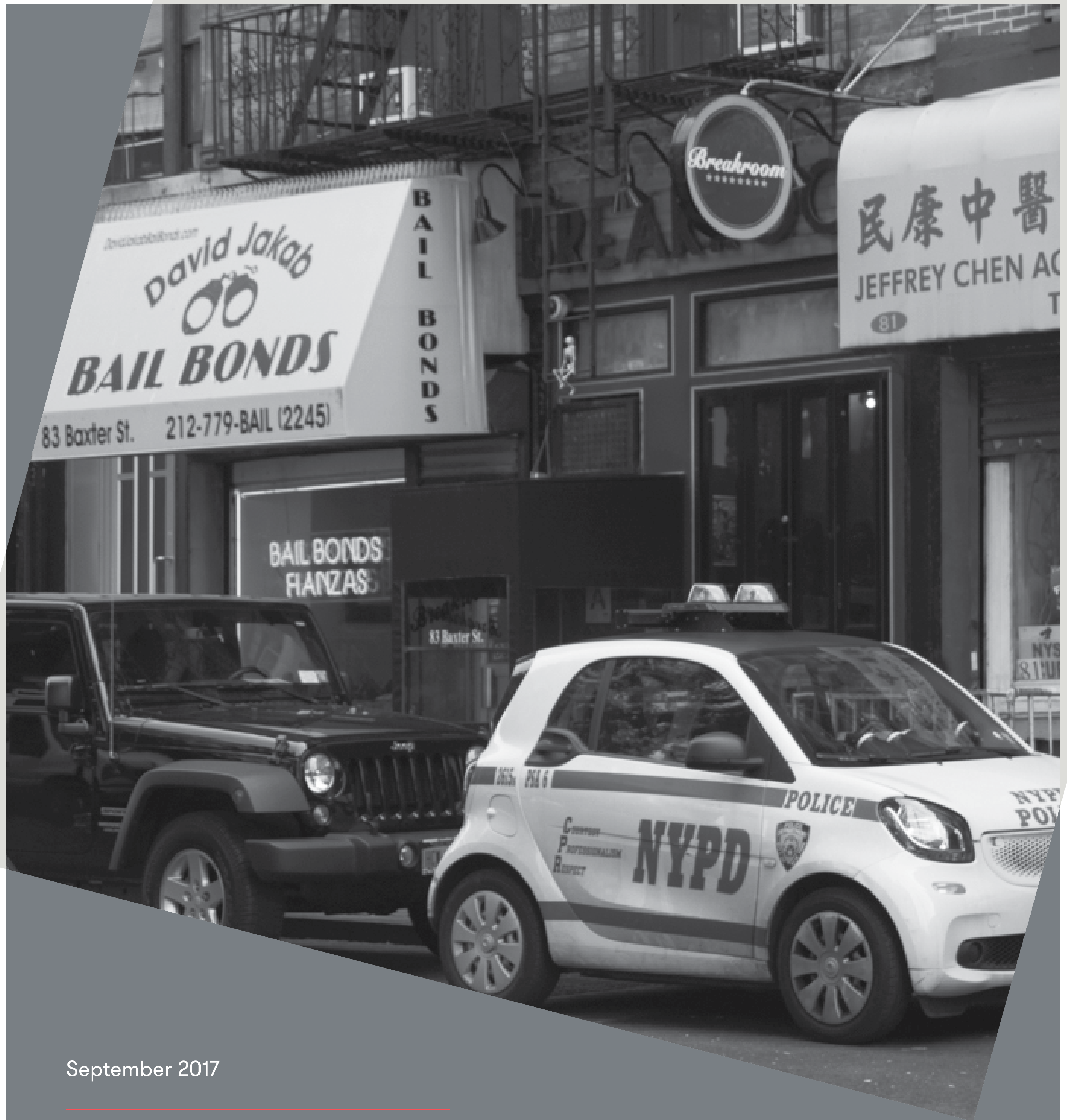

September 2017

Against the Odds

Experimenting with Alternative Forms of Bail in New York City's Criminal Courts

Vera
INSTITUTE OF JUSTICE

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From the Director

"Judge, if you set that amount of bail the odds are my client won't make it."

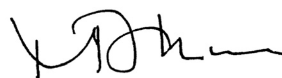
Those words are uttered frequently by defense attorneys in arraignment courts throughout New York City. Annually, almost 50,000 admissions to the jails at Rikers Island and across the city are for those held pretrial because they cannot afford the bail set in their case.

Under New York law, the use of bail doesn't have to be this onerous. Judges may opt to set bail from nine forms, including bail that requires a deposit of no more than 10 percent of the total amount, or bail that requires no upfront payment at all. Although these "alternative" forms of bail—known as partially secured and unsecured bonds, respectively—have been available for decades, they remain underutilized in the courts, where judges traditionally set bail in the form of cash or an insurance company bail bond.

Why aren't alternative forms of bail used more widely and what would happen if they were? In partnership with the Office of Court Administration, Vera explored these questions in a three-month experiment designed to promote the use of alternative forms of bail in New York City arraignment courts. The results of that effort are documented in this report, along with insights about the procedural challenges associated with these forms of bail and recommendations to improve their use.

Up against a mandate in the next decade to close Rikers Island and to cut the average daily jail population by half, improving the bail system is critical to criminal justice reform in New York City. While there is movement afoot to eliminate money bail altogether, this experiment demonstrates that significant progress can be made right now, under the current law, to reduce the power of money as a determinant of liberty. The 99 cases that comprise the cohort of this project tell a fascinating story about the possibility of culture change in the use of bail in the city's criminal courts, and demonstrate the potential of alternative forms of bail to serve as one more tool to make the bail system fairer.

Today, the number of people incarcerated in New York City's jails is at an all-time low, as is its crime rate, with several thousand fewer arrests this year compared to last. New York City has already demonstrated that less incarceration can equal *more* public safety, yet we cannot stop there. In the months since this project's inception, more stakeholders already have become aware of these forms of bail and efforts are underway to increase their use. We hope this report contributes to the growing knowledge about alternatives to traditional bail and reinforces what recent research demonstrates all too clearly—money alone should not determine a person's pretrial liberty.



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Executive summary

Statistics show that money bail is unaffordable and out of reach for many New Yorkers. Even though the median bail amount on felony cases in New York City is $5,000—and even lower—at $1,000, on misdemeanor cases – over 7,000 people are detained pretrial at Rikers Island and other New York City jails on any given day because they cannot make bail.

Under New York law, the use of bail doesn't have to be this burdensome. In setting bail, judges have nine forms to choose from, including "alternative" forms such as partially secured or unsecured bonds, that require little to no upfront payment to secure a person's pretrial release. The traditional practice in the courts, however, is to ignore these options and impose only the two most onerous forms of bail to make: cash bail and insurance company bail bond.

The Vera Institute of Justice (Vera) launched a three-month experiment in New York City arraignment courts to examine what would happen if alternative forms of bail were used more often. In what kinds of cases might judges be willing to set these forms of bail? In what amounts? What impact would these alternatives have on a person's ability to make bail? What other pretrial outcomes might be expected?

Drawing from a cohort of 99 cases in which an unsecured or partially secured bond was set, these cases were tracked over a nine- to 12-month period to document bail-making, court appearance, pretrial re-arrest, and final case disposition. Interviews were conducted with judges, defenders, and court staff to better understand the results and develop recommendations for improving the use of bail in New York City.

The results were promising. Sixty-eight percent of the cohort made bail, and an additional 5 percent were released on recognizance. The use of alternative forms of bail in the cohort was not limited to low-level offenses or certain types of offenses. Approximately 54 percent of cases had a top charge of a felony, and the cohort—felonies and misdemeanors—spanned the gamut from drug possession, larceny, and robbery, to assault, criminal contempt, and weapons possession. Those released had a combined court appearance rate of 88 percent and a rate of pretrial re-arrest for new felony offenses of 8 percent. When released pretrial, the majority of cases resolved in a disposition less serious than the initial top charge at arraignment, with

fully one-third ending in dismissal and another 19 percent ending in a non-criminal conviction.

Ninety-nine cases out of the thousands where bail is set is a miniscule number in the larger scheme of New York City's bail system, yet this experiment illustrates the possibility of meaningful culture change.

The recommendations in this report offer strategies to increase and ease the use of alternative forms of bail:

- stakeholders should be educated about them;
- the associated paperwork and procedures to set these forms of bail should be simplified;
- they should be set routinely as an option in addition to traditional forms of bail; and
- when bail is set, it should be done with an individualized inquiry into a person's ability to pay.

Introduction

Every day in New York City, people who have been arrested are brought before a judge to hear the formal charges filed against them by the state. This is the process of arraignment, which typically occurs within 24 hours after arrest.[1] At arraignment, if the case is not resolved with a dismissal or a plea, the judge must make a decision—to release a person on his or her own recognizance pending trial, or to set bail—a sum of money intended to serve as collateral. Although New York law allows judges to opt from nine forms of bail—some less burdensome than others—in practice, they select only two forms: cash bail and insurance company bail bonds.[2]

Out of the nine forms of bail available, these "traditional" forms of bail—those used most commonly—are the most difficult for individuals and their families to afford. Cash bail requires a full payment of money up front to the courts, which is returned to the payer at the end of the case minus a small administrative charge if a guilty plea or conviction is secured. An insurance company bail bond requires a person to pay a 10 percent premium and other nonrefundable fees to a for-profit bail bond company, and to satisfy conditions such as obtaining multiple payers and proof of employment. Many New Yorkers cannot meet the financial and other demands of these traditional forms of bail. As a result, when bail is set, slightly less than half of all defendants make bail before the end of their cases.[3] Instead, they remain detained pretrial at Rikers Island or other city jails, such as the Brooklyn Detention Complex; the Vernon C. Bain Center, colloquially known as "the Barge" or "the Boat"; or the Manhattan Detention Complex, often called "the Tombs."

Partially secured and unsecured bonds are alternative forms of bail that are as legitimate under New York law as the traditional bail options. Alternative forms of bail are also easier to afford, as they do not require people to put up large amounts of money or to pay nonrefundable premiums and fees. Yet in setting bail on more than 40,000 cases annually, judges in New York City rarely impose these alternatives.[4] This is despite a 2012 ruling from New York's highest court that judges are required to impose at least two forms of bail so that a person may choose whichever option is less onerous.[5]

In a moment of intense focus on bail reform nationally and locally, Vera partnered with the New York State Office of Court Administration on a

three-month experiment in arraignment courts across New York City to promote the use of alternative forms of bail and explore these questions: What would happen if partially secured and unsecured bonds were used more often? In what kinds of cases might judges be willing to set these forms of bail? If set, what impact would these alternatives have on a person's ability to make bail? What rates of appearance at future court dates or re-arrest pending trial could be expected? How would these cases resolve?

The project had three objectives:

- to educate judges and defense attorneys about alternative forms of bail and combat the overall lack of awareness about how to request, or set, a partially secured or unsecured bond;
- to create a cohort of cases in which these forms of bail were set and to analyze their outcomes, including bail-making, court appearance, pretrial re-arrest, and case disposition; and
- to develop a better understanding of why alternative forms of bail have rarely been used, what about the cases in the cohort inspired a different approach, and what efforts are needed going forward to promote the use of these forms of bail more widely.

This report documents the results and offers some recommendations for reform. Although the results provide some valuable insights, it is important to note their limitations. Because the project was not designed as a research study, the cases in the cohort are not necessarily representative of the typical cases on which judges set bail. Due to the lack of a control group, the data comparisons offered in this report between alternative and traditional forms of bail for pretrial outcomes on bail-making, failure to appear, and re-arrest rates are illustrative only, and not conclusive. It is important not to overstate these as findings or draw generalized inferences from this project. What the results in this report do offer, however, are insights into the reasons why alternative forms of bail have historically been underutilized, how their greater use might impact pretrial detention rates and pretrial measures of success, and some steps that can be taken to increase their use in New York City arraignment courts.

How bail typically operates in New York City

Under New York law, the purpose of bail is to guarantee a person's appearance at subsequent court dates after an arrest.[6] The prevailing logic is that a financial stake hanging over a person's head serves as an incentive to appear in court or risk forfeiting that money. The request for bail comes initially from the prosecutor's office, with an assistant district attorney making a recommendation for a particular bail amount to be set based on the nature of the charges, the person's criminal history, any outstanding warrants, and other factors like ties to the community and employment status. When a person before the court is facing serious charges, has a long criminal record, or has a warrant history of missed court appearances, the amount of bail requested by the district attorney's office tends to increase.[7] The prosecution's bail request acts as an anchor, increasing the likelihood that the court will set bail, often at amounts beyond the reach of average New Yorkers.[8] In New York City, more than 50 percent of people cannot pay the bail amount imposed by the court, even though bail is set at lower amounts, on average, compared to other jurisdictions nationwide: the median bail amount set in New York City for misdemeanors is $1,000 and, for felonies, $5,000.[9] That many people cannot afford bail in the amount of $1,000, let alone $5,000, demonstrates New Yorkers' limited economic resources to make bail.[10]

Juan Gonzalez's case illustrates how the bail process typically works in New York City.[11] Juan found himself in handcuffs and under arrest when he tried to break up a brawl at the bar where he worked. After waiting in a cell for almost 24 hours until he met the public defender assigned to his case, he learned he was charged with felony assault. The public defender told him that based on experience the prosecutor would likely seek $15,000 bail, and the judge would likely set bail at $10,000.

Juan didn't have $10,000. He doubted his mother had that money either, but was sure she could come up with 10 percent of the amount and go to a bail bond company. His lawyer informed him that in addition to paying the 10 percent premium, Juan would also need at least one or two family members employed full-time to agree to sign for the bond and to show paystubs or tax returns. The public defender called Juan's mom, who in turn called his brother, uncle, and three other family members. Within a half hour, all six of them were at the courthouse, waiting anxiously for Juan to appear in front of the judge.

At the bail hearing, the prosecutor argued that bail should be set at $15,000 because Juan presented a flight risk, the assault charges were serious, he had a prior misdemeanor assault conviction, and recently had been arrested for theft of services—entering the subway without paying the fare—for which he had failed to complete his required two days of community service. Juan's lawyer argued for his release, detailing the circumstances of the brawl and his client's attempts to intervene. The public defender explained that the misdemeanor assault conviction was from five years prior, when Juan was 17 years old, and that he had successfully completed three years of probation and received youthful offender status. He further told the judge that Juan wasn't able to finish the community service on the recent arrest for jumping the turnstile because he had started working full-time and would have lost his job had he taken time off. The public defender pointed out Juan's family members in the courtroom, indicating Juan's strong ties to his community.

Nevertheless, the judge set bail at $7,500 insurance company bail bond or $5,000 cash. In practice, this ruling required Juan and his family either to pay more than $750 in non-refundable premiums and miscellaneous fees to a for-profit bail bond company, or to deposit $5,000 cash up front with the court. His family couldn't afford $5,000 in cash and, although his brother and uncle had $750 and were willing to sign for a bail bond, they couldn't find a bail bond company to underwrite the bond as neither Juan's brother, uncle, nor other family members were employed full-time. Despite potentially having a good defense at trial, Juan remained in jail for six weeks until he pled guilty to a misdemeanor and was released.

Filled with individuals like Juan Gonzalez who are unable to make bail, Rikers Island and other New York City jails face a crisis.[12] Upwards of 75 percent of people there on any given day are detained pretrial because they cannot make bail.[13] Almost half of those who enter are released from jail within seven days or less, illustrating the high levels of churn.[14] But although thousands of New Yorkers cycle quickly through the city's jails, another 10 percent of the jail population remains detained for at least six months, many for longer, awaiting resolution of their criminal cases.[15] The case of Kalief Browder, a 16-year-old arrested and held at Rikers Island for three years until his case was dismissed, brought into stark relief some of the most harmful consequences of bail and pretrial detention.[16]

New York's alternative forms of bail

Bail wasn't intended to work this way. Historically, the purpose of bail was to *increase* pretrial release and to guard against unnecessary pretrial detention. (See "Why bail reform matters" on page 9.) However, the practical effect of requiring cash bail or bond fees and premiums to be paid in exchange for pretrial release is that many people, despite being presumed innocent, remain in jail while awaiting trial because they do not have enough money to make bail.

Almost 50 years ago, the New York State Legislature recognized the need for an alternative:

> On the one hand, a judge may commit the defendant to prison or fix bail—which may well be beyond the defendant's means. On the other, he may release the defendant upon his own recognizance. In many instances, none of these decisions seems attractive or satisfactory. With this in mind, the proposal inserts two intermediate devices, one termed an "unsecured bail bond" and the other a "partially secured bail bond."[17]

In 1970, the legislature reformed the state's bail laws to allow judges to consider less restrictive forms of bail than cash. The express objective of bail reform was to "reduce the un-convicted portion of our jail population."[18] In addition to prescribing cash bail and insurance company bail bonds, New York State Criminal Procedure Law §520.10 allowed for an additional seven alternative forms of bail, most of them secured or unsecured variations of surety or appearance bonds.[19]

For people held on bail, these alternative forms provide options as to who can pay bail for them, in what form, and in what amount. The first distinction is between surety and appearance bonds. A *surety bond* requires the payer—called the "obligor" in the statute—to be someone other than the defendant, although a defendant may serve as one of two or more obligors. An *appearance bond* requires the defendant to be the sole person paying the bond. The second distinction is between secured, partially secured, and unsecured bonds. A *secured bond* requires those responsible for the bond to deposit personal or real property with the court, while a *partially secured bond* requires a money deposit of no more than 10 percent of the bond, although a judge may set a lesser amount. An *unsecured bond*, in contrast, requires no deposit of either property or money, but simply a promise to be liable for the full amount of the bond if the person fails to appear at subsequent court dates and bail is forfeited.

To see how these alternative forms of bail would play out in practice, consider again the case of Juan Gonzalez. If the judge had still set bail at $7,500

bond or $5,000 cash, but set the form of bail as a partially secured bond, Juan and his family would only have had to deposit $750—money that would be returned to them at the end of the case if he appeared for all his court dates.[20] If the judge had set an unsecured bond, Juan and his family wouldn't have needed to make any deposit at all, allowing him to walk out of the courtroom after his arraignment on a promise that they would pay the full amount of the bond only if he failed to appear in court. In setting either alternative form of bail, the obligors—in this case, his family members—would still swear, under oath, to be liable for the full $7,500 and complete paperwork attesting to their liability. But Juan Gonzalez likely would not have spent the night—much less six weeks—in jail.

Why bail reform matters

Historically, the purpose of bail was to facilitate pretrial release.[a] Bail originated as a sorting mechanism to release those individuals likely to return to court during the pendency of their case and detain those who posed too high of a flight risk. However, over time, the shift from the use of personal sureties and unsecured bonds to cash bail and bail bonds issued by for-profit companies resulted in the disparity we see today—hundreds of thousands of people in jail awaiting trial and unable to afford their freedom, while those wealthy enough to make bail are set free.[b]

In 1961, troubled by how many men and women they saw in pretrial detention when they visited a Manhattan jail, Louis Schweitzer and Herbert Sturz started the Manhattan Bail Project. Over three years, the Bail Project interviewed thousands of defendants in Manhattan Criminal Court and recommended release on recognizance to the presiding judge if the person demonstrated he or she was not a flight risk based on employment history, local community ties, and past criminal record.[c] Data from the experiment showed that 98 percent of individuals released returned to court, and were 250 percent more likely to be acquitted at the end of their cases than those who remained in jail on bail. Building on the success of the Manhattan Bail Project's findings, Congress passed the Bail Reform Act of 1966 to revise bail practices so that people "were not needlessly detained . . . regardless of financial status."[d]

Despite these efforts, the use of bail and rates of pretrial detention across the United States continued to rise, especially in smaller jurisdictions.[e] The result is the current system, in which almost 450,000 presumptively innocent individuals are held in jail nationwide on any given day simply because they cannot afford their bail.[f] Recent research has shown that the effects of unnecessary pretrial detention defy conventional wisdom that incarceration equals public safety—even short stays in jail can lead to increased rates of failure to appear and recidivism.[g]

The failings of pretrial justice over the past five decades have galvanized efforts at bail reform among the courts, criminal justice stakeholders, and advocates, based on many of the same lessons learned from the Manhattan Bail Project. Nationally, litigation challenging the use of bail schedules has resulted in several jurisdictions reconsidering their use of bail in low-level and misdemeanor cases.[h] Recent reforms to the New Jersey bail system have yielded a dramatic reduction in the use of cash bail.[i] In New York City, many new initiatives provide an alternative to traditional bail.[j] For example, nonprofit charitable bail funds in the Bronx and Brooklyn pay bail for people held in jail on misdemeanor charges where bail is set at $2,000 or less.[k] Building on the success of the bail funds, the New York City Council approved funding for a bail fund in all five boroughs to be launched in 2017.[l] Another citywide program, called Supervised Release, began in March 2016. It provides pretrial supervision to 3,000 people annually who are at risk of having bail set.[m]

The fundamental problem with cash bail is this: How can it be that two otherwise similarly-situated individuals, with the same charges, criminal histories, and circumstances, face radically different fates based simply on their wealth? Collectively, recent bail reform efforts have shown that people do not need their own money at stake to return to court, and that money as the determinant of pretrial liberty is neither effective nor fair.

Experimenting with alternative forms of bail: How it worked

Project impetus: Why are alternative forms of bail underutilized?

Despite being legitimate forms of bail, judges rarely if ever set an unsecured or partially secured bond in New York City courts.[21] There are several theories as to why. In some cases, particularly those involving serious charges, judges may use cash bail as a means to secure pretrial detention in the absence of a preventive detention statute by setting bail out of reach. In other instances, judges may simply be unaware of the options to use less restrictive forms of bail.[22]

Many judges, especially those newer to the bench, are unaware that these forms of bail exist under New York law, or have never seen them imposed when bail is set in the courts. As one judge noted, "It's just part of the culture—cash or bond? When I became a judge, it's just what everyone was using."[23] Another judge recounted, "I've rarely been asked to consider an alternative form of bail. The first time I was asked to set a partially secured bond, I hesitated because I was unfamiliar with the paperwork or the process."[24] This lack of familiarity is especially common in arraignments, where by custom the most recently elected or appointed criminal court judges are assigned.

The burden does not lie solely with the bench. Judges rarely receive requests from defense attorneys to set alternative forms of bail, and most judges are unlikely to go against custom and impose a form of bail that was not requested. Many defense attorneys are unaware that partially secured or unsecured bonds are available under New York law, or do not know the procedure and paperwork required to secure them. As one prominent public defender wrote, "I am the first to admit that until a few years ago, I had never really looked at the bail statute. I certainly never asked a judge to set a form of bail other than cash or insurance company bond."[25]

To request one of these alternative forms of bail—a partially secured or unsecured bond—the Office of Court Administration requires at least one person paying to agree to sign paperwork and swear under oath to be

liable. That person must be able to demonstrate that he or she has a source of income and will pay the full amount if bail is forfeited.

Both judges and attorneys may be deterred from using partially secured or unsecured bonds at arraignments because of the complexity of the paperwork required and the time needed to complete it and take the necessary testimony from obligors. Three different forms must be completed to secure an alternative form of bail. The *bail bond* form states the type of bail set, the amount of bail, and the names of the responsible parties. If the bond is secured, the bail bond form lists the property posted and, if the bond is partially secured, the amount deposited. A *justifying affidavit* must also be completed for each person responsible for the bond, and requires information about their place of residence, employment, and income. The third form, *undertaking to answer*, must also be completed for each responsible party, and requires each to swear under oath to be responsible for the person's appearance in court and liable for the full amount of bail if he or she fails to appear and bail is forfeited.

Project design and queries: What if alternative forms of bail were used more?

This experiment was conducted in criminal court arraignments in Manhattan, Queens, Brooklyn, and the Bronx over a three-month period. A total of 99 cases were identified from arraignment court calendars where an unsecured or partially secured bond had been set. Those cases were tracked over a nine- to 12-month period after arraignment to document bail-making, court appearance, pretrial re-arrest, and final case disposition.

Educating stakeholders about alternative forms of bail. Before the project period began, Vera trained defense attorneys at every public defender office in Manhattan, Queens, Brooklyn, and the Bronx on how to request partially secured and unsecured bonds at arraignments.[26] Attorneys from these offices are present at arraignments in all five boroughs and collectively handle the vast majority of cases arraigned in New York City.[27] Public defenders who attended the trainings were educated on New York's bail statute, including the nine forms of bail, and trained on following the procedure and completing the paperwork required for requesting an alternative form of bail. The training included time for discussion to share borough-specific strategies to

increase the likelihood that arraignment judges would set partially secured and unsecured bonds. Vera staff shared training materials and a short guide to alternative forms of bail during the trainings, which were also disseminated by e-mail to all attorneys in each of the offices.

Choosing and tracking a cohort. During the three-month project period, Vera, in collaboration with the New York State Office of Court Administration, reviewed the daily arraignment court calendars in Brooklyn, Manhattan, Queens, and the Bronx to flag cases in which an alternative form of bail was set. From December 2015 through March 2016, 99 cases were identified in which judges granted an unsecured or partially secured bond option in addition to traditional forms of bail. Prior to the project, court staff in arraignments routinely noted on the arraignment court calendar the outcome of every case heard during the shift, including information as to type and amount of bail set, and whether bail was made at arraignment. During the project period, court staff were instructed to note if a judge set an unsecured bond by listing "USB" next to that case, or "PSB" for a partially secured bond.

A daily review of completed court calendars identified all cases marked with "USB" and "PSB," which were then added to the project cohort. After documenting the docket numbers, defendant names, top charge, and other identifying information, Vera requested data from the Office of Court Administration on bail-making, future court appearances, case dispositions, and new arrests within the five boroughs for those cases. Vera's analysis of that data is documented below.

Baseline comparison data. No control group exists as the project was not designed to be a research study. Given this limitation, generalized inferences from the results in this report cannot be made.[28] There is, however, readily available data that provides a valuable baseline comparison of key pretrial outcomes in New York City that can be used for illustrative comparisons on bail-making, failure to appear, and pretrial re-arrest rates. The New York City Criminal Justice Agency (CJA) documents overall outcomes for all criminal court cases arraigned in New York City. Vera compared data from the project cohort on bail-making and failure to appear in court to citywide data in CJA's 2015 Annual Report.[29] Vera also compared re-arrest data to a 2009 CJA study on pretrial re-arrest rates.[30]

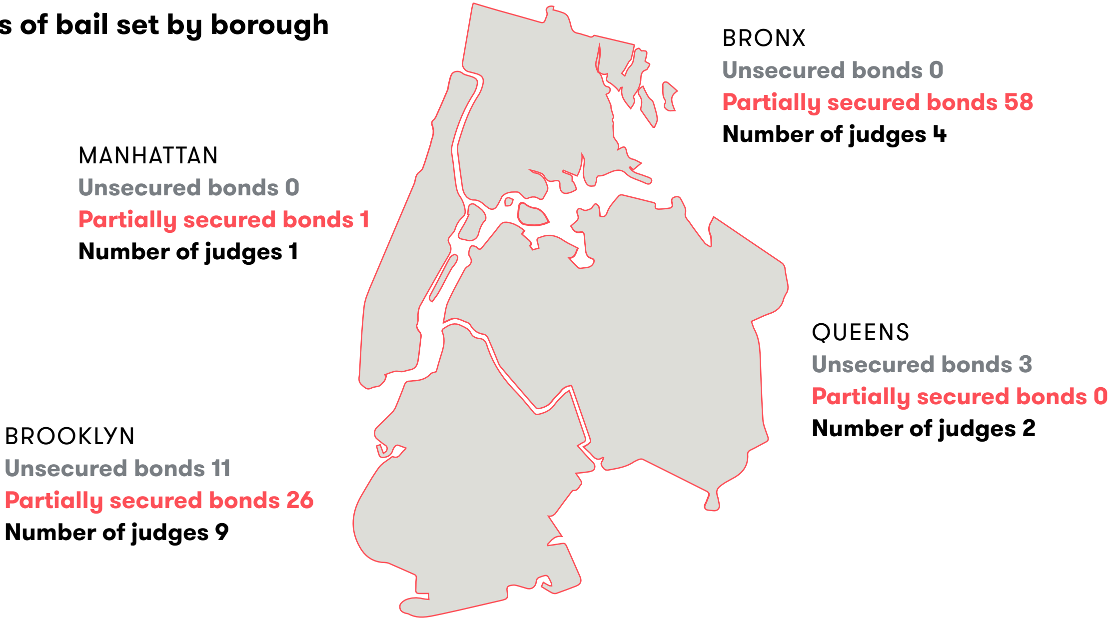
Data analysis

The 99 cases that were evaluated were tracked for a nine- to 12-month period following arraignment to document appearance at future court dates, often scheduled six to 12 weeks apart, and to allow time for the majority of cases in the cohort to resolve. Vera staff obtained and analyzed case outcome data for the cases along the following measures: failure to appear, pretrial re-arrest, and ultimate case dispositions. From interviews with stakeholders, including judges, defenders, and court staff, Vera also gathered qualitative information to better understand why an alternative form of bail had been granted.

In all cases in the cohort, an alternative form of bail was set *in addition to* traditional bail options, such as cash or an insurance company bail bond.[31] Although this does not conclusively rule out the possibility that defendants in any of the cases in the cohort would otherwise have been released on recognizance but for the setting of an alternative form of bail, it suggests that bail would likely have been set in these cases regardless.

Figure 1

Alternative forms of bail set by borough



Bail setting by borough and type of bond

By far the greatest use of partially secured and unsecured bonds during the project was in Brooklyn and the Bronx. Although each of the four boroughs included in the demonstration project had at least one case in which an alternative form of bail was set, and 16 judges set a partially secured or unsecured bond at least once, 96 percent of all cases (95 cases) came from these two boroughs. As shown in Figure 1 on page 13, in the cases studied, judges set an unsecured bond in 15 percent (14 cases), and a partially secured bond in the remaining 85 percent (85 cases).

Forms of bail set by charge and offense type

Vera analyzed the use of alternative forms of bail for cases in the cohort by charge as shown in Figure 2.[32] Notably, the use of partially secured and unsecured bonds was not limited to only low-level offenses. More than half of the cases examined had a top charge of a felony—29 percent nonviolent

Figure 2

Alternative forms of bail set by charge level

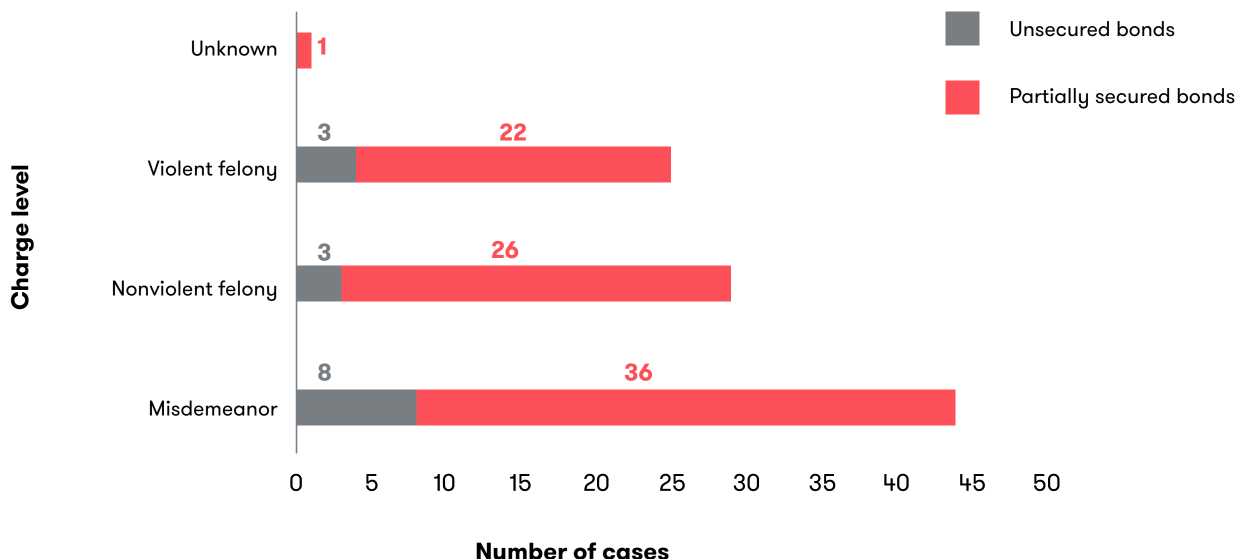
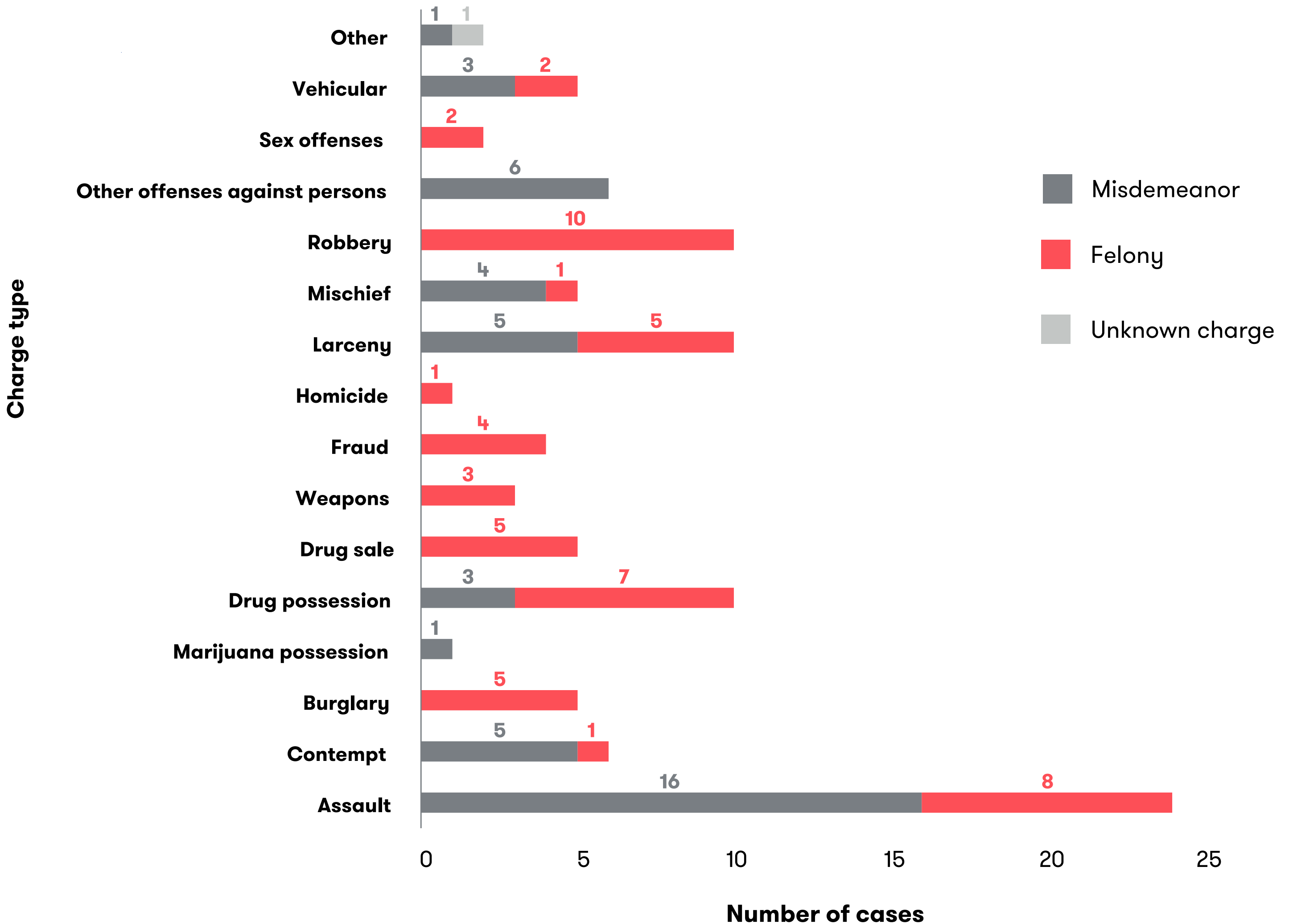


Figure 3

Alternative forms of bail set by offense type

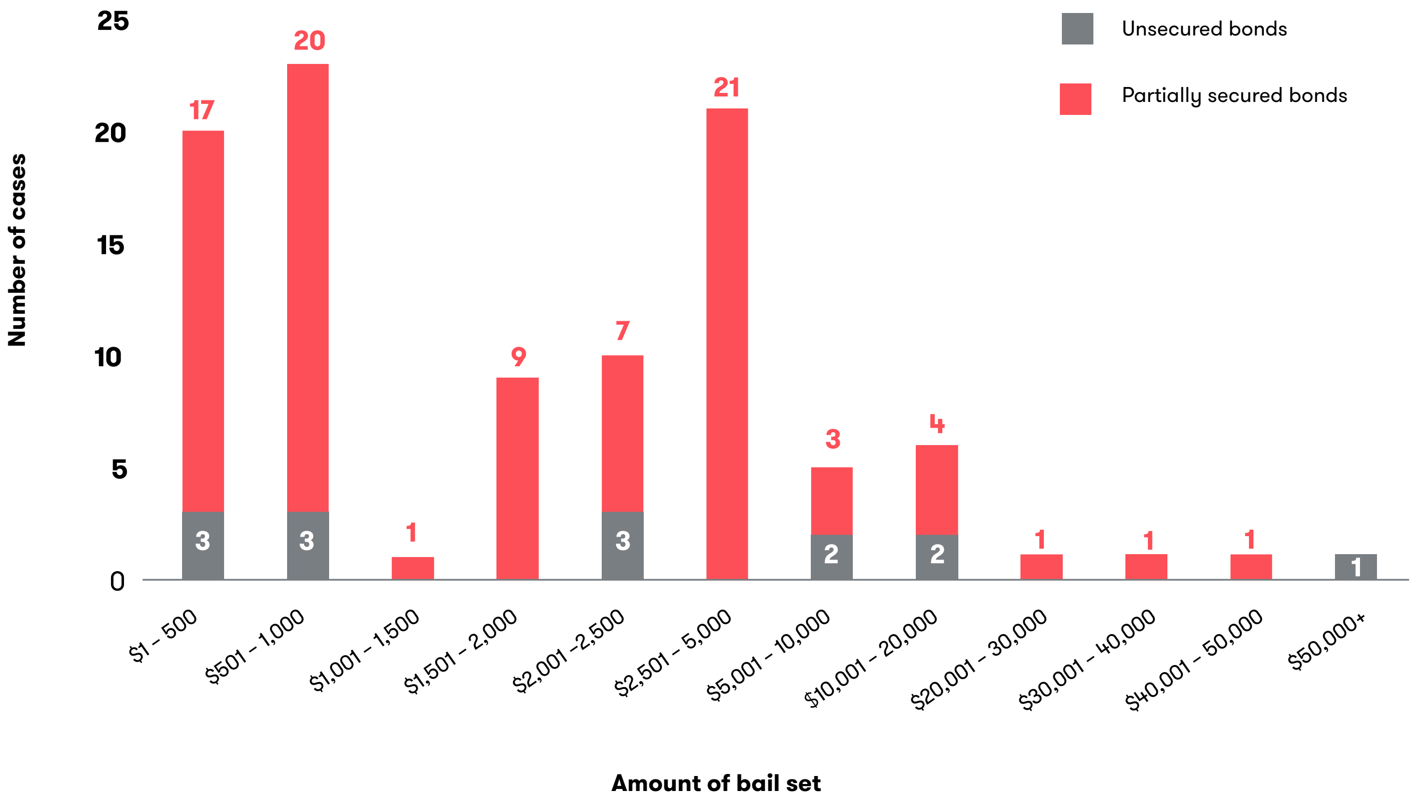


felonies (29 cases) and 25 percent violent felonies (25 cases). Forty-four percent had a top charge of a misdemeanor (44 cases).

The range of types of cases in which an alternative form of bail was set was similarly broad. Although felony and misdemeanor assault charges by far comprised the greatest number of cases in which an alternative form of bail was set, as shown in Figure 3, overall these forms of bail were set in cases as varied as vehicular offenses, drug sales, and weapons offenses.

Figure 4

Amounts of bail set when an alternative form used



Bail amounts

Vera also tracked the amount of bail set in the 99 cases. During trainings with public defenders at the outset of the project, several attorneys expressed concern that even if judges were willing to set unsecured or partially secured bonds, they would only do so at higher than typical amounts. As one defense attorney noted, "If a judge traditionally sets $500 bail that my client can't pay, and instead sets a partially secured bond of $5,000, then there's no difference in outcome."[33] According to CJA, in New York City, the median bail amount for a misdemeanor is $1,000 and, for a felony, $5,000.[34] The cases in which a partially secured and unsecured bond were set did not deviate significantly from these baseline comparisons. As shown in Figure 4, while 15 percent of cases (15 cases) had a bond amount set higher than the New York City average for felonies, 43 percent (43 cases) had bail set at $1,000 or less.

Table 1

Bail-making when alternative forms used

Outcome	Overall	Unsecured bond	Partially secured bond
Rates of bail made when an unsecured and partially secured bond was set	68%	100%	64%
Number released on bail when an unsecured or partially secured bail was set	68 out of 99	14 out of 14	54 out of 85
Number released on recognizance after arraignment	5 out of 99	0 out of 14	5 out of 85

Bail-making rates

Vera also analyzed the rate at which bail was made in the cases in which an alternative form was set. As shown in Table 1, 68 percent of people made bail overall (68 cases). Because no deposit is required, where an unsecured bond was set, 100 percent of individuals were immediately released at arraignment (14 cases). Bail was made in 64 percent of cases where a partially secured bond was set (54 cases), predominantly at arraignment or within one week post-arraignment. In 6 percent of cases in which a partially secured bond was set, bail was not made but the individual was released on recognizance with no bail at a post-arraignment court date (5 cases).[35]

As a baseline comparison, the overall citywide average of bail-making at arraignment is 11 percent, with bail being made immediately in 10 percent of felony cases and 13 percent of non-felony cases.[36] When bail is set, in 12 percent of both felony and non-felony cases individuals are released on recognizance at a court date after arraignment without posting bail.[37] In an additional 34 percent of felony and 32 percent of non-felony cases, bail is made post-arraignment. Citywide, individuals in the remaining 45 percent of felony and 43 percent of misdemeanor cases do not make bail at any point prior to disposition.[38]

Table 2

Time until bail made when a partially secured bond was set

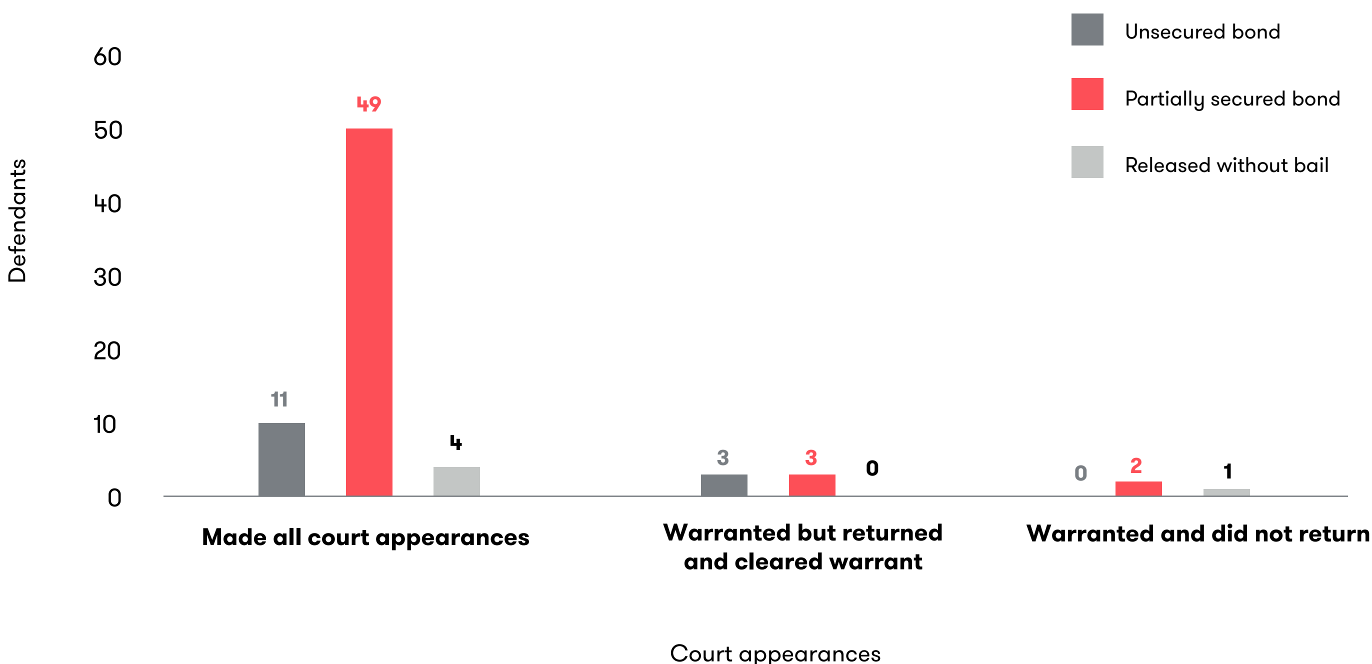
Outcome	Misdemeanors	Nonviolent felonies	Violent felonies
Made bail at arraignment	16	8	4
Made bail within one week	4	6	7
Made bail between one and two weeks	2	1	1
Made bail between two and three weeks	3	0	1
Made bail within one month or after	0	0	1
Did not make bail	11	9	6
Bail not made but later released	1	2	2

In looking at the 54 cases in which a partially secured bond was set *and* bail was made, 52 percent made bail immediately at arraignment (28 cases). An additional 31 percent made bail within one week after arraignment (17 cases). In line with other known statistics about bail-making in New York City, rates of making bail dropped off significantly after the first week.[39] Despite an alternative form of bail being set, almost one-third of all individuals in the cases studied did not make bail before disposition (26 cases). (See Table 2.)

Impact on case outcomes

The experiment sought to measure the impact of alternative forms of bail on individual case outcomes over time. For the 73 cases in which people were released because they either made an alternative form of bail or were released on recognizance post-arraignment, Vera tracked pretrial failure to appear, new arrests while cases were pending, and final case dispositions. By the time the final data was compiled in February 2017, more than 90 percent of all cases in the dataset had been resolved.

Figure 5
Failure to appear at future court dates by type of release



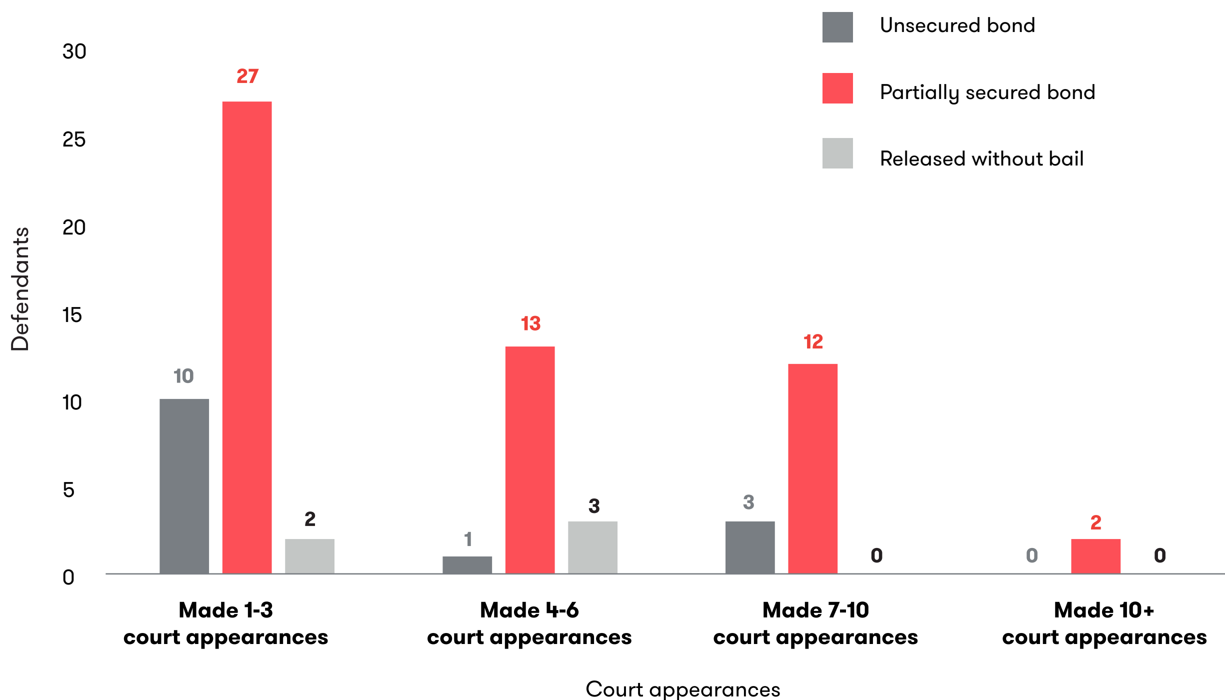
Failure-to-appear rates

Failure-to-appear (FTA) rates measure whether a person returns to court as required for subsequent appearances after release on recognizance or making bail. In New York City, if a person does not appear in court on a scheduled court date, a judge may issue a bench warrant for the person's arrest.[40] If the person is released on bail, a bench warrant will result in bail being forfeited unless the person returns to court and provides a satisfactory explanation for the failure to appear.[41] In practice, judges may "stay" a bench warrant if a person does not appear in court on a scheduled court date but his or her lawyer provides an explanation for the failure to appear. In these instances, no bench warrant is issued and bail is not forfeited despite the defendant's non-appearance in court.

Warrants were counted any time a bench warrant was issued, including in cases in which a bench warrant was issued for a missed court appearance but the defendant returned to court voluntarily within a short time after and bail was ultimately not forfeited. "Stayed" bench warrants were not counted in this analysis, as technically no failure to appear or forfeiture of bail occurred. Overall, the FTA rate for cases in the cohort was 12 percent. (See Figure 5.) One hundred percent of people who were

Figure 6

Number of court appearances made by type of release

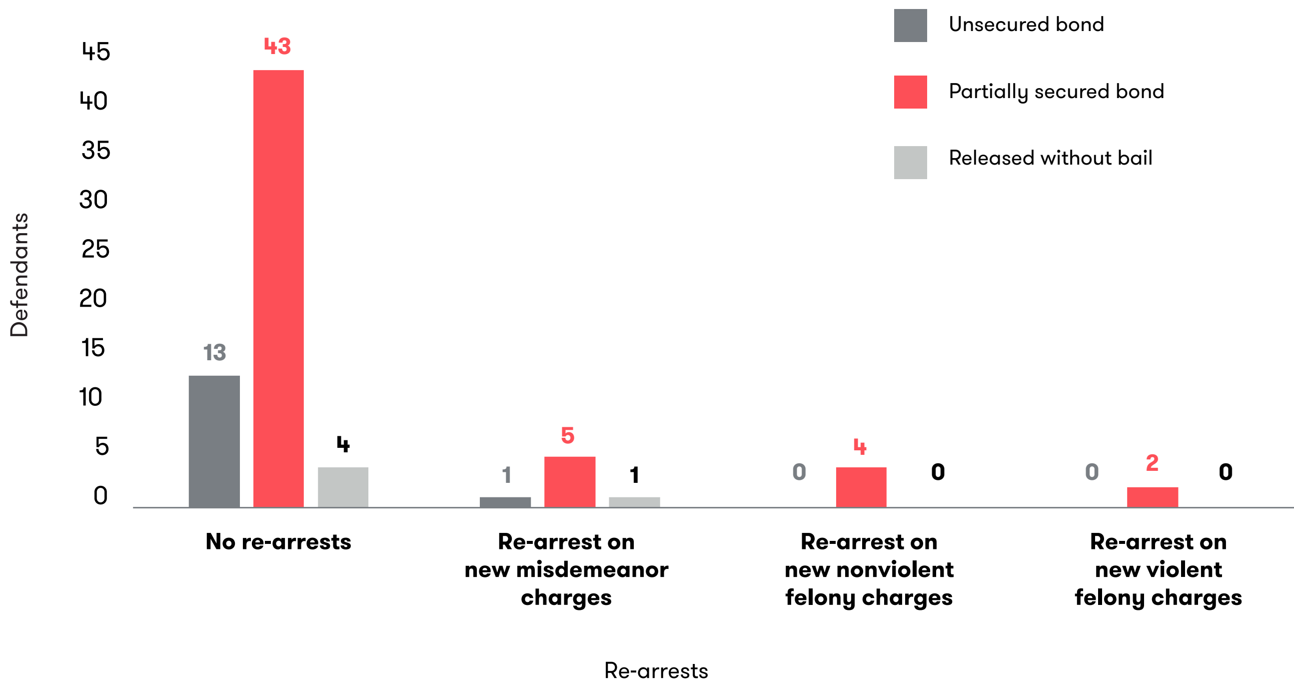


either released or made bail on violent felony charges, including robbery and assault, made all court appearances. The FTA rate for people who were either released or made bail on nonviolent felony charges, such as drug possession or drug sale, was higher than the overall average for the cohort.[42] In six cases, people warranted at least once during the pretrial period but returned to court and were continued on bail. In three cases, individuals had warranted and had not returned to court. As a baseline comparison, these FTA rates closely mirror those in the cases analyzed by CJA in published citywide statistics on post-arraignment court appearance rates. Overall, the citywide average rate of failure to appear is 11 percent in felony cases and 14 percent in non-felony cases.[43]

A significant number of individuals in the cohort made several court appearances during the tracking period. Approximately one-half of the 73 cases were resolved within one to three court appearances after arraignment. In 17 cases, people appeared in court at least seven times or more within the tracking period. (See Figure 6.)

Figure 7

Pretrial re-arrest by type of release



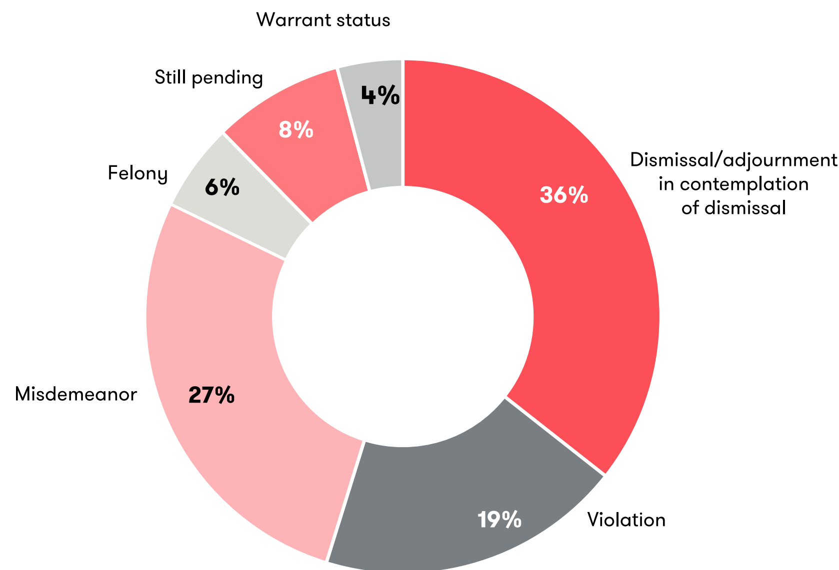
Rates of re-arrest

For all 73 cases in which the person was released or made bail, any re-arrest for a new misdemeanor, nonviolent felony, or violent felony offense was tracked in the Office of Court Administration's CRIMS database.[44] Overall, the re-arrest rate for any new offense was 18 percent. Nine percent of individuals had a new arrest on a misdemeanor charge, 5 percent on a nonviolent felony, and 3 percent on a violent felony offense. (See Figure 7.) As a baseline comparison, these rates of pretrial re-arrest are comparable to those published by CJA in a 2009 study, where overall pretrial re-arrest rates were 18 percent of individuals who were released on recognizance or made bail.[45]

Case disposition

Case dispositions were tracked for all 73 cases in the cohort where bail was made or the person was released. (See Figure 8.) Slightly over one-third (26 cases) resulted in a dismissal or an adjournment in contemplation of dismissal, known colloquially as an "ACD," where charges are ultimately dismissed after a period of six to 12 months.[46] Another 19 percent (14 cases) resolved with a violation plea, which is a non-criminal class of offenses under New York law that does not result in a criminal conviction or a permanent record. Twenty-

Figure 8
Case dispositions



seven percent of cases (20 cases) resolved in a misdemeanor conviction, while only 6 percent of cases (4 cases) resolved in a felony conviction. At the time of data analysis, 8 percent of cases (6 cases) were still pending, and 4 percent (3 cases) were in warrant status where the defendant hadn't appeared at a scheduled court date or at a date thereafter.

Overall themes and takeaways

The baseline comparison of pretrial measures of success between traditional forms of bail, as reported by CJA in bail-making, failure to appear, and pretrial re-arrest, and the alternative forms used in the experiment, suggest promising results and the need for a deeper, more methodologically rigorous study. A closer look at the cases generated as a result of the project also uncovered some interesting trends.

Notable trends

Alternative forms of bail were used in a wide range of cases. Courts set alternative forms of bail in a wide range of cases, both by level of offense and offense type. Judges did not limit the use of partially secured and unsecured bonds to only low-level cases—approximately half of the cases in the cohort involved felony-level charges. Moreover, a significant number

of the cases examined would not have been eligible for other existing bail initiatives in New York City, such as supervised release or the charitable bail funds. (See "Why bail reform matters" on page 9.) More than half involved a top charge of a felony, making them ineligible for a charitable bail fund; and at least one-third were excluded by charge from supervised release, which does not accept violent felony offenses or any charges where the allegations involve domestic violence or sexual misconduct.

In serious cases where pretrial release is appropriate but release on recognizance is not granted, alternative forms of bail may be a promising alternative. Judges, particularly when granting partially secured bonds, may feel confident that there is still "skin in the game." As one judge noted, "You could go with a 'more traditional' low cash bond, with an amount of $1,000 bond or $500 cash, but then you realize they would not be able to make it. The defense attorney tells you, 'Judge, they have $100.' Under those circumstances, I was very open-minded in the right case. That $100 to one family might be like $100,000 to another family. It might be more than enough to secure my confidence that this person would come back to court on the next date."[47]

The majority of cases in which bail was made resolved in a dismissal or a low-level disposition. Another notable trend was that the majority of cases resolved in a disposition far less serious than a felony charge, even though half of all cases involved a top charge at arraignment of a nonviolent or violent felony. Fully a third of all cases where a partially secured or unsecured bond were made resulted in an outright or delayed dismissal, and almost half resolved with a conviction of a violation, or a misdemeanor-level charge. In contrast, fully 100 percent of cases in the cohort that were not released resolved in a misdemeanor or felony disposition. (See Figure 8 on page 22.)

The disposition outcomes of the project cohort closely resemble overall case outcomes in New York City where, according to the most recent annual report from the New York City Criminal Courts, approximately 42 percent of arraignments resolve in either an ACD or an outright dismissal.[48] What is notable about the project cohort of cases compared to the overall citywide numbers is that all defendants in cases in the project cohort had bail set, while the vast majority of defendants included in the citywide numbers were released on recognizance. Given recent studies that document the negative impact of bail on case dispositions, this trend in overall case dispositions suggests that setting an unsecured or partially secured bond instead of, or in addition to, a traditional form of bail may lessen the deleterious effect of bail on final case outcomes by increasing rates of pretrial release and removing the pressure to resolve a case with a guilty plea.[49] This possibility merits further study.

Factors influencing adoption of alternative forms of bail

The cases in which an alternative form of bail was granted were unique. Those instances in which a judge agreed to a partially secured or unsecured bond were cases that stood out in some way from the usual thrum—a case where the person accused had a particularly compelling story, or the facts were unusual, or an attorney made an especially forceful argument on the record on behalf of the client. In one case in Brooklyn, for example, a defense attorney reported that an unsecured bond was set only after he made an extensive record and spent several minutes describing to the court the unique circumstances that led to his client being arrested and charged with a violent robbery offense.[50] Another defense attorney noted, "Setting an alternative form of bail is great in theory, but if it's in an amount that isn't reflective of a person's actual financial circumstances it's not that helpful. Judges who have set partially secured or unsecured bonds often do so because the defense lawyer has presented a fuller picture of their client, their family, and their financial resources."[51]

Compared to the usually rushed three or four minutes most cases last in arraignment, with only cursory information given about the circumstances of the person accused, the level of detail provided in cases where an alternative form of bail was set may have influenced the judge to depart from imposing traditional cash or an insurance company bail bond. These cases often involved a more extensive back-and-forth and discussion of a person's circumstances, including financial ability to make bail, than is usually done at arraignment. As one judge described, "I like the process where you bring the surety up and you put the surety under oath. It adds gravity to the situation. When I set a partially secured bond, I almost invariably talk to the defendant and the family about losing that money. There's more in that circumstance because you have a family member saying, 'You better come back. I took an oath for you.'"

Partially secured bonds could be used as an alternative to insurance company bail bonds. Partially secured bonds are seen by some judges as an effective alternative to insurance company bail bonds. Most such bail bonds require obligors to demonstrate full-time employment through paystubs and tax returns. Other sources of income, such as from public assistance or disability payments, are often not accepted. Nor will many bail bond companies underwrite low bails, especially those set at $1,000 or less, as they are not profitable for the company. Partially secured bonds operate almost like insurance company bail bonds, except that the 10 percent deposit is

refundable, meaning a person who makes all appearances loses no money. One judge equated partially secured bonds as the functional equivalent of an insurance company bail bond: "If we do a typical bail bond, there's a private bond company and they're responsible for the paperwork. With a partially secured bond, the company is taken out of the mix and it's the court that works with the defense to prepare the paperwork."[52]

Two judges, one in Brooklyn and the other in the Bronx, were primarily responsible for the 99 cases in the project where an alternative form of bail was set. One noted that the reason he began to set partially secured bonds was that it was increasingly requested by defense attorneys. He said, "What initially happened is that a partially secured bond was requested. I gave it thought and I did it. Initially, I met some resistance to completing the paperwork. It's more work for the defense attorney and for the court. But any time you're doing something new or different it takes time. Culture change. You can do it but it takes time."[53]

Recommendations

The results of this experiment suggest that if New York City courts opted more frequently for alternative forms of bail, they could potentially reduce the use of pretrial detention without compromising other important considerations of compliance with court appearances and public safety. However, the challenge will be to make the process by which these forms of bail are requested and set easier, and to educate and encourage both the judiciary and the defense bar to actively embrace them.[54] Vera spoke with judges, defense attorneys, and court staff to better understand the barriers to using alternative forms of bail and to develop strategies for their increased use at arraignment, resulting in the following recommendations.

Educate stakeholders about alternative forms of bail

Increasing outreach to key stakeholders so that they can develop comfort and familiarity with these forms of bail—and their potential to increase pretrial release without compromising failure to appear or public safety—is

critical to promoting their use. One of the judges involved in the project used his experience in setting alternative forms of bail as a guide for training other judges citywide, and the Office of Court Administration has included alternative forms of bail as part of their judicial seminar curriculum.

Simplify the paperwork required

One deterrent to requesting a partially secured or unsecured bond is the complexity of the paperwork required to secure them. Even in cases where the eligibility criteria for issuing an alternative form of bail is met—willing sureties present in court, proof of income, money in hand to pay the deposit amount—most of the time no request for these forms of bail is ever made. In part that is because of the logistics of completing the paperwork. It takes, on average, at least 10 to 15 minutes to complete the forms. This process becomes onerous for attorneys and court staff during a busy arraignment shift, especially if multiple defendants are making requests for alternative forms of bail. To make the process easier, courts should simplify the paperwork. In lieu of the currently required three forms, the necessary information could be organized into a clear and simple double-sided single page specific to the type of bail being requested—partially secured, unsecured, or secured.

Allow an alternative form of bail to be routinely set as a third option

Judges in New York are already required to set at least two forms of bail to give defendants and their families the option to make bail in the least onerous form. Typically, judges opt for cash up front or commercial bonds. In cases where an insurance company bail bond is set, one option is to automatically set a partially secured bond as a third option. A partially secured bond option would allow obligors to demonstrate their liability to the court for the full amount of bail with non-traditional sources of income typically not accepted by private bail bond companies. Moreover, unlike for-profit bond companies, courts are not dissuaded from using partially secured bonds in cases where low bail is set.

Introduce an independent assessment of ability to pay

The mere act of requesting an unsecured or partially secured bond prompted a more thorough hearing in court of the circumstances of the case. In many cases where an alternative form of bail was set, either the defense attorney offered or the judge requested some information about ability to pay bail—why the person could not make cash bail or afford a commercial bond, and if there were any family members or friends who could serve as obligors. In cases where release on recognizance is not appropriate, the courts should consider introducing an independent assessment at arraignment of a person's ability to pay bail. That assessment would consist of an interview with the defendant to gather information about income, financial obligations, and potential obligors. The assessment would then provide the court with a recommendation for how much bail should be set and in what form.

Conclusion

Ninety-nine cases out of a total of several thousand where bail is set is a miniscule number in the larger scheme of New York City's court system. Yet this small cohort tells a fascinating story of how a change in practice can potentially have a significant impact on reducing the use of pretrial detention without compromising public safety or rates of court appearance.

In a time where the larger mandate is to close Rikers Island and reduce the city's average daily jail population by half, using alternative forms of bail is one of many strategies that judges should have in their wheelhouse. Even with such alternatives, the role of money in our justice system still lurks within this endeavor. Is there a place for it? And if so, what should that place be? In the long term, our courts must grapple with and address those larger normative questions. In the short term, although money is still a factor in release, alternative forms of bail require the courts to truly consider a person's individual circumstances at the decision point of pretrial release. The move towards a more considered decision to detain or release may result in more equitable release determinations in which money is not the sole factor impacting a person's pretrial liberty.

Endnotes

1 New York City also offers an alternative route to arraignment. Upon arrest, an officer has the discretion to issue a Desk Appearance Ticket (DAT) if the arrest charge is a violation, misdemeanor, or an eligible class E felony offense. When a DAT is issued, the person avoids being transported to central booking immediately after arrest. Instead, he or she is released from the precinct and given a date to appear for arraignment within the next several weeks. By New York Police Department policy, DATs may only be issued if the person arrested has no outstanding warrants and can provide state-issued identification at the time of arrest. In 2015, approximately 70,000 DATs were issued out of a total of more than 300,000 arrests. See New York City Criminal Justice Agency (CJA), *Annual Report 2015* (New York: CJA, 2016), 26. According to official statistics from the Office of Court Administration, in 2015 the New York City courts arraigned 314,815 cases, including DATs. See Criminal Court of the City of New York, *Annual Report 2015* (New York: Office of the Chief Clerk of the New York City Criminal Court, 2016), 7, https://perma.cc/NX5E-RD3E.

2 The bail statute itself uses the term "insurance company bail bond" to connote those bonds underwritten and proffered by private, for-profit companies. N.Y. Criminal Procedure Law §520.10(1)(b). These types of bonds are colloquially called "commercial bonds" and the companies that underwrite them "private bond companies" or "for-profit bond companies." The terms are used interchangeably in this report.

3 CJA, *Annual Report 2015* (New York: CJA, 2016), at 30. CJA interviews people arrested in the criminal courts in all five boroughs and generates a risk score for that person's likelihood of appearance in court based on their current residence, employment, contact information, and past criminal history. That risk score tells the arraignment judge whether the person has a low, medium, or high risk of failure to appear. CJA also collects data from arraignments on bail setting, bail-making, and failure to appear. According to its 2015 annual report, 60 percent of cases arraigned continued past arraignments. Ibid. at 17. The bail-making statistics above apply only to cases where bail was set that continued past arraignments.

4 Jamie Fellner, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City* (New York: Human Rights Watch, 2010), 17, https://perma.cc/ZK2D-743R. The one exception is the use of credit card to pay bail, which has become more common since the New York State Office of Court Administration issued a directive governing its use in 2013. See Mary T. Phillips, *New York's Credit Card Bail Experiment* (New York: CJA, 2014), https://issuu.com/csdesignworks/docs/creditcardbail14/1?e=2550004/9230440.

5 *People ex rel. McManus v. Horn*, 18 N.Y.3d 660 (2012).

6 See N.Y. Criminal Procedure Law §510.30 (application for recognizance or bail; rules of law and criteria controlling determination).

7 For more on how prosecutors choose bail amounts, See Fellner, *The Price of Freedom* (New York: Human Rights Watch, 2010), at 41-46.

8 Ibid. at 41-42.

9 CJA, *Annual Report 2015*, 22. In comparison, the average amount of bail nationally for felony cases nearly doubled between 1992 and 2006 from $25,400 to $55,500. Justice Policy Institute, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail* (Washington, DC: Justice Policy Institute, 2012), 10, http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf. Bail is also set less often in New York City compared to other cities across the United States. See New York City Mayor's Office of Criminal Justice, "Safely Reducing the New York City Jail Population," https://perma.cc/L5M2-YJZ2. Moreover, of the approximately 150,000 cases in New York City that continue past arraignments in a given year, nearly seven out of 10 individuals are released on recognizance (ROR) without any type of financial condition imposed. See Mary T. Phillips, *A Decade of Bail Research in New York City* (New York: CJA, 2012), 32.

10 To the extent that full-time employment or participation in education or a training program is a meaningful proxy for economic opportunity, only 46 percent of men and 38 percent of women assessed by CJA at the time of arrest reported having a full-time job or being engaged in training or school. CJA, *Annual Report 2015*, 9.

11 Based on a true account of an arrest and arraignment proceeding in Bronx Criminal Court, as narrated by the lawyer assigned to the case. Details have been changed to protect privacy.

12 See Nick Pinto, "The Bail Trap," *New York Times Magazine*, August 13, 2015, https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html.

13 New York City Mayor's Office of Criminal Justice, "Safely Reducing the New York City Jail Population," https://perma.cc/L5M2-YJZ2. This includes approximately 650 of the 10,000 people held daily at city jails who are there pending trial on misdemeanor charges. Ibid.

14 Ibid.

15 Ibid.

16 Jennifer Gonnerman, "Three Years on Rikers Without Trial," *New Yorker*, October 6, 2014, http://www.newyorker.com/magazine/2014/10/06/before-the-law.

17 Temporary Commission on Revision of the Penal Law and Criminal Code, *Proposed New York Criminal Procedure Law* (New York: West Publishing Co., 1969), Section 5, https://perma.cc/3VM5-FRLN.

18 Ibid. The law's drafters provided a hypothetical to illustrate the utility of alternative forms of bail: "[A] young man charged with burglary who has previously been embroiled with the law but resides in the community and whose father is a reputable person long employed in the same position at a fairly moderate but adequate salary. Here, a judge not inclined to release the defendant on his own recognizance doubtless would, under present law, fix bail, and in a fairly substantial and possibly burdensome amount . . . If so authorized, however, he might well be satisfied to release the defendant upon his father's undertaking to pay $1,000 (possibly accompanied by a $100 deposit) in the event of the defendant's failure of appearance."

19 N.Y. Criminal Procedure Law §520.10. The forms of bond now allowed include:
• Secured surety bond
• Secured appearance bond
• Partially secured surety bond
• Partially secured appearance bond
• Unsecured surety bond
• Unsecured appearance bond
The State Legislature also amended this section in 1986 to authorize bail to be posted by credit card.

20 In New York City courts, when cash bail or a deposit is posted on a partially secured bond, that full amount is returned at the end of a case, minus a 3 percent administrative fee when the case ends in a violation, misdemeanor, or felony conviction. A recent proposal by the New York City Council, the Mayor's Office of Criminal Justice, and other city agencies seeks to end the practice of taking a 3 percent fee in cases where bail is posted and all court appearances have been made. See New York City Council, "Speaker Melissa Mark-Viverito to Introduce Department of Correction Reform Package," press release (New York City: New York City Council, September 12, 2016), https://perma.cc/22WC-XPPU.

21 Fellner, 2010, 17.

22 Ibid.

23 Interview with sitting Criminal Court judge, December 9, 2016.

24 Interview with sitting Criminal Court judge, July 24, 2017.

25 Justine Olderman, "Fixing New York's Broken Bail System," *City University of New York Law Review* 16, no. 1 (2012), 9-20, http://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1319&context=clr.

26 The trainings were led by a Vera staff member who was a former public defender, and some of the trainings provided Continuing Legal Education credits to attorneys who attended. A total of nine trainings were conducted overall—at each borough office of the Legal Aid Society, and at The Bronx Defenders, Brooklyn Defender Services, the Neighborhood Defender Service of Harlem, and New York County Defender Services.

27 The Legal Aid Society, Bronx Defenders, Brooklyn Defender Services, Neighborhood Defender Service of Harlem, and the New York County Defender Services assign attorneys to arraignment parts across the five boroughs in New York City. With the exception of arraignments in Staten Island, these attorneys are present in arraignment courts seven days a week, 16 hours a day, including weekends and holidays. In FY2017, these indigent services providers represented more than 350,000 cases. See The Council of the City of New York, *Report of the Finance Division on the Fiscal 2018 Preliminary Budget* (New York: NYC City Council, 2017), 5, https://perma.cc/UJ3D-YXTP.

28 Some other limitations about the results should be noted. The information gathered from court calendars to identify cases in which a partially secured or unsecured bond was set relied on the accuracy of the entries in those calendars. Moreover, the information available on the calendars and from a match with the Office of Court Administration's court records database, called CRIMS, did not include age, race/ethnicity, or any other demographic information, nor did it include prior warrant or criminal history information about the individuals for whom an alternative form of bail was set, two factors which tend to bear heavily on the bail decision.

29 CJA, *Annual Report 2015*. For purposes of this project, Vera assumed based on anecdotal knowledge of bail setting practices in New York City that only traditional forms of bail were set in the cases reported by CJA, and that a partially secured or unsecured bond was the form of bail made in the cases tracked in the cohort. See Fellner, 2010, 17 (discussing customary practices in bail setting among city judges). An additional assumption was made that individuals in the cases in the project cohort would not

have been released on recognizance prior to the project, thus resulting in "net-widening."

30 Qudsia Siddiqi, *Research Brief: Pretrial Failure Among New York City Defendants* (New York: CJA, 2009), 3, https://perma.cc/G9JX-CPNN.

31 In all cases where an unsecured or partially secured bond was set, that option was a third (or even fourth) alternative to traditional cash bail, insurance company bail bond, or, in a limited number of cases, credit card bail.

32 For one case in which a partially secured bond was set, the top charge was missing in the dataset.

33 Interview with defense attorney, Brooklyn, New York, March 9, 2017.

34 CJA, *Annual Report 2015*, 22.

35 These are individuals who do not make bail but are released at a court date following arraignment because the district attorney does not yet have the necessary evidence to move forward on misdemeanor charges, or has not secured an indictment from the grand jury on felony charges. See N.Y. Criminal Procedure Law §170.70 (release of defendant upon failure to replace misdemeanor complaint by information) and §180.80 (proceedings upon felony complaint; release of defendant from custody upon failure of timely disposition).

36 CJA, *Annual Report 2015*, 30. Percentages in the CJA report may not total 100 percent because of rounding. Ibid. at 31.

37 See footnote 35. N.Y. Criminal Procedure Law §170.70 (release of defendant upon failure to replace misdemeanor complaint by information) and §180.80 (proceedings upon felony complaint; release of defendant from custody upon failure of timely disposition).

38 CJA, *Annual Report 2015*, 30. The CJA reports data on cases where bail is set at arraignment. The CJA data cited in this report combines overall bail-making on all cases—felonies and nonfelonies—at three junctures: at arraignment, post-arraignment, and when bail is not made prior to disposition. In addition to those measures, of cases where bail is initially set at arraignment, approximately 12 percent of felonies and 11 percent of nonfelonies are released on recognizance after arraignment. Those statistics were not included in the numbers cited in this report.

39 See New York City Mayor's Office of Criminal Justice, "Safely Reducing the New York City Jail Population," https://perma.cc/L5M2-YJZ2. Seventy-five percent of all individuals who make bail when it is set make bail within 0-6 days of arraignment.

40 A bench warrant is a judicial order that informs law enforcement and other authorities that a defendant can be taken into custody for a missed court appearance or another failure to comply with a judicial order. See Criminal Procedure Law §530.70 (order of recognizance or bail; bench warrant).

41 See N.Y. Criminal Procedure Law §540.10 (forfeiture of bail; generally).

42 During stakeholder interviews, both judges and defense attorneys were asked about the high rate of FTA for individuals charged with felony drug offenses compared to individuals charged with other offenses. Anecdotally, both judges and defenders noted that people arrested on felony drug offenses may often struggle with other challenges that impact court appearance, such as substance use disorders and housing instability.

43 CJA, *Annual Report 2015*, 33.

44 The CRIMS database only allowed for re-arrest information to be gathered for cases that were open or that resulted in a misdemeanor or felony conviction. Any arrests that resulted in a dismissal or a favorable, non-criminal disposition were not captured in the re-arrest statistics. Moreover, the CRIMS database only tracks arrests within the five boroughs of New York City, so any potential arrests outside that area were not captured.

45 Qudsia Siddiqi, *Pretrial Failure Among New York City Defendants* (New York: CJA, 2009), 3.

46 See N.Y. Criminal Procedure Law §170.55 (adjournment in contemplation of dismissal); and §170.56 (adjournment in contemplation of dismissal in cases involving marijuana).

47 Interview with sitting Criminal Court judge, December 9, 2016.

48 Criminal Court of the City of New York, *Annual Report 2015* (New York: Office of the Chief Clerk of the New York City Criminal Court, 2016), 17.

49 For research on the impact of bail and pretrial detention on case outcomes, see Paul Heaton, Sandra Mayson, and Megan Stevenson, "The Downstream Consequences of Misdemeanor Pretrial Detention," *Stanford Law Review* 69, no. 3 (2017), 711-794; and Timothy R. Schnacke, Michael R. Jones, and

Claire M. B. Brooker, *The History of Bail and Pretrial Release* (Maryland: Pretrial Justice Institute, 2010), 1-5.

50 Interview with defense attorney, Brooklyn, New York, March 9, 2017.

51 Interview with defense attorney, Bronx, New York, December 16, 2016.

52 Interview with sitting Criminal Court judge, December 9, 2016.

53 Ibid.

54 Though prosecutors were not included in this project, because of their primary influence on bail requests such education and outreach should include district attorney offices as well.

"Why bail reform matters" (page 9)

[a] Timothy R. Schnacke, Michael R. Jones, and Claire M. B. Brooker, *The History of Bail and Pretrial Release* (Maryland: Pretrial Justice Institute, 2010), 1-5.

[b] For an overview of historical underpinnings of bail and its current use in the United States, see John Jay College of Criminal Justice and Prisoner Reentry Institute, *Pretrial Practice: Rethinking the Front End of the Criminal Justice System* (New York: John Jay/PRI, 2016), 15-17, https://perma.cc/9UED-5TX5.

[c] Joel L. Fleishman, J. Scott Kohler, and Steven Schindler, *Casebook for the Foundation: A Great American Secret: How Private Wealth is Changing the World* (New York: Public Affairs, 2007), 81-83.

[d] Bail Reform Act of 1966, 18 U.S.C. §§3146-3151.

[e] See Jacob Kang-Brown and Ram Subramanian, *Out of Sight: The Growth of Jails in Rural America* (New York: Vera Institute of Justice, 2017), 9-13, https://perma.cc/234F-MVK7.

[f] Prison Policy Initiative, "Mass Incarceration: The Whole Pie 2017," https://perma.cc/74JQ-XLAF.

[g] On the negative public safety consequences of even short terms of pretrial detention, see Christopher T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger, *The Hidden Costs of Pretrial Detention* (New York: Laura and John Arnold Foundation, 2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf. On incarceration and public safety generally, see Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer* (New York: Vera Institute of Justice, 2017), https://perma.cc/K5P8-L529.

[h] See, e.g., O'Donnell v. Harris County, Texas, No. 4:16-CV-01414 (S.D. Tex. December 16, 2016,) at 94, https://perma.cc/SX97-F9TX (holding that bond schedule that made no individualized determination of ability to pay violated constitutional rights of poor defendants). See also the work of Civil Rights Corps, a nonprofit organization that has filed lawsuits challenging the use of money bail and wealth-based pretrial detention policies, http://www.civilrightscorps.org/.

[i] For an overview of these reforms, see New Jersey Courts, *Criminal Justice Reform: Report to the Governor and Legislature* (Trenton, NJ: New Jersey Courts, 2016), 1, http://www.judiciary.state.nj.us/courts/assets/criminal/2016cjrannual.pdf.

[j] New York City Mayor's Office of Criminal Justice, *Justice Brief: The Jail Population—Recent Declines and Opportunities for Further Reductions* (New York: Mayor's Office of Criminal Justice, 2017), 15-18, https://perma.cc/CEG3-RFD6.

[k] See the work of the Brooklyn Community Bail Fund, https://brooklynbailfund.org/, and the Bronx Freedom Fund, http://www.thebronxfreedomfund.org/. These two organizations were established under the New York State Charitable Bail Act of 2012, which allows nonprofit funds to operate as bail payment agents without charging a premium or fee for their services. See Office of the Governor of the State of New York, "Governor Cuomo Signs Legislation to Help Low-Income Defendants Meet Bail Requirements," press release (Albany, NY: Office of the Governor of NY, July 18, 2012), https://perma.cc/KWC3-WBP6.

[l] See John Surico, "New York City is Creating a Bail Fund to Help People Get Out of Jail," Vice News, June 29, 2015, https://perma.cc/RW9B-B2KS.

[m] Cindy Redcross, et al., *New York City's Pretrial Supervised Release Program: An Alternative to Bail* (New York: MDRC/Vera, 2017), https://perma.cc/LLX8-AEH9.

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