Bail Reform in New York

Legislative Provisions and Implications for New York City

Center for Court Innovation

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On April 1, 2019, New York State passed sweeping criminal justice reform legislation that eliminates money bail and pretrial detention for nearly all misdemeanor and nonviolent felony defendants; requires prosecutors to disclose their evidence to the defense earlier in case proceedings; promotes speedy trial rights; and reduces the maximum length of a jail sentence for people convicted of a misdemeanor from one year to 364 days (avoiding deportation exposure for many immigrants convicted of minor crimes). This document reviews the major components of the first of these changes, bail reform, and includes data indicating the scope of its potential impact in New York City.

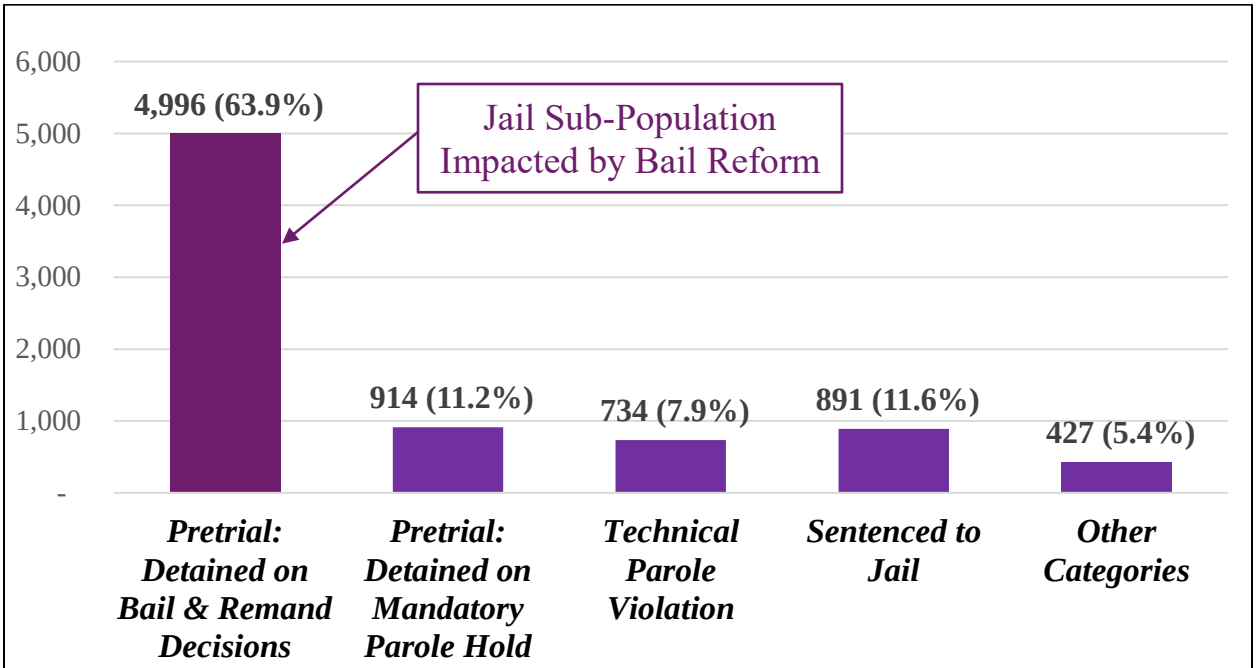
On any given day in early 2019, more than 22,000 New Yorkers were incarcerated in a local jail—about 8,000 in New York City and 14,000 in the rest of the state. As is the case in local jails across the country, more than six in ten of these individuals were held pretrial, prior to a conviction, usually stemming from an inability to afford money bail. The stakes for how bail reform impacts this pretrial population are especially high in New York City, given the city's efforts to close the jail complex on Rikers Island. Bail reform, along with the other reform measures, is scheduled to go into effect on January 1, 2020.

Elimination of Money Bail and Pretrial Detention in Most Cases

New York's bail reform requires most defendants to be released during the pretrial period, eliminating both money bail and pretrial detention in nearly all misdemeanors and nonviolent felonies, while preserving bail and detention as options in most violent felonies. Our analysis indicates that of the almost 205,000 criminal cases that were arraigned in New York City in 2018, the new legislation leaves money bail as an option in just 10 percent. For those one in ten cases, the law also requires judges to explicitly consider what defendants can afford to pay before setting bail.

Shown in the graphic on the next page, of the 7,822 people held in a New York City jail on April 1, 2019, almost 5,000 were held pretrial and potentially impacted by the changes in the bail law.[1] Our analysis finds that 43 percent of these 5,000 individuals (excluding those held on a parole violation or after a sentence is imposed) would have been released under the State's bail reform, were it already in effect, since they would no longer be eligible for money bail or pretrial detention.

The New York City Jail Population on April 1, 2019:
Total = 7,822



Source: New York City Department of Correction data via NYC Open Data (analysis by the Center for Court Innovation).

Misdemeanors

Bail reform disallows money bail in almost all cases charged with a misdemeanor, with two exceptions: (1) sex offense misdemeanors, and (2) misdemeanor criminal contempt (PL 215.50) where there is an underlying allegation of domestic violence. Of people charged with misdemeanor or lesser offenses and held in jail in New York City on April 1, 2019, 12 percent met one of these exceptions. The bail law also eliminates the possibility of straight pretrial detention ("remand") in *all* cases charged with a misdemeanor or lesser offense.

Felonies

The law establishes nine criteria where both money bail and remand remain permissible in felony cases, while also indicating a range of other options that should be considered in these cases, including release on the defendant's own recognizance or non-monetary conditions such as pretrial supervision. As a practical matter, the nine criteria permit bail and detention with nearly all violent felonies but rule it out with nearly all nonviolent felonies. The nine criteria are as follows:

1. **Violent Felony Offense (VFOs), with the exception that bail and detention are disallowed if the charge is the second subsection of burglary in the second degree (PL 140.25(2)) or the first subsection of robbery in the second degree (PL 160.10(1)):** In practice, most second degree robbery cases do not involve the exempted subsection, so among violent felonies, it is really only burglary in the second degree cases that cannot routinely face bail or detention under the new law.[2]

2. **Nonviolent Felony Witness Intimidation (PL 215.15):** On April 1, there were only three such cases in pretrial detention in New York City.

3. **Nonviolent Felony Witness Tampering (PL 215.11, 215.12, 215.13):** On April 1, there was just one case in pretrial detention in New York City.

4. **Class A Felony, *except* Class A drug felonies other than PL 220.77:** Although most Class A felonies involve violent charges such as murder, predatory sexual assault, and arson, according to the New York State Penal Law, Class A felonies are technically in their own category. The new law allows all Class A felonies to continue to face money bail or detention, with the exceptions of four of five Class A drug felonies in the penal law. The only Class A drug felony that may still face money bail or detention is operating as a major trafficker (PL 220.77).

5. **Sex Offenses:** This provision allows bail or detention for any "felony sex offense" as listed in section 70.80 in the Penal Law (encompassing rape, sexual abuse, sexual assault, and several other sex offenses); or for incest (PL 255.25, 255.26, or 255.27). Most of these charges are classified either as violent or Class A felonies. On April 1, 2019, there were only 13 individuals charged with applicable nonviolent felonies in pretrial detention in New York City.

6. **Conspiracy to Commit Murder:** On April 1, there were 48 individuals with the underlying charge of conspiracy in the second degree (PL 105.15) in pretrial detention in New York City. Available data does not indicate the exact subset who specifically conspired to commit murder.

7. **Terrorism Related Offenses:** This provision encompasses: (1) money laundering in support of terrorism in the first or second degrees (PL 470.24 or 470.23); or (2) any felony terrorism charge defined in PL 490, except PL 490.20 (making a terroristic threat). Not a single individual with these charges was in the New York City pretrial jail population on April 1.

8. **Felony Criminal Contempt with an Underlying Allegation of Domestic Violence (PL 215.51(b), (c), or (d), or 215.52):** This provision encompasses felony order of protection violations in cases of domestic violence. There were an estimated 78 such cases in pretrial detention in New York City on April 1.[3]

9. **Select Offenses Against Children:** This provision specifies three charges technically classified as nonviolent felonies: (1) facilitating a sexual performance by a child with drugs or alcohol (PL 263.30), (2) use of a child in a sexual performance (PL 263.05), or (3) luring a child (120.70.1). On April 1, three people were in detention with these charges in New York City.

Requirements for Considering Financial Resources When Setting Bail

In principle, the purpose of bail has never been to detain, but to incentivize court attendance by exposing defendants to the potential loss of money if they skip court. However, because courts routinely set bail amounts that are unaffordable, bail has the practical effect of detaining thousands of defendants. In 2018, New York City defendants posted bail at arraignment in only 15 percent of criminal cases where bail was set. The defendants in the remaining cases were all incarcerated after arraignment. Of those sent to pretrial detention who had to post bail to secure their release, 51 percent were able to post bail before their case was resolved.[4]

The new law adds requirements designed to help ensure that defendants can pay bail when it is set.

- **Alternative Forms of Bail:** Judges are required to set at least three forms of bail, which must include a partially secured or unsecured bond—two of the least onerous forms of bail. A partially secured bond allows defendants (or their friends or family) to pay 10 percent or less of the total bail amount up front; the balance is only paid if the defendant skips court. An unsecured bond works the same way, but no up-front payment is required. In the preexisting status quo, the use of these "alternative" forms of bail is rare. However, research by the Vera Institute of Justice demonstrates that people who pay bail in this fashion are as likely to attend their court dates as people who pay the full bail amount up front.[5]

- **Explicit Consideration of Ability to Pay:** The new law also requires judges to consider each defendant's (1) "individual financial circumstances," (2) "ability to post bail without posing undue hardship," and (3) "ability to obtain a secured, unsecured, or partially secured bond." The clear legislative intent is that bail should be set in forms and amounts that are affordable.

Release on Recognizance

The bail reform law also encourages courts to release defendants on their own recognizance while their cases are pending. In these cases, defendants are under no restriction and must simply appear at their appointed court dates. The court must release defendants on

recognizance unless they pose "a risk of flight." Release decisions, including on recognizance, may *not* be based the defendant's perceived future dangerousness or risk to public safety.

Non-Monetary Release Conditions

The new law also describes several non-monetary conditions (other than money bail) to help defendants attend their court dates.

- **Non-Monetary Conditions:** In those cases where a risk of flight exists, judges must have the option of setting non-monetary conditions. The law states that judges must select the "least restrictive" conditions that will "reasonably assure the principal's return to court." Judges must also explain their decision "on the record or in writing." Examples of non-monetary conditions that courts are likely to use include supervised release, additional court date reminders, travel restrictions, and limitations on firearms or weapons possession. The legislation also includes language indicating that jurisdictions must establish more types of non-monetary conditions than supervised release alone and can only order supervision when less intensive conditions cannot reasonably assure court attendance.

- **Pretrial Services Agencies:** The law requires the New York State Office of Court Administration to certify one or more pretrial services agencies in each county. These agencies must be public or nonprofit entities. They are responsible for supervising defendants released with non-monetary conditions and must submit an annual report to the court system.

- **Court Appearance Reminders:** Either the court or its pretrial services agency must notify all defendants released on recognizance or with non-monetary conditions of court appearances by text, phone, email, or first-class mail. The court must also allow all defendants to select a preferred notification method.

- **Electronic Monitoring:** Electronic monitoring is allowed for 60 days (with an option to renew after a subsequent court hearing) in (1) felony cases, (2) misdemeanor domestic violence cases, (3) misdemeanor sex offenses (defined in Penal Law Article 130), and (4) misdemeanors where the defendant was convicted of a violent felony in the past 5 years. Electronic monitoring may only be ordered if "no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure a principal's return to court." When such monitoring is ordered, the defendant is considered "in custody" for the purposes of sections 170.70 and 180.80 of the Criminal Procedure Law. These sections limit custody to six days from arrest to grand jury action in felony cases or five days from criminal court arraignment to the filing of corroborating documents in misdemeanor cases.

- **Changes to Release Conditions:** At future court dates, the court must consider easing non-monetary conditions in response to compliance and may impose additional conditions in response to noncompliance – the latter so long as defendants have an opportunity for a hearing, and the court finds "by clear and convincing evidence" that the defendant violated a release condition. Whenever a defendant is in pretrial detention, the defense attorney may also proactively apply for a review of the prior release decision and must be able to present evidence supporting a less onerous condition. Finally, the defense may also apply to a judge of the superior court for a review of any prior release decision by a local criminal court judge.

Permitted Responses to Pretrial Noncompliance

The new law delineates several specific criteria allowing the court to revoke release on recognizance, non-monetary conditions, or money bail. In all instances, the court must first hold a hearing where the defendant can present evidence or cross-examine witnesses.

Circumstances Where Sanctions May Include Money Bail or Remand

If the defendant was initially charged with a felony and the court "finds reasonable cause to believe the defendant committed" a new Class A felony, violent felony, or witness intimidation, the court may revoke the prior release order and either set bail or remand the defendant.

Circumstances Where Sanctions May Include Money Bail or Electronic Monitoring

In cases involving any of the following four forms of pretrial noncompliance, the court may set money bail (even if bail was not previously allowed at arraignment) but may *not* remand the defendant. The four forms of noncompliance are (1) "persistently and willfully failed to appear" in the current case; (2) violated an order of protection (PL 215.51.b, c, or d); (3) initially charged with a misdemeanor or violation and then charged with felony witness intimidation or tampering during the pretrial period; or (4) initially charged with a felony and charged with a new felony while the first case is pending. A defendant also qualifies for electronic monitoring in response to the above four forms of noncompliance.

Other Important Bail Reform Provisions

- **Risk Assessment:** Courts may consider information from formal release assessment tools that are designed to predict a defendant's likelihood of appearing in court. Any such tools must be publicly available, unbiased by "race, national origin, sex, or any other protected class," and validated for predictive accuracy (with validation data made publicly

available in de-identified form). Further, an individual defendant's assessment results must be made available to the defense, upon written request.

- **Bench Warrant Grace Period:** The new law prohibits courts from issuing a warrant for 48 hours whenever a defendant fails to appear, unless the defendant is charged with a new crime or there is evidence of a "willful" failure to appear. During the 48-hour period, the defense attorney can contact the defendant and encourage a voluntary return.

- **Domestic Violence:** Either detention or money bail is allowed for all violent felonies involving domestic violence as well as for criminal contempt cases technically classified as nonviolent felonies. Money bail, but not remand, is allowed in criminal contempt cases classified as misdemeanors. Electronic monitoring is allowed in all domestic violence cases, and money bail, but not detention, is also allowed in response to an order of protection violation while the current case is pending. In addition, the amendment to section 530.13(8)(a) adds that non-monetary conditions can be revoked for an alleged violation of a temporary order of protection previously issued by any Supreme or Family Court judge.

- **Annual Report:** The Office of Court Administration must make publicly available the annual reports that each pretrial services agency submits. These reports must provide the number of defendants supervised with a breakdown by race/ethnicity and charge. The reports must also indicate the frequency and nature of court-imposed modifications to conditions during the pretrial period, average length of time on pretrial supervision, number and reasons for supervision revocations, and final case dispositions and sentences in cases supervised.

Pre-Arraignment Detention Reform

In lieu of taking a defendant into custody for the approximately 24-hour period between arrest and arraignment, if a defendant is charged with a misdemeanor or a Class E felony, the arresting officer must issue a Desk Appearance Ticket (DAT), which allows the defendant to be released and then return to court on a preset arraignment date. This date must be no more than 20 days later, unless the defendant is participating in a pre-arraignment diversion program that requires more time.

There are several exceptions to Desk Appearance Ticket eligibility: domestic violence cases, sex offense cases, several Class E felony charges that involve either escape from custody or bail jumping, cases where it is reasonably expected that an order of protection will be issued, cases where a driver's license may be suspended or revoked, cases where the defendant has an outstanding warrant or history of failing to appear in court, and cases where the defendant cannot establish identity—although a formal photo identification is *not* required. Police officers also have discretion not to issue a Desk Appearance Ticket if the defendant appears to "face harm without immediate medical or mental health care."

In 2018, just under 40,000 Desk Appearance Tickets were issued by law enforcement in misdemeanor and Class E felony cases in New York City. By comparison, allowing that the frequency of some exceptions to the new Desk Appearance Ticket requirement cannot be quantified (such as how often defendants cannot establish identity or how often they present with severe mental health needs), available data suggests that as many as 90,000 Desk Appearance Tickets would have been issued if the new legislation had been in effect.[6]

The Impact of Bail Reform

New York's criminal justice reform legislation significantly curtails the use of both money bail and pretrial detention. We estimate that, were it in effect today, 2,138—or 43 percent—of the 4,996 defendants held pretrial in New York City on April 1, 2019 would be released.[7] Under the new regime, these defendants would face charges that would make them ineligible for money bail and detention, and they would instead be released on recognizance, non-monetary conditions, or, in limited circumstances, electronic monitoring. (This analysis excludes defendants held in jail on April 1 due to a parole violation or after a sentence was imposed, who are *not* impacted by bail reform.)

The data further indicates that of those in pretrial detention on April 1, 2019, 88 percent charged with a misdemeanor or lesser offense and 91 percent charged with a nonviolent felony would be released under the new law (shown in the graphic on the next page).[8]

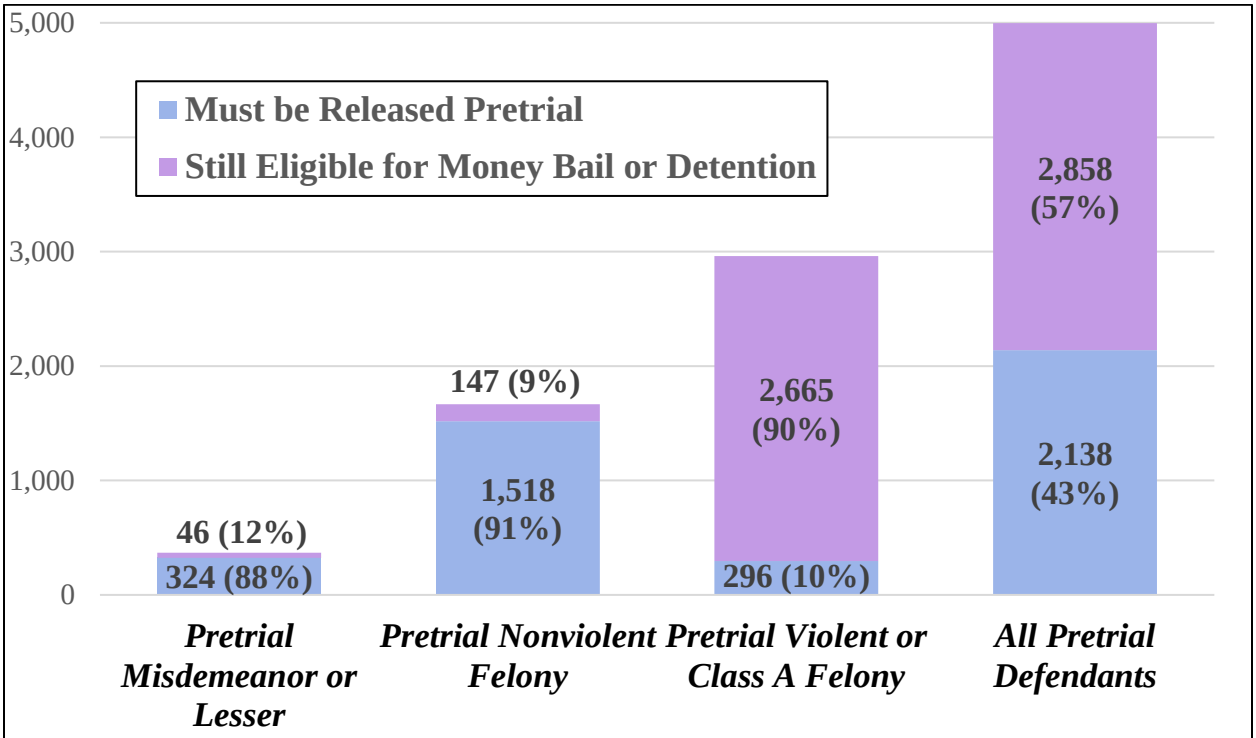
Three important qualifications are worth noting:

- At least some of the defendants who would no longer be detained according to the above analysis could, in fact, be detained *later* in the pretrial period if they met one of the circumstances where money bail or detention may be imposed in response to pretrial misbehavior.

- The data employed to derive the above estimates is imperfect. For instance, Department of Correction data only indicates the "top charge" for each defendant in jail, and in some cases, it is possible that other attached charges still qualify a defendant for detention even if the top charge does not. Also, isolating domestic violence cases held in New York City jails is a somewhat inexact science (see endnote 3).

- The analysis above omits 914 defendants who were detained pretrial on April 1, 2019 because a new criminal case triggered a parole violation on an older case. The filing of a parole violation creates a mandatory "parole hold" that bail reform does not remove.

The Potential Scope of Bail Reform:
Impacted Defendants in New York City's Pretrial Detention Population on April 1, 2019 (Total = 4,996 Defendants in Pretrial Detention)



Source: New York City Department of Correction data via NYC Open Data (analysis by the Center for Court Innovation). The pretrial jail population reflected in this chart omits defendants whose pretrial detention resulted from a parole violation.

Conclusions

Based on available data for who was in jail in New York City on April 1, 2019, bail reform will reduce the pretrial jail population by at least 2,100 people. Jail reductions are likely to be significantly greater outside New York City, given that many upstate jurisdictions currently detain a greater proportion of misdemeanor defendants during the pretrial period.

Unlike other recently passed bail reforms in New Jersey and California, New York's approach did not eliminate money bail for all cases. For some cases—mainly violent felonies—New York sought to reform the use of bail with provisions requiring a partially secured or unsecured bond and other measures to make bail more affordable. By retaining the option of money bail, the logic of New York's approach is that judges will take advantage of the continued option to set bail in violent felonies where they might have detained the defendant outright if bail had been eliminated. In theory, the defendants in these cases may be able to pay bail *more often than in the past* due to the new provisions requiring that bail amounts consider defendants' ability to pay. New York's reform law also includes

clear language throughout requiring courts to set the "least restrictive" pretrial condition that can reasonably secure court attendance. In short, even where it is allowed, the legislation strongly discourages money bail or detention absent a clear justification linked to court attendance.

It is possible, however, that courts will respond to bail reform in ways that limit its scope. For one, courts may elect to rely less on money bail, and more on straight remand, in cases where either is permissible. Second, in adherence to the legislation, courts may take some account of defendants' financial resources but, for the many indigent defendants who pass through the criminal courts every day, in practice, bail amounts may continue to be unaffordable.

On the other hand, it is also possible that the implementation of the law will minimize the possibility of pretrial detention and lead to reductions in New York City's jail population of closer to 3,000 individuals, rather than the 2,100 suggested above. Under this scenario, bail reform would bring the city's jail population under the 5,000 number widely cited as necessary to close the Rikers Island jail complex.

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Notes

[1] New York City jail population data included throughout this document is based on publicly available Department of Correction data for a snapshot date of April 1, 2019. The specific source is: NYC Open Data, *Daily Inmates in Custody*.

[2] Of cases arraigned on robbery in the second degree in New York City in 2018, only 27 percent involved the first sub-section for which money bail and detention would be disallowed. By contrast, of cases arraigned on burglary in the second degree, 91 percent involved the relevant second sub-section, meaning that nearly all second-degree burglary charges could not face bail or detention.

[3] Department of Correction data solely indicates the penal law charge for individuals held pretrial, and this charge does not per se communicate whether the case involved domestic violence. However, for purposes of preparing this document, the proportion of common domestic violence charges, including criminal contempt, that involved domestic violence was estimated using a methodology developed previously for the Independent Commission on New York City Criminal Justice and Incarceration Reform (known as the Lippman Commission). The method is discussed in Appendix B of the Commission's April 2017 report, *A More Just New York City*.

[4] Bail payment outcomes are based on data provided by the New York State Office of Court Administration. The analysis excludes cases involving bail amounts of one dollar, which typically signify that a mandatory hold is in effect, precluding the defendant's release until the hold is lifted.

[5] Rahman, I. (2017). *Against the Odds: Experimenting with Alternative Forms of Bail in New York City's Criminal Courts*. New York, NY: Vera Institute of Justice.

[6] Based upon data provided by the New York State Office of Court Administration, of just over 170,000 misdemeanors and Class E felonies arraigned in 2018, 61 percent, totaling just over 104,000 cases, qualified for a Desk Appearance Ticket, after ruling out sex offenses, domestic violence, other types of assaults (which might elicit an order of protection), the excluded escape and bail jumping charges, defendants with an outstanding or prior warrant for failure to appear, and driving while intoxicated (DWI) or reckless driving cases. (Besides DWI and reckless driving, other Vehicle and Traffic Law misdemeanors were not ruled out in the analysis, because almost half of them already received a Desk Appearance Ticket in 2018, making it likely that police officers would continue to issue Desk Appearance Tickets in such cases under the new law.) Allowing that the analysis omits several exceptions to mandatory Desk Appearance Ticket issuance, including certain Vehicle and Traffic Law offenses, cases where defendants cannot make their identity known, defendants with an open warrant in a summons case, or defendants who appear to require immediate mental health or medical care, it is plausible that the actual percentage of misdemeanors and Class E felonies who would have received a Desk Appearance Ticket under the new law falls closer to 50 to 55 percent, which would have involved about 85,000 to 95,000 cases in 2018. In this regard, there is significant uncertainty in any estimate. On one hand, additional individuals might fall under the exceptions, which could make the resulting Desk Appearance Ticket numbers lower, while, on the other hand, police officers have discretion to issue Desk Appearance Tickets even when some exceptions apply, which could make the future numbers higher.

[7] These results indicate the number of people held pretrial in a New York City jail on April 1, 2019 who would no longer be there under bail reform. However, over the course of 2018, for example, over 27,000 unique individuals cycled in and out of the city's jails during the pretrial period for as few as several days to more than a year. This significantly larger number of individuals who currently experience pretrial detention each year are not all represented in a one-day snapshot.

[8] For purposes of this computation, violent and Class A felonies are combined. An exception is that four nonviolent drug felonies (PL 220.18, 220.21, 220.41, and 220.43), which are technically part of Class A, but are ineligible for detention under bail reform, are grouped with the nonviolent felonies. This grouping closely follows standard convention in most New York State research.