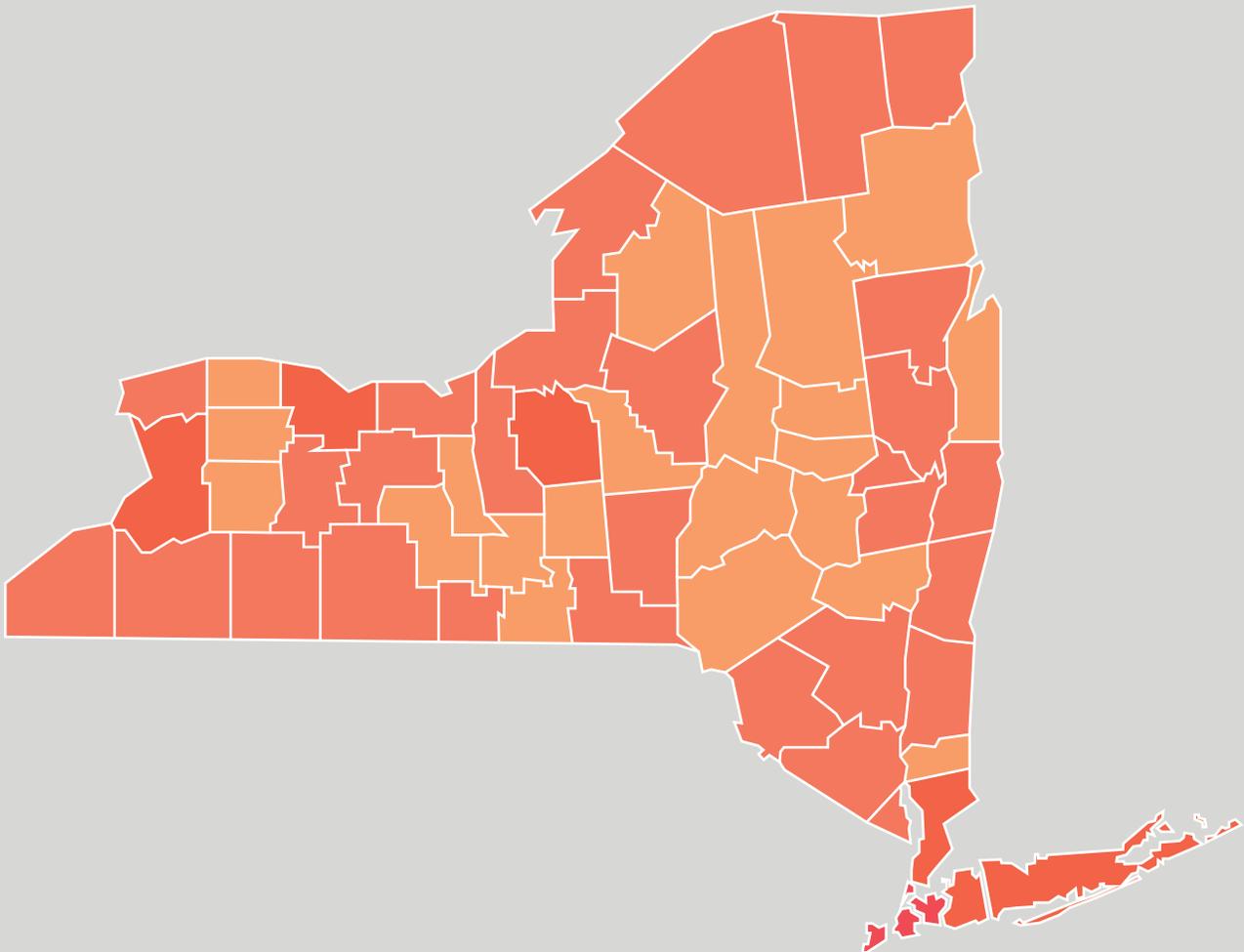




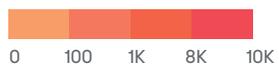
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New York, New York: Highlights of the 2019 Bail Reform Law

Insha Rahman



Cover image from Vera Institute of Justice, *Empire State of Incarceration* (New York: Vera Institute of Justice, 2018), “Jail Census” (showing average daily number of people held in jail in each county), <https://www.vera.org/state-of-incarceration/data-clearinghouse>.



Source: Non-New York City data is from the New York State Division of Criminal Justice Services and New York City data is from the New York City Department of Correction.

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Introduction

In April 2019, New York passed legislation on bail reform to update a set of state pretrial laws that had remained largely untouched since 1971. Compared to California's Senate Bill 10, passed in August 2018, or New Jersey's Bail Reform and Speedy Trial Act, enacted in January 2017, New York's new bail law received relatively little media coverage or national press. To many interested in bail and pretrial justice, New York's reform seemed un-newsworthy as it didn't go as far as originally promised to eliminate money bail entirely.

If implemented effectively, a conservative estimate of the legislation's impact suggests that New York can expect at least a 40 percent reduction overall in the state's pretrial jail population.

Yet the relative lack of fanfare over the passage of New York's new bail law belies its historic and transformative potential to end mass incarceration at the local level. If implemented effectively, a conservative estimate of the legislation's impact suggests that New York can expect at least a 40 percent reduction overall in the state's pretrial jail population.¹ That bests the 30.4 percent reduction achieved by bail reform in New Jersey, and the anticipated impact of Senate Bill 10 in California—which is currently on hold pending a challenge by the bail bond industry—if it goes into effect in 2020.²

What exactly comprises New York's new bail law? What inspired this set of reforms? Can bail reform truly claim to be bold if money isn't eliminated entirely? And what precedent might New York's model of bail reform set for other jurisdictions?

This primer provides historical context and an overview of the legislation itself, highlights five unique aspects of the legislation, and offers a few thoughts for how the wins in New York can inspire more comprehensive and transformative bail reform elsewhere.

The origins of New York’s new bail law

In recent years, New York City has experienced a remarkable decline in its jail population, from more than 20,000 people in jail on any given day in the early 1990s to less than 8,000 people today.³ Yet across the rest of the state, jail populations have remained steady or, in many rural and suburban areas, increased despite historic declines in arrests statewide. In 2018, the average daily jail population in New York State was slightly less than 24,000 people on any given day.⁴ Almost 70 percent of those in jail were held pretrial.⁵ The median amount of bail on which people were incarcerated across the state varied widely—from \$1,000 on a misdemeanor in New York City to \$5,000 for that same offense in Buffalo.⁶ Despite the variation in bail amounts, the end result was the same—thousands of New Yorkers, predominantly people of color, were jailed every single day because they were unable to afford the dollar amount of their freedom.

In 2015, the death of Kalief Browder, a young man from the Bronx who spent three years incarcerated at Rikers Island on \$3,000 bail and tragically took his own life shortly after his release from jail, inspired real momentum for bail reform in New York.

In January 2018, Governor Andrew Cuomo declared in his State of the State address, “Kalief Browder did not die in vain,” as he announced a set of reforms to the existing bail statute that would mandate release for most misdemeanors and nonviolent felonies and reserve bail only for the more serious cases, including domestic violence and violent felonies. Under his proposal, if bail were set, judges would have to consider a person’s ability to pay and set multiple forms of bail to make it easier to pay. Importantly, his proposal would allow, for the first time in New York’s history, for judges to impose preventive detention—remand with no bail—in serious cases if a person posed a risk to public safety. Building on the governor’s proposal, the New York State Assembly passed a similar bail reform bill in the spring of 2018, but with one notable exception: they rejected the public safety provision amidst concerns about introducing a new basis for detention under New York law.

Despite this momentum, bail reform stood no chance in the then Republican-led New York State Senate. All of that changed on November 6, 2018, when New York

voted in a Democratic majority in the Senate, ushering in a new era of “triple blue” from the legislature to the governor’s office.

The governor and the legislature entered the 2019 legislative session under heightened scrutiny from advocates and progressive reformers to truly reform New York’s criminal justice system.

In 2019, Governor Cuomo released another bail proposal, this time recommending that New York eliminate money bail entirely. What prompted the evolution from the 2018 bill that permitted bail to remain for serious cases to the 2019 proposal that eliminated it entirely? For one, the national landscape on bail reform had transformed in just one year. In August 2018, California passed and Governor Jerry Brown signed into law Senate Bill 10, making it the first state in the country to fully eliminate money bail. Suddenly, it was no longer radical to propose taking money out of the pretrial equation entirely. Second, the same organizing and advocacy that flipped the New York Senate from red to blue had changed the narrative on criminal justice reform. The governor and the legislature entered the 2019 legislative session under heightened scrutiny from advocates and progressive reformers to deliver on their campaign promises to truly reform New York’s criminal justice system, starting with bail.

With the bar set by Governor Cuomo at a full elimination of money bail, New York State Senate Majority Leader Andrea Stewart-Cousins signaled her support for ending money bail, and Assembly Speaker Carl Heastie followed suit. Throughout January, February, and into March of 2019, the debate over the bail reform proposal didn’t even touch on the money bail question. Rather, it centered on two key provisions of rivaling bills—what charges were in the “detention eligibility net,” or slated for mandatory release versus eligible for detention; and whether any consideration of risk to public safety would be added to the law.

In the final few weeks leading up to the budget deadline of April 1, it was clear that the major impasse was over the public safety provision introduced by Governor Cuomo that allowed judges to, on serious charges, impose preventive

detention if a person “posed a current risk to the physical safety of a reasonably identifiable person or persons.”

A little bit of context is important here. New York was, and remains, the only state in the country that precludes judges from taking into account any consideration of public safety when setting bail or imposing pretrial detention. Until the 1970s, all bail statutes only considered failure to appear. With the advent of “tough on crime” rhetoric and policies, several states began to amend their bail laws to include a consideration of risk to public safety. In 1984, Congress passed the Federal Bail Reform Act, which introduced public safety in the federal bail system and survived a constitutional challenge in *United States v. Salerno*.⁷ Since then, 49 states, all except New York, have changed their bail laws to allow judges to consider both risk of failure to appear and public safety in pretrial decisions.

Public safety was a non-issue in bail reform efforts in places like California and New Mexico, where it was already part of the law, but it proved to be a lightning rod in New York’s fight. Opponents to the public safety provision included many justice reform advocates, especially the defense bar and several members of the Assembly, who feared that adding public safety to the bail statute would justify yet another reason to impose detention above and beyond the current standard of failure to appear. Supporters of the public safety provision argued that judges were already factoring public safety into the pretrial calculus by setting extremely high bail as a means of imposing detention. Allowing judges to openly consider public safety would simply bring transparency to that decision. Many in the law enforcement field, including police and prosecutors, criticized the proposed provision as not going far enough to protect public safety, as it was limited to instances of potential physical injury.

Ultimately, no public safety provision made it into the final bill but, as a compromise, money bail remained for the kinds of serious cases—most violent felonies, all sex-related charges, some domestic violence offenses—that trigger concerns about public safety. Those offenses are the minority of cases—only one out of 10—that come through the criminal justice system in New York. The final bill that passed eliminated money bail and mandated release for 90 percent of all arrests statewide.

Key elements of New York's new bail law

New York's new bail law will take effect in January 2020. Pretrial decisions—for release, conditions of supervision and, in eligible cases, to set bail—will be guided by a consideration of whether a person poses a risk of flight to avoid prosecution. The overall framework of the new law takes a charge-based approach, where the level of the offense and the specific charge—whether it is a misdemeanor, nonviolent felony, or violent felony; and if it involves domestic violence or a sex-related or other specific offense—for the most part will dictate whether the case is mandated for release, either on recognizance or under certain kinds of pretrial nonmonetary conditions, or eligible for bail to be set.

- › On misdemeanors, judges must either release the person on their own recognizance or set nonmonetary conditions, including court-ordered pretrial supervision. Electronic monitoring may not be imposed on most misdemeanor offenses, unless the charge involves domestic violence or sex-related offenses or the individual has a prior violent felony conviction within the past five years. Bail may not be set on misdemeanor offenses except in sex-related misdemeanors and one specific domestic violence charge, criminal contempt, based on allegations of violating a stay-away order.
- › On all nonviolent felonies, if release on recognizance isn't granted, judges may impose nonmonetary pretrial conditions, including electronic monitoring. They may also set bail on a select number of nonviolent felony charges, including sex offenses, witness tampering, terrorism-related offenses and, again, felony-level criminal contempt in domestic violence cases.
- › On violent felonies, judges may set bail if they do not find that release on recognizance, nonmonetary conditions, or electronic monitoring is sufficient to assure a person will return to court. There are two exceptions to bail on violent felonies, which include specific subsections of burglary in the second degree and robbery in the second degree where no actual violent conduct is alleged. On those burglary and robbery in the second degree cases, judges may

not set bail and must either release on recognizance or under nonmonetary conditions.

Under the new law, when judges set bail they must consider a person's ability to pay bail and the hardship it will impose. Judges must also offer bail in an unsecured or partially secured form, where the person is not required to deposit any money upfront (an unsecured bond) or only deposit up to 10 percent of the bail amount (a partially secured bond) with the court in order to be released. This provision mandates the use of forms of bail that have been in New York's bail statute since 1971 but have been used relatively infrequently even though they are much easier for people to afford than the full cash amount.⁸ Importantly, mandating a partially secured or unsecured bail option undermines the for-profit bail bond industry as it gives families and loved ones the option to pay a portion of the bail directly to the court instead of turning to a bail bond agency if they can't come up with the full bail amount.

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The new law also requires judges, in imposing conditions of pretrial supervision, to consider the least restrictive conditions that will reasonably ensure a person appears for their court dates. It also requires judges to actively revisit the conditions of supervision. For example, if the person has demonstrated compliance, these conditions should be lessened or lifted entirely at subsequent court appearances. The use of electronic monitoring is prohibited in the vast majority of misdemeanor cases and is primarily reserved for people charged with felonies or offenses involving domestic violence or sex-related charges. Electronic monitoring may only be imposed after a finding by the court that no other nonmonetary conditions will realistically ensure a person's return to court and for a maximum period of 60 days (with the potential for an extension if the court deems it necessary). Importantly, the costs of electronic monitoring—which in most jurisdictions are borne by the person wearing the monitor—cannot be imposed on that individual. All expenses related to pretrial supervision—from electronic monitors to programs and mandates—must be paid for by the county.

Five distinctions that set New York's new bail law apart from other efforts at bail reform

Although the overall framework of New York's new bail law resembles the kinds of bail reform legislation passed in other jurisdictions, there are five provisions that distinguish and set it apart as the bail reform bill most likely to produce transformative outcomes and result in fewer people in jail. The common thread between those five provisions—outlined below—is that they remove or severely restrict the discretion law enforcement, prosecutors, and judges have traditionally enjoyed in the criminal justice system at large and in the bail and pretrial calculus in particular.

1. Mandatory appearance tickets

The option for police to issue an appearance ticket at the time of arrest—essentially a summons to appear in court at a later date—on misdemeanors and the lowest level of felonies has existed in New York's bail statute for decades, yet remains underutilized by officers who have discretion to ignore it. Under the new law, police officers will now be required to issue an appearance ticket for any misdemeanor or class E felony arrest, with limited exceptions. If implemented effectively, this mandatory appearance ticket provision has the potential to transform fundamental fairness on low-level offenses, from significantly increasing pretrial release rates to limiting the amount of time people spend in police custody to only a few hours.

2. Mandatory release on a wide swath of offenses

The language of every other bail reform statute in the country—from Washington, DC, to New Jersey, California, and beyond—requires the courts to consider a presumption of pretrial release for most offenses. New York's new bail law goes a critical step further to mandate, not simply presume, pretrial release for a wide

swath of offenses that constitute the majority of all arrests in New York State. This small but significant tweak to the statutory language is nothing short of remarkable. Under the new law, discretion to override a presumption of release in favor of setting bail or imposing detention is eliminated in most misdemeanor, nonviolent felony, and even two common violent felony offenses. It is, of all the provisions in the new law, the one that strikes hardest at curtailing the discretion prosecutors and judges have held in the pretrial calculus.

3. Parsimony in the conditions imposed on release

Most jurisdictions routinely impose mandates such as drug testing, electronic monitoring, participation in programs and counseling, and frequent check-ins as standard conditions of pretrial release. In many of those places, people are required to pay for their conditions of supervision, often at a cost between \$5 to upwards of \$20 a day. Under New York's new law, there are provisions to ensure judges set the least restrictive conditions that will reasonably assure a person's appearance in court and do not require people to pay for those conditions. Electronic monitoring may only be used on felony and select misdemeanor cases and, when imposed, must be reviewed after no longer than 60 days to determine whether it is still needed to ensure a person's pretrial compliance. The requirement that all conditions of pretrial release must be paid for by the county will serve as a check on unnecessary monitoring and conditions so that localities are not bearing unnecessary pretrial costs.

4. Discrete role of risk assessment instruments

Until New York's new law, every effort at bail reform assumed that using a risk assessment instrument was an essential part of a pretrial framework or, at least, a necessary evil. Alaska, California, New Jersey, and Washington, DC, all codified the use of risk assessment instruments into their reforms, and hundreds of jurisdictions across the country use them to inform pretrial decisions.

In recent years, there has been growing criticism about the potential of risk assessments to bake in and reinforce racial and other biases, and New York's

new law noticeably does not incorporate risk assessment into the overall pretrial framework. In the new law, these instruments are only mentioned in the context of assessing whether a person is to be released on recognizance or, if released under conditions, to assess what services are needed. They are not to be used as the sole basis to justify setting bail or imposing detention. Moreover, any instruments used must be transparent and developed so that they are free of bias, and data must be collected and reported by the agencies responsible for pretrial services agencies. These limitations and explicit requirements are a huge step forward to address the concerns that risk assessment instruments pose in the pretrial field.

5. Mandate for ability to pay and more affordable forms of bail

To the extent that New York's bail reform law came up short—in that money bail remains for more serious offenses—the new statute goes further than any other jurisdiction that uses money bail to make bail easier to afford. The new law requires judges to consider a person's "ability to post bail without posing undue hardship, as well as his or her ability to obtain a secured, unsecured, or partially secured bond." The law also requires judges, when setting bail, to set at least three or more forms of bail, one of which must be an unsecured or partially secured bond. No other statute directs judges to consider a person's ability to pay bail in such stark language, and no other statute mandates the imposition of a less restrictive form of bail that, if heeded, will essentially spell the end of the for-profit bail bond industry in New York.

Food for thought in implementation

Of course, the most carefully drafted law will not achieve its stated objectives if implementation falls short. New York is an especially challenging ecosystem in which to roll out new policies and practices, given the diversity of size, geography, and resources across the 62 counties that hold more than 1,300 courts and process approximately 400,000 criminal cases each year.

Implementation involves many moving parts, but three rise to the top as key to having the new law take full effect.

1. A centralized pretrial process and community-based pretrial services

Counties need to invest in both court- and community-based resources to ensure that people released under the new law—who may otherwise have been in jail pretrial—have access to the types of services they need to support their release.

For court-based resources, each county should have a centralized arraignment part in lieu of conducting arraignments across multiple courts. Several pilot centralized arraignment parts already exist in New York in counties as diverse as Onondaga, a large and metropolitan county with Syracuse as its biggest city; to rural Washington, where the total county population is a fraction of Syracuse's size. A representative from the pretrial services program should staff the centralized arraignment part to facilitate information about pretrial needs and, if bail may be set, provide an assessment of a person's ability to pay.

At the same time, counties should invest in community-based pretrial services for referrals to treatment, counseling, and other types of pretrial assistance. While many pretrial programs have traditionally been housed in probation departments, New York's new law is an opportunity to move away from a pretrial "monitoring" model to one that responds to "needs." Connecting people to services in the community allows them to stay engaged even after their cases are finished and pretrial supervision ends.

2. Robust training of prosecutors, judges, and defense attorneys

New York's new bail law requires the courts to fundamentally change their approach to the pretrial process. But legislation alone does not yield culture change. Robust training—of prosecutors, judges, and defense attorneys—about the mandates of the new law, strategies to implement it fully, and pitfalls to be wary of is one of the most important ways to ensure culture change. That training should come from all levels—certainly by the statewide Office of Court Administration for judges, but also at local, countywide meetings.

3. Systematic and transparent data

Ongoing data collection and sharing is key to accountability and to shaping culture change long-term. After all, how will counties know if they are effectively implementing the law unless they are able to measure the impact of their changes? From the outset, each county should develop a baseline of its most recent year's court system data to assess what percentage of cases should fall into the categories of automatic release, bail eligible, or remand once the new law goes into effect. Counties should then collect and publicly share monthly statistics on key provisions of the new law: appearance tickets, release rates, conditions of release imposed and, when bail is set, measures related to bail-setting and bail-making.

If you can make it in New York, you can make it anywhere

Even though New York's new bail law has not been celebrated to the extent that the reforms in New Jersey, or even California, were heralded as groundbreaking, there are many subtle and not-so-subtle lessons for other jurisdictions here.

The most important one to highlight is the re-examination of failure to appear as a basis for bail or imposing detention. Even though the new law doesn't explicitly say this, by mandating release on a majority of offenses the legislation effectively eliminates failure to appear as a justification for bail or detention. The underlying assumption is that risk of failure to appear can and should be managed in the community through pretrial supervision, and not jail. It sounds simple, but what it represents is a seismic shift in the underlying principles of a pretrial system.

The hard work of implementing and defending these reforms is already underway. And, across the country, other cities and states should and will be looking to New York as a model for pretrial justice. After all, if bail reform succeeds in New York—a vast state with varied geographies—it can succeed anywhere.

Endnotes

- 1 Vera conducted an unpublished analysis of county-level jail data to estimate the potential impact of the new law on local jail populations.
- 2 For New Jersey statistics, see New Jersey Administrative Office of the Courts, “Criminal Justice Reform Data, January 1–December 31, 2018,” <https://perma.cc/M7HQ-KUL5>.
- 3 See Vera Institute of Justice, “Incarceration Trends,” database, www.trends.vera.org, for early 1990s jail incarceration data. See New York City Open Data, “Daily Inmates in Custody,” <https://perma.cc/TM27-BLDN>, for 2019 jail incarceration data.
- 4 New York State Division of Criminal Justice Services, *New York State Jail Population 10 Year Trends: 2009–2018* (Albany, NY: New York State Division of Criminal Justice Service, 2019), <https://perma.cc/R4JP-F859>.
- 5 Vera Institute of Justice, “Empire State of Incarceration,” December 2017, www.vera.org/state-of-incarceration.
- 6 For New York City, see New York City Criminal Justice Agency (CJA), *Annual Report 2016* (New York: CJA, 2018), 21, <https://perma.cc/KC5W-9KXX>. For Buffalo, see Andrea Ó Súilleabháin and Colleen Kristich, *Cruelty and Cost: Money Bail in Buffalo* (Buffalo, NY: Buffalo Partnership for the Public Good, 2018), 5, <https://perma.cc/VJ5D-HPKN>.
- 7 *United States v. Salerno*, 481 U.S. 739 (1987).
- 8 N.Y. Criminal Procedure Law § 520.10.

About citations

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Credits

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For more information about this brief, contact Insha Rahman, director of strategy and new initiatives, at irahman@vera.org.

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Vera Institute of Justice
233 Broadway, 12th Floor
New York, NY 10279
T 212 334 1300
F 212 941 9407

Washington DC Office
1111 14th Street, Suite 920
Washington, D.C. 20005
T 202 465 8900
F 202 408 1972

New Orleans Office
1307 Oretha Castle
Haley Blvd., Suite 203
New Orleans, LA 70113

Los Angeles Office
634 S Spring Street, #300A
Los Angeles, CA 90014
T 213 416 0058
F 213 416 0075