Putting Bail Reform into Practice

How Courts and Criminal-Legal Actors in Upstate New York Implemented Bail Reform, 2021-2022

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Executive Summary

In April 2019, New York State passed a slate of historic pretrial reforms—collectively known as "bail reform"—with the goal of reducing the number of people held in jail pretrial by limiting when judges can set money bail. Following the law's enactment in 2020, criminal cases are now divided between bail-*ineligible* charges—most misdemeanors and nonviolent felonies—and bail-*eligible* charges. Judges can still set bail on people with bail-ineligible charges based on a limited number of carveouts, such as when that person is on probation or parole. The immediate impact of bail reform was clear: from April 2019 to March 2020, the number of New Yorkers incarcerated pretrial fell by more than 40 percent. Five years and three rounds of legislative amendments later, the statewide pretrial jail population remains 17 percent lower than the day bail reform passed.[1] While these reductions in the state's jail population are notable, little is known about the courtrooms, criminal-legal actors, or decision-making practices behind the numbers.

This report is the second in a two-part series combining administrative data analysis, court observations, and interviews with court actors to provide an extensive look into how five upstate counties—Albany, Broome, Erie, Tompkins, and Ulster—implemented bail reform on the ground. The previous report focused on the bill's initial implementation in 2020 during the height of the COVID-19 pandemic and lockdown.[2] This report continues the story to examine how upstate courts implemented bail reform post-lockdown and solidified a "new normal" within the pretrial system between 2021 and 2022. In particular, the report highlights how courts interpreted and applied key provisions of bail reform regarding presumptive release, pretrial supervision, bail arguments, bail affordability, and court non-appearance.

Based on Vera's analysis of administrative data, court observations, and court actor interviews, the major findings are as follows (all findings relate to 2022, as compared to 2021, unless otherwise specified):

1. Pretrial release and supervision

   Judges' Pretrial Release Decisions
   - Judges released most people with bail-ineligible charges and half of people with bail-eligible charges—either on their own recognizance (ROR) or under supervision (RUS).
   - Racial disparities in pretrial release persist, especially for people with bail-eligible charges.

   Judges' Use of Supervised Release and Individualized Non-monetary Conditions
   - Judges' use of supervised release increased substantially following bail reform for both bail-eligible and bail-ineligible cases.
   - Court actors believe that judges are more likely to impose RUS in bail-ineligible cases if they involve low-level drug charges, substance use, mental health issues, or homelessness.
   - In most cases, judges ordering RUS do not set individualized non-monetary conditions other than monitoring.

   Court Actor Arguments for Pretrial Release
   - When charges were bail-ineligible, prosecutors usually deferred to the court and rarely requested RUS and defense attorneys requested RUS in only limited contexts.

- When charges were bail-eligible, prosecutors never voiced support for ROR and rarely requested RUS, and defense attorneys never disputed judges' use of RUS.

2. Examining the More Restricted Use of Money Bail Following Bail Reform

   Judges' Use of Money Bail
   - Judges set bail less frequently after bail reform, even for bail-eligible charges.
   - Judges often set partially secured bonds (in which the charged person pays just a percentage of the bond in order to be released) at amounts that were higher than cash and insurance company bond, undermining the goal of making bail affordable.
   - Judges set similar bail amounts based on charge severity, suggesting judges did not make individualized assessments.
   - Racial disparities in bail-setting rates were greater for misdemeanor charges; in 2022, judges set bail for Black and Latinx people charged with a misdemeanor at 1.3 and 1.5 times the rate for white people charged with a misdemeanor, respectively.

   Court Actors' Arguments Regarding Bail
   - Prosecutors usually requested bail when the law allowed, often in amounts proportionate to charge severity.
   - Prosecutors based their bail recommendations on charge severity and history of criminal-legal contact—without explicit connections to flight risk.
   - Both defense attorneys and prosecutors themselves believe that prosecutors are motivated by concerns over perceived dangerousness.
   - Defense requests varied from ROR to RUS to "reasonable" bail based on the anticipated decision by the judge.
   - Defense attorneys emphasized people's limited history of convictions or missing court, employment status, and local ties.

   Ability to Pay
   - Defense attorneys—and, in a few cases, judges—raised people's ability to pay in less than 40 percent of bail-set cases.
   - In defining ability to pay, prosecutors emphasized bail amount relative to charge severity, while defense attorneys emphasized affordability.

3. Examining the Higher Bar for Revoking Pretrial Release

   Judges' Decisions on Return on Warrant Cases
   - Judges often maintained pretrial release when a person missed court and was arrested on a bench warrant but was not charged with a new criminal offense.

   Judges' Interpretations of "Willful and Persistent" Failure to Appear
   - Judges may be applying the "willful and persistent failure to appear" standard with limited evidence in order to set bail on people otherwise entitled to release.
   - Judges emphasized "persistence" over "willfulness," often considering two to four missed appearances as "persistent."

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Introduction

Five years have passed since bail reform took effect in New York State. Bail reform was intended to curb wealth-based pretrial detention by limiting the use of money bail—a practice that criminalizes poverty by keeping people in jail pretrial for no other reason than their inability to afford bail. To that end, the reforms restricted judges' discretion to set bail on New Yorkers charged with a bail-ineligible offense—most misdemeanors and nonviolent felonies. (Judges can still set bail on someone with a bail-ineligible charge in a limited number of exceptions, such as when the person is on parole or probation.) For people with more serious charges still subject to bail, the reforms aimed to make bail more affordable by requiring judges to consider a person's "ability to post bail without posing undue hardship" and to set at least three forms of bail, one of which must be a partially secured or unsecured bond.[3]

Since passing in April 2019 and taking effect in January 2020, bail reform has gone through a tumultuous adjustment period. Fueled by opposition from law enforcement groups, "tough on crime" political campaigns, public concerns about crime, and negative coverage in the popular press, Governor Andrew Cuomo and his successor, Governor Kathy Hochul, amended the law three times—in April 2020, April 2022, and May 2023—expanding the list of charges and circumstances in which judges can set bail and limiting the scope of the original reform in other ways. Moreover, just months after bail reform took effect, the COVID-19 pandemic shuttered courts, forcing arraignments online and disrupting the normal flow of the criminal-legal system, while the largest protest movement since the Civil Rights era—the demonstrations against police brutality in the wake of George Floyd's murder—called for an end to racial injustice in the criminal-legal system.

In 2019, the Vera Institute of Justice (Vera) undertook a four-year study combining administrative data analysis, court observation, and court actor interviews to understand the effects of bail reform on New York's criminal courts and jails. This report is the last in a series of jail briefs, factsheets, and in-depth analyses documenting these changes in counties outside New York City. Vera's previous in-depth report studied the implementation of bail reform over its first year, including the COVID-19 shutdown, examining court practices and court actors' perceptions of the reforms.[4] Key findings included:

- New Yorkers' likelihood of pretrial detention after arrest fell by more than 35 percent in the year after bail reform took effect.
- Most court actors supported bail reform and its goal of reducing wealth-based pretrial detention.
- At arraignment, prosecutors usually requested bail where allowed, relying heavily on charge severity and criminal history to justify their requests to judges.
- Judges rarely considered people's ability to pay—doing so in less than 30 percent of bail-set cases.
- People facing criminal charges experienced significant barriers returning to court, including poverty, substance use disorders, and mental health issues—all exacerbated by the pandemic.
- Inconsistent practices among court actors hindered successful implementation of the law.

This report continues that work by examining how bail reform was put into practice over the following two years, as uncertain implementation created a new, if still evolving, normal. In particular, this report documents bail reform's implementation focusing on the following three key areas:

1. judges' decisions to release people pretrial—either on recognizance or under supervision—and the use of nonmonetary conditions;
2. bail-setting, bail amounts and types, and the consideration (or lack thereof) of people's ability to pay; and
3. bench warrant issuance, "return on warrant" hearings, and pretrial release revocations when people miss court.

Throughout this report, Vera has found that racial disparities consistently increased following the implementation of bail reform.[5]

Finally, while the previous report provided the public with a big picture of bail reform's first year, the current report dives into the specific practices that underlie and ultimately create larger trends. Bail reform may have mandated new realities at the level of state law, but local norms, local policies, and human discretion remain central to how criminal courts function and their outcomes. If stakeholders wish to understand not just whether bail reform impacted, say, bail-posting rates but *how* and, moreover, how these rates might be improved, then understanding how on-the-ground actors put bail reform into practice on a daily basis is crucial.

Study Sample and Methods

This study combines findings from three different data sources to develop a holistic understanding of arraignment and other pretrial practices. Vera used statewide pretrial administrative data to explore trends in pretrial release and bail decisions for all counties outside of New York City ("non-NYC counties"). In addition, researchers conducted court observations in three non-NYC counties to gain a deeper understanding of how courtroom actors make the pretrial decisions that are driving those trends. Researchers also interviewed court actors in five counties to understand their reasonings and perceptions regarding various court practices. Each of these research activities involved its own method for sampling, data collection, and analysis. (See Appendices for more details on the research methods used in this study.)

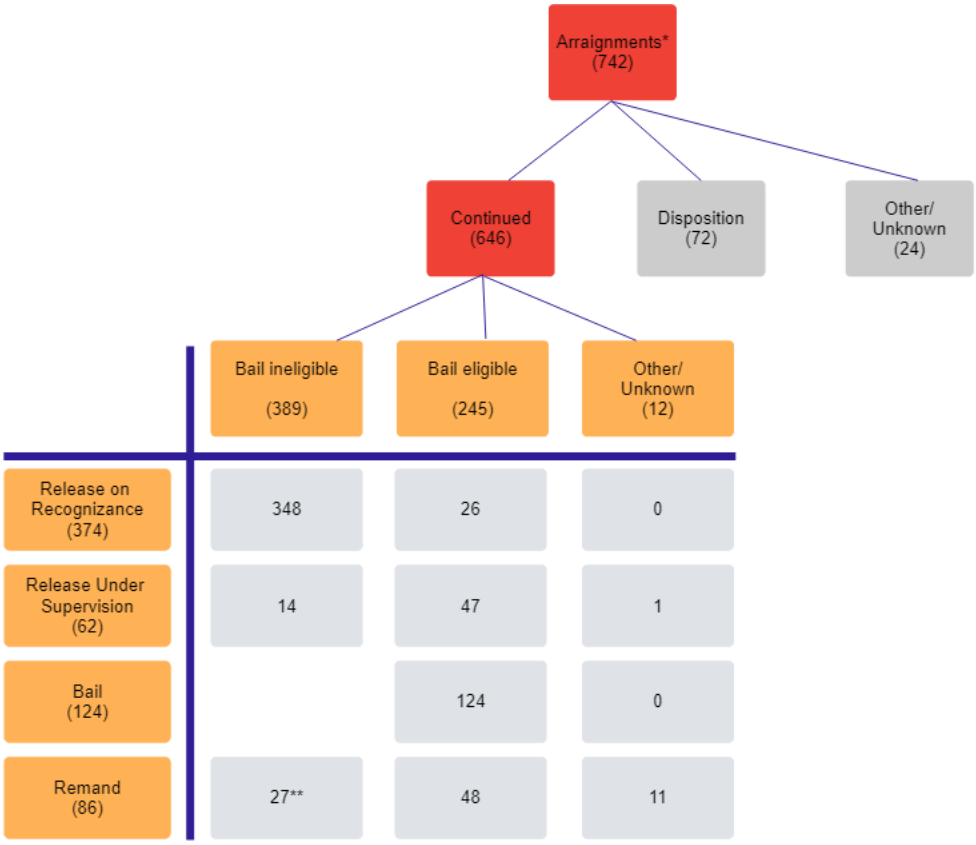
1. **Statewide pretrial administrative data:** Vera used administrative pretrial data published by New York's Division of Criminal Justice Services (DCJS) and Office of Court Administration (OCA) to look at case characteristics and outcomes for everyone arraigned in non-NYC criminal courts, excluding town and village courts, from January 1, 2019, to June 30, 2022.

   This report refers to charges as "bail-eligible" and "bail-ineligible." Bail eligibility of a case was not explicitly identified in the administrative data—instead, Vera determined eligibility based on the top charge code for each case. As noted, there are additional circumstances that can make a case eligible for bail, such as charge subsection and probation/parole status. As this information was not available in the administrative data, Vera was not able to include it when determining the bail eligibility of a case (See Appendix I for details). As such, counts of "bail-ineligible cases" presented in this report that are based on administrative data might include cases in which judges were able to set bail or remand the accused person based on circumstances other than charge-based bail eligibility.

2. **Virtual and in-person court observations:** Vera observed 1,069 hearings, including 742 arraignments (virtually in 2021 and in-person in 2022) in Broome, Erie, and Ulster Counties. (See Figure 0.1 for a description of the arraignment sample.) This nonrandom sample focused on custodial arraignments in city courts. For each hearing, researchers recorded court actor information (for example, the names of judges, prosecutors, and defense attorneys), case characteristics (for example, bail eligibility, charge severity, and judge decisions), and court actor statements (for example, bail requests and reasoning). Unlike the administrative data used in the report, which bases bail eligibility solely on *charge*, researchers conducting court observations were able to determine the bail eligibility of each *case,* accounting for non-charge eligibility criteria. The researchers analyzed the quantitative data using *R* and the qualitative data using *NVivo*.

Figure 0.1

Vera's sample of observed arraignments in non-NYC counties (n = 742)



Source: Vera court observations, 2021-2022.
* Includes 21 cases that are return on warrant and arraignment.
** Includes eight nominal bail set cases.

3. **Non-NYC court actor interviews:** Vera interviewed 26 defense attorneys, six prosecutors, and 14 pretrial supervision officers from Albany, Broome, Erie, Tompkins, and Ulster Counties. (Vera could not obtain OCA approval for judicial interviews.) Interviews lasted between one and two hours, during which the researchers asked participants about their arraignment practices, motivations, experiences on the job, and perceptions of bail reform and its implementation.

The following findings triangulate these three methods to provide an in-depth account of how courts outside of New York City have implemented bail reform. For more details on each of these methods, see Appendices I, II, and III.

Finally, a note on language. Throughout this report, Vera uses the term "pretrial release" to encompass cases in which people are released on their own recognizance (ROR) or released under supervision (RUS) at arraignment. While a person can post bail to secure release at arraignment, in practice bail is effectively equivalent to detention. In 2022, only 32 percent of people with bail set ever posted bail and only 21 percent were able to do so within five days. In short, when judges set bail on people, the vast majority will spend at least one day in jail and most will never leave while their case is pending. For this reason, Vera does not include bail-set cases when discussing "pretrial release" in general.

1. Examining the expansion of pretrial release and supervision

What we already know

Previous research by Vera revealed that New York's bail reform, which mandates release for people charged with most misdemeanors and nonviolent felonies, effectively limited the use of pretrial detention tied to money bail.[6] Other research has shown that, following the implementation of bail reform, the overall pretrial release rate in upstate counties increased almost 10 percentage points. According to a report by Data Collaborative for Justice, upstate courts released about 70 percent of people arraigned in 2021, an increase from 61 percent in 2019.[7] The increase in pretrial release was mainly due to an increase in people released on recognizance (ROR): judges' overall use of ROR increased by almost 10 percentage points from 2019 to 2021 while their overall use of release under supervision (RUS) remained the same.[8]

Vera's previous court observations in 2020 demonstrated how non-NYC judges had to release people with bail-ineligible charges even when they expressed their opposition to bail reform.[9] Vera also found that judges sometimes set RUS on people with bail-ineligible charges as a more restrictive condition than ROR; however, the majority of people in these RUS cases had no history of missing court and had no other open cases.[10] Finally, Vera found that more than half of these RUS cases involved an order of protection.

Research findings

1a. Judges' pretrial release decisions

Findings from the Division of Criminal Justice Services (DCJS) pretrial data analysis

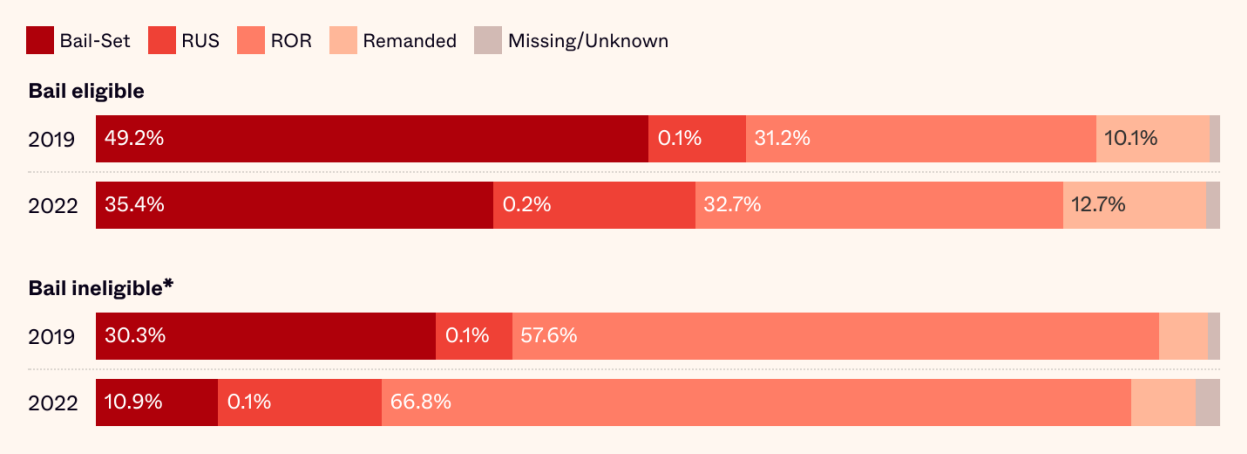
Judges released most people with bail-ineligible charges and half of people with bail-eligible charges—either on their own recognizance (ROR) or under supervision (RUS)

Vera's analysis of DCJS data shows that, in 2022, upstate judges ordered pretrial release in 79 percent of all cases that were not disposed at arraignment ("non-disposed arraignments")—either on recognizance (ROR, 61 percent) or under supervision (RUS, 18 percent). Judges continued to release people without bail even in cases where bail remained an option. In 2022, judges released 82 percent of people with a bail-ineligible charge and 51 percent of people with a bail-eligible charge without bail (Figure 1.1). (See Appendix I for details on bail eligibility.)

Consistent with Vera's previous findings, most people released pretrial with bail-eligible cases had minimal prior records and no serious open cases. About 19 percent of these cases involved people with a prior felony conviction, and 15 percent had an open felony case. The most common bail-eligible charges among people released pretrial were criminal contempt, strangulations, endangering the welfare of a child, and assault.

Figure 1.1

Arraignment decision by bail eligibility, 2019† and 2022



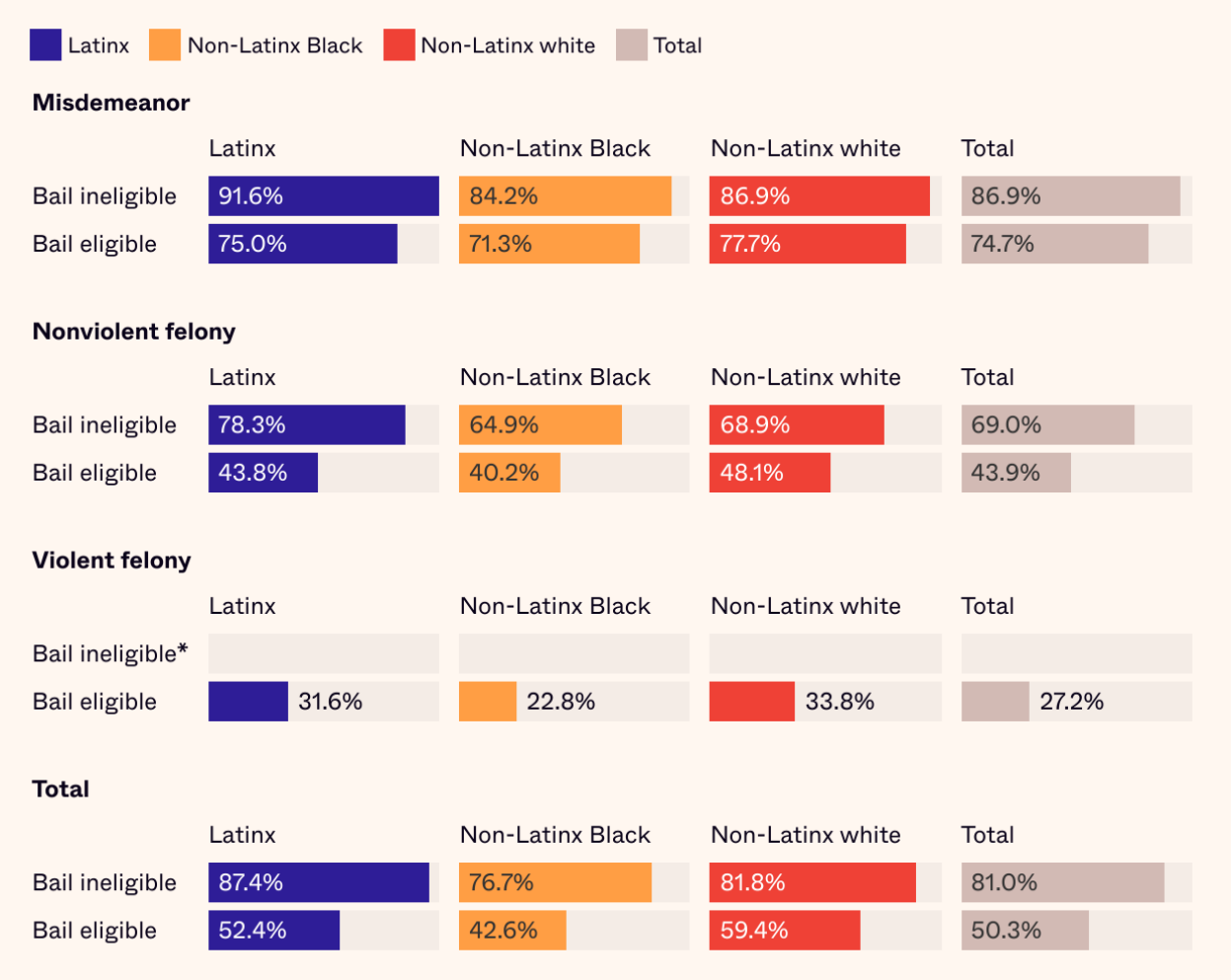
Source: Division of Criminal Justice Services Supplemental Pretrial Data.
Sample: 85,732 cases (in 2019) and 69,710 cases (in 2022) in non-NYC counties that were not disposed at arraignment.
† In this chart, Vera retroactively applied bail eligibility to 2019 charges based on 2022 bail laws for comparison purposes.
*Judges may remand or set bail on people with bail-ineligible charges under certain conditions, such as when the accused person is charged with a felony while on probation or parole. The available data does not capture these specific technicalities.
Note: Vera considered a bail amount of $100 or less to be nominal bail.

Racial disparities in pretrial release persist, especially for people with bail-eligible charges

Racial disparities in non-NYC counties' pretrial release rates continued following bail reform, especially for people charged with a bail-eligible offense. In 2022, judges released 48 percent of white people charged with a bail-eligible nonviolent felony compared to 44 percent of Latinx people and 40 percent of Black people (Figure 1.2). The Black-white racial disparity was even greater for violent felony cases where judges released white people at a rate 1.5 times that for Black people (Figure 1.2). Interestingly, while judges consistently released white people at the highest rates for bail-eligible cases, they released Latinx people at the highest rates for bail-ineligible cases.

Figure 1.2

Percent of cases released—either on recognizance (ROR) or under supervision (RUS)—by charge severity, bail eligibility, and race/ethnicity in 2022



Source: Division of Criminal Justice Services Supplemental Pretrial Data.
Sample: Cases in non-NYC counties that were not disposed at arraignment in 2022, including 12,725 cases identified as Latinx, 26,772 cases identified as non-Latinx Black, and 27,504 cases identified as non-Latinx white people.
* There are no bail-ineligible violent felonies.

1b. Judges' use of supervised release

Findings from DCJS pretrial data analysis

In 2022, judges ordered supervised release in more than 15 percent of cases, a big increase from 2019

While non-NYC judges released most people pretrial, a substantial percentage of these people had to submit to pretrial supervision (RUS). In 2022, judges released under supervision 15 percent of people with a bail-ineligible charge and 18 percent of people with a bail-eligible charge (Figure 1.1).

Notably, regardless of bail eligibility, judges' use of supervised release increased substantially from 2019, when they released only 7 percent of all cases under supervision.

Findings from court observations and court actor interviews

Court actors believe that judges are more likely to impose RUS in bail-ineligible cases if they involve low-level drug charges, substance use, mental health issues, or homelessness

Given the increase in the use of RUS following bail reform, it is important to understand why judges in non-NYC counties impose RUS. Vera's court observations and interviews provide insights into court actors' behaviors and rationales. In 2021 and 2022, Vera observed 47 bail-eligible cases and 14 bail-ineligible cases in which judges ordered RUS. Of these 61 cases, judges explained their decision in only 13 cases.

Of the 14 bail-ineligible cases in which the judge ordered the person released under supervision rather than on their own recognizance, six involved minor drug possession charges. This suggests that judges were more inclined to order RUS if they thought the accused person had a substance use issue. Court actors interviewed by Vera agreed. When asked why a judge might order RUS in a bail-ineligible case, substance use, mental health issues, and homelessness were the most common answers. For example, one public defender told researchers:

> I just had one case this morning. The person has a very bad criminal history, but it's a [bail-ineligible] DWI [driving while intoxicated]. The prosecutor told the judge, "We're fine with ROR." The judge had concerns that maybe the person needs treatment, so the judge put them in pretrial [supervision] to make sure that they go to their treatment.

This perception that judges are more likely to order supervised release in cases where they believe the accused person has a substance use issue may also hold true in some lower-level bail-eligible cases. Vera observed one bail-eligible case in which a man charged with second degree burglary was also going to a methadone clinic for substance use treatment. The judge told the man "I'm only doing RUS and the counseling because [court documents say] that allegedly you're a known drug user." The judge did not explain how she believed supervised release or substance use treatment would impact the man's ability to appear in court.

Judges were more likely to order RUS in bail-eligible cases when they involved alleged domestic violence, unless the person was charged with or had previously been convicted of violating an order of protection

Vera observed 47 bail-eligible cases in which the judge ordered release under supervision (RUS). These cases shared several characteristics. About 40 percent involved domestic violence (DV) charges, and in more than half, the judge had issued an order of protection at some point. Vera found this same trend when analyzing DCJS pretrial data: in 2022, non-NYC judges were more likely to release someone on RUS if they had a bail-eligible DV charge (31 percent) than if they had a bail-eligible charge unrelated to DV (16 percent). In sum, judges were more likely to consider RUS if the case involved alleged domestic violence.

During court observations, judges' decisions to either order RUS or set bail in a bail-eligible case often hinged on whether the person had been charged with, or ever convicted of, violating an order of protection. For example, after asking the court clerk "are there any prior convictions for criminal contempt [for violating an order of protection]?" one judge stated "I don't see any. I will allow for RUS." By contrast, of the 36 bail-eligible cases Vera observed in which the person was charged with violating an order of protection, more than two thirds had bail set (17) or were remanded (eight); just six were released under supervision and five were released on recognizance.

Use of RUS and reasons for its use vary widely by judge and county, according to court actors

When asked why judges use supervised release, court actors agreed it varies from judge to judge. "I think it's the individual judges and their feelings about RUS," explained one defender. "There are a couple that are quick to set RUS…Others don't seem to like the idea and you have to make a pretty good argument." Another defender described one bail-ineligible case in which "the judge determined by himself that he wanted to release the person on pretrial [supervision]" even though neither the prosecution nor the defense requested it. Participants also cited judge training (one attorney noted, "if they've gone to a conference and learned about it, all of a sudden they're using it on every case") and jurisdiction (some interviewees noted that Centralized Arraignment Part (CAP) judges, who arraign cases in town and village courts, seem more likely to order RUS "if they know they're going to keep that case").

Pretrial supervision officers may also influence judges' use of RUS. During interviews with Vera, pretrial supervision staff from multiple counties said they interview at least some people pre-arraignment and provide judges with risk assessments regarding their likelihood of court non-appearance. As one participant explained:

> I can't say to what extent the judge is actually accepting a recommendation. Again, that's not exactly what we're doing. You can easily get there by reading the instrument. You know what I mean? It's like that's sort of what we're doing, sort of recommending or not recommending, or saying this person's not appropriate for RUS. To what extent our indication is valued or listened to, I can't say for certain.

In one court Vera observed, a probation officer was sometimes present at arraignment. For example, after setting bail, one judge in that court said, "I think, based on everything, I could add RUS to this one; there is no gun involved, it was a knife, and they generally will… in fact is anyone from RUS here?" The probation officer replied, "Yes. We would take the same precautions and reach out to the victim and keep in contact with the defendant if she is released." Similarly, during interviews, multiple pretrial supervision officers said that they consider complainants' safety when making recommendations to judges regarding release. As one officer put it, "If the victim says that they're afraid [for their life], then we definitely don't want them to be out." An in-depth discussion of pretrial risk assessments or supervision officers' role in the courtroom is beyond the scope of this report. Given their potential to influence judges' release decisions, however, both practices merit further investigation.

Finally, it is important to note that judges' use of RUS varied county to county. In Ulster and Broome Counties, Vera observed judges order RUS without giving people the option to post bail instead. In Erie County, however, judges ordered "bail or RUS," meaning the accused person could either post bail or report to supervised release. These "bail or RUS" cases constituted almost 80 percent of all RUS-set cases observed in Erie County. According to pretrial supervision officers, most people assigned "bail or RUS" end up under their supervision. However, this practice is not recorded in any administrative data. This unique practice of offering people the option of bail or RUS in Erie County merits further study.

1c. Court actor arguments for pretrial release

Findings from court observations and court actor interviews

Prosecutors and defense attorneys usually deferred to the court and rarely requested RUS in bail-ineligible cases

When a case was ineligible for bail, prosecutors and defense attorneys rarely argued for anything other than ROR. In the 389 bail-ineligible arraignments Vera observed, most prosecutors (91 percent) and defense attorneys (81 percent) did not make any request and deferred to the court, presumably knowing that the judge would set ROR (as they did in 93 percent of cases, Figure 0.1).[11] Both parties rarely requested RUS: Vera observed just six bail-ineligible cases in which the prosecution, defense, or both requested RUS (Figure 1.3).

Figure 1.3

Prosecutor and defense requests by bail eligibility

	PROSECUTOR REQUEST	DEFENSE REQUEST*
BAIL INELIGIBLE		
NO REQUEST/DEFER	354 (91.0%)**	315 (81.0%)
ROR	6 (1.5%)	54 (13.9%)
RUS	4 (1.0%)	2 (0.5%)
BAIL	6 (1.5%)	0 (0.0%)
NOMINAL BAIL	0 (0.0%)	8 (2.1%)
REMAND	4 (1.0.%)	0 (0.0%)
OTHER/UNKNOWN	15 (3.9%)	10 (2.6%)
TOTAL	389 (100.0%)	389 (100.0%)
BAIL ELIGIBLE		
NO REQUEST/DEFER	44 (18.0%)**	57 (23.3%)
ROR	0 (0.0%)	91 (37.1%)
RUS	4 (1.6%)	31 (12.7%)
BAIL	156 (63.7%)	43 (17.6%)
NOMINAL BAIL	0 (0.0%)	7 (2.9%)
REMAND	37 (15.1%)	0 (0.0%)
OTHER/UNKNOWN	4 (1.6%)	16 (6.5%)
TOTAL	245 (100.0%)	245 (100.0%)

Source: Vera court observations, 2021-2022.
Sample: 634 arraignments observed by Vera.
* The defense often made multiple release requests (for example, requesting RUS or minimal bail for the same case) at arraignment. The figure reports the most lenient request.
** These figures include 22 cases (eight bail-ineligible and 14 bail-eligible) for which the DA was not present and so did not make any request.

Court actors report that, when charges are bail-ineligible, both defense and prosecution will request RUS in very limited contexts to address perceived health issues related to substance use, mental health, or homelessness

Given the rarity with which Vera observed prosecutors and defense attorneys request RUS in a bail-ineligible case, their motivations for doing so were hard to glean from court observations alone. Interviews with court actors provide important insight into when court actors consider requesting pretrial supervision in lieu of ROR. Interviews revealed that both prosecutors and defense attorneys do request RUS in bail-ineligible cases, but only in a limited context: as a way to address what they perceive or know to be serious health issues or other vital needs.

During interviews, prosecutors said they only request RUS in bail-ineligible cases if they think RUS is necessary to address underlying factors such as substance use, mental health, or homelessness. “I'll request [RUS] only if there's some flag that I know about,” explained one prosecutor. “[I had] one

case where the person was so inebriated that they couldn't get through [the arraignment] and made some comment that they wanted to die."

Similarly, defense attorneys universally agreed that they rarely request RUS when a client is otherwise entitled to be released ROR. The only exception, most agreed, was concern for a client's health or safety. As one defender explained:

> If we have somebody who, in our opinion, needs treatment because it would help prevent them from picking up a new charge, help with negotiations for the charge they're getting arraigned on, or just improve their quality of life, I'll pitch pretrial [supervision]. I'll pitch it as opposed to ROR because my fear is they just get released, they are in no better position than they were when they came in, and the chances of them picking up something else goes up.

Defense attorneys emphasized, however, that they rarely request RUS in bail-ineligible cases. "You can guess how many clients would actually want to [accept RUS instead of ROR]," one attorney said. "I think in my entire career, I've done it once." These statements underscore the difficult choices practitioners and system-involved New Yorkers face when criminal courts are the privileged access point for healthcare and other vital services.

When charges were bail-eligible, prosecutors routinely requested bail, never voiced support for ROR, and rarely requested RUS, except in a small number of domestic violence cases

In 2020, Vera found that prosecutors rarely voiced support for ROR or requested RUS when charges were bail-eligible.[12] Similarly, during court observations conducted in 2021 and 2022, assistant district attorneys (ADAs) explicitly supported or requested release in just 1.6 percent of cases (Figure 1.3). Vera did not observe a single prosecutor verbally support ROR in a bail-eligible case. However, Vera did observe prosecutors defer to the judge in a small number of bail-eligible cases (10 out of 44) where release seemed likely.

As for supervised release, Vera observed only four bail-eligible cases out of 245 in which the prosecution requested RUS. Notably, each of these four cases involved DV charges and an order of protection. For example, one assistant district attorney told the judge "we recommend RUS to make sure he obeys the order." While four cases is too small a sample to draw conclusions from, it raises a question whether prosecutors are more willing to request RUS in bail-eligible cases if they meet these criteria.

Interview participants suggested other scenarios in which prosecutors might also consent to RUS in a bail-eligible case. "There are scenarios where we will release someone to supervision. ROR is a little bit less likely," explained one prosecutor. "If the felonies [on a person's criminal record] are really old, like from 15+, 10+ years ago," if it is the person's first arrest, "especially if it's a lower-level felony," and, to a lesser extent, if the prosecutor suspects mental health or substance use have contributed to the person's arrest.

Defense attorneys requested release in approximately half of bail-eligible cases

Defense attorneys requested release in about half of all bail-eligible cases—ROR more frequently than RUS (37 percent versus 13 percent, respectively) (see Figure 1.3). They often supported their release request by highlighting a person's lack of recent conviction history or recorded court

absences. They also referenced, though less frequently, their clients' inability to afford any amount of bail or their need to access community-based services. Other arguments for release included healthcare access, college enrollment, caregiving responsibilities, and the case's merits (for example, evidence of self-defense). For example, in one Erie County case, the defender explained that their client "is currently in a methadone clinic. [He has] a bit of a checkered past but has been getting help through the clinic and goes there regularly."

Vera observed 57 bail-eligible cases in which the defense made no request and simply deferred to the judge. Defense attorneys' motivations for this likely varied by case. For example, of these cases, judges ordered release (ROR/RUS) in 11 and remand without bail in 28. The defense attorneys may have anticipated these decisions and seen no value in making a request. However, Vera observed 18 cases in which defense attorneys made no argument while judges set bail on their clients. This practice in particular raises concern and needs further exploration as to defense attorneys' rationale.

Defense attorneys did not push back on judges' supervised release decisions

Interestingly, Vera never observed a defense attorney dispute a judge's decision to order RUS, even in bail-ineligible cases where the only alternative would be ROR. During interviews, defense attorneys agreed that they rarely dispute a judge's RUS decision, regardless of bail eligibility, for fear of damaging their reputation or of judges tacitly rebuking them by setting more restrictive conditions or setting bail. "There is still a tendency to put people on pretrial [supervision] when that's maybe not what the statute says should be done," one attorney told researchers. "But you're not going to argue with the judge when the person is walking out the door."

1d. Use of non-monetary conditions

Findings from DCJS pretrial data analysis

When releasing people under supervision, judges set additional non-monetary conditions of release in less than half of cases

Everyone released under supervision is required to report to their county's pretrial supervision agency for monitoring; in non-NYC counties, that is usually the Probation Department. In addition, judges are given discretion to set other non-monetary conditions, including travel restrictions; orders of protection; firearms restrictions; a mandate to maintain employment, housing, or school enrollment; curfews; mandatory programming such as a substance use or mental health evaluation; bed-to-bed hospital transfers; and electronic monitoring. According to DCJS pretrial data, in 2022, non-NYC judges did not set any additional non-monetary conditions (beyond reporting to their supervision agency for monitoring and avoiding rearrest) in 61 percent of RUS cases, a small decrease from 65 percent in 2020.[13]

When ordering RUS, judges set additional non-monetary conditions more often in felony cases than in misdemeanor cases. In 2022, of all RUS cases, judges set additional non-monetary conditions in 44 percent of violent felony cases, 41 percent of nonviolent felony cases, and 36 percent of misdemeanor cases. Judges imposed additional non-monetary conditions at roughly similar rates for women (38 percent) and men (39 percent). Judges also imposed non-monetary conditions at roughly similar rates for white (35 percent) and Black people (37 percent) and at a higher rate for Latinx

people (47 percent). Finally, when they set additional non-monetary conditions as part of supervised release, judges relied predominantly on three: electric monitoring, firearm restrictions, and what DCJS classifies as "other" restrictions (Figure 1.4). The DCJS data system does not identify which specific conditions it includes under "other." Court observations suggest, however, that substance use and mental health evaluations may constitute a substantial proportion of this "other" category. During court observations in 2022, judges ordered a substance use or mental health evaluation in seven of of the 13 cases in which they set RUS *and* additional non-monetary conditions.

Figure 1.4

Non-monetary conditions set for people released under supervision

Condition	2020		2022	
	N	%	N	%
Contact restrictions**	43	0.6	356	3.3
Electronic monitoring	728	10.3	1,553	14.4
Firearm restrictions	217	3.1	336	3.1
Travel restrictions	206	2.9	184	1.7
Maintain employment, school, or housing	14	0.2	60	0.6
Pretrial programming	4	0.1	28	0.3
Other conditions*	1,632	23.1	2682	24.9
No specified conditions	4,633	65.5	6,595	61.1
Total RUS cases+	7,075	100	10,791	100

Source: Division of Criminal Justice Services Supplemental Pretrial Data
+ Judges can order more than one condition per case. Therefore, the sum of each condition is greater than RUS case totals and percentages sum to more than 100 percent.
* DCJS categorizes any conditions not specified by the legislature as "other." This includes curfews and, as Vera learned during court observations, substance use and mental health evaluations.
** Includes orders of protection.

Findings from court observations and court actor interviews

During court observations, most judges did not say why they were or were not setting conditions or why they favored specific ones. However, court observations suggest that judges who set additional non-monetary conditions rarely do so based on an individualized assessment of the accused person's circumstances or needs. As discussed above, court actors are more inclined to request RUS in bail-ineligible cases if they are worried about a person's substance use or health. In most cases Vera observed, however, judges who set additional conditions on top of RUS did so with little or no input from the prosecution or defense, and almost never explained their decisions. Based on interviews with court actors, the process by which judges select and set conditions seems to vary by county, court culture, and individual judge. According to interviews, in Albany County, "conditions are usually left up to the judge;" in Erie County "it's really judge-specific;" in Tompkins County judges get "input from both sides;" and in Broome County, judges use a checklist of conditions and often just select "any other conditions as determined needed by pretrial release."

Net widening

Supervised release can function as an alternative to pretrial incarceration for people who would otherwise be held on bail. For people who would otherwise be released ROR, however, supervised release can lead to net widening in the form of expanded state supervision and onerous conditions that, should they result in failures to comply, can create a backdoor for judges to set bail or detain someone on remand.

After bail reform made many charges no longer eligible for bail, judges' use of both ROR and RUS increased substantially from their 2019 levels (see Figure 1.1). However, since bail reform took effect, judges in non-NYC counties appear increasingly likely to order RUS in bail-ineligible cases for people who would otherwise be released ROR: According to the DCJS data, in 2022, 15 percent of people with a bail-ineligible charge were released on RUS, up from 10 percent in 2020. Over this same period, the bail-setting rate for bail-ineligible cases increased from 9 to 11 percent while the ROR-setting rate fell from 73 percent to 66 percent. Both researchers and policymakers should monitor whether this trend continues or intensifies.

Both court observations and system actor interviews illuminated instances in which judges chose supervision rather than releasing people ROR. Court observations found that some judges used RUS not (or not only) to ensure return to court but as a response to drug use or homelessness. During interviews, both defenders and pretrial supervision officers reported cases in which they felt judges had ordered RUS unnecessarily. As one attorney told Vera:

> A couple of the judges have to be pretty close to ROR'ing the person before they'll consider RUS, which is silly since the person is now stuck reporting to Probation; and if they stop reporting to Probation, they get picked up on a warrant and can be hit with as much bail as the judge wants.

According to pretrial supervision officers, some judges also fail or refuse to remove people from RUS and place them on ROR even after they have proved themselves capable of attending their court dates. One officer told Vera, "Even if they're showing up for court, even if they're making their court dates and haven't missed anything, I've asked for, 'Can you remove this person?' and they won't."

These findings suggest that some degree of net widening in the use of RUS might have occurred following bail reform. A more precise and generalizable account of net widening and its impacts on bail setting, court appearance, and people's lives, however, is beyond the scope of this study and merits further investigation.

2. Examining a More Restricted Use of Money Bail

What we already know

Bail reform prohibited the use of money bail for people charged with most misdemeanors and nonviolent felonies. As a result, the overall bail-setting rate in non-NYC counties fell by 17 percentage points between 2019 and 2022.[14] The bail-setting rate for people with non-violent felony charges in particular plummeted from 48 percent to 18 percent during that time.[15] However, Vera's previous report found that courtroom cultures regarding bail remained the same in cases where judges still have discretion to set bail.[16] According to court observations in 2020, both prosecutors and judges continued to rely on money bail when the law allowed. Moreover, when justifying their decisions to request or set bail, prosecutors and judges relied heavily on criminal history and charge severity.[17] Despite a statutory imperative to consider a person's ability to pay when setting bail, this discussion remained absent in more than 70 percent of cases in which judges set bail.[18] The lack of consideration of ability to pay explains why most people who had bail set were unable to post bail in a timely manner. In 2020, only one in five was able to post bail within a week of their arraignment.[19]

Building on the previous body of research, Vera conducted analysis of DCJS pretrial data from 2021 and 2022 to examine how judges set different forms of bail and bail amounts. This report also provides insight into courtroom actors' behaviors and perspectives based on 742 arraignment observations and interviews with 46 court actors.

Research findings

2a. Judges' use of money bail

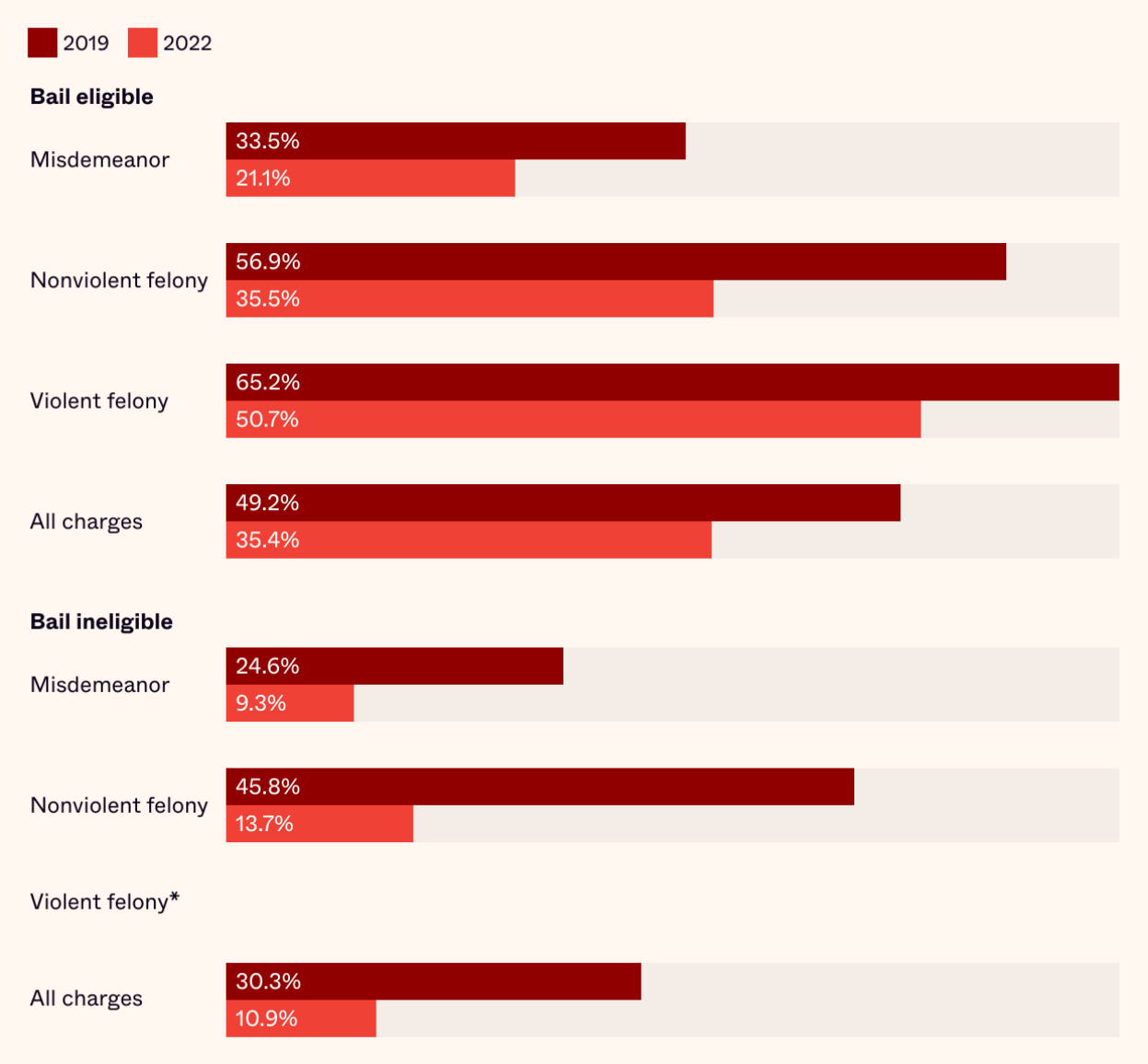
Findings from DCJS pretrial data analysis

Judges set bail less frequently after bail reform, even for charges that remained eligible for bail

Bail reform substantially reduced non-NYC judges' use of money bail. From 2019 to 2022, the bail-setting rate for all non-NYC counties decreased from 35 percent to 18 percent. Unsurprisingly, this decrease looked different depending on bail eligibility. The bail-setting rate for people with bail-ineligible charges in non-NYC courts fell dramatically from 30 percent in 2019 to just 11 percent in 2022 (see Figure 2.1). Perhaps more surprisingly, the bail-setting rate also fell for people with a bail-*eligible* charge from 49 percent in 2019 to 35 percent in 2022. While the extent of this decrease varied by charge severity, the downward trend was consistent (see Figure 2.1).

Figure 2.1

Bail-setting rates in non-NYC courts by bail eligibility and charge severity



Source: Division of Criminal Justice Services Pretrial Data
* There are no violent felonies that are bail-ineligible.
Sample: Total bail eligible cases in 2019= 19,393; Total bail eligible cases in 2022=19,997; Total bail ineligible cases in 2019=66,339; Total bail ineligible cases in 2022=49,713
Note: Judges can still set bail on noneligible charges in several circumstances (for example, if the accused person was charged with a felony while on probation or parole), but these cannot be identified in the administrative data. Additionally, Vera considered a bail amount of $100 or less to be nominal and categorized such cases as remanded.

Judges set a third bail option but continued to underutilize unsecured bond

New York offers judges nine types of bail to choose from: cash bail; insurance company bond, in which a private company agrees to pay someone's bail in exchange for a premium fee (usually 10

percent) and cash or property as collateral; credit card; and unsecured, partially secured, and secured versions of both appearance and surety bonds.[20] (While anyone can post a surety bond, only the accused person can pay an appearance bond.) Before bail reform, judges were required to offer two types of bail, but they could set any type of bail they chose—usually cash bail and an insurance company bond. Following bail reform, judges who set bail are now required to offer at least three types of bail, including a partially secured option, which typically requires people pay 10 percent of the bail amount to buy their freedom, or an unsecured option, which requires no payment up front. This reform was intended to reduce undue hardship for people posting bail. Other studies have found that judges largely adopted this practice in 2020.[21] Two years later, this remained the case. According to pretrial data from the New York State Office of Court Administration (OCA), non-NYC judges set a partially secured bond as a third option in nearly 100 percent of bail-set cases in 2022 (see Figure 2.2).

Figure 2.2

Bail forms offered in non-NYC bail set cases in 2022

	COUNTS	PERCENT
No third option	45	0.3%
Third option included:	11,509	86.7%
Partially secured bond	11,471	-
Unsecured bond	38	-
4 or more options included*:	1,725	13.0%
Partially secured bond and other	1,692	-
Other than partially secured bond	33	-
Total bail set cases	13,279	100.0%

Source: Office of Court Administration Pretrial Data
Note: The majority of bail-set cases in the OCA dataset included cash bail and insurance company bail, with a few exceptions: only 45 cases did not include cash and/or insurance bond information, 0.3 percent of all non-nominal bail cases in 2022. Based on court observations, researchers assumed these were data entry errors and that judges set cash bail and an insurance company bond in all bail-set cases. Vera researchers considered bail amounts of $100 or less to be nominal and removed them from the table.
*Only 69 cases included unsecured bond as an option.

Notably, judges did not utilize all bail options available to them, and they set partially secured bonds far more often than unsecured ones. Judges seem to have universally preferred that people forfeit their financial collateral *before* being released. The reasons for this are difficult to discern without interviewing judges. During court observations, judges never explained why they set one bail form and not another. Prosecutors usually requested cash bail, insurance company bond, and partially secured bond, but rarely said why. Defense attorneys sometimes requested judges consider a "low" or "reasonable" bail, but they rarely specified a desired bail type. Court actors' perceptions of different bail forms and their utility merit further study.

Judges often set partially secured bond amounts higher than cash and insurance company bond, undermining the goal of making bail more affordable

Although judges almost always set a third bail option, many did so in a way that undermined bail reform's goal of making bail more affordable. In 2022, when non-NYC judges set partially secured bond, they set it at a higher amount than cash bail in 91 percent of cases (see Figure 2.3). Indeed, judges set partially secured bond 10 times higher (or more) in 32 percent of these cases, meaning that posting 10 percent of the partially secured bond would cost the same as or more than paying the entire cash bail. Moreover, judges set partially secured bond above insurance company bond in 77 percent of cases. Why judges might do this is unclear and would benefit from further research. What is clear, however, is that these practices undermine bail reform's goal of making bail more affordable.

Figure 2.3

Bail amounts for partially secured bonds compared to cash bail and insurance company bonds

	COUNT	PERCENTAGE
Partially secured bond (PSB) vs cash		
PSB < cash	17	0.1%
PSB = cash	1,235	9.4%
PSB > cash	11,911	90.5%
Total bail set cases with a PSB	13,163	100.0%
10% of PSB vs cash		
10% of PSB < cash	8,929	67.8%
10% of PSB = cash	3,473	26.4%
10% of PSB > cash	761	5.8%
Total bail set cases with a PSB	13,163	100.0%
PSB vs insurance company bond		
PSB < insurance company bond	132	1.0%
PSB = insurance company bond	2,865	21.8%
PSB > insurance company bond	10,166	77.2%
Total bail set cases with a PSB	13,163	100.0%

Source: Office of Court Administration Pretrial Data

Judges set similar bail amounts based on charge severity, suggesting they did not make individualized assessments

As noted, since bail reform took effect, judges have imposed bail in a substantially lower number of cases. The types of cases that no longer have bail set are predominantly lower-level offenses. There has, therefore, been a change in the average bail-set amount. The median cash bail amount set by judges doubled from 2019 to 2022, bail amounts less than $7,500 became relatively less common, and bail amounts greater than $7,500 became more common.[22]

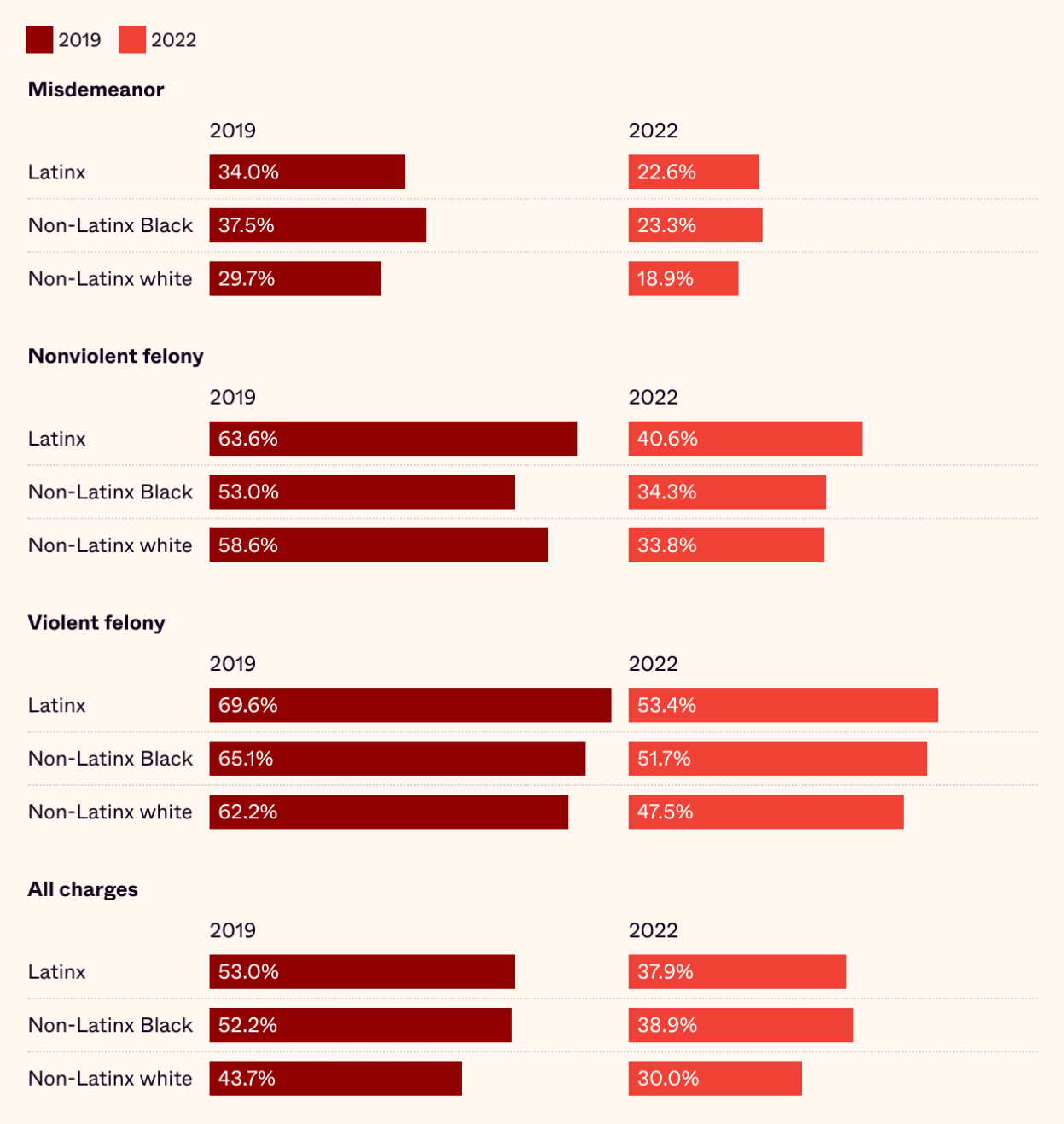
This increase in average bail amounts was likely due to the changing composition of charges that remained eligible for bail. After bail reform, judges were no longer allowed to set bail on charges for which they used to set lower bail amounts—such as petit larceny, minor drug possession, and unlicensed operation of a motor vehicle—but they continued to set bail on eligible charges at similar amounts. From 2019 to 2022, the median bail for misdemeanors doubled, while the median bail for felonies stayed the same (see Figure 2.4). This trend merits further analysis controlling for other factors that could influence judges' bail amount decisions including case characteristics, like charge and criminal history; judge characteristics, like prior professional experience; and court characteristics, like jurisdiction, county, and region.

Racial disparities in bail setting rates were greater for misdemeanor charges than for felony charges

The burdens of bail continue to fall disproportionately on Black and Latinx New Yorkers. In 2022, the overall bail-setting rate for bail-eligible charges in non-NYC counties for Black and Latinx people was 38 and 39 percent, compared to 30 percent for white people (see Figure 2.4). These racial disparities looked different, however, depending on charge severity and the type of charge. Non-NYC judges set bail for Latinx and Black people charged with a misdemeanor or a violent felony at higher rates than their white counterparts. For nonviolent felonies, judges set bail for Latinx people at higher rates than they did for Black and white people.

Figure 2.4

Bail-setting rates in non-NYC courts for bail-eligible charges by charge severity and race



Source: Division of Criminal Justice Services Supplemental Pretrial Data
Sample: Cases in non-NYC counties that were not disposed at arraignment, including 3,107 cases identified as Latinx, 8,893 cases identified as non-Latinx Black, and 6,801 cases identified as non-Latinx white people (2019); and 3,528 cases identified as Latinx, 8,965 cases identified as non-Latinx Black, and 6,802 cases identified as non-Latinx white people (2022).

Some of these disparities may be explained by racial bias tied to specific charges. For example, in 2022, non-NYC judges were more likely to set bail for Black people accused of the following misdemeanors than for white people facing the same charge:

- forcible touching (misdemeanor): judges set bail for 37 percent of Black people compared to 14 percent of white people;
- unlawful imprisonment (misdemeanor): judges set bail for 12 percent of Black people compared to 7 percent of white people; and
- criminal contempt in the second degree (misdemeanor): judges set bail for 29 percent of Black people compared to 24 percent of white people.

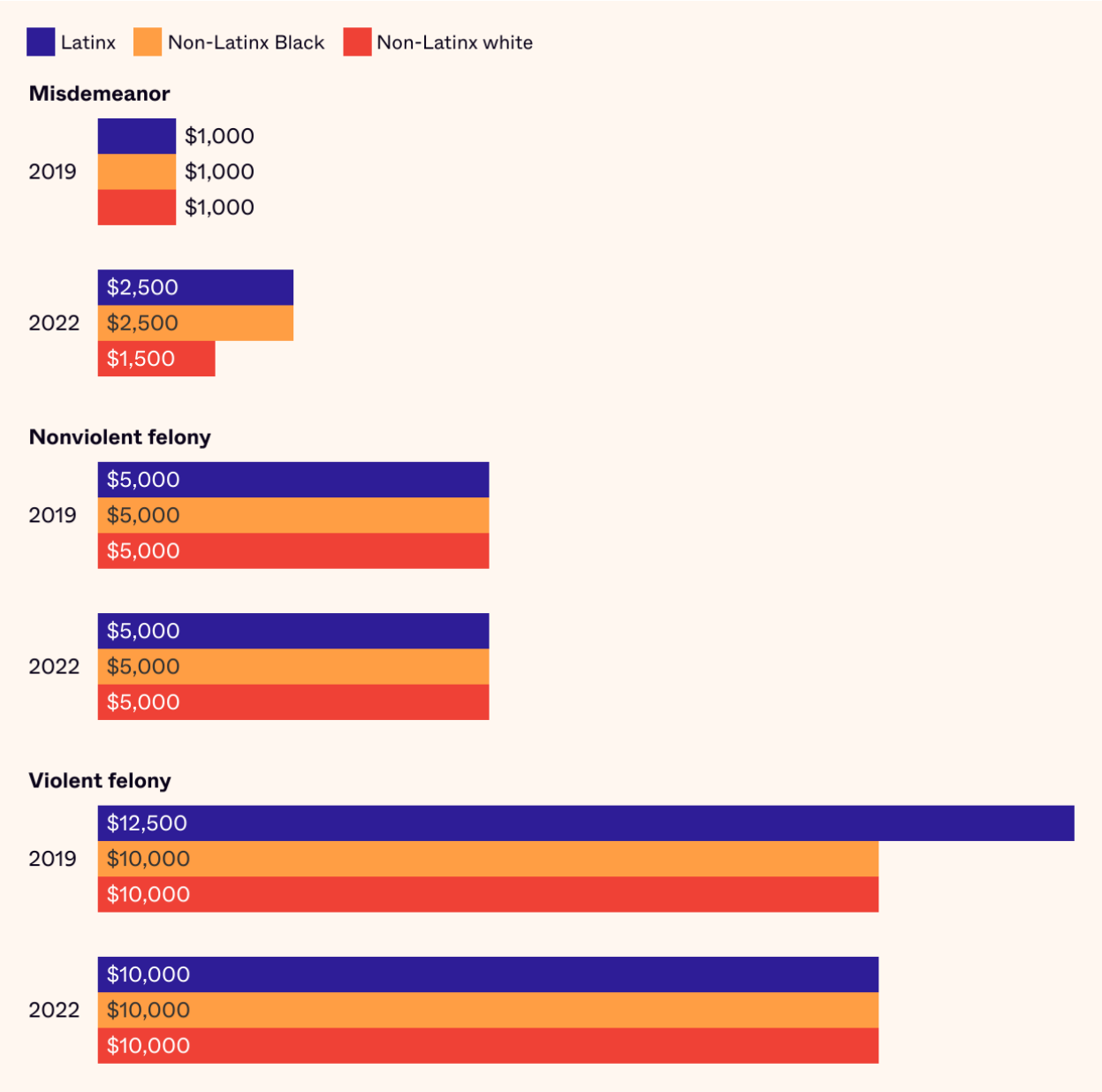
This analysis remains exploratory, however, and other discretionary decision points (for example, policing and charging practices) may be responsible for racial disparities. Judges' decisions to set bail and their racial impacts merit further investigation.[23]

Judges set higher bail amounts for Black and Latinx people with misdemeanor charges than for white people

Vera also examined racial disparities in the bail amounts set by non-NYC judges (see Figure 2.5). Focusing on bail-eligible charges in 2022, the median bail amount varied by race and ethnicity in misdemeanor cases, but not in nonviolent or violent felony cases. Judges set higher bail on bail-eligible misdemeanor cases for Black and Latinx people than they did for their white counterparts. Racial disparities in bail amounts are likely to impact who is able to post bail and thereby be released pretrial. Further research—including charge-based analysis and analysis of bail-ineligible cases where bail is set for reasons other than the alleged charge—is vital to understand the mechanisms driving these racial disparities in a criminal legal system where Black and Latinx people have been consistently overrepresented.

Figure 2.5

Median bail amounts for bail-eligible charges by race and charge severity, non-NYC counties



Source: Division of Criminal Justice Services Supplemental Pretrial Data.
Sample: In 2019, 1,623 cases identified as Latinx, 4,547 cases identified as non-Latinx Black, and 2,916 cases identified as non-Latinx white that had bail set at $100 or more in non-NYC counties; In 2022, 1,276 cases identified as Latinx, 3,271 cases identified as non-Latinx Black, and 1,820 cases identified as non-Latinx white that had bail set at $100 or more in non-NYC counties.
Note: Vera considered a bail amount of $100 or less to be nominal bail.

2b. Judges' reasoning for bail decisions

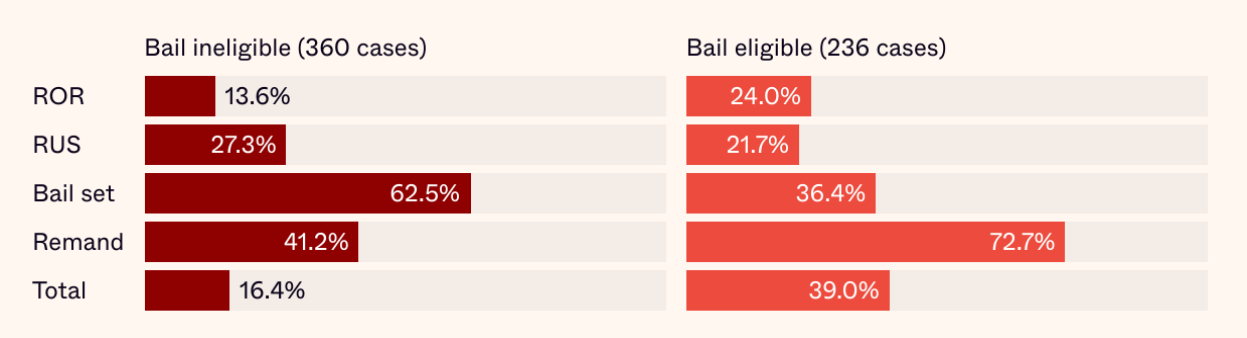
Findings from court observations and court actor interviews

Judges often did not provide reasoning for their decisions, even for bail-set cases

During court observations, judges often provided no explanation for their pretrial decisions. They were more likely to give their reasoning, however, in bail-eligible cases (39 percent) than in bail-ineligible cases (16 percent, see Figure 2.6). Within bail-eligible cases, judges were also more likely to explain themselves when setting bail (36 percent) than when ordering ROR (24 percent) or RUS (22 percent). Perhaps unsurprisingly, judges were most likely to explain their decisions when remanding someone, usually by pointing to charge severity (almost half of these cases involved violent felony charges) and the person's conviction history. This may be because judges usually remanded people with bail-eligible charges for discretionary reasons—meaning they could set bail or release the person—whereas judges remanded people with bail-ineligible cases primarily for mandatory administrative reasons, such as a detainer from another county.

Figure 2.6

Percent of cases in which judge provided reasoning for their decision, by bail eligibility and arraignment decision



Source: Vera court observations, 2021-2022

Judges set bail based mainly on charge severity, and court actors identified the judge's professional background, interpersonal dynamics, and jurisdiction as other factors likely to influence judges' decisions

During court observations, when judges gave their reasoning for setting bail on people with a bail-eligible charge (44 cases), the most common reasons cited were charge severity (25 cases); previous court non-appearance (12 cases); and other criminal-legal involvement, such as being on parole/probation or having an open case (11 cases). During interviews, court actors agreed that judges set bail based largely on charge severity, especially when a person is charged with a gun-related offense or physical violence. "It seems like a very particular subset is always going to sit [in jail]," explained one defender, "the guns [and] ones that are arguably pretty serious harm, like a bad assault." "It takes a miracle to get a person [with a gun-related charge] out in the community," said another. While one prosecutor complained that some judges set "super low [bail]" for gun-related charges, most agreed that judges usually set higher bails or remand. Indeed, according to Vera's analysis of DCJS pretrial data, judges set bail or remand the majority of people with bail-eligible gun-related charges. Judges ordering ROR or RUS in gun-related cases is rare: of all bail-eligible gun cases in 2021 and 2022 (6,108 cases), just 21 percent received ROR and 12 percent received RUS.

Following charge severity, court actors agreed that criminal history and previous bench warrants are the most important factors for judges in making their decisions. "Before [bail reform], they were basing their decisions on criminal history and failures to appear," said one defense attorney. "It's pretty much the same."

Under New York's bail law, when making a pretrial release decision judges "must consider and take into account available information about the principal, [the accused person], including:"

- the accused person's "activities and history;"
- the current charges;
- the person's criminal conviction record if any;
- any record of "previous adjudication as a juvenile delinquent;"
- any record of flight to avoid criminal prosecution;
- the person's "individual financial circumstances" and their "ability to post bail without posing undue hardship;"
- any record of violating an order of protection;
- any history of "use or possession of a firearm."
- whether the person is "alleged to have caused serious harm to an individual or group"

Source: CPL 510.10 1(f)
https://www.nysenate.gov/legislation/laws/CPL/510.10

While court actors concurred on the factors most important to judges, they also agreed that pretrial decisions vary judge to judge. "City court is its own animal," one defender explained. He continued:

> You got three judges. They all do things a little different. One judge just takes the floor, won't hear anything from anyone. If you say, "Judge, if I could be heard…," they will just look at you and say, "Well, if you think it'll do any good." The second judge does give everyone an opportunity to be heard. The third judge goes out of their way to remand as many people as they can.

Interviewees suggest that judges' decision-making can vary based on prior employment (for example, former police versus defense attorneys), jurisdiction (for example, superior court judges oversee more serious cases), and local culture (for example, courts that are "pro-prosecution" or where "it's really difficult to get someone held"). Court actors also underscored the importance of interpersonal dynamics. According to one ADA, "even with judges who are setting bail more often, sometimes it's just how they feel about the public defender in the room." Judges may also be influenced by how they perceive the people being arraigned. One prosecutor shared that they had seen judges revise a bail decision because a person was "coming in hot" or disrespectful. "It's a real human dynamic," they said of arraignment.

Finally, according to court actors, judges may also be influenced by the political climate. "Judges don't want to see their name in the paper," said one defender. "They all have that situation in their mind," explained another, "where they will release somebody, and something happens." One participant, however, saw a much more direct connection between public scrutiny and judges' decision-making:

> The sheriff's deputies are in the room. I sometimes feel like judges feel this extra pressure because you have law enforcement staring at you while you're making this decision. I think judges feel a strain… There are actually two entities in that room that are impacted by what the judge does… If you think that the sheriffs aren't getting out there and saying, "the judge just let this guy go. Can you believe that?" I think these judges know that. They're voted on.

2c. Prosecutor arguments for bail

Findings from court observations and court actor interviews

Prosecutors usually requested bail when the law allowed, and ADA interviewees agreed that bail eligibility is sufficient cause to request bail

In 2020, Vera found that prosecutors almost always requested bail or remand when a person's charges were bail-eligible.[24] In 2021 and 2022, Vera's court observations showed that prosecutors continued to request bail in the majority of bail-eligible cases—69 percent—and they requested remand in a further 16 percent of bail-eligible cases.

During interviews, court actors corroborated this, saying prosecutors prefer to request bail whenever possible. "If something's bail-qualifying, the ADA is always asking for bail," complained one defense attorney. Prosecutors fall on a spectrum, explained another, describing how in his county there is one ADA who "doesn't argue for bail almost ever" and another who "asks for bail even though they know it's non-qualifying," but most are "in the middle and think they're supposed to say something for bail if it's a qualifying offense." Prosecutors agreed with this account and argued that bail-eligible charges usually merit a bail request.

Vera asked prosecutors if they ever decline to request bail. "If someone's violating an order of protection," said one ADA, "and they're just trying to speak to their kids and everything else is good, I will be more hesitant to argue for jail." Other possible scenarios included uncooperative complainants or evidence suggesting self-defense. These were exceptions to the rule, however—exceptional cases in which the ADA would consider release "even though it's qualifying."

Prosecutors based their bail recommendations on charge severity and history of criminal legal system contact—without explicit connections to flight risk; they are also motivated by concerns over perceived dangerousness, according to court actors

Vera's previous court observations found that, in 2020, prosecutors' most common justifications for bail or remand were charge severity and criminal history.[25] During court observations in 2021 and 2022, prosecutors gave an explicit reason for requesting bail in 77 percent of bail-eligible cases, and charge severity remained by far the most common—followed by history of criminal-legal contact, which could include previous convictions, incarcerations, or failures to appear in court. ADAs often rattled off these histories as simple counts without any context or detail, such as when one ADA said the accused person had "six misdemeanors [convictions] and two failures to appear."

Regarding charge severity, prosecutors sometimes invoked it in brief and formulaic ways, as when one ADA requested $35,000 bail for a man charged with felony gun possession "given the seriousness of the charge and the nature of the allegations." Others invoked charge severity in graphic detail by paraphrasing or reading aloud case documents, usually written by the DA's office or police, that included allegations of physical violence. This was especially common in cases involving a complainant. For example, one ADA told the judge that the accused person had "broke[n] the complainant's phone by throwing it to the ground and then hitting her in the face with it and choking her. Three FTAs [failures to appear]. Bail $12,000 A, B, or E."

Although New York's bail law includes both current charges and alleged serious harm as statutory factors for courts to consider to ensure a person's return to court, prosecutors who referenced these points during court observations rarely explained *why* charge severity mattered or how it related to the accused person's likelihood of appearing for court. Interviews with court actors suggest two explanations. On the one hand, prosecutors may have been implying that the person was a flight risk based on their possible sentence if found guilty. During interviews, prosecutors referred to this as "sentence exposure." As one explained:

> Our argument is that, based on the severity of that sentence, because [three and a half years in prison] is a severe sentence for [someone with no criminal history], that could contribute to the defendant's risk of flight. He would try to go to Canada or another state where extradition is gonna be more of a pull.

On the other hand, prosecutors may have been invoking charge severity to suggest that a person was inherently dangerous. This was the interpretation shared by defense attorneys during interviews. "I think they have really seized upon this rhetoric surrounding dangerousness to make asking for exorbitant amounts of bail more palatable," explained one. "The DAs know they can't [legally] make the dangerousness argument, but they do and the judges don't really put a kibosh on that," said another. However, given that prosecutors who invoked charge severity, be it in a cursory or graphic way, rarely explained explicitly *why* it mattered for the purposes of ensuring return to court, it is difficult to confirm when and how either reasoning—sentence exposure or perceived dangerousness—was motivating prosecutors.

Perceived dangerousness in pretrial decisions has been a perennial source of controversy in New York. While New York's bail law allows courts to consider whether someone "is alleged to have caused serious harm," courts are only meant to consider this as it relates to their likelihood of returning to court.[26] For their part, prosecutors Vera interviewed acknowledged that consideration of perceived dangerousness is prohibited at arraignment. Despite this, they nonetheless saw addressing perceived dangerousness and managing perceived safety risks as central to their function and mission as prosecutors. For example, one ADA stated repeatedly that "return to court is the goal of bail as prescribed by law in New York." In the same breath, however, he bemoaned that other states consider "community safety, but we [New York State] don't have that." He continued, saying "risk to life and safety is what we're really interested in." This same ADA also described multiple cases in which he explicitly requested bail based on the degree of alleged violence. Another ADA was blunter, saying "we can't look at dangerousness, but from a prosecutor's perspective you're looking at that." Statements such as these suggest that prosecutors see the statutory purpose of bail and their own priorities and criminal-legal function as contradictory. For some, these statements reflected personal philosophy, such as one ADA's belief that criminal-legal responses are necessary to combat gender-based violence. For others, they reflected policy, as in Erie County where participants said they were trained to request bail for anyone charged with possessing a loaded firearm.

Prosecutors requested higher bail amounts for more serious charges, albeit with a wide range

When asked about *how much* bail to request and why, one prosecutor responded thus:

> The [bail] amounts? That's a whole other thing. It's like The Price Is Right. What's the dollar amount? And you have to make these decisions so quickly. In those morning court sessions, doors open, people file in, someone walks over, drops some files, people fill up those chairs, you're looking around, the judge is calling cases and you're flipping through this stuff. $50,000 [bail], order of protection, that kind of stuff. It is a tough process.

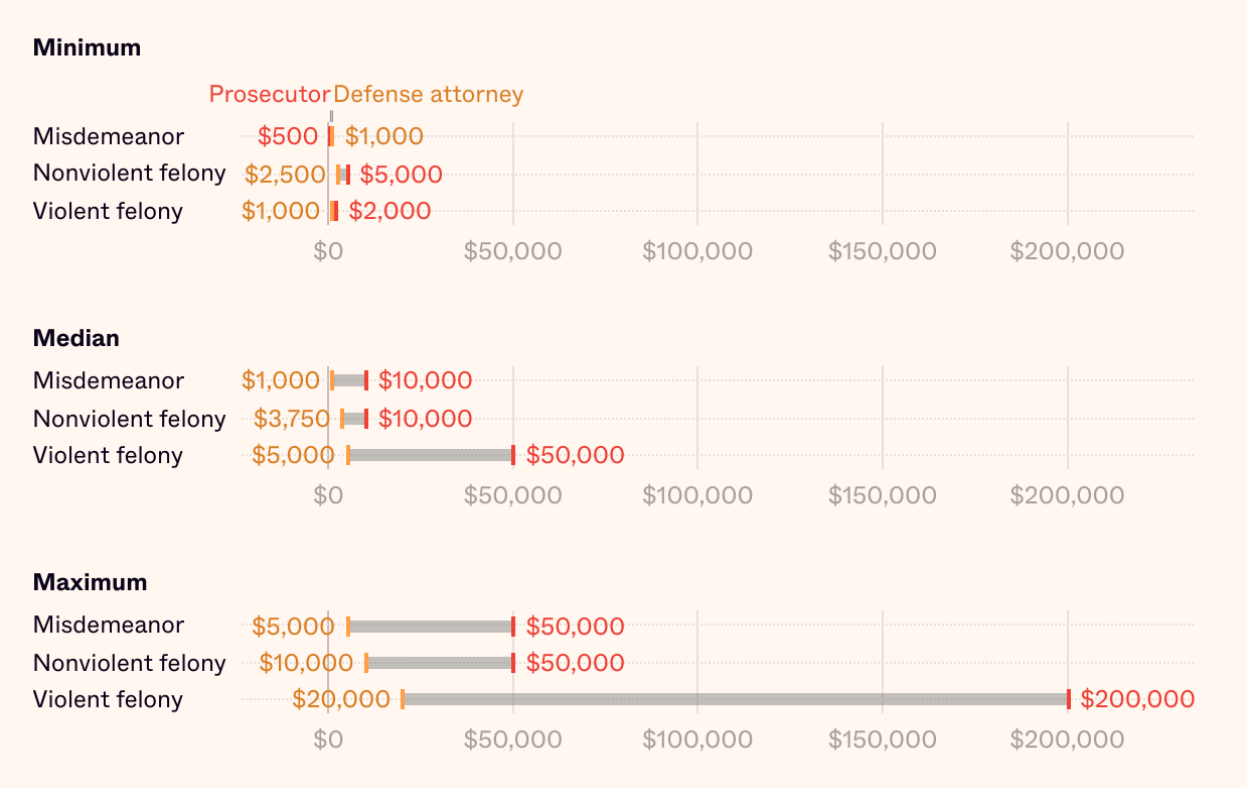
During court observation, ADAs requested judges set bail amounts of anywhere from $500 to $200,000, with a median bail request of $20,000. When requesting bail, ADAs almost always specified the bail amount (94 percent) and bail types (90 percent) they wanted judges to set, usually three forms (69 percent): cash, insurance company bond, and partially secured bond. Prosecutors usually requested the same bail amount for each bail type (80 percent). In those cases where ADAs requested different amounts for different bail types, however, they always requested that judges set the partially secured bond higher than cash bail. Indeed, in almost 70 percent of such cases, the ADA requested judges set the partially secured bond at least two times higher than cash bail. This suggests that prosecutors might be contributing to judges' practice of setting partially secured bonds higher—sometimes 10 times higher—than cash bail, thus undermining the goal of bail reform to make bail more affordable.

In general, prosecutors requested higher bail amounts for more serious charges. The median bail amount requested by ADAs for people charged with a misdemeanor or nonviolent felony was $10,000, compared to $50,000 for people charged with a violent felony (see Figure 2.7). At the same time, ADAs requested a wide range of bail amounts even among cases with comparable

charge severities. For example, Vera observed ADAs request as low as $500 and as high as $50,000 for people charged with misdemeanors. This suggests that ADAs consider factors other than charge severity, such as the person's history of criminal-legal contact or the quality of evidence.

Figure 2.7

Prosecutor vs defense cash bail request by charge severity



Source: Vera court observations, 2021-2022

During interviews, prosecutors agreed that they primarily base their bail amount requests on charge severity. For example, one ADA said her "go-to number" for domestic violence (DV) and weapons charges was $50,000. Moreover, prosecutors explained that, in at least some cases, they request bail amounts specifically because they expect the accused person will not be able to afford it and they want them to be incarcerated pretrial. For example, one ADA said someone with a DV charge "should be held so he's removed from the domestic violence situation." Another ADA put it this way, "The message is sent to the defendant. You're going to sit in [jail]. We're going to hold the line on bail. If we get a chance to slap it on you, we're going to."

2d. Defense arguments against bail

Findings from court observations and court actor interviews

Defense requests varied based on the anticipated decision of the judge

During court observations, when someone had a bail-ineligible charge, defense attorneys tended to defer to the judge regarding release. When a case was bail-eligible, however, they often asked the

judge to consider multiple options—including ROR; RUS; setting bail that was "reasonable," "low," or "lower" than the amount requested by the prosecution; or setting a specific bail amount—seemingly based on how lenient or punitive they expected the judge to be. Looking at all bail-eligible-case arraignments Vera observed in 2021 and 2022, the defense attorney's least restrictive request was ROR in 36 percent of cases, "reasonable" or "low" bail in 19 percent, and RUS in 13 percent. Even when requesting ROR or RUS, however, defense attorneys often addressed the possibility of bail. Indeed, defense attorneys included a specific bail amount in their request in 40 percent of bail-eligible cases and 46 percent of bail-set cases. These observations show no clear pattern, however, to suggest why defense attorneys argued for "reasonable" or "lower" bail versus suggesting a specific bail amount.

Strikingly, defense attorneys made *no* request and deferred to the court in more than a fifth of bail-eligible cases (52 out of 226 observed). In half of these cases, the accused person was remanded—usually for administrative reasons like an out-of-county warrant—suggesting that attorneys knew the judge was required or likely to remand their client. Still, it is concerning that, out of the 52 bail-eligible cases in which defense attorneys made no request or argument, judges set bail on 16 people and ordered a further six to report to pretrial supervision with no input or pushback from the defense. This merits further study.

County spotlight: Judges in Broome County frequently remand people without bail. Why do defense attorneys rarely push back?

During court observations at Binghamton City Court in Broome County, Vera researchers noticed that city court judges there were remanding people far more often than their peers in other counties.[27] Indeed, according to DCJS pretrial data, in 2022, judges in Broome County remanded 41 percent of bail-eligible cases—more than triple the overall rate of 13 percent for all non-NYC counties. At the same time, Vera observed that defense attorneys in Broome County were far more likely than their peers in other counties to defer to the judge when a case was bail-eligible—49 percent in Broome County (29 out of 59 cases) compared to 15 percent in Erie County (27 of 184 cases)—meaning that, in many of these cases, city court judges were remanding people without any opposition. Why would defense attorneys allow judges to remand so many of their clients without contest?

Interviews with Broome County court actors provide some insight into defense attorneys' rationale. When asked why they so rarely oppose city court judges remanding their clients, participants explained that they see this as a strategic choice in their clients' best interests. Rather than have city court judges set bail at an amount they expect will be exorbitant and unaffordable, defense attorneys prefer to have city court judges remand their client and then appeal to county court judges for release. "Strategically, you may be better off just getting the remand," explained one defender, "because then you can go to county court if you think you can get them to do [supervised release]." By contrast, if the city court judge were to set bail, participants worried, then the county court judge would be less likely to reduce bail or order release. "Let's say bail is $100 and your client doesn't have the money to pay that," explained one attorney, "if you want [RUS], you can go back to the original judge; but if you go to county court, they are going to turn you away because they do not think $100 is unreasonable." In fact, every defense attorney Vera interviewed shared this perception that county court judges are more likely than their peers at city court to consider a relatively low bail

(for example, $1,000 cash bail) to be reasonable, no matter how unaffordable it might be, because they are used to seeing high-level cases with bail amounts in the tens of thousands. For defense attorneys in Broome County, securing the best outcome for their clients has thus become a complicated calculus. While city court judges seem likely to set an unaffordable bail at arraignment, county court judges seem unlikely to consider ability to pay once bail has been set, even after someone has been in jail for days.

It is ultimately unclear whether this practice—letting one judge remand someone so that another judge might release them—actually results in fewer people sitting in Broome County's jail. It is also unclear how common this practice is outside Broome County. During interviews, attorneys from Albany, Erie, Tompkins, and Ulster Counties said they regularly appeal to county court judges to revise or overturn lower court judges' bail decisions, but almost always after indictment or once a plea deal seems likely. Only in Broome County was this practice so commonly observed *at arraignment* and so top of mind during interviews. Further investigation is necessary to determine the scale of this practice, whether it is successful in securing pretrial release for more clients, and whether it has any impact on pretrial incarceration.

When arguing for release, defense attorneys emphasized people's limited conviction and bench warrant records as mitigating factors

Defense attorneys provided justification for their requests in 69 percent of bail-eligible cases—less often than prosecutors (79 percent). Defense attorneys' reasoning, however, differed substantially. Unlike prosecutors, defense attorneys often referenced their clients' records to highlight mitigating factors. They pointed to the rarity (or lack) of convictions in a person's record, the time elapsed since any convictions, the low-level charge severity of any convictions, or the lack of connection between any convictions and the current charges.[28] For example, Vera observed one defense attorney make the following argument in a bail-eligible case:

> [The accused] does not have any prior criminal history. I understand it is a serious charge, but he is a delivery worker. He is in college. I'm not sure if release on his own recognizance is an option, but like I mentioned, the pretrial release program will oversee people out of the area.

Defense attorneys also addressed previous bench warrants, if any existed, often highlighting how relatively rare or old they were. For example, one public defender told the judge:

> [The accused] is a lifelong resident of Buffalo… [He has] FTAs [failures to appear] from 2014 and 2016 but since then [he's been] in contact with the court system…If [the court is] inclined to issue bail [I request the] amount of $1,000.

Participants echoed these same arguments during interviews. Describing a recent client of theirs, one defense attorney explained that "his last failure to appear was in 2004. He's got six failures to appear, but none of them have been within the last 18 years. People change."

In arguments about flight risk, defense attorneys emphasized pull factors, prosecutors emphasized push factors

Court actor arguments at arraignment also highlighted a key difference in how prosecutors and defense attorneys talk about a person's flight risk. Defense attorneys often raised people's employment status and ties to the local area when requesting release—factors rarely addressed by prosecutors. Of bail-eligible cases in which the defense provided their reasoning for requesting pretrial release (n = 122), lack of previous convictions and local ties were the most common reasons (36 percent each), followed by lack of court non-appearance history and employment status (30 percent each). These arguments were sometimes brief ("He works five days a week") and sometimes emphasized the collateral consequences that setting bail would have for people and their households ("He is fully employed and has a child on the way").

In a few cases, defense attorneys cited unemployment as a reason for release because, as one defender told the judge, the accused was "unemployed and homeless, so any amount of bail would be well outside her ability [to pay]." Other economic factors why bail or RUS were inappropriate, according to defenders, included reliance on unemployment benefits (and thus a lack of resources to abscond), housing instability, and lack of a cell phone.

Beyond employment, defense attorneys raised a range of local ties, including long-term residency, community involvement, substance use treatment, military service, education, parenting, eldercare, and other personal relationships. For example, one attorney told the judge: "He's in a drug program he has to attend every Wednesday. [He has] long ties to the community; lived here all his life…" In another case, the defense explained: "The purpose of court is to make sure she returns. She is a lifelong resident of Buffalo, has lived in the same place for years, children she has full custody of."

These examples highlight a defining difference between how prosecutors and defense attorneys make arguments about flight risk. Whereas prosecutors focused exclusively on push factors like sentence exposure that disincentivize return to court, defense attorneys emphasized pull factors like employment or local ties that incentivize return to court. Moreover, prosecutors rarely tied their arguments explicitly to flight risk, whereas defense attorneys were much more likely to frame their argument in those explicit terms.

Notably, however, although defense attorneys said during interviews that employment and local ties were important, they agreed that judges are usually unswayed by these factors alone. According to one attorney, local ties matter, but never in the accused person's favor. "It's not helpful to be from Albany and have lived here for your whole life, but it's definitely detrimental to you if you're not from Albany." Many judges reportedly will not consider employment or local ties without documentation, which can be difficult to procure at arraignment. Ultimately, although individual judges may release a person because they are employed or in substance use treatment, in general, charge severity and conviction history remain paramount. "If somebody has six felony convictions but says they're working," said one participant, "[the judge is] going to want them remanded." "Even though community ties are technically something the judge is supposed to look at," explained another, "I'll usually make some sort of an argument…if they don't have much of a [criminal] record…I'll still cite all of the old reasons because I feel like those are things that judges hear and they're familiar with."

Defense attorneys' pretrial release arguments are shaped by courtroom dynamics—collegiality, reputation, and credibility

Court culture and interpersonal dynamics in the courtroom—particularly collegiality, professional reputation, and perceived credibility—can also significantly influence defense arguments, according to court actors. As one defense attorney elaborated:

> I'm [in the town and village courts] a lot and I know most of the staff and judges. Navigating their apparent emotions is just like any other relationship where you're dealing with the same people, with coworkers… I guess familiarity allows us to develop better arguments for that judge, or we try to.

Similarly, when asked why defense attorneys sometimes defer to judges, even in bail-eligible cases, one defense attorney explained:

> There are definitely attorneys who walk into the courtroom and everybody groans…Then, I think judges are less willing to hear you when you actually have a very legitimate argument because they're assuming you're just arguing all the time. If it's something that is honestly very important, they're just like, "Well, who cares? It's the same argument every single time."

Interestingly, one defender said she is less constrained by collegiality and reputation after the passage of bail reform than she was before. "I had to try to keep a reputation of being reasonable with them in order to get anywhere for any of my clients…That was a thing back then [before bail reform] whereas I feel like now either I don't care or I feel like I might get somewhere."

2e. Ability to pay

Findings from court observations and court actor interviews

Court actors, mostly defense attorneys, raised people's ability to pay in roughly a third of bail-eligible cases and just half of bail-set cases

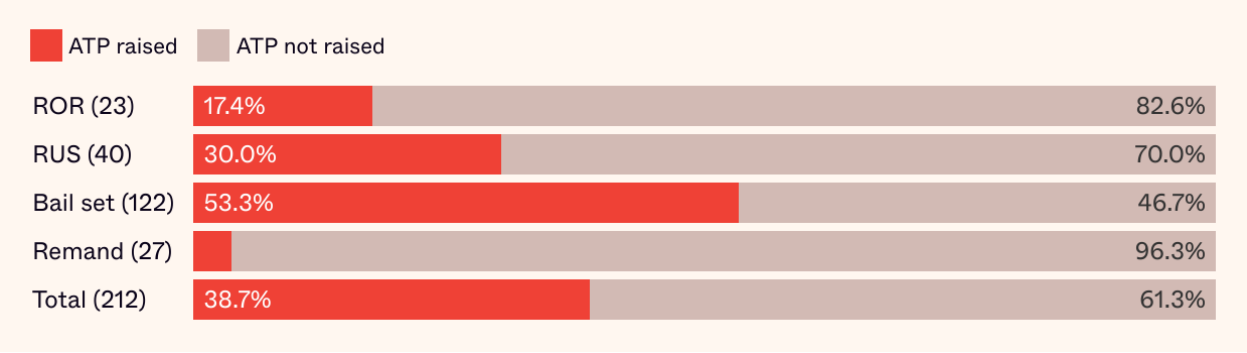
In 2020, Vera found that, despite bail reform's mandate that judges setting bail must consider a person's "ability to pay without posing undue hardship," explicit discussion about ability to pay (ATP) was absent from more than 60 percent of bail-set cases.[29] In 2021 and 2022, courts still fell far short of universal compliance.[30] During court observations in 2021 and 2022, court actors—almost always the defense—raised ATP in more than half of bail-set cases (see Figure 2.8). It is likely that in many of these cases the defense did not raise ATP because release already seemed likely, because the person was not indigent, or because they assumed the judge would be unswayed. Regardless, in nearly half of bail-set cases the defense did not raise ATP, missing an opportunity to tip the scales toward release or a more affordable bail. Finally, looking at all bail-eligible cases, court actors raised ATP in 39 percent. That is to say, in more than two-thirds of cases in which the defense attorney could have cited a person's financial circumstances to argue for release, they did not.

Court actors concurred that defense attorneys are usually the ones to raise ATP. Indeed, one prosecutor said it was the defense attorney's "role." Moreover, defense attorneys agreed that they usually raise ATP before the judge makes a release decision, rather than waiting until judges set bail to argue over what bail amount would be affordable. Vera only observed the defense attorney raise ATP *after* the judge set bail in a few (nine) cases. For example, after one judge set bail at $2,000, the defense attorney asked their client "are you going to be able to post this?" Waiting until the judge

has already set bail to raise ATP, however, seems to be unpopular. As one defense attorney explained, "I don't really like getting to the point where I'm arguing dollars because I know most of the people don't have any." Instead, defense attorneys Vera observed usually combined their arguments for release with an appeal to the judge that, should they set bail, they set it at an affordable amount.

Figure 2.8

Whether ability to pay (ATP) was raised in court for bail-eligible cases, by release decision



Source: Vera Court Observation, 2021-2022

Importantly, the bail law does not give judges any guidance about how to determine or measure ATP. Defense attorneys raised ATP in two ways during court observation.

1. As one tactic, defenders emphasized their client's indigency, arguing that it made difficult or impossible for them to pay bail.
2. Alternatively, defenders asked that, should judges set bail, they set it at or below a specific amount. For example, one defender told the judge "He can put up bail in $1,000" before the judge set $50,000.

(See Appendix II. Methodology section for an explanation of how Vera measured ATP in this study.)

As noted, Vera considered any case in which defense attorneys asked the judge to consider a specific bail amount as an instance of raising ATP. Interviews with defense attorneys indicate, however, that such requests and the bail amounts defense attorneys suggest may have more to do with what defense attorneys believe judges are willing to do (based on past experiences) than with what the accused person can actually afford. For example, one public defender said that, if she knows the judge wants to set bail and will not go lower, she sometimes requests $1,000 bail, and then appeals to a superior court judge for release. "You could set $1,000 bail. Our clients aren't going to make that anyway. You can set $1,000 or $1,000,000. It's basically the same. But you're going to get in front of a new judge and figure it out then." During court observations, Vera only observed two attorneys request a bail amount below $1,000. These findings suggest that defense attorneys believe judges set bail based on what they consider appropriate (given the charge severity, conviction history, or other factors that they think are important) or what is conventional in a given court, rather than actual affordability. In turn, defense attorneys' requests for bail may not be simple reflections of their client's ability to pay but rather strategic decisions aimed at securing the "least bad" outcome.

Finally, Vera observed a small number of cases (five) in which judges spoke explicitly about bail affordability. For example, after one defense attorney requested "$1,000 bail or RUS," the judge set cash bail at $1,000 and partially secured bond at $1,500. The judge explained his decision, saying

"my guess is his family can post bail." In another case, the judge set bail and then asked the defense, "I don't know if [he] could raise the bail?" These examples suggest that some judges may be considering bail affordability even when verbal arguments about a person's financial circumstances are absent.

In defining "ability to pay," prosecutors emphasized bail amount relative to charge severity, defense attorneys emphasized affordability

During interviews, ADAs and defenders disagreed on how often ATP comes up at arraignment. Defense attorneys said it was rare. Prosecutors, however, said "it comes up a lot." Upon closer examination, this discrepancy reflects how each group differently defines and prioritizes ability to pay.

Prosecutors discussed ATP in terms of how judges set bail relative to what they requested, whether that bail was "high" or "low" relative to the charge severity, and their concerns about how "low bail" might impact public safety. As one ADA said, "The second part to a bail argument is the defense attorney trying to ask for a reduction in bail. That's a very tricky argument because you can't say, 'Let's set high bail because this person is dangerous.'" Bail affordability was not a priority for prosecutors. As one explained, "We don't know what the defendant can afford. I don't think that would affect what our offices would ask for anyways."

By contrast, defense attorneys discussed ATP in terms of whether judges meaningfully considered a person's financial circumstances and whether bail was actually affordable for the accused person. Several recalled cases in which the judge had set bail below the ADA's request, had asked if the accused person worked or had children, or lowered bail after the defense raised ATP. For defense attorneys, however, just asking about a person's financial situation or even lowering bail did not mean judges were truly considering ability to pay or setting affordable bail amounts. "I don't think they really [consider ATP]," said one defender. "Most of the people I do arraignments for make $30,000 a year. But a judge will set $20,000 cash, $40,000 bond on a lower-level felony… and they're not going to be able to [post bail]. It's just not going to happen." Another participant put it bluntly. "It's just fully ignored in every way. It's a beautiful legislative addition, but in practice judges aren't observing or listening."

There were some exceptions. According to participants, some judges will consider ATP if the accused person is employed or in treatment for substance use, and some judges genuinely want bail to be affordable. Several participants also cited the influence of bail reform. "They don't want to be reversed [by a superior court judge]," said one prosecutor. "They know they're under a microscope. They know that bail reform exists," said a defense attorney.

Judges often set bail amounts below what prosecutors requested but above what defense attorneys said was affordable

During court observation, judges often set bail amounts between prosecutors' and defense attorneys' requests. When the prosecution requested a specific bail amount and the judge set bail, it was usually below what the prosecutor had requested (67 percent); judges set bail equal to or higher than the ADA's request in 23 and 11 percent of cases, respectively. By comparison, when the defense included a specific bail amount in their request and the judge set bail, the judge often set bail above the defender's request (75 percent); judges set bail equal to or lower than the defense's requests in 17 and 8 percent of cases, respectively.[31]

During interviews, court actors confirmed this trend. "[Judges] usually split the difference," said one

defender. “They usually come down at least a little, probably not as far as we want them to.” Another defense attorney explained how he perceived judges’ calculus:

> Whereas before [bail reform] judges might have said, “$10,000 sounds right,” now they actually think about “Okay, what is an appropriate amount for this person?” They probably look at it and say…“I think it's $10,000, but I'm going to cut it in half. I'm going to give this guy a break and make it $5,000.” I don't think they take into account what resources somebody has to pay.

As this attorney suggests, court actors seem to disagree about what is an “appropriate” bail and whether an appropriate bail is necessarily an affordable bail.

Bail-posting rates and affordability

The relative absence of ATP discussion from arraignments likely impacts both how many people are able to post bail and how quickly they are able to do so. Bail-posting rates thus offer a useful additional data point in assessing how bail reform has impacted bail affordability.

According to DCJS pretrial data analyzed by Vera, in 44 percent of the 29,616 cases that had bail set in non-NYC counties in 2019, people were able to buy their freedom—34 percent within five days. In 2022, these figures fell to 29 percent and 18 percent (of 12,514 cases), respectively. Similarly, the median amount of time spent in jail before posting bail has increased from one day in 2019 to two days in 2022. In sum, bail remains unaffordable for most people following bail reform, suggesting that the lack of ATP consideration observed in this study is widespread.

Racial disparities in bail-posting have also shifted post-reform. In 2019, five-day bail-posting rates were similar for Black and white people charged with a misdemeanor or violent felony, and only slightly higher for Black people charged with a nonviolent felony (36 percent vs 33 percent). In 2022, the five-day bail-posting rate was similar for Black and white people charged with a misdemeanor (13 percent) or nonviolent felony (15 percent vs 16 percent), but higher for Black people charged with a violent felony (23 percent vs 18 percent). Latinx people had higher bail posting rates than other racial/ethnic groups regardless of charge severity. The reasons behind these differences remain unclear and merit further study.

3. Examining the Higher Bar for Revoking Pretrial Release

What we already know

A judge can revoke a person's pretrial release and set bail or remand if they miss court or if their supervised release case manager rules them to be noncompliant—even if their original charge is bail-ineligible. Bail reform included additional protections for system-involved people who miss court, including requiring judges to give them a 48-hour grace period before issuing a bench warrant and requiring courts to hold an evidentiary hearing to prove that they had "persistently and willfully failed to appear" before revoking release.[32] According to a DCJS report, slightly less than 20 percent of non-NYC cases arraigned in 2022 had a bench warrant issued within six months of arraignment.[33] However, little has been reported about what happens when a person is arrested and returned to court on a bench warrant or how judges and court actors are implementing bail reform's due process protections.[34]

Research findings

3a. Judges' decisions on return on warrant cases

Findings from court observations and court actor interviews

Judges often maintained pretrial release when a person missed court and was arrested on a bench warrant but had no new charges

When a person returns to court for a bench warrant—either voluntarily or under arrest—they have a "return on warrant" (ROW) hearing. During court observations, Vera witnessed a total of 51 ROW hearings.[35] The majority involved people who had missed court following arraignment, though a handful had missed their arraignment after receiving a desk appearance ticket (DAT). Roughly two-thirds had been arrested on a bench warrant solely for missing court (see Figure 3.1). The remainder had been arrested both for missing court and for a new charge as well. Whether judges maintained or altered a person's prior release status (for example, ROR, RUS, posted bail) depended largely on two factors: whether they had a new charge and whether their original charge was bail-eligible.

When a person had missed court but had no new charges, judges tended to maintain their release status. When a person had missed court *and* been arrested for a new charge, the opposite was true; judges altered the person's previous release status (for example, from ROR to RUS or bail) in more than half of these cases (see Figure 3.1). Bail eligibility seems to accentuate this trend; judges were especially likely to maintain a person's release status when they had no new charges *and* their original charge was bail-ineligible, doing so in 83 percent of such cases. For example, one such ROW hearing lasted less than a minute:

> *Judge: [Prosecutor], do you have anything?*
>
> *Prosecutor: No, nothing.*
>
> *Judge: If you're not in court when you're supposed to be, another bench warrant will be issued for your arrest. You're released on your own recognizance.*

Not every hearing was so quick, however. Vera observed one ROW hearing involving a woman who had been previously released under supervision where the judge, her attorney, and she spoke for

eight minutes about mailing addresses, whether or not she qualified for a public defender, and her other open cases. The judge ultimately continued her on RUS with no added conditions.

Figure 3.1.

Judges' decisions to maintain or alter person's release status in return on warrant (ROW) cases, by whether the person was rearrested on new charges

Source: Vera Court Observation, 2021-2022

During interviews, court actors agreed that most judges maintain people's release status if they miss court, especially if it is their first bench warrant and they are not rearrested for a new charge. As one defender told us, "People don't typically get locked up unless it's a pretty high-level offense or they're missing court and missing court and missing court. Even then, you're not getting locked up unless it's a super serious offense or you catch more charges." Important caveats, however, included "tougher judges" and judges who are "quicker to set bail on failures to appear" because they reportedly resent bail reform.

During court observations, most people whose release was maintained had been released ROR (see Appendix IV). Vera observed one case, however, in which the person was released on RUS and continued on RUS after missing multiple intake appointments with probation. According to interviews, this is common practice. As one pretrial supervision officer told Vera, judges tend to maintain people on RUS unless someone is "getting rearrested for new felonies or absolutely just skipping out and not having any contact with us whatsoever." Future studies should examine how prevalent this practice is. Also, research that explores why people miss court will help in the development of practical solutions to address court non-appearance.

3b. Judges' interpretation of "willful and persistent" failure to appear

Findings from court observations and court actor interviews

Judges may be applying the "willful and persistent failure to appear" standard with limited evidence in order to revoke pretrial release and set bail on people otherwise entitled to release

Under bail reform, judges can still set bail on people with a bail-ineligible charge if they "persistently and willfully failed to appear [for court] after notice of scheduled appearances."[36] Vera observed only four cases in which judges set bail on people with bail-ineligible charges by invoking this "willful and persistent" (W&P) carveout. Analysis of court actors' arguments about W&P provides unique insights into what may be an important loophole in bail reform's attempt to reduce the use of bail through charge-based bail eligibility—and how this might impact pretrial incarceration—that are not available from administrative data.

Vera observed three judges invoke W&P to set bail on four people previously released ROR or RUS whose original charges were bail-ineligible. Several characteristics of these cases suggest areas for future inquiry. First, each case involved misdemeanor charges with little relevance to public safety, including minor drug possession and a traffic violation. Second, none of the judges held a formal evidentiary hearing before setting bail to prove the accused person's absences were willful and persistent, as required by law.[37] Judges only raised W&P once they had already set bail. Concerningly, Vera did not observe any of the four defense attorneys dispute the judge's use of W&P to set bail or attempt to explain their client's absences.

Third, judges did not explicitly define "willful and persistent," and their inquiries about why people missed court suggest that they do not share a consistent definition. In two cases, the judge asked the accused person why they had missed court, presumably to help determine the person's willfulness. In two cases, they did not. In two cases, the accused person had missed three or four court dates. In two cases, there was no verbal discussion of how many appearances the person had missed and thus what constituted persistence.

Fourth, each accused person reported significant life hardships that likely contributed to their missed appearances. One man apologized for his absence, saying there had been "lots of deaths in the family." Another said she had been overwhelmed by her drug-related arrests in other counties—some of which caused her to miss court—and wanted help with her substance use. All four people were either charged with minor drug possession or said they were in active withdrawal. All four were homeless or unstably housed. Finally, each judge set bail between $500 and $1,000 without any arguments from court actors about ability to pay. Three people, however, told the judge they would be unable to afford the set bail amount.

During interviews, most court actors said prosecutors and judges invoke W&P sparingly. One attorney said judges often threaten to set bail using W&P as a "scared-straight tactic" to encourage return to court but rarely follow through. ADAs and judges reportedly prefer to set bail for charge-based reasons and to avoid the logistical nuisance of an evidentiary hearing if possible. This perception was not universal, however. One defender in Albany County said judges there were using W&P "to incarcerate lots of people on non-qualifying misdemeanor charges."

Judges emphasize "persistence" over "willfulness" without consensus on how to define these terms, according to court actors

There was little consensus or agreement among interview participants about the "willful and persistent" standard, how to define it, or what constitutes an evidentiary hearing. As one prosecutor told us, "This is like the wild west… my experience of willful and persistent is very uneven… case law is very uneven. It really depends on where you are." Judges seem especially uneven in whether and how they conduct evidentiary hearings. As one defender explained, judges in his county regularly issue bench warrants, hold ROW hearings before the defense has a chance to speak to their client or gather evidence, and set bail or remand the person as a matter of course. "Then we can revisit it," he continued, "once [we] get the opportunity to review the evidence and talk to [our] client. They're having half of the hearing and then having the other half later…Basically, having a hearing you can't prepare for… A lot of other cases, they're just not having the hearings." Defense attorneys from every county echoed this complaint. When judges do hold W&P hearings, participants said they are often scheduled abruptly with little time for gathering evidence or talking with clients, last a few minutes or even seconds, and consist largely of tallying the accused person's missed court appearances with little discussion of why.

Indeed, according to interview participants, most judges emphasize persistence (the number of missed appearances) and overlook willfulness—or they simply assume that persistence implies willfulness. As one defender put it, "Most of the time, if they had missed two or more court dates, they're going to make a judicial determination that they're willfully, persistently not appearing." Other defenders echoed this perception. "I don't think willful is actually a factor [for the judges]," explained one attorney. "I think they just say, 'If you weren't there, it's willful.'" During Vera's court observations, each of the three judges who invoked W&P to set bail emphasized persistent non-appearance. Regarding willfulness, however, the judges were inconsistent and unclear. In one case, the judge said the accused person had been "unresponsive" to court notices but did not ask them or their lawyer why. In another, the accused person said she had missed court due to substance use issues and poor mental health, but the judge made no further inquiry. In the last two cases, the judges did not discuss willfulness at all.

Judges view two to four missed appearances as "persistent" failure to appear, according to court actors

How many missed appearances is too many? During interviews, most participants agreed that three was the norm, though some had seen judges set bail after just two. As one defender put it:

> It's like a three-strikes rule. As a rule of thumb…what judges will often do is, you get a free pass on your first missed appearance. The second one they'll say the next appearance is going to be appear-or-warrant. They'll put it on the record that if the client does not appear at the next one that it's an appear-or-warrant date.

Prosecutors tended to endorse this practice. "Most courts view three FTAs [failures to appear] as willful and persistent," said one prosecutor, "I usually have the same mindset." Defense attorneys, however, tended to disagree and wished judges would consider context more. As one defender put it:

> I think it starts with why the person wasn't there. Some [court] notices are still going to an old address. So, obviously I don't think that should be a willful failure to appear because the person doesn't know about it. I think it's also dependent upon the court… How often does your court meet? Some courts meet once a month. How much notice is given between the missed court date and the next court date? I think if the client is at least making an effort, you know, even if he's making every other court appearance or whatever the case may be, that's fine.

Conclusion

Jurisdictions across the United States are attempting to reckon with the injustices of money bail—a wealth-based system of pretrial detention that has become the front door to mass incarceration. Nationwide, the majority of people in jail are held pretrial simply because they are too poor to afford bail.[38] States and municipalities have experimented with a variety of pretrial reforms: New Jersey (2017) and Illinois (2021) passed legislation eliminating money bail altogether; Harris County, Texas (2019), Atlanta, Georgia (2018), and Colorado (2019) did the same for misdemeanor cases, city ordinance violations, or both; prosecutors from San Francisco to Philadelphia have pledged not to request cash bail; and, although later repealed by ballot initiative, the California Money Bail Act (2017) sought to replace money bail with risk assessment-based detention.[39]

In New York State, new bail legislation created a list of charges in which judges are no longer allowed to set bail. Since its passage in April 2019, the state legislature has amended bail reform three times—in April 2020, April 2022, and May 2023—rolling back the original reform, creating additional

carveouts, and limiting the law's scope. As of June 2022, more than three years after the original reform passed, New York's pretrial population remained lower than pre-reform levels; from April 2019 to June 2022, pretrial incarceration in New York State fell by 20 percent.[40] The pretrial population has steadily increased since then, however, and in July 2024, the average daily pretrial population across New York stood at around 12,000 people.[41]

Vera's court observations and interviews in non-NYC courts demonstrate how this new two-tiered pretrial system based largely on bail eligibility has been implemented in daily courtroom practices. For bail-ineligible cases, with detention no longer possible, defense attorneys and prosecutors appear to have shortened their pretrial arguments. Prosecutors rarely pushed for more restrictive release decisions, such as supervised release, and instead deferred to judges, who often released the accused person without any conditions. For bail-eligible cases, on the other hand, Vera observed traditional adversarial arguments from two parties—prosecutors requesting bail or remand and defense attorneys requesting release. Even here, arguments rarely included any clear attempts to determine the least restrictive means of ensuring that someone would return to court or to meaningfully assess the affordability of bail amounts, two key components of the bail reform legislation.

Prosecutors and judges relied on people's history of criminal-legal system contact (for example, conviction and incarceration) and charge severity as grounds for setting bail. These factors can easily be construed to imply a person is inherently dangerous. Perceived dangerousness thus continues to be the elephant in the courtroom. Despite being legally inadmissible and a violation of New Yorkers' due process rights, court actors agreed that perceived dangerousness motivates both prosecutors and judges.

This mismatch between what is legally allowed and what court actors actually consider raises questions about the limits of legislative change and due process in the face of court actor discretion and local culture. Can the current court culture be changed? What legal, institutional, or cultural changes could encourage or enforce a truer focus on flight risk and the barriers people face in appearing for court? Could better implementation of the existing legislation improve these conditions, or are other reforms necessary? These questions merit further discussion among practitioners, policymakers, and researchers. Providing judges with clear guidance on pretrial decision-making and incentivizing judges to make their reasoning explicit on the record, however, could be two first steps in changing courtroom cultures.

Beyond classifying certain charges as bail-ineligible, how else might New York further reduce the use of wealth-based pretrial detention? This study illustrates how judges setting bail have continued to omit or overlook people's ability to pay; it also shows how defense attorneys have a vital role to play in ensuring people's financial situation is taken seriously. While prosecutors requesting bail almost always included specific bail amounts, defense attorneys adopted different strategies based on how they expected judges to respond. Whether such expectations are accurate, however, merits further research. For now, discussion with practitioners is needed to determine how best to ensure a person's ability to pay is raised in every case where a judge considers setting bail, and whether formalizing the ability-to-pay process could be one workable solution. Without action, New York will continue to have a wealth-based system of pretrial detention, albeit a smaller one than in 2019, that criminalizes poverty and prevents more meaningful decarceration.

Bail reform has had uneven impacts on New Yorkers depending on their race and ethnicity. Although bail reform reduced the overall number of Black and Latinx New Yorkers held on bail, the benefits of reduced pretrial detention have been even greater for white people.[42] Vera's administrative data analysis in this report suggests the reasons for this discrepancy are nuanced and complex. Racial

disparities in bail-setting rates were less noticeable when looked at by charge severity than when considered in total, but remained, particularly for misdemeanor and violent felony cases. Racial disparities in the bail amounts judges set were less evident, except for misdemeanor cases in which Black and Latinx people faced much higher bail amounts than white people. These disparities may partially explain why Black and Latinx people in non-NYC counties (as well as in New York City) continue to be incarcerated in jail at much higher rates and for longer periods of time than white people.[43]

This study was limited in that court observations were not sufficiently numerous to meaningfully disaggregate racial factors from other potentially confounding case-level factors, like conviction history; court-level factors; and local context. Further research is needed to understand why Black and Latinx people have not benefitted from bail reform to the same degree as white people. Moreover, policymakers should integrate racial equity analyses into the policymaking process and adopt anti-racist policies to ensure that future reforms chip away not just at mass incarceration but specifically at its racist mechanisms. These policies may include targeting statutory factors (like deemphasizing conviction histories in pretrial arguments) known to disfavor communities of color, or it may include targeting upstream policies (overpolicing of Black and Latinx communities) that affect who winds up in court in the first place.[44]

The current study was also limited in that it missed the voices of two key groups—judges and system-impacted people. Future studies are necessary to understand why, as this research showed, judges do not always provide rationale for their decisions, even when they choose to set bail. Research should similarly ask: how do judges conceptualize and weigh factors like flight risk, perceived dangerousness, and a person's ability to pay when making pretrial release decisions and setting bail amounts? Answering these questions is critical if policymakers and advocates want to ensure bail reform delivers on its promise.

Research is also needed that considers the experiences and perspectives of system-impacted people. Policy solutions that increase the rate at which people return to court can be best formulated by understanding the barriers people face and the resources the state might offer them—be that through their supervised release case manager or via other community supports. In particular, non-NYC counties have rapidly expanded the use of supervised release since bail reform passed, with responsibility for this supervision largely being entrusted to probation departments. How have these agencies, designed for law enforcement, adapted to working with people not convicted of a crime, and how are the people placed under supervision fairing? Policymakers and practitioners seeking to improve the pretrial criminal-legal system must have the input of those they are hoping to help: system-impacted New Yorkers.

It took years of advocacy and struggle to pass bail reform in New York. Now, several years after its passage, it is clear that more work remains to fulfill its promise. While this work may be legislative in part, much of it will need to take place in the courtroom—indeed, in the thousands of courtrooms across the state. As this report has illustrated, the ultimate success of bail reform is not solely dependent on the strength of the legislation: it is implemented by human actors—prosecutors, pretrial officers, defense attorneys, and judges—whose motivations and behaviors matter. As we fight to further reduce pretrial detention and create a safer and more just New York, we need to consider not just the laws we pass but also how those laws are put into practice.

Appendix I. Methodology for DCJS and OCA Data Analysis

Data collection

Vera researchers processed and aggregated yearly data on non-New York City (non-NYC) pretrial populations from two datasets available on New York's Unified Courts System website.[45] Town and village court arraignments are excluded from both datasets. The first dataset, known as the Division of Criminal Justice Statistics (DCJS) Supplemental Pretrial Release Data File, provides details on arraignments involving people aged 18 and older arrested on charges requiring fingerprints between January 1, 2019, and December 31, 2022, in New York State. Non-NYC arraignments comprised 39.8 percent of the total arraignments (301,437 out of 758,243). The second dataset, referred to as the Office of Court Administration (OCA) dataset or statutorily required data file, encompasses arraignments at the docket level from January 1, 2020, to June 30, 2023. Non-NYC arraignments constituted 49.0 percent of all state arraignments (436,988 out of 891,342).

Study sample

Given Vera's focus on court practices in non-NYC counties, Vera used a subsample of the data that includes only records of people who were arraigned in those counties.

Analysis

Because the two datasets differ in terms of date range and types of available information, researchers analyzed either the OCA data or the DCJS data depending on the research question and data available. Throughout the report, Vera indicates which dataset was used to arrive at each research finding. Researchers used the DCJS supplemental pretrial data for any analyses that compared measures of outcomes pre- and post- bail reform and for analyses relating to the type of bail a person posted. Information about bail amounts for bail type other than cash was only available from the OCA data. Researchers used the DCJS supplemental data for the comparison of cash bail amounts pre- and post-bail reform. For the analysis of types of bail set, researchers used the OCA data. When analyzing bail-set cases, Vera excluded cases with bail amounts of $100 or less (18 percent or 11,301 of all bail-set arraignments from 2019 to 2022); Vera considered these cases to have administrative holds and to have been remanded with nominal bail.

Throughout this report, the term "bail eligibility" refers to a case's eligibility for bail based on the top charge. Vera determined the bail eligibility of each case by referencing penal law charge codes from 2022. In cases where bail eligibility was dependent on charge subsection, Vera categorized them as ineligible by default in the absence of subsection. Specific charges—including assault in the third degree and arson in the third degree—can be bail-eligible if charged as a hate crime. Because so few of these charges were prosecuted as hate crimes, Vera considered them as ineligible by default.

There are several non-charge-based circumstances that can make a case bail-eligible that were not discernible in the data. For example, a charge is bail-eligible if the accused person is charged with a felony and was on probation or parole at the time of arrest. Also, a person charged with an offense alleging "harm to an identifiable person or property" is eligible for bail if the person had a pending case meeting the same criteria ("harm plus harm" provision, CPL 530.40 4(t)). As a result, it can be

presumed in the current analysis that cases with bail-ineligible charges that nevertheless received bail include at least some cases that were eligible for bail for a non-charge-based reason. The current analysis thus underestimates the number of cases that are eligible for bail.

Vera used the race and ethnicity variables found in both administrative datasets to create four categories: non-Latinx Black, non-Latinx white, Latinx, and Other. "Other" included all other reported races, including people who were originally reported as Asian or Native American as well as those whose race or ethnicity was recorded as "other" or unknown. It is worth noting that the agencies responsible for the datasets do not provide details on how they determine a person's race or ethnicity. Lack of transparency in data collection for race and ethnicity, particularly for Latinx people, can limit our understanding of racial disparities in the criminal legal system that stem from specific policies or disparate treatment by system actors.

The datasets report a total of 12 non-monetary condition types for both lower court and upper court arraignments. For analysis, researchers considered a condition as being set if it was set at either lower court or upper court. Vera researchers combined several conditions into fewer groups (see Figure 4.1).

Figure 4.1.

Non-monetary conditions as categorized by New York's DCJS (left) and as grouped by Vera for analysis (right)

Original condition in the data	New grouping of condition for analysis
Electronic monitoring	Electronic monitoring
Travel restrictions	Travel restrictions
Passport surrender	
Firearm restrictions: No firearms or weapons	Firearm restrictions
Diligent efforts to maintain employment	Maintain employment, school, or housing
Diligent efforts to maintain housing	
Diligent efforts to maintain school or educational programming	
Placement into mandatory programming	Pretrial programming
Removal to hospital pursuant to 9.43 of mental health law	Hospitalization
Obey order of protection issues by other jurisdictions	Contact restrictions
Obey court conditions from family offense	
Other conditions	Other conditions

Source: Division of Criminal Justice Services Supplemental Pretrial Data

Appendix II. Methodology for Virtual and In-Person Court Observation Analysis

Data collection

This report draws on observations of court hearings held in 2021 and 2022. In 2021, changes to court operations implemented in response to the COVID-19 pandemic meant that court hearings were held virtually, and Vera staff were able to conduct the observations by viewing them online. In 2022, in-person court operations had resumed. Vera therefore hired two local researchers in each sample county to attend hearings, usually at each county's largest City Court. In both years, court observers received training on New York's pretrial criminal legal system, data collection tools, key variables and indicators, and research ethics. Researchers also conducted one to two weeks of pilot observations, depending on their preexisting knowledge of criminal court procedure, prior to beginning data collection. During data collection, court observers met every week with their fellow Vera researchers and a supervisor to review court notes and troubleshoot data quality issues.

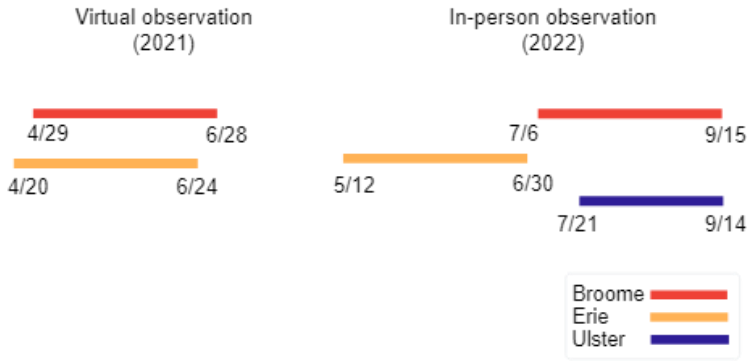
During each hearing, court observers collected case-specific information—for example, hearing type, charges, whether there was an open warrant, judges' decisions—as well as court actor names and demographic information. The court observers also collected qualitative data during the observations, including arguments made by judges and attorneys, court actor behaviors, and interactions between court actors and accused people.

Data collection differed slightly for virtual versus in-person hearings. In 2021, virtual hearings allowed researchers to type verbatim transcripts. In 2022, in-person hearings required researchers to take handwritten notes. (For both years, it should be noted that some dialogue presented in this report has been paraphrased for brevity.) Court observers attended hearings individually or in pairs. They digitally scanned and saved all handwritten court observations then entered this data into a Qualtrics survey. When more than one court observer observed a hearing, researchers compared notes to ensure data accuracy. In 2022, court observers attempted to access administrative records via the New York State Unified Court System's *WebCrims* website for every hearing observed to supplement charge information collected during in-person observation. Records were only available, however, for a third of hearings observed. When possible, Vera used information from *WebCrims* (for example, name, charges, judges' release decisions) to corroborate court observations.

Study sample

Vera conducted court observations in 2021 and 2022 using a non-random sample of court hearings (see Figure 4.2). In 2021, Vera researchers observed hearings in Broome and Erie Counties. In 2022, researchers observed hearings in Broome, Erie, and Ulster Counties. Vera purposively chose these counties to include a diversity of non-NYC counties in terms of region (Hudson Valley, Southern Tier, and Western New York); population size; socio-economic and racial makeup; jail incarceration rate; and court caseloads in terms of size and common charges.

Figure 4.2
Court observation period by year, county, and mode



During 2021 and 2022, researchers observed a total of 1,075 hearings involving 30 judges, 48 prosecutors, and 109 defense attorneys. Most cases (929) were observed in city courts (see Figure 4.3). Researchers excluded 80 cases from the analysis in which an accused person was not present. The majority of hearings researchers observed (742, or 74.6 percent) were arraignments, mostly custodial arraignments (527). Of the 646 non-disposed arraignments researchers observed, 38 percent (245) were bail-eligible based on the top charge or other case characteristic. The majority of bail-eligible cases involved a felony (66 percent), just under half involved a violent felony offense (45 percent), a quarter involved DV-related charges (24.8 percent), and a quarter involved a firearm (24.4 percent). The most common bail eligible charges researchers observed were weapons possession, criminal contempt, and assault—24.0 percent, 13.7percent, and 13.0 percent, respectively.

Most arraignments lasted less than 10 minutes (79.8 percent). A defense attorney was present in almost all arraignments, while a prosecutor was present in 90 percent of cases. The most common arraignment outcome was release on recognizance (374) followed by bail (132), release to pretrial supervision (62), and remand (78). In 41 percent of the cases, judges issued an order of protection or had done so at a previous hearing.

Although arraignment outcomes were clear, the question of how to determine whether or not court actors raised a person's ability to pay (ATP) was not self-evident. New York's bail law does not give any guidance about how judges should determine or measure ATP. Vera considered ATP to have been raised if any court actor mentioned the accused person's finances, if the defense attorney said they could not afford any bail, or if the defense attorney asked the judge to set bail at or below a specific bail amount should the judge choose to set bail. Court actors could raise ATP before or after the judge made a bail decision or set specific bail amounts.

Finally, in evaluating court practices related to ATP, Vera looked both at bail-eligible cases in general and bail-set cases in particular. Court actors could arguably raise ATP in any bail-eligible case, so understanding how often ATP was raised in *all* bail-eligible cases was important. However, court actors were understandably more likely to raise ATP in cases where either the judge was likely to set bail but had not yet decided or the judge *did* set bail. For this reason, Vera's analysis regarding ATP focuses on bail-set cases in particular.

Figure 4.3
Court observations by county, court type, and year

Year	Court	Broome	Erie	Ulster	Total
2021	City court	85	356*	0	441
	CAP†	66	0	0	66
	Total	**151**	**356**	**0**	**507**
2022	City court	114	129	245	488
	Town and village	0	39	41	80
	Total	**114**	**168**	**286**	**568**

† Centralized arraignment part (CAP).
* These observations include 16 town and village court hearings. In 2021, Erie County took advantage of pandemic-era virtual hearings to set up a *de facto* CAP court, in which city court judges heard arraignments for people arrested in town and village jurisdictions.

Figure 4.4
Appearance type by county and court type

Appearance type	Court	Broome	Erie	Ulster	Total N
Arraignment	City court	149	433	64	646
	CAP (2021)	49	0	0	49
	Town and village (2022)	0	36	26	62
	Total	198	469	90	757
Regular court appearance	City court	35	15	178	228
	CAP (2021)	14	0	0	14
	Town and village	0	2	15	17
	Total	49	17	193	259
Return on warrant	City court	15	37	3	55
	CAP	3	0	0	3
	Town and village	0	1	0	1
	Total	18	38	3	59

Qualitative analysis of court observation data

Once data collection was complete, Vera researchers used the software NVivo to qualitatively code and analyze hearing transcripts and court notes for patterns in court actor behaviors, pretrial arguments, and court cultures. This coding process consisted of both deductive analysis—based on predetermined research questions—as well as inductive analysis to identify emergent themes. Two Vera researchers coded the data independently and met weekly to clarify coding procedures and discuss any discrepancies. The researchers used statistical measures to ensure interrater reliability: statistical agreement below 80 percent triggered discussion and potential recoding. The researchers also used consensus coding and iteratively revised the codebook.[46] Researchers used weekly

meetings to discuss preliminary findings. Research staff discussed and agreed upon all themes and findings presented in this report.

Appendix III. Methodology for Systems Actor Interview Analysis

Data collection

Vera researchers conducted semi-structured interviews in 2021 and 2022 with defense attorneys, prosecutors, and pretrial supervision officers from five non-NYC counties. In each county, agency heads (for example, the district attorney, chief public defender, or director of probation) provided Vera with a list of eligible interviewees. In some cases, this included all agency staff; in others, this was a single individual. In addition, some agencies were unable to extend their support due to external circumstances or did not respond when contacted to participate. As a result, some counties and court actor types are overrepresented in Vera's sample.

Vera's interview protocol was consistent for both 2021 and 2022 data collection. Vera researchers conducted interviews via Zoom or by phone depending on respondents' preferences. Interviews lasted an average of 75 minutes. In addition to demographic questions, interviews included a series of open-ended questions centered on the respondents' experiences on the job, perceived successes and limitations of bail reform, and perceived implementation challenges. All interviews were supplemented with field notes written immediately following the interview to document researcher reflections and develop themes emerging from the data. Finally, to ensure confidentiality, Vera deidentified all interview-related data and stored it in a secure system managed by Vera staff.

Study sample

Vera researchers interviewed a nonrandom sample of 46 court actors from Albany (nine), Broome (six), Erie (20), Tompkins (seven), and Ulster (four) Counties in Upstate, Central, and Western New York. Of the 46 participants included in this study, Vera interviewed eight in 2021, 34 in 2022, and four in both years; 18 had also been interviewed in 2020 for Vera's previous report on New York's bail reform implementation.[47] Vera conducted the interviews between May and October of 2021 and May and October of 2022—after the second round of amendments to bail reform. For this report, Vera combined participants from both years into a single sample and analyzed all interview data together. Vera made this choice given the relative consistency in participant responses and analytical themes across both years. However, Vera distinguishes between 2021 and 2022 interview findings when the research is time-specific (for example, relating to COVID-19 restrictions) or when triangulating interviews with court observations or administrative data specific to a single year.

Interview participants included three groups: prosecutors (six), criminal defense attorneys (26), and pretrial supervision officers working out of the probation department (14). Nineteen men and 27 women participated in interviews. All but three respondents were white.

Figure 4.5
Interview participants by court actor type and county

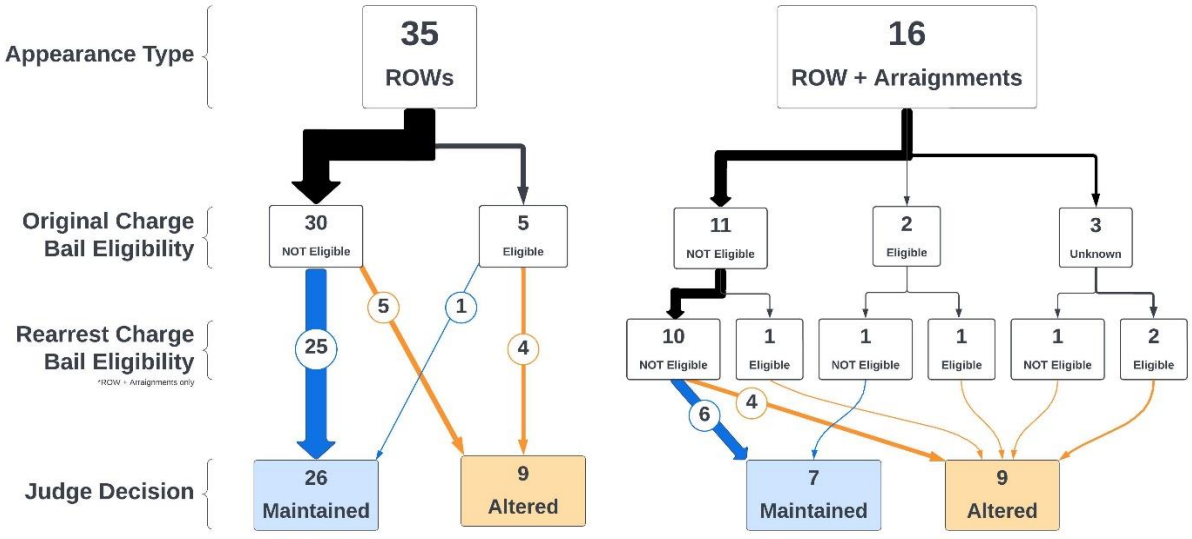
Type	Albany	Broome	Erie	Tompkins	Ulster	Total
Defense attorney	7	4	11	4	0	26
Prosecutor	0	0	3	1	2	6
Pretrial supervision officer (Probation)	2	2	6	2	2	14
Total	9	6	20	7	4	46

Qualitative analysis of interview data

As with the court observations, Vera researchers used NVivo to qualitatively code and analyze interview transcripts and field notes. For data collected in 2021, two researchers independently coded interview data and met weekly to discuss interrater reliability and create and revise a codebook. A single researcher coded all interview data collected in 2022. Vera researchers combined the coded data from both years for further analysis, including comparisons between the two years. To ensure rigor both within and across 2021 and 2022 data analysis, coding and non-coding staff met throughout the process to discuss coding, revise the codebook, and share preliminary findings. All research staff discussed and agreed upon all themes and findings presented in this report.

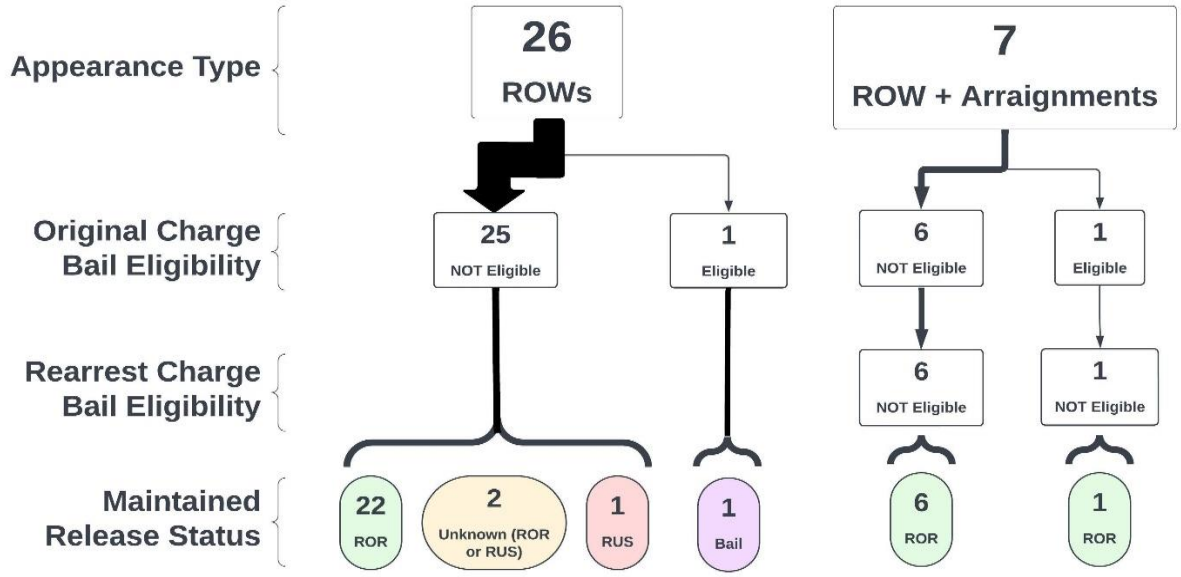
Appendix IV. Supplemental Figures

Figure 4.6
Judges' decisions for return on warrant cases by appearance type and bail eligibility



Source: Vera Court Observation, 2021-2022

Figure 4.7
Pretrial release status maintained by appearance type and bail eligibility



Source: Vera Court Observation, 2021-2022

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Credits

The Vera Institute of Justice is powered by hundreds of advocates, researchers, and policy experts working to transform the criminal legal and immigration systems until they're fair for all. Founded in 1961 to advocate for alternatives to money bail in New York City, Vera is now a national organization that partners with impacted communities and government leaders for change. We develop just, antiracist solutions so that money doesn't determine freedom; fewer people are in jails, prisons, and immigration detention; and everyone is treated with dignity. Vera's headquarters is in Brooklyn, New York, with offices in Washington, DC, New Orleans, and Los Angeles. For more information, visit vera.org. For more information about this report, contact Jaeok Kim, associate director for research Greater Justice New York initiative, at jkim@vera.org.

Endnotes

[1] As of November 2024. New York State Division of Criminal Justice Services, Monthly Jail Population Trends, 2, https://www.criminaljustice.ny.gov/crimnet/ojsa/jail_population.pdf.
[2] Jaeok Kim, Cherell Green, Alex Boldin, Quinn Hood, and Shirin Purkayastha, *A Year of Unprecedented Change: How Bail Reform and COVID-19 Reshaped Court Practices in Five New York Counties* (New York: Vera Institute of Justice, 2022), https://www.vera.org/publications/the-impact-of-new-york-bail-reform-on-statewide-jail-populations.
[3] CPL 510.10 1(f) https://www.nysenate.gov/legislation/laws/CPL/510.10.
[4] Jaeok Kim, Cherell Green, Alex Boldin, Quinn Hood, and Shirin Purkayastha, *A Year of Unprecedented Change: How Bail Reform and COVID-19 Reshaped Court Practices in Five New York Counties* (New York: Vera Institute of Justice, 2022), https://www.vera.org/publications/the-impact-of-new-york-bail-reform-on-statewide-jail-populations.
[5] Jaeok Kim and Christopher Gernon, *New York Jail Population Brief, January 2019-June 2021* (New York: Vera Institute of Justice, 2023), 18-20, https://www.vera.org/publications/the-impact-of-new-york-bail-reform-on-statewide-jail-populations.
[6] Insha Rahman, *New York, New York: Highlights of the 2019 Bail Reform Law* (New York: Vera Institute of Justice, 2019), https://perma.cc/49LN-YBA4.
[7] Olive Lu and Michael Rempel, *Two Years In: 2020 Bail Reforms in Action in New York State.* (New York: Data Collaborative for Justice, 2022), 6, Table 2, https://datacollaborativeforjustice.org/work/bail-reform/two-years-in-2020-bail-reforms-in-action-in-new-york-state/.
[8] Ibid, 6.
[9] Jaeok Kim, Cherell Green, Alex Boldin, Quinn Hood, and Shirin Purkayastha, *A Year of Unprecedented Change: How Bail Reform and COVID-19 Reshaped Court Practices in Five New York Counties*, (New York: Vera Institute of Justice, 2022), https://www.vera.org/publications/the-impact-of-new-york-bail-reform-on-statewide-jail-populations.
[10] New York State Division of Criminal Justice Services, *Supplemental Pretrial Release Summary Tables, 2019-2022* (2023), 14, https://www.criminaljustice.ny.gov/crimnet/ojsa/pretrial-release/DCJS_Supplemental_Pretrial_Release_Summary_Tables.pdf.

[11] The percent of arraignments in which judges set ROR in the court observation data (89.4 percent in Figure 0.1) is much higher than in the DCJS data (66.8 percent in Figure 1.1). This is because of the incomplete identification of bail eligibility in the DCJS data. See Appendix I: Methodology for DCJS and OCA Data Analysis for details.
[12] Jaeok Kim, Cherell Green, Alex Boldin, Quinn Hood, and Shirin Purkayastha, *A Year of Unprecedented Change: How Bail Reform and COVID-19 Reshaped Court Practices in Five New York Counties* (New York: Vera Institute of Justice, 2022), 15, https://www.vera.org/publications/the-impact-of-new-york-bail-reform-on-statewide-jail-populations.
[13] OCA does not have valid data from 2019 to compare pre- and post-reform time periods.
[14] New York State Division of Criminal Justice Services, *Supplemental Pretrial Release Summary Tables, 2019-2022* (2023), 17, Figure 4, https://www.criminaljustice.ny.gov/crimnet/ojsa/pretrial-release/DCJS_Supplemental_Pretrial_Release_Summary_Tables.pdf.
[15] Ibid, 17.
[16] Jaeok Kim, Cherell Green, Alex Boldin, Quinn Hood, and Shirin Purkayastha, *A Year of Unprecedented Change: How Bail Reform and COVID-19 Reshaped Court Practices in Five New York Counties* (New York: Vera Institute of Justice, 2022), https://www.vera.org/downloads/publications/a-year-of-unprecedented-change-bail-reform-covid-19-five-new-york-counties.pdf.
[17] Ibid, 16.
[18] Ibid, 15.
[19] New York State Division of Criminal Justice Services, *Supplemental Pretrial Release Summary Tables, 2019-2022* (2023), Table 6, https://www.criminaljustice.ny.gov/crimnet/ojsa/pretrial-release/DCJS_Supplemental_Pretrial_Release_Summary_Tables.pdf.
[20] Legal Aid Buffalo, "Bail FAQs: What are the Forms of Bail?," https://legalaidbuffalo.org/bail-faq/
[21] Michael Rempel and Joanna Weill, *One Year Later: Bail Reform and Judicial Decision-Making in New York City* (New York: Center for Court Innovation, 2021), https://www.innovatingjustice.org/sites/default/files/media/document/2021/One_Year_Bail_Reform_NYS.pdf.
[22] New York State Division of Criminal Justice Services, *Supplemental Pretrial Release Summary Tables, 2019-2022* (2023), Table 5, https://www.criminaljustice.ny.gov/crimnet/ojsa/pretrial-release/DCJS_Supplemental_Pretrial_Release_Summary_Tables.pdf.
[23] Similarly, analyzing New York statewide data from 2019, 2020, and 2021, researchers found that "Black defendants were most disadvantaged in the likelihood of bail being set post reform, while both Latino and Black defendants had significantly higher mean bail amounts compared to White defendants." Esther Laaninen, "Pretrial Consequences: The Impact of New York State Bail Reforms on Racial and Ethnic Disparities in Pretrial Outcomes," Abstract, (Thesis, John Jay College of Criminal Justice, The City University of New York, 2023), https://www.proquest.com/docview/2786852355/abstract/.
[24] Jaeok Kim, Cherell Green, Alex Boldin, Quinn Hood, and Shirin Purkayastha, *A Year of Unprecedented Change: How Bail Reform and COVID-19 Reshaped Court Practices in Five New York Counties* (New York: Vera Institute of Justice, 2022), 15, https://www.vera.org/downloads/publications/a-year-of-unprecedented-change-bail-reform-covid-19-five-new-york-counties.pdf.
[25] Ibid, 16-17.
[26] CPL 510.10 1(i), https://www.nysenate.gov/legislation/laws/CPL/510.10.
[27] This analysis excludes cases in which judges remanded a person for nondiscretionary or automatic reasons such as having two prior felony convictions or having a detainer from another jurisdiction.
[28] Defense attorneys interviewed for this study reported that they rarely see the conviction or arrest record before arraignment, if at all.
[29] New York SB S1509-C (2019) and New York AB A2009-C (2019), https://perma.cc/UVX9-PJNS; Jaeok Kim, Cherell Green, Alex Boldin, Quinn Hood, and Shirin Purkayastha, *A Year of Unprecedented Change: How Bail Reform and COVID-19 Reshaped Court Practices in Five New York Counties* (New York: Vera Institute of Justice, 2022), 15-16, https://www.vera.org/downloads/publications/a-year-of-unprecedented-change-bail-reform-covid-19-five-new-york-counties.pdf.
[30] The percentage of cases where court actors raised the person's ability to pay (ATP) increased in 2021 and 2022 court observations compared to the 2020 court observations. However, after the 2020 observations, researchers changed the way that they counted cases where APT was raised. They did so in a way that led to more cases being counted as having ATP raised.
[31] In order to focus on bail amounts, this analysis excludes 31 cases in which the ADA requested bail and the judge set "bail or RUS" or "bail and RUS." These decisions may reflect a judge's consideration of ATP, concern for a person's ability to access community-based services, or a desire to set a less restrictive securing order.
[32] Michael Rempel and Krystal Rodriguez, *Bail Reform in New York: Legislative Provisions and Implications for New York City*, (New York: Center for Court Innovation), 7, https://www.innovatingjustice.org/sites/default/files/media/document/2019/Bail_Reform_NY_full_0.pdf; CPL 530.60 2(b)(i), https://www.nysenate.gov/legislation/laws/CPL/530.60.

[33] New York State Division of Criminal Justice Services, *Supplemental Pretrial Release Summary Tables, 2019-2022* (2023), Table 11, https://www.criminaljustice.ny.gov/crimnet/ojsa/pretrial-release/DCJS_Supplemental_Pretrial_Release_Summary_Tables.pdf.
[34] For research on why people miss court, see Shannon Magnuson, Amy Dezember, Kevin Kuemeier, Cherrell Green, and Dana Gautschi, *Understanding Court Absence and Reframing "Failure to Appear"* (Justice System Partners, 2023), https://justicesystempartners.org/wp-content/uploads/2023/05/SJC-Lake-County-Getting-to-Court-as-Scheduled-Reframing-Failure-to-Appear.pdf.
[35] This analysis excludes an additional 26 ROW cases Vera observed in which judges transferred the case to drug, DV, or mental health court without any ruling; remanded the person for administrative reasons (for example, a detainer); or dismissed the case.
[36] CPL 530.60 2(b)(i), https://www.nysenate.gov/legislation/laws/CPL/530.60.
[37] CPL 530.60 2(c).
[38] Prison Policy Initiative, "Mass Incarceration: The Whole Pie 2024", March 14, 2024, https://www.prisonpolicy.org/reports/pie2024.html.
[39] Critical Resistance and Community Justice Exchange, "On The Road to Freedom: An Abolitionist Assessment of Pretrial and Bail Reforms, June 2021, https://criticalresistance.org/wp-content/uploads/2021/08/OnTheRoadToFreedom_FINAL_June2021-compressed.pdf.
[40] Jaeok Kim and Christopher Gernon, *New York Jail Population Brief, April 2019-June 2022* (New York: Vera Institute of Justice, 2024), https://www.vera.org/publications/the-impact-of-new-york-bail-reform-on-statewide-jail-populations.
[41] Vera Institute of Justice, "New York Criminal Legal System Data Hub: Pretrial," database (New York: Vera Institute of Justice), (search: Jail population by status, Statwide, Pretrial, 7/1/2024), https://www.vera.org/ny-data-hub/Jail#top.
[42] Jaeok Kim, Quinn Hood, and Elliot Connors, *New York Jail Population Brief, January 2019-December 2020* (New York: Vera Institute of Justice, 2022), https://www.vera.org/publications/the-impact-of-new-york-bail-reform-on-statewide-jail-populations.
[43] Jaeok Kim and Christopher Gernon, *New York Jail Population Brief, April 2019-June 2022* (New York: Vera Institute of Justice, 2024), 14-16, https://www.vera.org/publications/the-impact-of-new-york-bail-reform-on-statewide-jail-populations; Olive Lu and Michael Rempel, *Two Years In: 2020 Bail Reforms in Action in New York State* (New York: Data Collaborative for Justice, 2022), 20-22, https://datacollaborativeforjustice.org/wp-content/uploads/2022/12/Two_Years_In_Bail_Reforms_New_York.pdf.
[44] Motion for Justice, Vera Institute of Justice, "Correct: Don't Consider Criminal History," https://motionforjustice.vera.org/strategies; Elizabeth Hinton, LeShae Henderson, and Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, (New York: Vera Institute of Justice, 2018); Nazgol Ghandnoosh, *One in Five: Ending Racial Inequity in Incarceration,* (Washington, DC: The Sentencing Project, 2023), https://perma.cc/SC7P-8RY9; Nazgol Ghandnoosh and Celeste Barry, *One in Five: Disparities in Crime and Policing,* (Washington, DC: The Sentencing Project, 2023), https://perma.cc/3ULA-R98R; Jennifer Skeem, Lina Montoya, and Christopher Lowenkamp, "Understanding Racial Disparities in Pretrial Detention Recommendations to Shape Policy Reform," *Criminology & Public Policy*, 22 no. 2 (2023), 233-262; Ruth Wilson Gilmore, "Globalisation and US Prison Growth: From Military Keynesianism to Post-Keynesian Militarism," *Race & Class*, 40 no 2-3 (1999), 171–188.
[45] New York State Unified Court System, "Pretrial Release Data," https://ww2.nycourts.gov/pretrial-release-data-33136.
[46] For definitions of statistical agreement, consensus coding, and interrater reliability in qualitative research, see Cliodhna O'Connor and Helene Joffe, "Intercoder Reliability in Qualitative Research: Debates and Practical Guidelines," *International Journal of Qualitative Methods*, *19* (2020), 1-13, https://journals.sagepub.com/doi/full/10.1177/1609406919899220#bibr11-1609406919899220.
[47] Jaeok Kim, Cherell Green, Alex Boldin, Quinn Hood, and Shirin Purkayastha, *A Year of Unprecedented Change: How Bail Reform and COVID-19 Reshaped Court Practices in Five New York Counties,* (New York: Vera Institute of Justice, 2022), 40, https://www.vera.org/publications/the-impact-of-new-york-bail-reform-on-statewide-jail-populations.