
Bail Reform Revisited

The Impact of New York's Amended Bail Law on Pretrial Detention

By Michael Rempel and Krystal Rodriguez

 Center
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Center for Court Innovation

520 Eighth Avenue, 18th Floor

New York, New York 10018

646.386.3100 fax 212.397.0985

www.courtinnovation.org

For correspondence, please contact Michael Rempel (rempelm@courtinnovation.org) or Krystal Rodriguez (rodriguez@courtinnovation.org) at the Center for Court Innovation.

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¹ We note that any 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.

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Bail Reform Revisited

The Impact of New York's Amended Bail Law on Pretrial Detention

Summary

On April 1, 2019, New York State passed sweeping restrictions to the use of money bail and pretrial detention, ruling out their use for nearly all misdemeanor and nonviolent felony charges. The reforms also established a new presumption of release for all cases—with conditions when deemed necessary. Even when bail and pretrial detention remain legally permissible, the reforms limited their use to cases when a judge finds them to be the least restrictive condition necessary to assure court attendance.

Bail reform went into effect January 1, 2020, and, with close to nine out of 10 cases made ineligible for bail,¹ contributed to a 40 percent decline in New York City's pretrial jail population. Elsewhere in the state, the impacts were even slightly larger.

The reforms were then amended April 3, 2020, with an effective date at the outset of July for the modified statute. The 2020 amendments include: (1) an expanded list of charges and situations, especially involving nonviolent felonies, in which judges may again set money bail or remand people to pretrial detention; (2) more options for ordering non-monetary release conditions (including mandated treatment, maintaining employment or educational involvement, and conditions related to the protection of domestic violence victims); and (3) new public reporting requirements to document pretrial decision-making and outcomes on an ongoing basis across the state.

Our analysis suggests that, when compared to the original reforms passed in 2019, the amendments will produce a 16 percent relative increase in the use of money bail and pretrial detention among New York City criminal cases and a 16 percent increase in the pretrial jail population. Similar effects are likely across the rest of the state.

That said, even amended, the bail law will continue to sharply reduce pretrial detention when compared to the pre-reform era. Approximately 84 percent of New York City criminal cases arraigned in 2019 would have been ineligible for bail under the amended statute; and the amendments still allow for an estimated 30 percent reduction in the city's jail population when compared to the absence of any reform.

This document describes New York's current bail law—focusing on the changes passed in April 2020. We then project the impact on the state's future use of bail and detention. The long-term effects of the emergency reductions in jail and prison populations triggered by the COVID-19 pandemic in the spring of 2020 are impossible to predict, as are other changes to court practice. However, in our conclusion, we weigh the factors that could produce a culture change in pretrial decision-making—in the direction of greater, or less, detention—and consider the effect each could exert on our models.

Legislative Provisions in the Amended Bail Law

Partial Elimination of Money Bail and Pretrial Detention

New York’s amended reform requires most defendants to be released during the pretrial period—while people are presumed innocent under the law. The amended law eliminates the use of money bail and pretrial detention for people charged with most misdemeanors and many nonviolent felonies, while preserving money bail and detention as legal options in virtually all violent felony cases.

Additionally, judges must order release on recognizance (with no conditions) unless the defendant poses a demonstrated “risk of flight,” in which case judges are required to select the least restrictive condition(s) necessary, including non-monetary ones, such as pretrial supervision or electronic monitoring. These conditions should reasonably assure court appearance and compliance with court conditions.

Charges Eligible for Bail and Remand Under the 2019 Reforms

In the original April 2019 reform, nine categories of charges—overwhelmingly felonies—remained eligible for bail. These are still bail-eligible under the 2020 amendments. The categories include: virtually all violent felony offenses; felony witness tampering; felony witness intimidation; Class A felonies (except *most* Class A drug charges); sex offenses; criminal contempt *when involving a crime of domestic violence*; conspiracy to commit murder; most terrorism charges; and offenses involving pornography and children.

Overwhelmingly, misdemeanors and nonviolent felonies became *ineligible* for bail. The specific provisions are detailed in our original analysis of the 2019 law.²

Additional Qualifying Charges Under the 2020 Amendments

In April 2020, the bail statute was amended to add certain misdemeanors and nonviolent felonies to the list of bail-eligible charges. In general, the New York State Penal Law classifies certain felonies as “violent” (PL 70.02), making all others statutorily “nonviolent.” We list the newly added charges below based on this general classification.

Newly Qualifying Misdemeanors. Given the statute’s focus on ensuring appearance in court, this year’s amendments made both bail jumping (PL 215.22) and escape from custody (PL 205.05) bail-eligible.

Also eligible, but only under specific circumstances: criminal obstruction of breathing or blood circulation (PL 120.11), *if committed as a domestic violence offense*;³ and endangering the welfare of child (PL 260.10), *if the defendant is required to register as a sex offender and is designated a level 3 sex offender*.

Newly Qualifying Nonviolent Felonies. The 2020 amendments re-categorized many more charges classified as nonviolent felonies as eligible for both money bail *and* remand. (While some misdemeanors are eligible for bail, none are subject to direct remand to pretrial detention, whereas *all* qualifying felonies can face *either* bail or remand.) Newly bail- and remand-eligible charges in the nonviolent felony category include:

- 1. Vehicular and Aggravated Assault:** Vehicular assault in the first degree and aggravated vehicular assault (PL 120.04, 120.04-a); and aggravated assault on a person less than 11 years old (PL 120.12).
- 2. Any Crime Resulting in Death:** This would include all homicide-related offenses listed in Article 125 of the penal law (PL 125.10-125.27), where some of these charges are designated nonviolent felonies (e.g., criminally negligent homicide and reckless manslaughter), as well as leaving the scene of an accident where a death occurred (VTL 600(2)(c)).
- 3. Financial Crimes:** Grand larceny in the first degree (PL 155.42); enterprise corruption (PL 460.20); money laundering in support of terrorism in the third and fourth degrees (PL 470.22, 470.21); and money laundering in the first degree (PL 470.20).
- 4. Sexual Performance of Children:** Promoting a sexual performance by a child and promoting an obscene sexual performance by a child (PL 263.10, 263.15).
- 5. Sex Trafficking:** All subsections of sex trafficking (PL 230.34, PL 230.34-a), of which most are designated nonviolent felonies and were *not* bail-eligible under the 2019 reform, while a few designated as violent felonies had already been designated bail-eligible last year.
- 6. Weapons Possession:** Criminal possession of a weapon on school grounds (PL 265.01-a).
- 7. Bail Jumping and Escape:** Felony bail jumping (PL 215.56, 215.57), and felony escape from custody (PL 205.10, 205.15).
- 8. Select Hate Crimes:** Assault in the third degree (PL 120.00) and arson in the third degree (PL 150.10), *if committed as a hate crime*. (When a hate crime is involved, assault in the third degree is deemed to be an E felony if the offense is completed. An *attempt* to commit assault in the third degree as a hate crime is designated as an A misdemeanor, pursuant to PL 485.10. Both the completed offense and attempt were made bail-eligible, but only the completed act, which is charged as a felony, is also eligible for remand.)

9. Select Domestic Violence Offense: Unlawful imprisonment (PL 135.10), *if committed as a domestic violence crime.*

10. Failure to Register as a Sex Offender: Failure to register (Corr. Law 168-t), *if the defendant is required to register as a sex offender and is designated a Level 3 offender.*

Newly Qualifying Violent Felonies. As in the original reform, all violent felonies remain bail-eligible, with two ongoing exceptions: Subsection 1 of robbery in the second degree (PL 160.10[1]); and subsection 2 of burglary in the 2nd degree (PL 140.25[2]). However, the 2020 amendments made burglary in the 2nd degree, subsection 2 bail-eligible, *if the burglary occurs in the actual “living area” of a dwelling, as opposed to a lobby or other common area.* There is no penal law subsection that distinguishes burglaries involving a living area, *specifically*; this aspect of the alleged crime must be interpreted by the court based on the details of the criminal complaint and other information available at arraignment.

Strangulation in the second degree (PL 121.12) is designated a violent felony and, as such, was already bail-eligible under the 2019 law; however, it was explicitly made bail-eligible, *if committed as a domestic violence crime*, in the 2020 amendment.

Newly Qualifying Class “A” Felonies. Class A felonies are the most serious crimes in the penal law and are further sub-categorized into “A-I” and “A-II.” Class A felonies, generally, were kept as bail- and remand-eligible under the 2019 reforms. However, most Class A *drug felonies* were made ineligible for bail, other than the charge of operating as a major trafficker (PL 220.77).

The 2020 amendments make all Class “A-I” drug felonies bail-eligible. In practical effect, this added two charges to the bail-eligible list: criminal possession of a controlled substance in the first degree and criminal sale of a controlled substance in the first degree (PL 220.21 and 220.43). (As indicated above, the third “A-I” drug felony—operating as a major trafficker [PL 220.70]—was made bail-eligible in 2019 and remains bail-eligible.)

Broad Categories of Defendants Eligible for Bail and Remand

The 2020 amendments delineate four other categories of defendants as newly eligible for bail or remand. The criteria are based on prior criminal history, conduct during a pending case, or pending sentencing status:

- 1. On Community Supervision:** Charged with a felony while on probation or parole release supervision. (The provision involving probation status is more significant, since parole violations filed due to a new case already require mandatory pretrial detention, independent of the bail laws.)
- 2. Persistent Felony Offender:** Charged with a felony, where the defendant could qualify as a *persistent felony offender* if sentenced on the current charge, pursuant to PL 70.10.

(A persistent felony offender has two prior felony convictions, each involving a sentence of more than one year, where the commission and imprisonment for the first felony predate the commission of the second felony. Persistent felony offender sentencing guidelines apply at the time of sentencing on the third felony conviction.)

- 3. Harm to Person or Property:** Charged with any felony or Class “A” misdemeanor involving “harm to an identifiable person or property,” where the alleged crime occurred while released on a felony or Class A misdemeanor charge that also involved harm to an identifiable person or property. (These criteria require that the prosecutor show reasonable cause to believe the defendant committed both the current charge and the underlying previous offense. Critically, neither charge needs to be one of the offenses qualifying for bail listed above.) Crimes involving “harm to an identifiable person or property” is *not* defined in the state penal law, meaning that judges will have to interpret this provision.⁴ (For the purposes of our projections, we think it prudent to assume they will adopt a broad reading.)
- 4. Pled Guilty or Convicted at Trial and Awaiting Sentencing:** Pled or found guilty on the current case, where the judge then adjourns the case for sentencing at a subsequent date (on average, 30 days later in detained cases). The 2020 amendments allow the judge to order bail or remand between the conviction and sentencing dates, even if the current charge was not otherwise bail-eligible earlier in the case (based on the newly added, PL 530.45[2-a]).

An updated bench card lists eligibility for each pretrial option by charge category, highlighting the changes made in 2020 (<https://www.courtinnovation.org/bail-revisited-bench-card>).⁵

Presumption of Release

The presumption of release introduced in the 2019 reforms remains in the amended statute. When considering pretrial options, judges are required to release individuals on their own recognizance unless there is a “risk of flight to avoid prosecution.” If there is such a risk, courts must consider the “least restrictive” condition(s) necessary to reasonably assure the defendant’s return to court and—added in April 2020—to reasonably assure “compliance with court conditions.” (While the logic behind this second consideration is potentially circular, one plausible interpretation is that a judge may add *further* conditions, so long as they aid someone’s ability to comply with the judge’s initial, minimum conditions.)

New Non-Monetary Conditions

While the 2019 reforms introduced the idea of “non-monetary conditions” that could be imposed pretrial, the 2020 amendments offer additional options for courts to consider.

Conditions that must be available to judges based on the 2019 reforms included “contact” with a pretrial service agency; “supervision” by a pretrial agency; travel restrictions (now amended to specifically state surrendering of a passport); the prohibiting of firearm possession; and electronic monitoring of a defendant’s location.

The *additional* non-monetary conditions explicitly specified in the amended 2020 law include:

- **Restrictions to Associations:** Refraining from association with certain victims, witnesses, or co-defendants involved in the current case.
- **Mandatory Programming:** Participation in programming through a pretrial service agency, including: (1) counseling, (2) treatment, and/or (3) intimate partner violence programs. Pretrial service agencies, that is, are no longer limited to the primary function of “supervision”; in conjunction with a court order, they can also offer treatment for a range of individual needs—so long as the treatment is linked to promoting return to court or compliance with (other) court conditions. Although court orders to treatment or intimate partner violence programming were not expressly precluded in the original bail reforms passed in 2019, the amended statute affirms that these options must be available.
- **Hospitalization Pursuant to Mental Health and Hygiene Law § 9.43:** Court-ordered hospitalization for at least 72 hours, where this 72-hour period can be extended as deemed necessary by medical staff, based on an ongoing assessment of the individual.
- **Conventional Community Ties:** Maintaining employment, school, other educational programming, or housing through “diligent efforts.”
- **Order of Protection:** Obeying an order of protection.
- **Victim Safety:** For domestic violence offenses (as defined by PL 530.11), obeying conditions to address victim safety, including ones requested by or on behalf of the victim.

The above list of non-monetary conditions is not meant to be exhaustive. Judges are permitted to order others deemed reasonable in a specific case. All non-monetary conditions can be ordered singularly or in combination and must be provided at no cost to the defendant.

Modification to Court Notifications

The 2019 statute required that the court or a pretrial service agency provide court date reminder notifications to all defendants who are released (with or without conditions). The 2020 statute specifies that when defendants do not share contact information with the court, they are forfeiting these reminders. Additionally, if the court or pretrial service agency fails

to send a reminder notification, this does not excuse the defendant's appearance on their scheduled court date.

Data Tracking and Reporting

Included in the 2020 amendments are significant new data-tracking and reporting requirements. The statute mandates the state's Division of Criminal Justice Services (DCJS) and the chief administrator of the courts to record and publish a series of data points annually. While the statute simply enumerates a long list of data elements, they can be roughly divided into *pretrial outcomes* and *subgroup breakdowns* (i.e., categories of people and cases that should be separately reported).

Pretrial Outcomes

- Pretrial decisions, specifically:
 - Number of defendants released on recognizance
 - Number of defendants released with conditions, including conditions imposed
 - Number of defendants remanded
- Length of pretrial detention (where applicable)
- Rate of failure to appear at scheduled court dates
- Re-arrest rates (presumably, refers to *pretrial* re-arrest rates)
- Case outcomes

Subgroup Breakdowns

- Gender, racial, and ethnic background of the defendant
- Nature of the criminal offense, including the top charge
- Criminal history (e.g., number and type of charges in the criminal record)
- Whether defendant was represented by counsel at every court appearance regarding the securing order (i.e., percent of defendants so represented)
- Any other information the courts and DCJS deem appropriate

Public Reports

Both agencies are required to release public reports of this information, made available on their websites. The Chief Administrator of the Courts (i.e., the New York State Unified Court System) and DCJS are required to release these reports at regular intervals—every 6 months and every 12 months, respectively. The courts and DCJS are due to release their first reports twelve months and eighteen months from the statute's effective date in July 2020.

Impact of the Original and Amended Reforms on Pretrial Detention

In the first section below, using a dataset of New York City criminal cases, we examine the impact of both the original 2019 reform and the 2020 amendments on exposure to money bail and pretrial detention at arraignments. The second section examines the potential impact on the pretrial jail population for both New York City and the rest of the state. Details on how we arrived at our projections, and limitations to the methodology, are covered in a *Technical Supplement* (<https://www.courtinnovation.org/publications/bail-revisited-NYS>).⁶

The Impact of Bail Reform at Criminal Arraignments

In 2019, the New York City courts arraigned close to 170,000 new criminal cases. The table below examines, in turn, those cases' legal eligibility for bail and remand, *had the original and amended reforms already gone into effect*. If the original reform had been in effect in 2019, we estimate that about 88 percent of all cases would *not* have been eligible for either bail or remand. Under the later amended law, that figure drops to 84 percent.

Eligibility for Money Bail and Remand for NYC Cases Arraigned in 2019

	Mandatory Release		Money Bail-Eligible	
NYC Criminal Arraignments in 2019	Original Reform	Amended Reform	Original Reform	Amended Reform
Misdemeanors	128,453			
Percent	96.6%	93.3%	3.4%	6.8%
Number	124,071	119,756	4,382	8,697
Nonviolent Felonies	22,760			
Percent	92.1%	87.2%	7.9%	12.8%
Number	20,971	19,837	1,789	2,923
Violent Felonies	15,730			
Percent	10.8%	5.9%	89.2%	94.1%
Number	1,700	927	14,030	14,803
All 2019 Arraignments	166,943			
Percent	87.9%	84.2%	12.1%	15.8%
Number	146,742	140,520	20,201	26,423

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

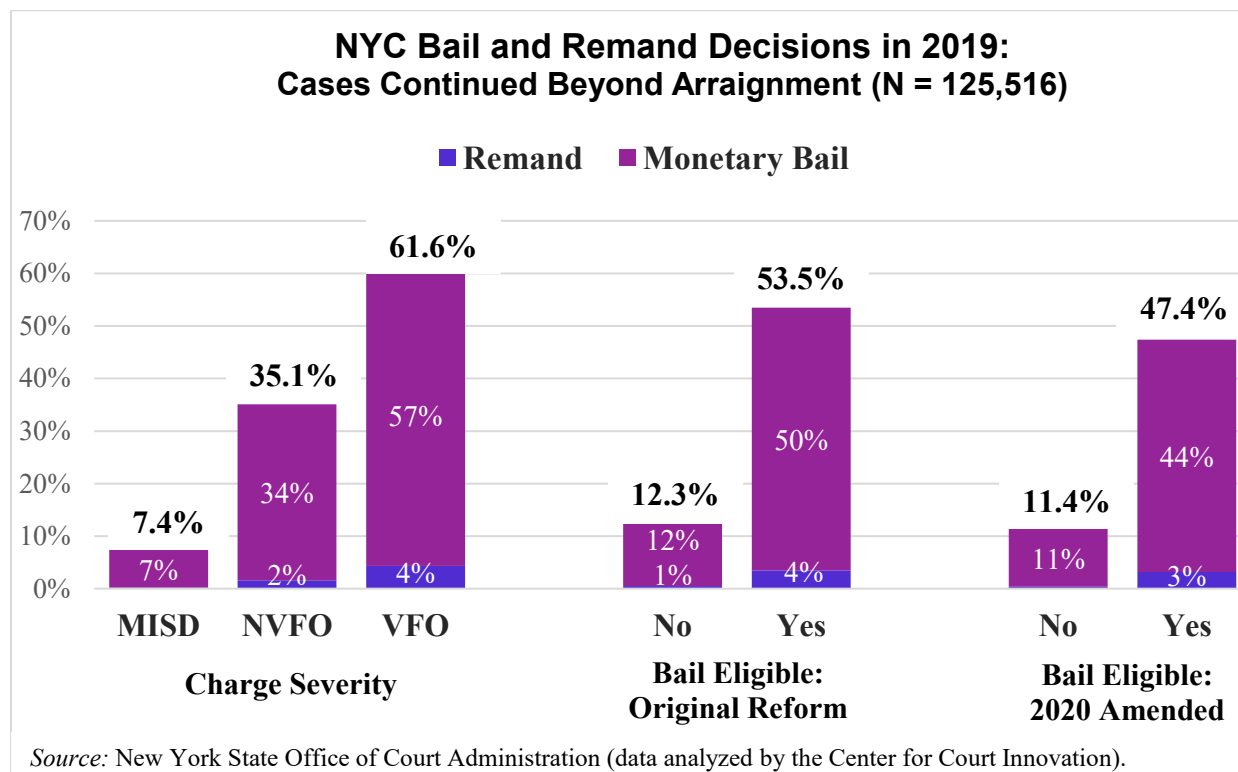
As shown in the table, most misdemeanors and nonviolent felonies arraigned in 2019 would *not* have been eligible for bail under the auspices of either of the two reforms. Conversely, 89 percent of violent felonies under the original reform, and a somewhat higher 94 percent under the amended law, would have remained exposed to both bail and remand.

Bail-Setting Prior to Either of the Two Reforms

Even when judges have the option to set bail, they have not always done so. Bail was permissible across-the-board throughout 2019, and remand was allowed for all felonies, but New York City judges only used bail or remand in about one out of five cases continued beyond arraignment.

The graphic below depicts actual bail and remand decisions in 2019. Collectively, judges ordered bail or remand in 7 percent of misdemeanors, 35 percent of nonviolent felonies, and 62 percent of violent felonies. (These combined bail and remand percentages exclude cases in which \$1.00 bail was set, signifying that another legal matter, outside of the current case in the judge’s discretion, required detention.)

As might be expected, judges were significantly more likely to make use of bail in the (generally more serious) categories of cases that remain bail-eligible under both the original and amended reforms. For example, in 2019, before either of the reforms went into effect, judges ordered bail or remand in 54 percent of the cases that remained bail-eligible under the original 2019 reforms. For those cases made *ineligible* for bail through these reforms, judges in 2019 made use of bail or remand only 12 percent of the time.



Impact of Reform on Cases with Bail or Remand Ordered in 2019

To gain a more refined perspective on the impact of bail reform, we isolated the approximately 23,000 cases in which New York City judges chose bail or remand at arraignment in 2019. Of those 23,000 cases, if the *original* reform had been in effect, these options would not have been available 55 percent of the time. Under the *amended* law, they would be ruled out less often—48 percent of the time.

As shown below, the greatest difference between the two reforms is in the handling of nonviolent felonies. The original reform banned bail and remand in 85 percent of nonviolent felony cases; for the amended law, the proportion drops to 75 percent.

In terms of absolute numbers, where judges ordered money bail or remand in 2019, they would have been unable to do so in about 13,000 cases under the original reform and in approximately 11,400 under the amended law.

The Bottom Line. Compared to the original legislation, if we look only at those 2019 cases where a judge ordered bail or remand, the 2020 amendments produce a projected 16 percent relative *increase* in legal exposure to these options. In absolute terms, under the amended statute, more than 1,600 additional cases in New York City became eligible for bail as compared to the original reform law.

Impact of Reform on 2019 NYC Cases Where Bail or Remand Were Ordered

	Mandatory Release		Money Bail-Eligible	
NYC 2019 Cases with Bail or Remand Ordered	Original Reform	Amended Reform	Original Reform	Amended Reform
Misdemeanors	6,594			
Percent	86.0%	79.3%	14.0%	20.7%
Number	5,670	5,229	924	1,365
Nonviolent Felonies	7,488			
Percent	84.8%	75.1%	15.2%	24.9%
Number	6,353	5,626	1,135	1,862
Violent Felonies	9,365			
Percent	10.4%	5.4%	89.7%	94.6%
Number	967	510	8,398	8,855
All Bail & Remand Cases	23,447			
Percent	55.4%	48.5%	44.6%	51.5%
Number	12,990	11,365	10,457	12,082

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

The Impact of Bail Reform on the Jail Population

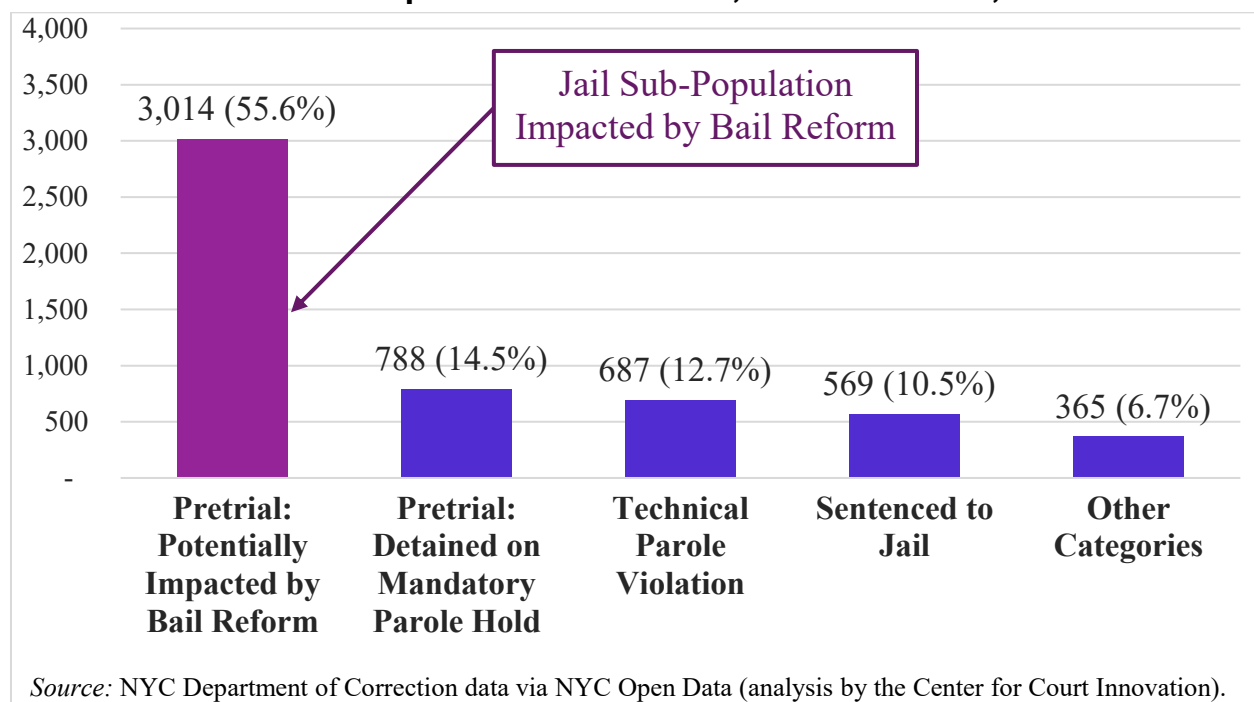
Due to efforts to alleviate the spread of COVID-19 behind bars, the jail population has significantly decreased, beginning mid-March 2020.⁷ However, with no way to anticipate the permanency of these reductions, we wanted to examine the actual and potential impact of bail reform *independent* of the emergency measures triggered by the pandemic. To do so, we have identified late February/early March 2020 as the optimal moment from which to both look *backwards* to the effects of the original reform almost one year after its passage, and *ahead* to project the consequences of the 2020 amendments.

The Jail Population in February and March 2020

New York State. On the average day in February 2020, the DCJS reported there were 14,575 people held in jails throughout New York State—including 5,351 in New York City and 9,224 elsewhere in the state.⁸

New York City. Within New York City, it is possible to segment the jail population with greater precision. The graphic below is for March 5, 2020.⁹ Of the 5,423 people in jail on this date, 3,014 (56 percent) were held pretrial, 15 percent on a parole violation due to a new charge, 13 percent on a technical parole violation, 11 percent on a jail sentence, and 7 percent due to warrants or for other reasons.

NYC Jail Population on March 5, 2020: Total = 5,423



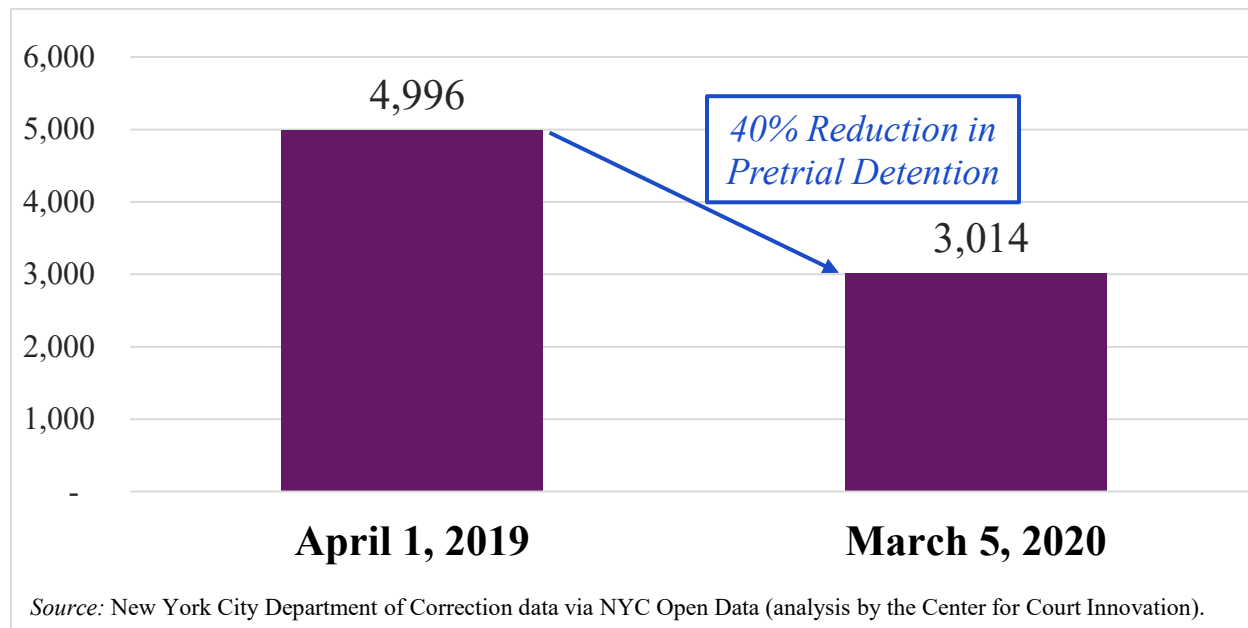
The Impact of New York’s Original (2019) Bail Reform

From April 2019 to March 2020, New York City’s pretrial jail population declined by 40 percent, or close to 2,000 people.

Impact of the Original Bail Reform on the NYC’s Pretrial Jail Population

TOTAL Jail Population, April 1, 2019 v. March 5, 2020: 7,822 v. 5,423

PRETRIAL Jail Population, April 1, 2019 v. March 5, 2020 = 4,996 v. 3,014



In the rest of the state, aggregate DCJS data points to an even larger 45 percent relative decline in pretrial detention from April 2019 to February 2020.¹⁰ That the impact appears greater outside of New York City is not surprising; prior to the initial reform, counties upstate tended to have higher proportions of people detained on misdemeanor charges. (That said, as DCJS data combines the pretrial population with people held on a parole violation stemming from a new charge—this latter group is unaffected by bail reform—the analysis for upstate counties is necessarily less precise than what can be produced for New York City alone.)

The Bottom Line. One of the paramount goals of the original reform was to reduce the number of people in jail pretrial, prior to a finding of guilt or innocence. The evidence is compelling that this goal was accomplished. It is too early, however, to properly assess the reform’s other goals, such as creating fewer disparities based on wealth in cases where bail continues to be set, or impacting recidivism, which requires a scientific study comparing similar defendants, respectively detained prior to reform and released after the law went into effect.

The Impact of the April 2020 Amendments

As shown in the above graphic, the original reforms contributed to a 40 percent reduction in New York City's pretrial jail population, bringing it to just over 3,000 in early March 2020.

Again, putting to one side (for now) the emergency COVID-19 population reductions, we project the April 2020 amendments will *increase* the city's pretrial jail population by approximately 15 to 16 percent relative to the new baseline of 3,000—an absolute number of about 470 people.

As another way of interpreting the effect, whereas the original reform contributed to a 40 percent reduction in New York City's pretrial jail population, the amended law, had it been passed in 2019, would have led to a smaller reduction—30 percent. Outside of New York City, the decrease relative to the pre-reform era would again be potentially somewhat larger.

The chart provided on the next page breaks down our projections by each charge or legal status made newly bail-eligible under the 2020 amendments. (Among those offenses, some are excluded from our list as, on an average day, people charged with them rarely appear in the daily jail population. The *Technical Supplement* details our methodology.¹¹)

Key Drivers of the Increase. In general, the largest drivers of the anticipated increase in the jail population, triggered by the amendments, are the changes listed below:

- **Burglary in second degree, second sub-section:** Money bail- and remand-eligible if remaining unlawfully in a living area of a building
- **Two Class A drug felonies**, criminal possession of a controlled substance in the first degree and criminal sale of a controlled substance in the first degree, PL 220.21 or 220.43
- **Harm to an identifiable person or property**, when alleged in the current and a pending case, while the underlying charges are not on their own bail- or remand-eligible
- **Convicted of a crime with a future sentencing date** (as above, applies only if the arraignment charge is not already eligible based on other criteria).

Notably, whereas more than two dozen charges and categories of defendants were made newly eligible for bail and remand under the 2020 amendments, the changes to just three charges alone—burglary in the second degree, criminal possession of a controlled substance in the first degree, and criminal sale of a controlled substance in the first degree—account for virtually half (48 percent) of the projected increase in the jail population resulting from the amendments. None of these three charges involve violence or threats to another individual.

Impact of the 2020 Amendments on the New York City's Jail Population

Added Bail-Eligible Charges or Situations	Jail Population Increase
Baseline Pre-COVID Pretrial Population (Potentially Impacted)¹	3,014
Burglary 2° (PL 140.25[(2)] ¹)	85
Possession or Sale of Controlled Substance 1° (PL 220.21, 220.43)	143
Sex Trafficking (PL 230.34, 34-a) ²	4
Crime Causing Death (PL 125.10 to 125.27)	7
Grand Larceny 1° (PL 155.42)	6
Assault 3° (PL 120.00), <i>classified as a hate crime</i>	1
Failure to Register as a Sex Offender (Correction Law 168-t)	3
Bail Jumping (PL 215.55, 215.56, 215.57)	2
Promoting an Obscene Sexual Performance by a Child (PL 263.10)	1
Enterprise Corruption or Money Laundering 1° (PL 460.20, 470.20)	5
Arrested on a Felony While on Probation	25
Persistent Felony Offender if Sentenced on the Current Case	36
Instant & Pending Case with Harm to an Identifiable Person or Property	85
Convicted of any Charge and Awaiting Sentencing on the Case	66
<i>Projected Numeric Increase Pretrial Population</i>	469
<i>Projected Percent Increase Relative to early March 2020</i>	15.6 percent
<i>Projected Percent Decrease Relative to the April 1, 2019 Pretrial Jail Population of 4,996 (i.e., relative to NYC's pre-bail reform baseline)</i>	30.3 percent

¹ As described in the Technical Supplement, we assume 61 percent of the PL 140.25(2) cases that the original reform removed from the jail population will be returned, based on the percent of burglaries occurring in a "living area."

² As described in the Technical Supplement, we assume 41 percent of PL 230.34 cases that the original reform removed from the jail population will be returned, based on cases whose sub-section makes them a nonviolent felony. (Subsections 5a and 5b are both violent felonies and, as such, were made eligible for bail and remand already in the original reform law.)

Culture Change and the Future of Pretrial Incarceration

Projected impacts are no more than that: mathematically derived predictions of the future, relying on assumptions rooted in preexisting practice. In the current context, we assume that, in the absence of the original or amended reforms, judges would have continued to make the exact same types of decisions they made throughout 2019.

However, if the decision-making culture in some—or many—courthouses across New York State evolves, and judges choose to detain people less often on money bail, even when it continues to be an option, our projections could prove to be inaccurate. That said, we also weigh the potential for an evolution in the opposite direction.

Reasons to Anticipate a Greater Jail Reduction

There are several specific ways in which it may be reasonable to expect an evolution in the years ahead in the direction of greater release rather than pretrial incarceration.

New Normal for Pretrial Detention After the COVID-19 Crisis?

The first factor to consider is the one whose eventual scope is the hardest to predict. Given the alarmingly high COVID-19 infection rate in jails and prisons across New York State and nationwide, beginning in mid-March 2020, many jurisdictions took steps to reduce their populations behind bars (while also receiving criticism from many for not moving quickly enough).¹² By the end of April, New York City had reduced its jail population to under 4,000 for the first time since shortly after World War II.¹³ Once the pandemic is brought under control, criminal justice systems may well revert to their preexisting practices. In New York City, this would mean a return to a jail population of about 5,400 people, with more than half held pretrial. But it is also conceivable that the changes forced upon the justice-system by the experience of COVID-19, along with a heightened recognition of the dangerous conditions people encounter behind bars,¹⁴ could produce a lasting shift in the direction of release.

Least Restrictive Condition

The original reform requires judges set the “least restrictive” condition(s) to “reasonably assure return to court” (this language is retained in the amended legislation). We have made no mathematical assumptions regarding the extent to which judicial decision-making may evolve in response to this provision. Yet it is reasonable to expect it will create at least some pressure to order bail or remand in fewer cases, since these options are now ruled out unless

the judge can credibly reason that no less restrictive condition—such as supervised release or other non-monetary measures—could suffice to ensure court attendance and compliance with court conditions.

More Affordable Bail

When setting bail, the amended law retains the requirement that the forms and amounts of bail be responsive to the defendant’s “individual financial circumstances” and “ability to post bail without posing undue hardship.” The reforms also require a partially secured bond or an unsecured bond to be set if bail is used, which respectively require only 10 percent or less, or none, of the bail amount to be paid up-front. (The payer becomes responsible for the balance only if the defendant skips court.) Over time, judges may become more accustomed to reducing bail amounts, or even substituting non-monetary conditions, for people of demonstrably limited means. This would have the effect of reducing the number of people detained on bail they cannot afford.

The Expansion of Pretrial Supervision

Both reforms mandate the establishment of pretrial service agencies able to undertake pretrial supervision (supervised release) in *any case*—regardless of the charge, criminal history, or characteristics of the defendant. This is a significant expansion. In New York City, for example, extremely few violent felonies were eligible for supervised release prior to bail reform—yet, *all* cases were made eligible in December 2019, one month before the original reform went into effect.

Strikingly, as shown on the next page, judges’ actual decisions in December 2019 demonstrate that, once more cases were made eligible for supervised release, judges immediately began substituting supervision for bail—even in cases that would *still be eligible for bail* under the original reform law that formally went into effect one month later in January (see the spike in the orange tracking line below).

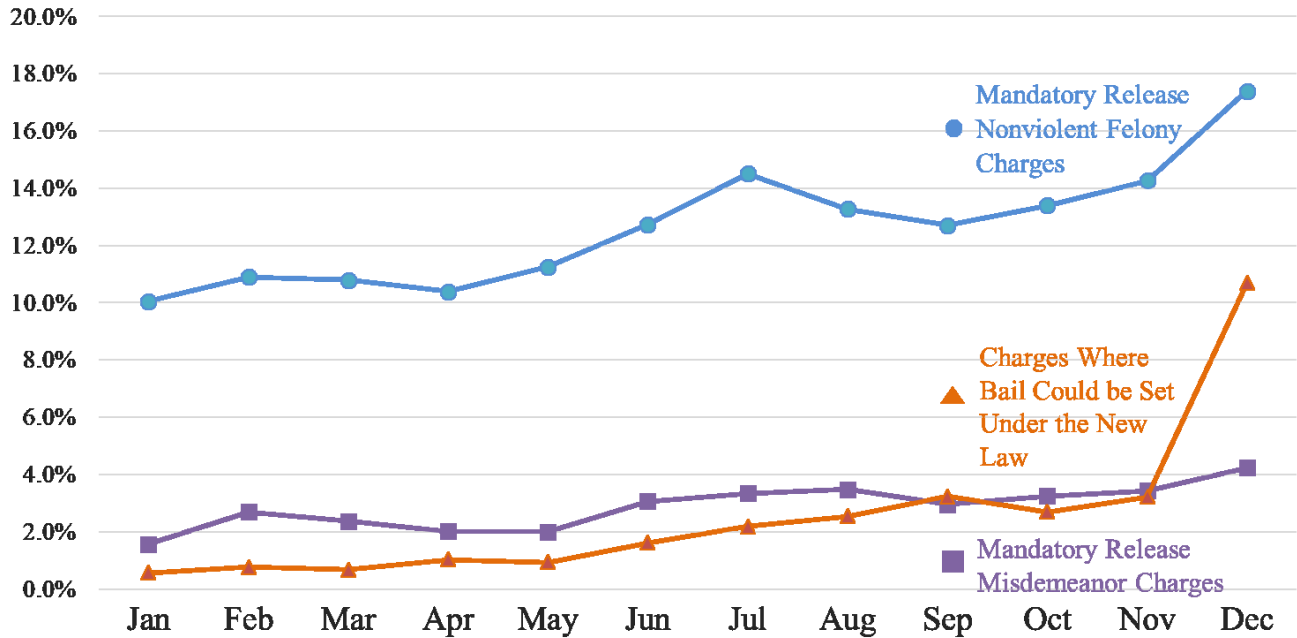
In the months and years ahead, if judges continue to demonstrate confidence in supervised release in those cases that remain legally eligible for bail, the increases in the jail population that we are predicting as a result of the amended reform could prove smaller than anticipated. (However, we note that the evidence shown below applies only to New York City. The pretrial supervision option as an alternative to bail in cases has yet to be assembled or assessed in other counties across New York State.)

New Non-Monetary Conditions

As discussed above, the amended reform specifies additional non-monetary conditions that judges can order in any case. Several of these conditions—such as treatment, mandated participation in an intimate partner violence program, and other conditions intended to aid victim safety—could be *more* rigorous and demanding than pretrial supervision alone. There

is a risk to this addition of conditions; the research is clear that court-ordered over-programming can be harmful (an especially concerning outcome when someone is presumed innocent).¹⁵ That said, it is also plausible that judges opt to order intensive programming for people whom they would otherwise have detained. In this scenario, affording judges the option to set more intensive non-monetary conditions may offer them a more appealing alternative to bail and detention.

Percent of 2019 Cases Receiving Supervised Release at NYC Arraignments by Month and Bail-Eligibility Status Based on the Original Reform Law



New Reporting Requirements

The extensive new annual reporting requirements may serve to hold court players more accountable, especially in the direction of setting the least restrictive condition(s) in all cases and reducing any decision-making that results in racial bias. (Public reporting on pretrial decision-making patterns must include breakdowns by race and ethnicity.) Over the long-term, the ability of reformers to review data and respond critically to each year’s decision patterns could help to further move court players in the direction of less detention, less bail, and fewer overly restrictive forms of release.

Reasons to Anticipate a Greater Jail Increase

Unpredictable dynamics may also lead to greater increases in pretrial detention than we have projected. Judges may engage in more inclusive interpretations of certain discretionary provisions regarding who is bail-eligible, such as when burglary in the second degree, second sub-section, truly involves a “living area,” and how often bail or remand are appropriate responses in the post-conviction, pre-sentence window.

The provision that judges may set bail when both a current and pending charge involves “harm to an identifiable person or property” may be especially vulnerable to expansive interpretations. Presumably, harm to a person includes alleged crimes that involve physical harm, a threat of such harm, or illegal weapons possession or use; and harm to property involves defacement or physical damage to someone’s property, as is suggested within the criminal mischief, tampering, or graffiti charges found in Article 145 of the penal law. However, it is plausible that judges will interpret “harm to property” far more inclusively to extend to most, or all, property charges (larceny, burglary, robbery, etc.).

Finally, in response to sensationalized media coverage of alleged crimes committed by people released pretrial, judges may well shift, not towards greater release, but greater detention, where the law still allows it.

Rigorous empirical analysis will be needed after the amended reform goes into effect in July 2020 to determine its actual consequences in courts and communities across New York State.

Conclusion

Our analysis suggests that, relative to the original reform, the amended bail statute will expose people to bail and detention in about 16 percent *more* criminal cases in New York City, and our best projection points to a 16 percent increase in the city’s pretrial jail population. That said, even the amended legislation will contribute to a 30 percent *decrease* in the city’s pretrial jail population when compared to the preexisting status quo before the passage of either reform law. (The decrease stemming from the original reform was 40 percent.) The decreases are potentially larger throughout the rest of the state.

The extent of the population reductions will rely largely on judges’ adherence to the statute in a few key areas: 1) opting at arraignment for release on recognizance or non-monetary conditions, *even when money bail remains a legal option*; 2) setting bail in affordable amounts and using attainable forms of bail payment; and 3) promoting court appearance and compliance through pretrial supervision and services in lieu of detention for those populations that may require additional supports.

Going forward, the new state mandate requiring data collection and annual public reporting will also be essential to ensuring effective implementation and policy.

Putting to one side the emergency jail reductions in the spring of 2020 occasioned by COVID-19, the increase to New York City’s jail population that we forecast will result from the amended reforms could hinder efforts to close the Rikers Island jail complex. (On March 5, 2020, the total jail population stood at 5,423; a population of 3,300 is required by the year 2026 to close Rikers Island.) Continued culture change in the direction of pretrial release combined with strong adherence to the new statutory requirements contained in both the 2019 and 2020 reforms can ensure that New York City remains on a humane and responsible path towards decarceration.

Notes

¹ 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>.

² Rempel, M. & Rodriguez, K. (2019), Op Cit.

³ According to the New York State Penal Law, a crime of domestic violence signifies that the victim is a member of the same family or household or is in or has been in an intimate partner relationship with the defendant (pursuant to PL 530.11).

⁴ After conferring with a range of New York City stakeholders, we decided that, in practice, the most plausible assumption for the purpose of projecting the impact of the amended reform law would be an inclusive one regarding how judges might define “harm to an identifiable person or property.” Therefore, when projecting the impact of this provision on the jail population, we assumed that any Class A misdemeanor or felony conceivably involving any physical threat or harm (including any weapons possession charge) would be defined as harm to a person, and we assumed that every property charge in the penal law would be defined as harm to property, with the sole exception of PL 165.15 (theft of services, usually turnstile jumping), which we did *not* assume any court would credibly interpret as involving such harm. As we note in the main narrative, we are not endorsing these inclusive definitions per se; to the contrary, our legal interpretation is that the literal meaning of “harm to property,” for example, would be limited to criminal mischief and related offenses (e.g., delineated in Article 145 of the penal law). As a practical matter, however, we decided it is more likely that courts will extend the definition of harm to property to a much greater number of property crimes.

⁵ Rodriguez, K. (2020). *New York’s Amended Bail Statute: Pretrial Options*. New York, NY: Center for Court Innovation. Available at: <https://www.courtinnovation.org/bail-revisited-bench-card>.

⁶ Rempel, M. & Rodriguez, K. (2020). *Projecting the Impact of New York’s Amended Bail Reform on the Pretrial Jail Population: A Technical Supplement*. New York, NY: Center for Court Innovation. Available at: <https://www.courtinnovation.org/publications/bail-revisited-NYS>.

⁷ NYC Criminal Justice. (April 30, 2020). *New York City Jail Population Reduction in the Time of COVID-19*. New York, NY: NYC Mayor’s Office of Criminal Justice. Available at: https://criminaljustice.cityofnewyork.us/wp-content/uploads/2020/05/COVID-factsheet_APRIL-30-2020.pdf.

⁸ New York State Division of Criminal Justice Services (DCJS). (April 2020). *Jail Population in New York State: Average Daily Census by Month*. Available at: https://www.criminaljustice.ny.gov/crimnet/ojsa/jail_population.pdf.

⁹ The data source is NYC Open Data. *Daily Inmates in Custody*. Available at: <https://data.cityofnewyork.us/Public-Safety/Daily-Inmates-In-Custody/7479-ugqb>. All results are based on an original case-level data analysis by the Center for Court Innovation. Data was downloaded, analyzed, and reported for the March 5, 2020 jail snapshot date. Data was also downloaded and analyzed on the following dates in near proximity, yielding virtually identical results: February 27, March 3, March 4, March 17, and March 18. After March 18, 2020, changing arrest, arraignment, and incarceration patterns resulting from the COVID-19 crisis, as well as purposeful efforts to release people early from the jails to protect them from COVID-19, yielded significant declines in the jail population.

¹⁰ For all state counties outside of New York City, the average pretrial jail population for both April 2019 and February 2020 (though including people held on parole violations due to a new case) is in DCJS (2020a), Op Cit.

¹¹ Rempel, M. & Rodriguez, K. (2020), Op Cit.

¹² See data on COVID-19 cases and changes to jail populations since the outset of this pandemic in Vera Institute of Justice. (2020). *COVID-19: Criminal Justice Responses to the Coronavirus Pandemic: Monitoring Jail Populations During COVID-19*. New York, NY: Vera Institute of Justice. Available at: <https://www.vera.org/projects/covid-19-criminal-justice-responses/covid-19-data>.

¹³ NYC Criminal Justice. (April 23, 2020), Op Cit.

¹⁴ See, for example, Legal Aid Society. (2020). *COVID-19 Infection Tracking in NYC Jails*. Frequent updates at: <https://www.legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails/>; and Board of Correction. (2020). *Daily COVID-19 Update*: Sunday April 12, 2020. Available at: <https://www1.nyc.gov/site/boc/covid-19.page>.

¹⁵ Adler, J., Barrett, J., & Rempel, M. (2020). *The Myth of Legal Leverage: Toward a Relational Framework for Court-Based Treatment*. New York, NY: Center for Court Innovation. Available at: <https://www.courtinnovation.org/publications/leverage-myth>.