

What Happened? Making Sense of Bail Reform in New York State, Part 2

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New York just passed historic pretrial justice reforms. Given that the governor, Senate leaders, and the Assembly speaker made public commitments to end cash bail, why didn't that happen? And what does it mean? This summary reviews how the new law came to be and explores why it looks the way it does. Read Making Sense of Bail Reform in New York State, Part 1 [here](#).

In early April 2019, New York passed a remarkably far-reaching justice reform package, overhauling the state's bail, discovery, and speedy trial laws, along with a handful of other important changes. The package was included as part of the state's massive fiscal year 2020 budget: This means that rather than passing stand-alone bills, the legislature passed the package within the larger budget process and the governor signed it.

These reforms are a really, really big deal. As the Center for Court Innovation (CCI) wrote in its [detailed analysis](#):

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).

What all this means is that, once the law takes effect in January, the pretrial detention population across the state will dramatically decrease; the pretrial population in New York City alone will likely drop by nearly 45 percent if not much more, expediting the closure of the Rikers Island jail complex. New York has gone from having the worst discovery law nationwide to being [the "vanguard" of discovery reform in the country](#); public defenders have described the reform as "[monumental](#)." (Discovery is the pretrial process of disclosing the evidence against a defendant in court.)

The new package also changed what police must do when making an arrest for misdemeanors and Class E felonies. Instead of taking a defendant into custody for approximately 24 hours between arrest and arraignment, in many cases an officer must now issue a [desk appearance ticket](#) (DAT), which allows the person to be released and to return to court at a later date. This will reduce the number of people detained for short periods.

All told, this is among the most significant justice reform packages yet passed in the United States. (We encourage you to check out CCI's [fact sheet](#) and [report](#).) But the full scope of the bail-reform provision may not be easy to grasp at first, in part because New York has a comparatively unusual bail statute—and because groups in the state have differing opinions about what reform should ultimately look like. To understand what happened, it helps to know a bit about the organizing and legislative dynamics that shaped the debate and final reform package. (Read more in [Part 1](#) of “Making Sense of Bail Reform in New York.”)

The bail law passed last month is based on the state's 1971 statute, a legislative framework intended to protect the presumption of innocence and limit wealth-based detention. The new law eliminates cash bail and mandates immediate release for nearly all misdemeanors and nonviolent felonies, which together constitute nearly 90 percent of all cases statewide. Cash bail is still on the books for a small subset of charges (mostly violent felonies), but unlike other states, the only consideration when setting bail is risk of flight—that is, whether or not the defendant will return to court. The new law does not include consideration of the “dangerousness” of the defendant. (In states where such considerations are allowed, this can lead to more people being held in preventive detention, with no option for pretrial release). For the relatively small number of defendants still subject to money bail in New York, the new law adds additional protections against wealth-based detention. It requires that judges make a finding about a person's financial circumstances and their ability to post bail without posing undue hardship. It also requires that judges offer defendants the options of unsecured or partially secured bonds. (See [Part 1](#) for more about such bonds.)

Given that the governor, Senate leaders, and the Assembly speaker made public commitments to end cash bail, why didn't that happen? This summary reviews how the new law came to be and explores why it looks the way it does.

Context

As we explored in [Part 1](#), the demands for bail reform have long varied among both advocates and lawmakers in New York. Some wanted to preserve the 1971 legislative framework, which does not consider dangerousness but does include cash bail. Others wanted a new framework that ended cash bail altogether, although opinions varied widely about how to address dangerousness. Some groups opposed adding dangerousness to the statute, some wanted to add it, and some were agnostic about it so long as cash bail would be eliminated. Still other groups (for transparency, this included Katal) held that deep decarceration could be achieved through either the 1971 framework or by ending cash bail if the reform package adhered to key principles. (See page 4 of [“A Guide to Bail Reform in New York.”](#))

Making matters more complicated, the state has virtually two justice systems: one in New York City and another one everywhere else. The differences among practices, infrastructure, and culture in these two systems are so vast and so significant that it is difficult to overstate their

influence in shaping reform debates, particularly for bail. One especially challenging aspect of this geographic difference involves pretrial populations: [Most people detained pretrial in New York City](#) are charged with *felonies*—and mainly *violent felonies*. In the rest of the state (and throughout most of the country), most people held in jails pretrial are charged with *misdemeanors*.

Why the difference? Social movements in New York City have won major victories over the past 20 years, leading to massive drops in the number of arrests, detentions, and people sentenced to jail or prison—clearly demonstrating that fewer arrests and less incarceration can coincide with [reduced crime rates and improved public safety](#). The difference between the city and the rest of the state has important implications for reform. For instance, if “dangerousness” considerations were added to the statute, people charged with *violent felonies*—the majority of the NYC pretrial population—would more likely be deemed dangerous and subject to preventive detention; many argue that this would compromise the presumption of innocence. Defendants charged with *misdemeanors*—the majority of the pretrial detention population everywhere else in the state—would likely be considered less dangerous and thus not jailed pretrial. The question of dangerousness therefore has different implications depending on the charge and the jurisdiction. This disparity spurred great debate among advocates and public defenders across the state about acceptable reform provisions.

Legislative Dynamics

The governor and Senate and Assembly leaders held widely differing opinions about justice reform. What happened in 2016 through 2018 profoundly shaped the negotiations this year.

The tragic death of [Kalief Browder](#) in 2015 made bail reform [more urgent in New York](#). Governor Andrew Cuomo, the state’s Chief Judge Jonathan Lippman, New York City Mayor Bill de Blasio, and a few key lawmakers joined advocates in calling for bail reform. They wanted to end cash bail, add “dangerousness” to the law, and require the use of risk-assessment instruments, [a position many advocate groups opposed](#). But the Republican-led Senate wasn’t going to support reform without adding dangerousness, and Democrats in the Assembly, concerned that such a provision would lead to expanded use of preventive detention, opposed that change. This created a logjam.

In early 2017, advocates worked with the Assembly [to introduce a far-reaching justice reform package](#); it included pretrial changes like speedy trial and discovery reform, along with proposals related to sentence reduction and ending solitary confinement. This package passed in the Assembly but was blocked by the Senate, which Republicans had controlled for nearly all of the previous 85 years. With few exceptions during the last three decades of that period, Senate Republicans (and some Democrats) worked to *expand* mass incarceration and the drug war—and thus served as the main roadblock to enacting sensible criminal justice reform in New York.

During the Republicans' reign over the Senate, the Assembly majority had expressed reservations about proposals to end cash bail, believing that any such effort would likely result in a compromise or trade-off that would lead to adding language about dangerousness and risk assessments to the law. That was the line many Assembly members would not cross. For this reason they preferred strengthening the 1971 legislative framework. It was the Assembly that had been largely responsible for the vast majority of criminal justice reforms passed in New York since the early 2000s; key members, particularly [Jeffrion Aubry](#) and Joe Lentol, had long established the Assembly as a reliably progressive body on justice reform issues. Understandably, in light of a national movement to end cash bail, many observers were confused by the Assembly's position of not fighting to end cash bail in New York.

In March 2017, after an intense fight, the [#CLOSErikers campaign](#) won a public commitment from Mayor Bill de Blasio to shut down the jails on New York City's Rikers Island. One of the next steps in the closure process was to reduce pretrial detention populations—and that required pretrial justice reform at the state level, bringing increased pressure on Albany.

Months earlier, Democratic State Senator Michael Gianaris had sponsored a proposal to end cash bail without including dangerousness, but Democrats were in the minority and their ability to advance legislation in the Senate was severely limited. By the fall of 2017, propelled by sustained organizing on the ground, bail reform picked up steam in Albany. The Assembly majority was working on a proposal based on the 1971 framework, eventually sponsored by Assemblywoman Latrice Walker. A number of groups (including Katal) worked on and supported both bills. And Governor Cuomo was preparing to introduce his own proposal, one that added dangerousness to the statute and required risk assessments. In the fall of 2017, advocates issued [a sign-on letter](#) with more than 130 community groups statewide, laying out their concerns to the governor and calling for an approach that would advance decarceration and racial equity.

Through sustained organizing, community groups had made bail reform a top legislative priority in Albany by early 2018. The governor included the issue in his budget proposal, though the details prompted advocates to send a [second public letter](#), outlining their concerns. Including controversial policy proposals like bail reform in the state budget process is a long-established strategy in New York designed to overcome impediments in the legislative process. (Many important measures have been passed this way, including [reform of the Rockefeller Drug Laws](#) in 2009.) With the Republican-led Senate an obstacle in 2018, the budget became the only viable pathway to achieve bail reform. Advocates fought to pass a reform package as part of that year's budget negotiations, but no deal was reached.

After the 2018 budget cycle, the Assembly forged ahead, with the Walker bill making its way through committees and heading for a vote. The bill eliminated cash bail for nearly all misdemeanors and some nonviolent felonies. It rejected dangerousness as a consideration for

pretrial detention. And because it left cash bail intact for those charged with violent felonies, the Assembly added protections to make it less likely that people would be detained because they couldn't afford bail. As the bill moved closer to a vote, two important things occurred. First, members of the Democratic majority in the Assembly took part in a robust internal debate about the proposal: A powerful bloc of members who believed the bill was too far-reaching—particularly for defendants charged with misdemeanor domestic violence and sex crimes—sought to constrict the bill's scope and widen the use of preventive detention. This became a serious political challenge that threatened the entire bill. Advocates had to intervene quickly to develop nuanced amendments and address these concerns without resorting to preventive detention.

Second, the divisions within the advocate community deepened. With the Senate Republicans blocking reform, the Assembly's Walker bill was the only viable pathway. Although some groups (including Katal) worked to pass the bill, others opposed it because it didn't end cash bail. Divisions deepened further over amendments to the Walker bill, among them controversial measures such as allowing electronic monitoring in limited circumstances. These fissures diminished the ability to find common ground.

Amid this heated debate, the [Assembly passed the Walker proposal in June 2018](#). For the first time in ages, lawmakers in New York had considered, debated, and passed a far-reaching bail reform proposal. As expected, the Republican-controlled Senate refused to take up the measure. Even so, passage of the Walker bill required the Assembly Democratic majority to work through a range of substantial political challenges, groundwork that prepared the Assembly to maintain an even stronger position in negotiations in the year ahead.

During the summer and fall of 2018, advocates geared up for the next session—organizing across the state; holding actions, teach-ins, and other public events; and keeping up the momentum for bail reform. In the November 2018 elections, Democrats won control of the New York State Senate in a “blue wave,” a huge change for New York that stirred hope for a new era of reform. And at the end of 2018, advocates [again petitioned Governor Cuomo](#) to pursue a set of principles for reform that centered on decarceration and racial equity.

The 2019 Session

Going into the 2019 session, the Senate had many new progressive members. Senator Gianaris, the sponsor of a far-reaching bill to end cash bail without adding dangerousness, became second in leadership of the new majority. In early January 2019, Governor Cuomo put forward a revised proposal to end cash bail. It was a dramatic improvement over his previous proposals, the result of sustained organizing on the ground in previous years. And although it didn't go as far as some might have liked, its inclusion in his budget proposal, coupled with full Democratic control of the state legislature, indicated that meaningful reform was finally within reach. Now that the Senate Republicans had been dispatched, the greatest challenge seemed to be resolving

differences about the framework for reform: ending cash bail or building on the 1971 legislative statute.

In February, Assembly Speaker Carl Heastie said he was open to ending cash bail entirely—presumably without adding “dangerousness” to the statute, a revision that could have led to widespread use of preventive detention. This was a major development.

But things weren’t as different as some advocates wished. While the new Senate majority was passing bills on a range of progressive issues like [election reform](#) and [reproductive health](#), its members struggled to find common ground on bail reform. Although many groups were making a hard push for the Gianaris bail bill, a conservative bloc of Senate Democrats stood in the way. It quickly became clear that the new Democratic Senate majority was not going to bring the Gianaris bill up for a vote, let alone pass it. This was a sobering reality for some advocates.

With the logjam in the Senate—a familiar problem in New York—overhauling the bail laws would have to happen as part of the budget process, which had an April 1 deadline.

Legislative leaders and advocates debated and fought over the details for weeks—sometimes in public, sometimes behind the scenes. The question of adding dangerousness to the statute remained a major sticking point. Who would be subject to pretrial detention and under what circumstances? With the budget deadline looming, the pressure was intense. Opponents of reform, especially many district attorneys, mounted their usual scare campaigns. Down to the last day, the deal could have fallen apart—and nearly did multiple times. The work advocates did in recent years—organizing across the state, keeping pressure on the governor and lawmakers, pushing the Senate to do better, and pushing for the 2018 passage of the Walker bill, proved critical in keeping the negotiations going in the right direction.

The final agreement was secured during the last hours before the deadline and included in the \$175 billion state budget package. As described, the Assembly had historically refused to accept any deal that could have expanded preventive detention by adding dangerousness considerations to pretrial decisions. It says a lot about the political dynamics that the final bail reform agreement was based on the Assembly’s Walker bill and did not include dangerousness.

The Assembly and Senate passed the budget on April 1, 2019, and the governor signed it into law, enacting one of the most sweeping pretrial reform packages ever passed in the United States.

Historic Reform

Without question, the justice package—with bail, discovery, and speedy trial reform at its heart—will transform pretrial practices in New York. These reforms will ensure that tens of thousands of people will not sit in a jail cell pretrial year after year. According to CCI’s [analysis](#), among almost 205,000 criminal cases arraigned in New York City in 2018, 90 percent of the

people involved would have been immediately released under the new laws, including those charged with second-degree robbery (a violent felony offense). That was the charge against Kalief Browder for allegedly stealing a backpack. The remaining 10 percent of people would have been eligible for money bail, with new provisions reducing the likelihood that they would be stuck in jail because they couldn't afford bail. Bail reform is expected to dramatically reduce jail populations in jurisdictions beyond New York City and expedite the process of closing the decrepit jail complex on Rikers Island. Given some of the new laws' process-oriented elements, it would be difficult to measure the statutes' total impact before they are implemented. The laws will take effect on January 1, 2020.

As far-reaching as the laws are, like all proposals that go through the legislative process they are the result of compromise and aren't perfect; some components of the law could be even stronger.

Even so, the reforms are something all parties—the Assembly, Senate, governor, and advocates—should be proud of. Some advocates represent the outcome differently, depending on the goals they sought:

- If the aim was decarceration, this is a *huge* Monumental, even.
- If the aim was ending cash bail, this is not a full victory, because cash bail still exists in New York, though it is limited.
- If the aim was to prevent dangerousness from being added to the statute, this is a critical win.
- If the aim was to add dangerousness considerations to the statute – either as an addition to “risk of flight” considerations, or in lieu of it – then this isn't a full victory because dangerousness was not included.

Next Steps

Although advocate groups take different positions on the specifics of the reforms ([this interview](#) provides a great example of some of the nuances), many agree broadly on the next steps.

First, the reforms must be immediately defended. Opponents of the expansive pretrial package—including the statewide district attorney association, some [sheriffs](#) and the *New York Post*—have launched a campaign of slander and lies [to scare the public](#) and turn the tide against change. Republicans in the [Senate](#) and [Assembly](#) have introduced bills to roll back the new law, while some Democrats have joined DAs in [calling for amendments to weaken the reforms](#). In New York City, the reforms have [sparked a backlash](#). The recent victory will not stand unless we fight to defend it.

Second, cash bail is still on the books for a small percentage of cases in New York, and the new law adds additional protections to reduce the likelihood of a person being stuck in jail because they can't afford bail. Even so, state law must be amended to allow [community bail funds](#) to post

bail for people who may otherwise be jailed pretrial. Legislation to accomplish this [passed the Senate](#) earlier this month and is expected to pass the Assembly and head to Governor Cuomo's desk; advocates are working to make sure he will sign it.

Third, implementation of the new reform package must be swift and muscular. The law's impact will be shaped by how effectively these pretrial changes are implemented—particularly bail reform. Judges, prosecutors, defense attorneys, and court clerks must all be trained and monitored. Data must be collected, analyzed, and reviewed. It's worth noting that this reform package passed as we marked the 10-year anniversary of another milestone: the rollback of the Rockefeller Drug Laws in April 2009. One lesson from the Rockefeller reform history is that implementation is critical to achieving the biggest impact. With bail reform, if we can ensure that the law is implemented effectively, its decarceration effects will be even greater.

Conclusion

Bail reform in New York has long been complicated and challenging—and it remains so today. Despite a range of differences in objectives, strategies, and tactics, community groups have won a historic victory that will significantly reduce pretrial jail detention populations statewide and will help us close jails. But we cannot rest. We have to defend and implement the reforms while building upon them—and continue the momentum toward ending mass incarceration in New York State.

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