s risk of flight.
3. ***When setting money bail, the new law includes language mandating that judges consider a bail amount that the defendant can afford.*** Specifically, the law requires consideration of the defendant’s “individual financial circumstances” and “ability to post bail without posing undue hardship.”⁹ This element of the statute operates to discourage using unaffordable bail amounts to achieve, de facto, the pretrial detention of the individual.

Expansion of Supervised Release

The final major strategy adopted in New York City is the large-scale implementation, beginning in 2016, of Supervised Release, a citywide pretrial supervision program. This program seeks to avoid the harms of pretrial detention in jail by allowing defendants who pose a real risk of missing their court dates to remain at home in their communities, while receiving supervision. The Supervised Release program is funded by the New York City government, and its policies are determined by public officials who work for the mayor. However, the City contracted with three nonprofit agencies to administer the program.¹⁰

People are enrolled in Supervised Release in response to an order from the judge. As discussed above, to order Supervised Release, the judge must find that the defendant poses a risk of flight and must also find that Supervised Release is the least restrictive condition necessary to reasonably assure that the defendant will attend at all court appearances.

Once someone is ordered to the program, they must participate in regular in-person and phone check-ins. In these check-ins, staff remind participants of their court dates, encourage them to follow court orders, and offer basic services such as a free transit MetroCard to get to

⁸ See New York Criminal Procedure Law (CPL) 510.10(1), as it reads after the passage of the 2020 reforms. See, also, CPL 510.10(3) and CPL 510.45(4).

⁹ See New York Criminal Procedure Law 510.30(1)(f), as it reads after the passage of the 2020 reforms.

¹⁰ The Center for Court Innovation, a nonprofit think tank where both of this article’s authors work, run Supervised Release in three boroughs of New York City: the Bronx, Brooklyn, and Staten Island. Two other nonprofit agencies, CASES and the Criminal Justice Agency, run the program in Manhattan and Queens, respectively.

and from court. More specifically, each participant is assigned to one of five “Supervision Levels,” based on two factors: (1) a formal assessment of their likelihood of appearing in court without supervision; and (2) whether the alleged crime is relatively less serious (defined as crimes for which bail and pretrial detention were eliminated in January 2020) or more serious (defined as crimes for which bail or detention could still, legally, have been imposed, but where the judge opted for Supervised Release instead). To illustrate the difference, people assigned to Supervision Level 1 must only participate in a single phone check-in each month; by contrast, people assigned to Supervision Level 5—the most intensive level—have to participate in one in-person check-in per week and must, in addition, attend 3-6 structured cognitive-behavioral therapy sessions in the course of the pretrial period.

Using a standard compliance form, staff from the Supervised Release program inform the judge, prosecutor, and defense attorney prior to each court date whether the client has been attending all check-ins and complying with other required elements of program participation.

In addition, when someone first enrolls in Supervised Release, a staff member conducts a comprehensive assessment of the participant’s needs in a wide range of areas, including housing, employment, education, mental health, and substance use; and staff can refer clients to additional services where appropriate, which the clients may attend on a voluntary basis. (These additional services are not required.)

Notably, from its first to third years, Supervised Release was only available to defendants facing nonviolent charges (except for a small violent felony pilot for 16-to-19-year-olds). Supervised Release also excluded any defendant classified on a risk assessment tool as posing a “high risk” of felony re-arrest. In January 2020, however, all eligibility restrictions were lifted in conjunction with the 2020 legislative reforms. Precisely because the 2020 reforms impose sharp limits on the use of bail and pretrial detention in jail, Supervised Release is likely to absorb a great many cases that were previously detained. Moreover, the success of the 2020 reforms—and, ultimately, the ability of New York City to slash its jail population to 3,300 as the law requires—may depend on the extent to which Supervised Release is both effective and is perceived as such. Absent evidence that Supervised Release can limit missed court dates and maintain public safety, a counter-reaction against New York’s dramatic reforms is conceivable.

Existing Data on Supervised Release Outcomes

Between March 1, 2016 and September 30, 2019, 15,294 defendants were enrolled in the Supervised Release program across New York City—reducing the potential number of jail admissions by the same substantial number. In 2018, of the total 4,627 defendants enrolled in the Supervised Release program, 57% were charged with a felony, indicating the intended target of the program: more serious offenses where the program operates as a true bail—and jail—alternative, due to the disproportionate detention rate of felony defendants. (To reiterate what is noted above, the January 2020 reforms will almost surely lead the Supervised

Release client population to shift to even more serious charges, including violent felony offenses.)

Moreover, in response to observed trends in the data indicating that some Supervised Release clients may not have even required community-based supervision and should have simply received straight release without conditions (ROR), the program piloted a policy in late 2018 known as “Risk-Informed Release.” This policy set certain criteria for low-risk defendants that would trigger a recommendation to the judge that some individuals are more appropriate for release to their communities *without supervision* (i.e., those who are most likely to show up to court). This policy was further developed to become a formal built-in mechanism of the Supervised Release program citywide and is continuing to serve as a critical check on potential over-supervision of low risk individuals in 2020 and beyond. In Brooklyn, where this policy was first piloted, 57 such cases were identified and given straight ROR in the first 4 months of implementation (Weill & Wada 2019).

As shown in Table 3, the documented outcomes to date for those participants who are enrolled in Supervised Release are encouraging. Citywide, the court appearance rate for Supervised Release participants was 88% in 2018, which is similar to the estimated rate of court appearance for the ROR population (86%; New York City Criminal Justice Agency 2019a). And while the main program aim is to ensure defendants will return to court, the data also show that 92% of Supervised Release participants are *not* re-arrested on a new felony offense while in the program. Further, these outcomes hold across different supervision levels, with a particularly high court appearance rate for the 16-19-year-old participants of the smaller pilot consisting of defendants charged with violent felonies or designated as high risk for felony re-arrest.

Table 3. Supervised Release Outcomes 2018

| Supervised Release Population | Court Appearance Rate ¹ | Percent with <i>No</i> Felony Re-Arrest | Percent with <i>No</i> Violent Felony Re-Arrest |
|---|------------------------------------|---|---|
| Citywide Supervised Release ² | 88% | 92% | |
| Least intensive supervision level | | 96% | 99% |
| Most intensive supervision level | | 89% | 96% |
| Violent felony/high risk youth pilot ³ | 95% | 88% | |

¹ The court appearance rate is defined as the percent of Supervised Release participants who attended every scheduled court date during the pretrial period of their case.

² Source: NYC Criminal Justice (2018a), Mayor’s Office of Criminal Justice *Supervised Release Quarterly Scorecard*.

³ Source: Mayor’s Office of Criminal Justice Supervised Release Quarterly Scorecard, October 2018; pilot data cover March 1 through September 30, 2018 only.

Finally, one critical component of the Supervised Release program is the ability to connect defendants to voluntary services relevant to their assessed service needs. Case managers, including clinically trained social workers, provide support that specifically mitigates criminogenic needs and barriers to returning to court. The data so far confirm the presence of significant needs within this pretrial population; an analysis of Supervised Release participants' assessment responses between January 2018 and June 2019 showed that a large proportion flagged for the possible presence of a specific need or interest in assistance:¹¹

- 55% flagged for a possible employment service need.
- 49% flagged for a possible education-related need.
- 40% flagged for a possible substance use need.
- 39% flagged for a possible mental health need.

Using these findings to inform available programming and relying on additional community-based service providers to assist participants (voluntarily) with these identified needs undoubtedly contributes to the program's overall effectiveness by reducing the barriers to returning to court.

Conclusion

The recent story of pretrial reform in New York City is data-driven and historically informed—motivated by the empirical harms of detention, including increased conviction rates and jail sentences, combined with negative criminogenic effects that counterproductively *increase* recidivism. With the support of state level legislative change, other jurisdictions may look to New York for an effective strategy for jail reduction and reducing reliance on money bail and pretrial detention. Strategies such as the Supervised Release option for judges are necessary to allow New York City to close the notorious Rikers Island jail complex—a historic event with a six-year statutory deadline. Closing the Rikers jails is a critical component of moving towards a more just and humane local criminal justice system.

Backed by a New York State-level legislative ban on pretrial detention for nine in ten criminal cases, judges will now release more defendants back to their communities. This will either be on their own recognizance, or, if considered a risk of flight, as part of the expanded Supervised Release program administered by three local nonprofit agencies. The Supervised Release option, operating as a “middle” alternative to straight release on one hand and pretrial detention on the other, while addressing the inequities that stem from the use of money bail, has produced promising outcomes so far. Local and national researchers, data analysts, and policymakers will be closely monitoring the data for evidence of continued

¹¹ The Supervised Release Program administered by the Center for Court Innovation in three NYC boroughs (the Bronx, Brooklyn, and Staten Island) uses a needs assessment tool—developed in-house—with defendants upon program intake; the needs flags data presented here represents the Supervised Release participants in those three boroughs only.

effectiveness of the program in relation to court appearance rates and public safety. On a larger scale, researchers will need to provide clear answers to whether the criminal justice reforms launched in 2020 are successful in achieving the twin goals of dramatically reducing incarceration and maintaining public safety. If these goals are achieved, New York's approach can be an important model for the Americas.

References

- Barry-Jester, A. M. (2018). *You've Been Arrested. Will You Get Bail? Can You Pay It? It May All Depend on Your Judge*. FiveThirtyEight. Available at: <https://fivethirtyeight.com/features/youve-been-arrested-will-you-get-bail-can-you-pay-it-it-may-all-depend-on-your-judge/>.
- Chauhan, P., Balazon, E. M., Tomascak, S., et al. (2016). *Trends in Admissions to the New York City Department of Correction 1995-2015*. New York, NY: The Misdemeanor Justice Project at John Jay College of Criminal Justice. Available at: https://datacollaborativeforjustice.org/wp-content/uploads/2016/08/DOC_Trends_Final.pdf.
- Dobbie, W., Goldin, J., & Yang, C. (2016). "The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges." NBER Working Paper Number 22511. Available at: <https://www.nber.org/papers/w22511.pdf>.
- Duce, M. Fuentes, C., & Riego, C. (2015). *The Impact of Criminal Procedure Reform in the Use of Pretrial Detention in Latin America*. Justice Studies Center of the Americas. Available at: http://biblioteca.cejamericas.org/bitstream/handle/2015/3551/Impact_of_Reform_on_PTD_in_Latin_America_CEJA%5b1%5d.pdf?sequence=1&isAllowed=y.
- Fox, A. & Koppel, S. (2019). *Pretrial Release Without Money: New York City, 1987-2018*. New York, NY: CJA. Available at: <https://www.nycja.org/publications/test-3>.
- Freudenberg, N., Daniels, J., Crum, M., Perkins, T., & Richie, B. E. (2005). "Coming Home from Jail: The Social and Health Consequences of Community Reentry for Women, Male Adolescents, and their Families and Communities." *American Journal of Public Health* 95: 10: 1725-1736.
- Hahn, J. (2016). *An Experiment in Bail Reform: Examining the Impact of the Brooklyn Supervised Release Program*. New York, NY: Center for Court Innovation. Available at: http://www.courtinnovation.org/sites/default/files/documents/BK%20SRP_Research%20Report_FINAL.pdf.
- Kaeble, D. & Cowhig, M. (2018). *Correctional Populations in the United States, 2016*. Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. Available at: <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>.

Lippman, J., Aborn, R. M., Cartagena, J., et al. (2017). *A More Just New York City*. New York, NY: Independent Commission on New York City Criminal Justice and Incarceration Reform. Available at: <https://static1.squarespace.com/static/5b6de4731aef1de914f43628/t/5b96c6f81ae6cf5e9c5f186d/1536607993842/Lippman%2BCommission%2BReport%2BFINAL%2BSingles.pdf>.

Listwan, S. J., Sullivan, C., Agnew, R., Cullen, F. T., & Colvin, M. (2013). "The Pains of Imprisonment Revisited: The Impact of Strain on Inmate Recidivism." *Justice Quarterly* 30: 1: 144-167.

Lowenkamp, C., VanNostrand, M., & Holsinger, A. (2013a). *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*. Houston, TX: The Laura and John Arnold Foundation. Available at: http://www.arnoldfoundation.org/wpcontent/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf.

Lowenkamp, C., Van Nostrand, M., & Holsinger, A. (2013b). *The Hidden Costs of Pretrial Detention*. Houston, TX: The Laura and John Arnold Foundation. Available at: https://static.prisonpolicy.org/scans/ljaf/LJAF_Report_hidden-costs_FNL.pdf.

New York City Criminal Justice Agency. (2019a). *Annual Report 2017*. New York, NY: CJA. Available at: <https://www.nycja.org/publications/cja-annual-report-2017>.

New York City Criminal Justice Agency. (2019b). *Overview of New York City's Pretrial Release Assessment*. New York, NY: CJA. Public PowerPoint presentation delivered to policymakers in New York City.

NYC Criminal Justice. (2019). *New York City is Leading a Historic Decarceration Plan*. New York, NY: Mayor's Office of Criminal Justice. Available at: <https://rikers.cityofnewyork.us/wp-content/uploads/Historic-Decarceration-Plan.pdf>.

NYC Criminal Justice. (2018a). *Supervised Release Quarterly Scorecard: July – September 2018*. New York, NY: Mayor's Office of Criminal Justice. Available at: https://criminaljustice.cityofnewyork.us/wp-content/uploads/2018/11/SR_11.14.18.pdf.

NYC Criminal Justice. (2018b). *Supervised Release Quarterly Scorecard: October – December 2018*. New York, NY: Mayor's Office of Criminal Justice. Available at: https://criminaljustice.cityofnewyork.us/wp-content/uploads/2019/02/SR_oct-dec_2018.pdf.

NYC Department of Correction. (2019). *NYC Department of Correction at a Glance: Information for the 12 Months of FY 2019 (August 2, 2019)*. Available at: https://www1.nyc.gov/assets/doc/downloads/press-release/DOC_At_Glance_FY2019_072319.pdf.

Patten, M., Hood, Q. O., Low-Weiner, C., et al. (2018). *Trends in Misdemeanor Arrests in New York, 1980 to 2017*. New York, NY: The Misdemeanor Justice Project at John Jay College of Criminal Justice. Available at: <http://misdemeanorjustice.org/wp-content/uploads/2018/12/FINAL.pdf>.

Phillips, M. T. (2012). *A Decade of Bail Research in New York City*. New York, NY: Criminal Justice Agency. Available at: <https://www.prisonpolicy.org/scans/DecadeBailResearch12.pdf>.

Rempel, M., & Rodriguez, K. (2019). *Bail Reform in New York: Legislative Provisions and Implications for New York City*. New York, NY: Center for Court Innovation. Available at: <https://www.courtinnovation.org/publications/bail-reform-NYS>.

Rempel, M., Kerodal, A., Spadafore, J., & Mai, C. (2017). *Jail in New York City: Evidence-Based Opportunities for Reform*. New York, NY: Center for Court Innovation. <https://www.courtinnovation.org/publications/jail-new-york-city-evidence-based-opportunities-reform>.

sayegh, g. (2019). *Making Sense of the Fight over NYC Jails*. New York, NY: Katal Center for Health, Equity, and Justice. Available at: <https://www.katalcenter.org/makingsenserikers>.

Spohn, C. (2007). “The Deterrent Effect of Imprisonment and Offender’s Stakes in Conformity.” *Criminal Justice Policy Review* 18:1: 31-50.

Subramanian, R., Delaney, R., Roberts, S., Fishman, N., & McGarry, P. (2015). *Incarceration’s Front Door: The Misuse of Jails in America*. New York, NY: Vera Institute of Justice. Available at: https://www.vera.org/downloads/publications/incarcerations-front-door-report_02.pdf.

Weill, J., & Wada, C. (2019). *Risk Informed Release Pilot—Preliminary Memorandum*. New York, NY: Center for Court Innovation. (Memorandum with pilot evaluation results, submitted to the Mayor’s Office of Criminal Justice in New York City on June 21, 2019.)

White, E., Labriola, M., Kerodal, A., Jensen, E., & Rempel, M. (2015). *Navigating the Bail Payment System in New York City: Findings and Recommendations*. New York, NY: Center for Court Innovation. Available at: <https://www.courtinnovation.org/sites/default/files/documents/Bail%20Payment%20in%20NYC.pdf>.

Zeng, Z. (2019). *Jail Inmates in 2017*. Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. Available at: <https://www.bjs.gov/content/pub/pdf/ji17.pdf>.