

Gun Violence and Bail Reform – Correlation or Causation?

Are Changes to New York's bail statutes the solution to our gun violence issues?

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Rochester City Council Members and the Rochester Chamber of Commerce have recently called on the Governor to call a special session of the state legislature to amend the bail laws and allow judges to consider dangerousness in response to increases in shootings and homicides in the last few years. Gun violence is a critical issue for the community and these public pronouncements deserve to be examined carefully to see if there is data or evidence to support them. While I do not doubt the sincere and deep concern that the writers of these letters have for Rochester, and for all those impacted by gun violence, I believe the data and facts call their conclusions into question.

A starting point is an examination of the concept of dangerousness in New York's bail laws. New York's bail statutes, going back to at least 1970, have, and still do prohibit judges from considering dangerousness in most circumstances when deciding whether someone who is arrested, and presumed to be innocent, should be detained or released pending trial, and if released under what conditions. A 2017 report from NYU entitled Preventative Detention in NY stated that New York was one of only four states that did not allow for preventative detention or the consideration of dangerousness by judges in making bail and pretrial confinement decisions. Viewed through that lens, one could argue that New York should look carefully at data and evidence to decide if it makes sense for our state to join the other states in allowing preventative detention.

The next question is whether there is any evidence that preventative detention is the answer to our gun violence problem. It is interesting to note that in the City Council letter to the Governor, the Councilmembers cite figures showing 26 homicides in Rochester in 2017, 25 in 2018, 32 in 2019, 51 in 2020, 81 in 2021 and 68 so far in 2022. The rise in homicides is unquestionably shocking and unacceptable. But in 2017, 2018 and 2019 when the homicide numbers were relatively low, judges were not allowed to consider dangerousness in making release decisions. This has not changed. Obviously factors other than preventative detention changed in 2020 to the present that have fueled a rise in homicides and specifically gun related homicides. It is also interesting to note that New York State experienced an unprecedented drop in homicides from a high of over 2600 per year in 1990 to under 600 per year in 2017, 2018 and 2019. During the entire time this unprecedented decline in homicides was occurring, New York did not allow preventative detention or the consideration of dangerousness in deciding whether to detain people presumed innocent before trial. It should also be noted that this recent spike in gun violence is not limited to New York. Urban centers across the United States, with high rates of poverty and racial segregation, have seen significant increases in gun violence, shootings and homicides since 2020 regardless of bail policies. This data raises serious questions as to whether preventative detention is truly the answer to the current gun violence crisis or simply an easy target that avoids looking at the true reasons behind, and solutions for, gun violence.

Another question that needs to be asked, particularly in light of the above data indicating the limitations of the impact of preventative detention on gun violence, is what are the problems

associated with or negative impacts of preventative detention. As the Rochester City Council and Chamber of Commerce letters properly note, the concept has been criticized as being discriminatory and racist. How is the future dangerousness of an individual determined? This issue was not addressed in either letter. Some have advocated for the use of risk assessment instruments, but these instruments have been shown to be inherently discriminatory and racially biased. Among other arguments, opponents of the instruments point out that the historical disparities in the criminal justice system infect the validity of any instrument that considers criminal history. If risk assessment instruments are not used how is dangerousness determined by judges? Is it like the famous pronouncement from Supreme Court Justice Stewart in 1964 regarding pornography where we know it when we see it? And if so, what impact do concepts like implicit bias have on decisions with unguided discretion? We should insist on evidence supporting a high degree of effectiveness in addressing a specific issue, in this case gun violence, before we are willing to risk increasing the already stark racial disparities in New York's criminal justice system. That evidence is lacking here. Interestingly, the Brennan Center report cited in the Rochester letter notes that New York's approach, rejecting preventative detention or consideration of dangerousness in bail decisions, which dates back to the 1970s, reflects an attempt to preserve the presumption of innocence and reduce racial biases against defendants. It would seem that these are principles worth preserving.

The Democrat and Chronicle reported that the City Council and Chamber of Commerce letters also contained calls for changes to bail reform. They reported that the Chamber letter included the claim that "Robberies, assaults, car-jackings, and illegal gun possessions plague our streets every day and the perpetrators are being met with appearance tickets,...It is commonplace for these individuals to be arrested, booked, and released on an appearance ticket, only to reoffend after which the same process ensues." There have been many claims regarding bail reform, and again it is important to look at the facts and data and not get caught up in the rhetoric. First it should be noted that the crimes described above by the Chamber are all violent felony offenses and both before and after bail reform judges had and continue to have the ability to set bail on these charges. There is nothing in the new bail statutes that requires judges or anyone else to issue an appearance ticket on these types of violent felony charges. If what the letter describes is actually happening, it is not due to bail law changes referred to as bail reform.

While there has been a lot of noise regarding bail reform, I have yet to see any meaningful data analysis to support the claim that increases in crime or shootings are attributable to bail reform. Interestingly, the City Council letter refers to a publication from the Brennan Center on the impacts of bail reform entitled "The Facts on Bail Reform and Crime in New York State". The publication's lead sentence reads "There is no clear connection between recent crime increases and the bail reform law enacted in 2019, and the data does not currently support further revisions to the legislation". The article correctly notes that crime and shootings have increased in cities across the country, making it unwise to look for explanations confined to New York, as New York's bail reform law is. The publication also notes that a recent analysis

done by the Albany Times Union suggested that relatively few people released under the new law went on to be rearrested for serious offenses. The same report notes that as many as 80,000 people who were presumed innocent may have avoided jail time due to cash bail because of the 2019–20 reforms and went on to pose no documented threat to public safety. When you consider the potential negative consequences of incarceration such as loss of employment, loss of spots in mental health and other treatment programs, and disruption of family life, the benefits of releasing non-violent offenders outweigh those of preventative detention. Additionally, the prevention of 80,000 unnecessary pretrial incarcerations of people who are presumed innocent, and many of whom are black or Hispanic, is a tremendous positive impact of the bail reform laws. The study's clear conclusion is that there is no evidence that the changes to the bail statute have caused an increase in crime. We should demand of those who claim otherwise that they provide data to support their claims. So far there has been no such credible claims supported by evidence and data.

It is also worth noting that overall crime in New York as reflected in the reported index crimes, has reached all time low levels. Data reported by the New York State Division of Criminal Justice Services indicates that index crime hit an all-time low in 2019 with 336,996 index crimes reported that year. Index crime rose about 2% to 343,861 in 2020, the second lowest number of index crimes ever reported in a year in New York, and fell slightly in 2021 to 343,357. This 2021 index crime level represents a 24% decrease in crime in New York since 2012. In Monroe County index crime is also at historic low levels. Index crime in Monroe County has declined from almost 19,000 index crimes reported in 2017 to 16,523 in 2019, 16,088 in 2020 and 14,726 in 2021 (<https://www.criminaljustice.ny.gov/crimnet/ojsa/stats.htm>). This data clearly does not support the narrative being pushed by those urging changes to the bail laws. The same report indicates that what has increased significantly in the last few years are murders and aggravated assaults, and as the data in the Rochester City Council letter indicates those increases are driven in part by increases in firearm related crime. It is hard to fathom how the changes to New York's bail laws that curtailed judges' ability to set bail for most misdemeanors and non-violent felonies, but retained their ability to set bail for violent felonies including possession and use of loaded weapons, could explain record low index crime rates with specific increases in crimes like homicide and firearm assaults. One would expect that if the changes made to the bail statutes were driving increases in crime, it would be for the crime categories that judges are no longer able to set bail and this is clearly not what the data shows. The much more logical conclusion from the data is that there are other factors driving these increases in shootings and homicides.

Another issue in the Chamber of Commerce letter worth examining is the claim regarding sentencing and judges' discretion in sentencing gun offenders. The same Democrat and Chronicle article cited above quotes the Chamber letter as saying "There was a time when the possession of an illegal gun brought a mandatory one-year jail sentence. That law was eventually changed because advocates fought for more judicial discretion. Ironically, it is that same group of advocates now arguing against judicial discretion regarding bail. Judges are

elected by their communities and certainly deserve to have the ability to exercise discretion and be held accountable for it." Ironically the law is actually the opposite of what the writer contends. Prior to 2006, possession of a loaded weapon in New York State was a class D felony, and possible punishments included a sentence of one year. Amendments to the weapons possession statutes passed in 2006 are still in effect and make possession of a loaded weapon a class C felony with a mandatory minimum sentence of 3 ½ years in state prison. If anyone arrested for carrying a loaded weapon is getting a sentence of less than 3 ½ years in prison, it means they were offered a plea to a lesser charge with a reduced sentence. And by pointing this out I am not criticizing the result in any case in which this may have happened as it would be irresponsible to do so without a full examination of the facts of each case in question. What the writer may be referring to was a philosophy and associated slogan as part of Project Exile prior to the 2006 changes to the gun law, supported by an agreement between law enforcement and prosecutors that the illegal possession of a loaded gun would at a minimum get the offender a year in prison. Again, the issue is not the need for legislation to impose harsh minimums, as that was passed some 17 years ago and is still in effect.

Recent increases in shooting and homicides suggests that there is a correlation between bail reform and increases in shootings and homicides as they both occurred at about the same time, but there is no proof that bail reform is causing the increases. To the contrary the evidence disproves causation. Given the critical importance of gun violence to the Rochester community, and to urban centers across the country with high rates of poverty and racial segregation, it is imperative that we look objectively at the issue and factors that may be driving it if we are to find meaningful solutions.

Two major events that occurred in the first half of 2020 that had a national impact, COVID and the murder of George Floyd, deserve consideration as a cause of the uptick in violence. COVID began to significantly impact the United States in the first two months of 2020, and by the middle of March of 2020 New York State had declared an emergency and put the state in virtual lockdown. This pandemic and resulting lockdown had massive impacts on the criminal justice system. Police departments dealt with severe staffing shortages as officers were out with COVID, or were complying with quarantine requirements due to possible exposure to COVID. People were also understandably hesitant to engage in face to face interaction due to risk of COVID infection. Total arrests statewide as reported on the DCJS statistics website, fell from almost 357,000 in 2019 to about 257,000 in 2020, a 39% decrease in a year. As noted above, overall index crime rose less than one percent during the same time arrests fell by 100,000. Monroe County has also seen a significant decline in felony arrests from 2019 to 2021. ([Adult Arrests - County and Region Selection \(ny.gov\)](#)). It is also worth noting that many evidence based strategies that have been shown to be effective in reducing homicides and shootings, such as hot spot policing and gun violence intervention strategies, when done right, rely heavily on face to face contact between officers and the public. These include custom and group notifications and police citizen interactions in hot spots. Staffing shortages and an understandable hesitancy to engage in close face to face contact effectively stopped good work being done in this area.

The court system in New York was also significantly impacted by COVID. The same DCJS statistics page indicates that convictions for felonies fell from over 23,000 statewide in 2019 to about 10,000 in 2020 (a 56% decline), and misdemeanor convictions fell from over 31,000 to just under 14,000 (a 55% decline). In the same time frame the number of people sent to prison in New York fell from over 12,000 in 2019 to less than 5,000 in 2020 (a 58% decline). The Monroe County data show a similar pattern of significant reductions in convictions and prison sentences from 2019 to 2020 and 2021. ([Dispositions of Adult Arrests \(ny.gov\)](#)). These are massive decreases in the number of people being convicted and sent to prison at a time when overall crime is level and homicides and shootings are rising significantly. Parole and probation, which rely heavily on face to face interaction between officers and those under supervision suffered significant disruption as well due to staffing shortages and the inability to safely personally interact.

Community efforts aimed at reducing gun violence, like the violence interrupters referred to in the Brennan Center report mentioned above, were also disrupted. New York State, through its SNUG program, supports street outreach teams in cities across the state. In addition New York City and other cities have their own network of street outreach programs. These programs suffered the same staffing shortages due to COVID and quarantine issues and street outreach work relies almost exclusively on face to face contact between workers and clients which could not be done safely for a significant period of time.

The Brennan Center publication also correctly points out that COVID caused a recession that was not felt equally across society, but in many ways impacted poor communities disproportionately. As businesses closed or scaled back operations due to COVID restrictions, those at the low end of the economic spectrum were often the first ones to get laid off or lose their jobs. Additionally, schools closed and went remote. Resources for child care were often not available for those in heavily impacted communities. Organizations like Boys and Girls Clubs, recreation centers, health clinics and so many more that do so much to help hold challenged communities together were forced to close or curtail operations due to COVID. All of these impacts, and more that have not been mentioned, put incredible additional strain on the poorest communities that were already under tremendous strain. These are the same communities that historically have suffered, and continue to suffer the highest rates of gun violence.

It is also worth noting that gun sales have taken place at record numbers in recent years. As Forbes points out, Americans bought a record breaking 22.8 million guns in 2020, and another 20 million firearms in 2021, the second highest number ever, behind only 2020 (<https://www.forbes.com/sites/joewalsh/2022/01/05/us-bought-almost-20-million-guns-last-year---second-highest-year-on-record/?sh=57f5372513bb>). This is almost 43 million guns added to American's arsenals in two years. It is widely recognized that a percentage of these guns make their way into the pool of "crime guns" through straw purchases, thefts and other illegal

sales or exchanges. It is worth considering the impact of the record gun sales nationwide, taking place at the same time as significant increases in gun crime across the country.

The other major event that took place in May of 2020 that needs to be looked at is the murder of George Floyd and the impact that had on communities across the country that have borne the brunt of the shootings and homicides. While all murders are shocking, the murder of George Floyd in many ways impacted people and communities in ways not experienced before. The nation watched video footage of an experienced police officer kneeling on and suffocating a man who was saying I cannot breathe and pleading for his life for almost 10 minutes. In many ways, Floyd's murder blew the lid off of simmering mistrust, resulting in marches, protests and urban unrest. For historical reasons that are too extensive to discuss in detail here, it is clear that there is significant distrust of the entire criminal justice system, and the police as part of that system, in the communities most impacted by homicides and shootings. For those interested in a deeper dive into these issues, the book *Ghettoside: A True Story of Murder in America*, by Jill Leovy contains relevant historical discussion of the roots of this distrust. It has been long studied and established that the legitimacy of the justice system in a community, and equally a community's perception of the legitimacy of the system and the police are directly related to levels of violence and crime. The President's Task Force on 21st Century Policing relied heavily on this concept. The impact of this erosion of trust and legitimacy, occurring at the same time as the impacts of COVID were hitting full force, and at the same time homicides and shootings were rising in these communities, cannot be discounted when looking for explanations for the rise in gun violence.

As the Brennan Center publication points out, crime is complex and policymakers should be wary of simplistic answers. Looking to simplistic solutions like adjustments to our bail laws is not going to solve the underlying problems that have led to unacceptably high levels of shootings in our urban centers. What we need are solutions aimed at the true causes of the problem. The deeper issues involve the fact that we still have incredibly high levels of poverty concentrated in parts of our urban centers. And we still have, in many practical ways, segregated schools and communities. These issues are long standing and persistent and will take time to address. In the meantime there are things that can be done. Renewing a joint law enforcement and community focus on strategies like hot spot policing, street outreach work and gun violence intervention efforts that have proven to be effective is critical. To succeed, the police and the community need the resources, staffing, and training to effectively do this work. Acknowledging the mistrust and historical basis for the mistrust of the criminal justice system and working to build relationships and restore trust is also critical. This effort needs to involve both law enforcement and the community. Trainings like the Principled Policing training developed by DCJS which relies heavily on procedural justice principles, can be an important first step for entire departments to undertake. A recent study reported in the Fall 2020 edition of *Translational Criminology, Incorporating Procedural Justice into Hot Spot Policing: Lessons from a Multicity Randomized Trial*, highlighted the importance of incorporating procedural justice into public safety work. The study documented the positive

impact of a hot spot policing effort carried out by officers with procedural justice training when compared to a similar effort done by those without the training. Community organizations are so important to maintaining the integrity and safety of our most challenged communities and must be fully and appropriately resourced to provide the safety net needed for true public safety. Reasonable gun policy at the state and federal level to prevent the record gun sales from flooding the streets with crime guns would also contribute to a solution. None of this work is easy. It does not allow us to blame others for our problems or rely on others to solve them for us. It will require all of us together to do the hard work over time that is needed to make progress. As noted above we have done this before, lowering homicides from a high of over 2600 per year in the early 1990's to less than 600 per year for 2017 to 2019. Last year we had 880 murders in New York State, far fewer than 1990 but still unacceptably high. Using evidence and data to accurately assess the problem and its causes, and using tested and proven strategies, law enforcement and the community, working together can make a difference.