

Strategies for Reducing Pretrial Detention: Models of Reform

Bail Reform in New York

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Historic Rationale for Money Bail

- 1. Secure Court Attendance:** Money bail incentivizes court attendance (to avoid forfeiting bail money).
- ~~**2. Protect Public Safety:** Money bail (or direct remand) can reduce pretrial re-offense for high risk defendants.~~
- 3. Balance Rights of the Accused:** In lieu of remand, bail makes pretrial release possible (once the bail amount is paid).

Harms of Bail in New York

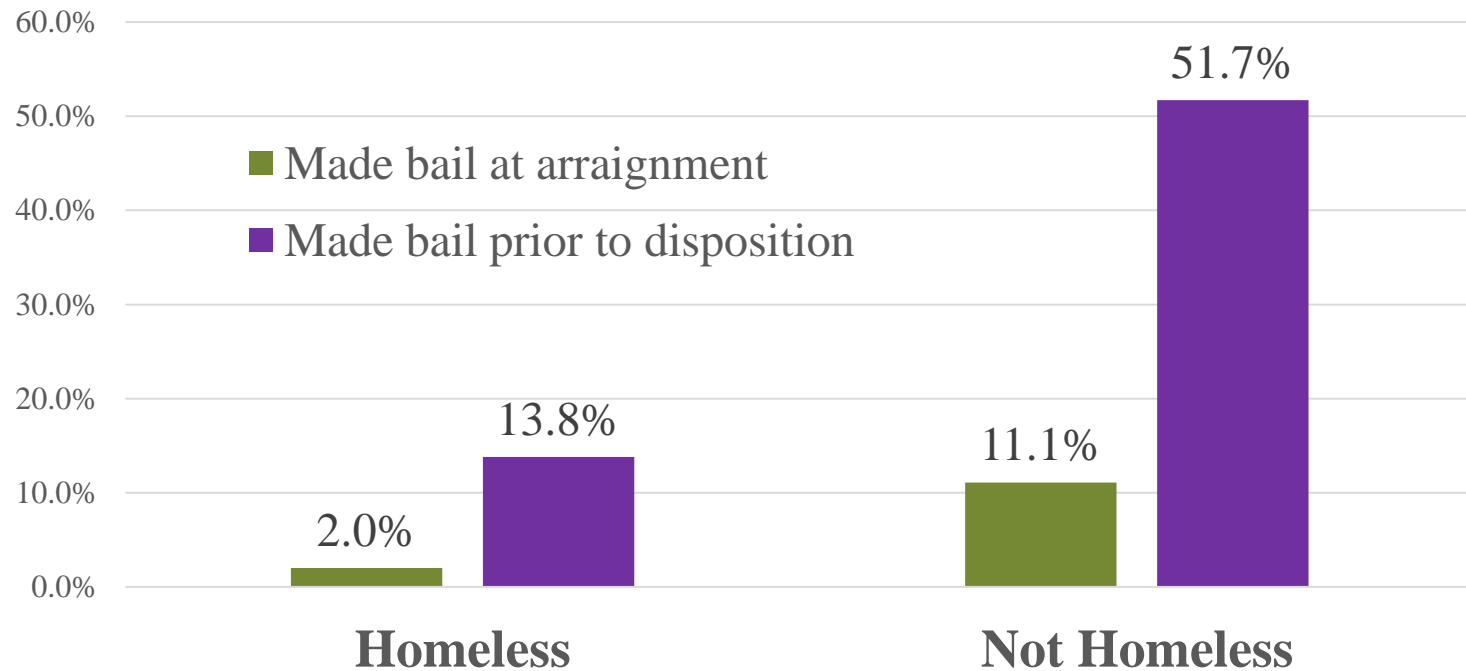
- 1. Few require money bail to incentivize court attendance.¹**
 - Any failure to appear (FTA): 15%
 - FTA & No Return within 30 Days: 7%
- 2. Bail usually operates to detain, not to facilitate release.²**
 - Bail payment at arraignment: 15%
 - Bail payment prior to disposition: 48%
- 3. Bail decisions neglect ability to pay.** Courts nationwide lack an assessment tool or protocol to examine financial resources.
- 4. Bail disadvantages homeless & other indigent defendants.**

¹ New York City Criminal Justice Agency (CJA 2019; reporting FTA rates in 2017).

² New York State Office of Court Administration data (2018 cases analyzed by the Center for Court Innovation).

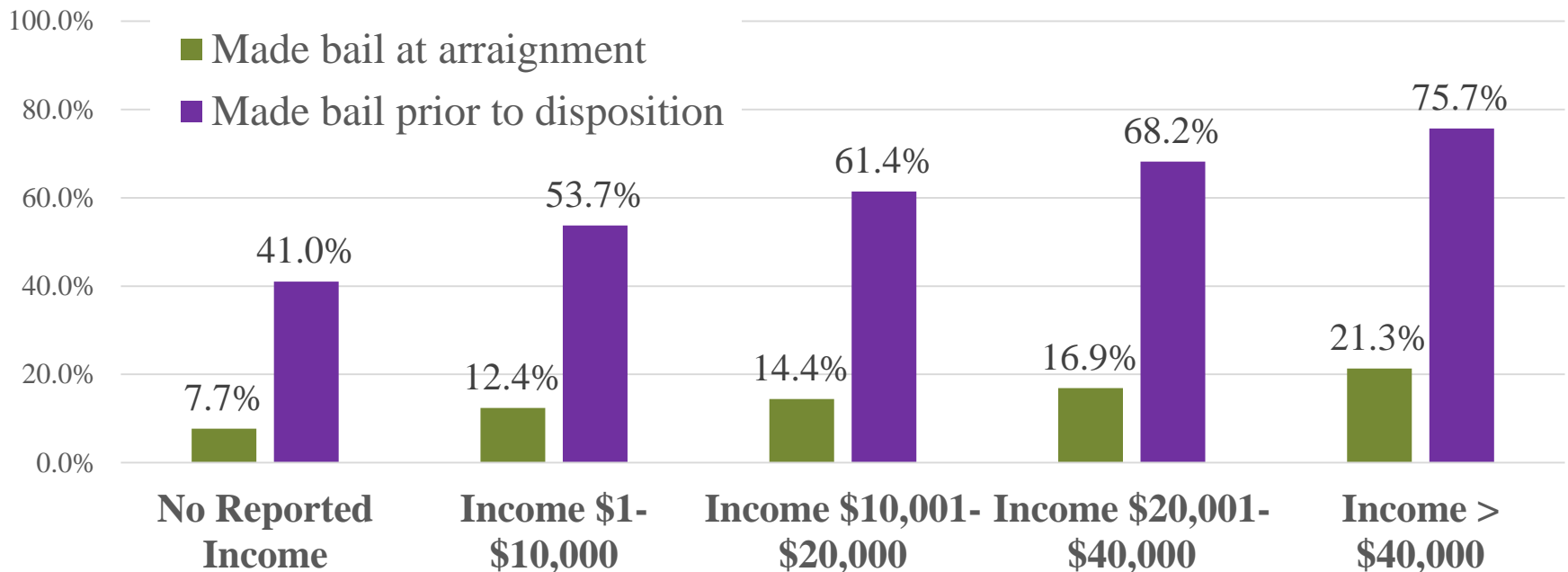
Homelessness & Ability to Pay Bail

Impact of Homelessness on Ability to Pay Bail: Bail Cases in 2015



Income & Ability to Pay Bail

Impact of Reported Income on Ability to Pay Bail: Bail Cases in 2015



Source: NYC Criminal Justice Agency data, analyzed by the Center for Court Innovation for MOCJ.

Harms of Bail in New York (*Continued*)

5. ***Traditional bail-setting may be unconstitutional.***¹

- New York: Kunkeli v. Anderson (Dutchess County, NY):

It is clear to this court that a lack of consideration of a defendant's ability to pay the bail being set at an arraignment is a violation of the equal protection and due process clause of the Fourteenth Amendment and of the New York State Constitution.

- Other States: Recent court rulings in California, Florida, Maryland, Massachusetts, New York, & Texas have found that bail amounts incorrectly ignore defendants' financial ability to pay.

6. ***Partially & unsecured bonds are rarely used.***

- Partially secured bond: Up to 10% paid up front.
- Unsecured bond: No up-front payment.

Harms of Bail in New York (*Continued*)

7. ***Bail & detention leverage guilty pleas & incarceration sentences.***¹

- NYC Impacts: Pretrial detention at time of disposition increases:²
 - *Conviction rate* by 10% in misdemeanor & 27% in felony cases.
 - *Jail sentences* by 40% in misdemeanor cases.
 - *Prison sentences* by 34% in felony cases.

8. ***Bail & detention largely do not promote public safety.***

- Kentucky: 48 hours+ in detention *increased* post-release recidivism—especially for low risk defendants (Lowenkamp et al. 2013b).
- Philadelphia & Miami-Dade: Detention reduced pretrial re-arrest but *increased* re-arrest over 2- & 4-year follow-up (Dobbie et al. 2016).

¹ Dobbie et al. 2016; Hahn 2016; Lowenkamp et al. 2013; Phillips 2012; Rempel et al. 2017.

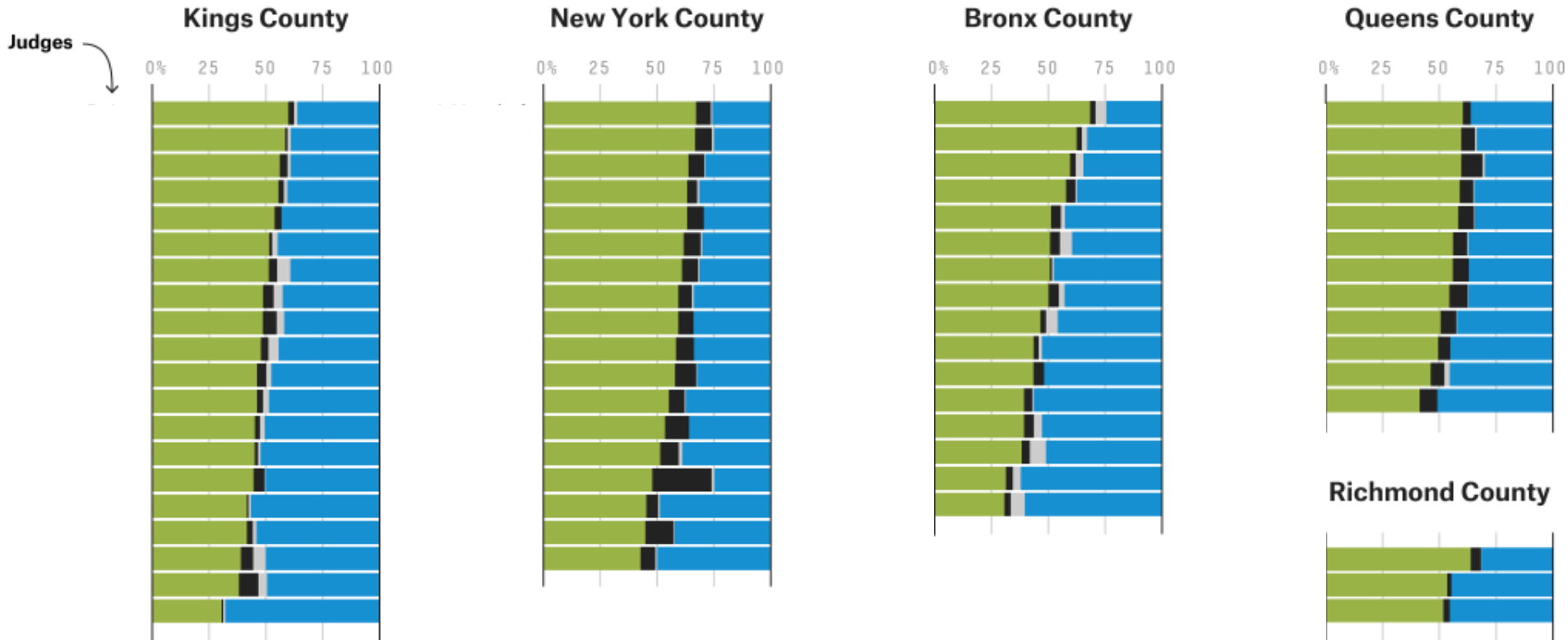
² Rempel et al. 2017.

9. Bail decisions are often inconsistent in similar cases.

Bail-setting practices for felonies vary widely by judge in New York City

Among felony arraignments handled by The Legal Aid Society in New York City in 2017, share that resulted in each outcome, categorized by county and judge

■ Bail greater than \$1 ■ Remanded (held without bail) ■ Released without bail or bail of \$0 ■ Other or incomplete data



Data includes all cases where the first appearance in court is a regular arraignment before a judge who heard at least 100 cases for that county in our data set. Cases where bail was set at \$1 are categorized as "other" because this amount is generally used to reflect an accounting tool that credits defendants for jail time served when they have multiple cases open at the same time.

FiveThirtyEight

Chart imported from: Barry-Jester, A. M. (2018). *You've Been Arrested. Will You Get Bail? Can You Pay It? It May All Depend On Your Judge.* FiveThirtyEight. Retrieved at: <https://fivethirtyeight.com/features/youve-been-arrested-will-you-get-bail-can-you-pay-it-it-may-all-depend-on-your-judge/>.

SOURCE: THE LEGAL AID SOCIETY

Harms of Bail in New York (*Continued*)

10. Bail is often set due to insufficient judicial options.

Release Decisions at Arraignment (2017)	Misdemeanor	Nonviolent Felony	Violent Felony
Continued at Arraignment (2017)	99,069	23,517	16,935
ROR	84.9%	43.8%	32.9%
Supervised Release	2.0%	11.3%	4.1%
Bail	12.8%	43.5%	62.2%
Remand	0.2%	1.4%	0.8%

Source: New York State Office of Court Administration data, analyzed by the Center for Court Innovation.

Bail Reform Legislation

▶ **Goals:**

1. Reduce the inequities of money bail.
2. Reduce unnecessary pretrial detention.

▶ **Core Elements:**

1. Elimination of Money Bail (all or some cases).
2. Supervised Release (expanded to more cases).
3. Preventive Detention (allowed in some or many cases).
4. Due Process (formal hearings on preventive detention).
5. Risk-Based Decision-Making (formal risk assessment tools inform in/out decisions, supervision tier, both, or neither).

Bail Reform Legislation:

Washington, D.C. (Passed 1992)

- ▶ **Elimination of Money Bail:** All charges. (Bail allowed only if defendant can pay & is reviewed if detained > 24 hours; used < 4%).
- ▶ **Supervised Release:** Default option. (~97% of released cases).
- ▶ **Preventive Detention:** Limited. (Only violent charges & select other circumstances, e.g., open case. If detained, right to trial within in 100 days of arrest except for “good cause.”)
- ▶ **Due Process:** Multiple hearings. (Detention at arraignment based on “clear & convincing” evidence; additional hearing in 5 days, with presumption of release except for crimes of violence.)
- ▶ **Risk-Based Decision-Making:** Supervision tier only. (Risk tool recommends a level of supervision, never detention.)

Bail Reform Legislation:

New Jersey (Implemented 2017)

- ▶ **Elimination of Money Bail:** All charges. (Bail allowed only if defendant can pay & no other condition can prevent FTA; rare).
- ▶ **Supervised Release:** Most common option. (~ 2/3 statewide).
- ▶ **Preventive Detention:** Allowed. (DV, weapons, sex crimes, other serious violence, 2+ prior serious violence, or *serious risk of FTA, danger, or obstruction of justice.* If detained, trial within 180 days of indictment, excluding “reasonable” delays.)
- ▶ **Due Process:** Multiple hearings. (Detention based on “clear & convincing” evidence, with presumption of release except for murder or crimes with a potential life imprisonment sentence.)
- ▶ **Risk-Based Decision-Making:** Detention & supervision tier. (Risk tool recommends ROR, a supervision tier, or detention.)

New York's Bail Reform Law

- ▶ **Approval:** April 1, 2019.
- ▶ **Effective Date:** January 1, 2020.
- ▶ **High-Level Overview:**
 - Partial Elimination of Bail: Most misdemeanors & nonviolent felonies.
 - New Standards for Setting Bail: Most violent felonies.
 - Least Restrictive Condition: In all cases, judges must set the least restrictive condition(s) to reasonably assure return to court.

Major Elements of the Reform

- 1. Partial elimination of money bail.**
- 2. Strict standards for setting bail (when legally permitted).**
- 3. New requirements for release on recognizance (ROR).**
- 4. Expansion of non-monetary conditions.**
- 5. Introduction of electronic monitoring.**
- 6. Permissible responses to pretrial noncompliance.**
- 7. Limited use of risk assessment tools.**

Partial Elimination of Money Bail

- ▶ **Misdemeanors:** No money bail, except:
 - Criminal contempt if domestic violence-related (Misd. & NVFO).
 - Sex offense. (Misd. & NVFO).
 - Witness tampering or intimidation (NVFO).
 - Operating as a major drug trafficker (NVFO).
 - Conspiracy to commit murder (NVFO).
 - Terrorism-related charges (NVFO).
 - Select offenses against children (NVFO).

- ▶ **Violent Felonies:** Money bail permitted, except:
 - No bail/detention in most burglary 2^o & some robbery 2^o cases.

- ▶ **Straight Remand (Preventive Detention):** Same rules as for money bail, except: Disallowed in misdemeanors (no exceptions).

Strict Standards for Setting Bail (Where Legally Permitted)

- ▶ **Flight Risk:** To set any condition besides ROR, court must find that defendant poses a “risk of flight to avoid prosecution.”
- ▶ **Least Restrictive Condition:** Court must set bail *only if* less restrictive conditions cannot reasonably assure return to court.
- ▶ **Partially or Unsecured Bond:** When setting bail, court must set 3+ forms, including a partially secured or unsecured bond.
- ▶ **Ability to Pay:** Court must consider:
 - “individual financial circumstances”
 - “ability to post bail without posing undue hardship”
 - “ability to obtain a secured, unsecured, or partially secured bond.”
- Implication: Money bail requires an ability to pay assessment.

New Requirements for Release on Recognizance (ROR)

- ▶ **Default Option:** Judges must set ROR absent “risk of flight.”
- ▶ **Court Date Reminders:**
 - Requirement: Defendants must receive court date reminder via text, phone, email, or first-class mail.
 - Defendant Choice: Defendants select a preferred notification method.

Expansion of Non-Monetary Conditions

- ▶ **Universal:** Non-monetary condition(s) available in all cases.
- ▶ **Supervised Release:** Each county must establish pretrial service agency(ies) to implement supervised release.
- ▶ **Lighter Touch Conditions:** Supervised release may be ordered only if less restrictive conditions cannot assure return to court; i.e., if not ROR, conditions must be the least restrictive.
- ▶ **Examples of Non-Monetary Conditions:**
 - Enhanced court date notification.
 - Supportive services (e.g., free transit; cell phone; court accompaniment).
 - Supervised release with supervision-only.
 - Supervised release with mandated treatment or services.

Introduction of Electronic Monitoring

- ▶ **Misdemeanors:** No electronic monitoring (EM), except:
 - Domestic violence.
 - Sex offense.
 - VFO conviction in past 5 years.
- ▶ **Felonies:** EM permitted in all cases.
- ▶ **Standard:** Judge must find that no other non-monetary condition can assure return to court.

Permissible Responses to Pretrial Noncompliance

- ▶ **Failure to Appear (FTA):** Judges may not issue warrant for FTA until after a 2-day “grace period.”
- ▶ **Remand or money bail may be imposed if:** Initial felony charge AND “reasonable cause” that defendant committed new Class A felony, violent felony, or witness intimidation.
- ▶ **Money bail or EM may be imposed if:**
 - Persistent & willful FTA the current case.
 - Order of protection violation.
 - Initial felony charge AND new felony charge.
 - Initial misdemeanor AND new felony witness intimidation/tampering.
- ▶ **Hearings:** Formal hearing required. Judge must order the least restrictive condition to assure return to court.

Risk Assessment Tools

- ▶ **The Judge:** Only risk assessments that predict FTA.
- ▶ **Pretrial Service Agencies:** May be able to use public safety risk assessments to assign a specific level or type of supervision.
- ▶ **Transparency Requirement:** Questionnaires, algorithms, & validation research must be made public.
- ▶ **Bias Reduction:** Tools must be unbiased by “race, national origin, sex, or any other protected class.”

Bail Reform Legislation: New York (*To-Be-Implemented 2020*)

- ▶ **Elimination of Money Bail:** *Partial.* (Bail allowed in most violent felonies, but ability to pay must be considered.)
- ▶ **Supervised Release:** *Must be available—along with other, less restrictive non-monetary conditions.*
- ▶ **Preventive Detention:** *Allowed, but exclusively for cases that are also eligible for money bail (and no misdemeanors).*
- ▶ **Due Process:** *Presumption of ROR, unless demonstrated “risk of flight”; least restrictive condition standard; formal hearings required to impose a more restrictive condition.*
- ▶ **Risk-Based Decision-Making:** *Risk of FTA, not public safety.*

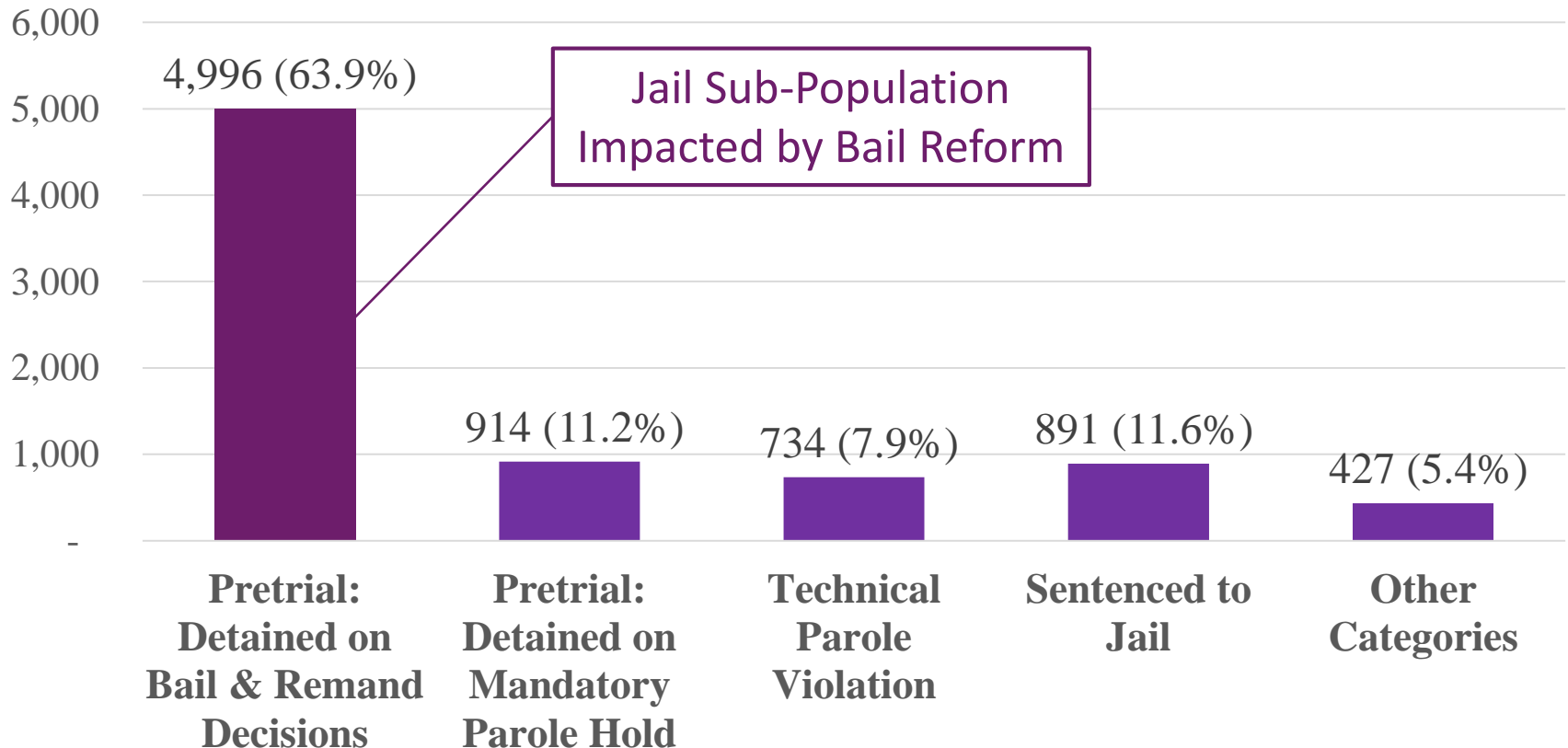
Impact of Bail Reform on Pretrial Decisions at Arraignment

Cases Arraigned in the NYC Criminal Courts in 2018 (N = 206,126)

	Misdemeanors or Lesser		Nonviolent Felonies		Violent Felonies		Total	
	#	%	#	%	#	%	#	%
Mandatory Release	162,272	97.6%	22,569	93.1%	1,899	12.2%	186,740	90.6%
Bail-Eligible	4,034	2.4%	1,663	6.9%	13,689	87.8%	19,386	9.4%

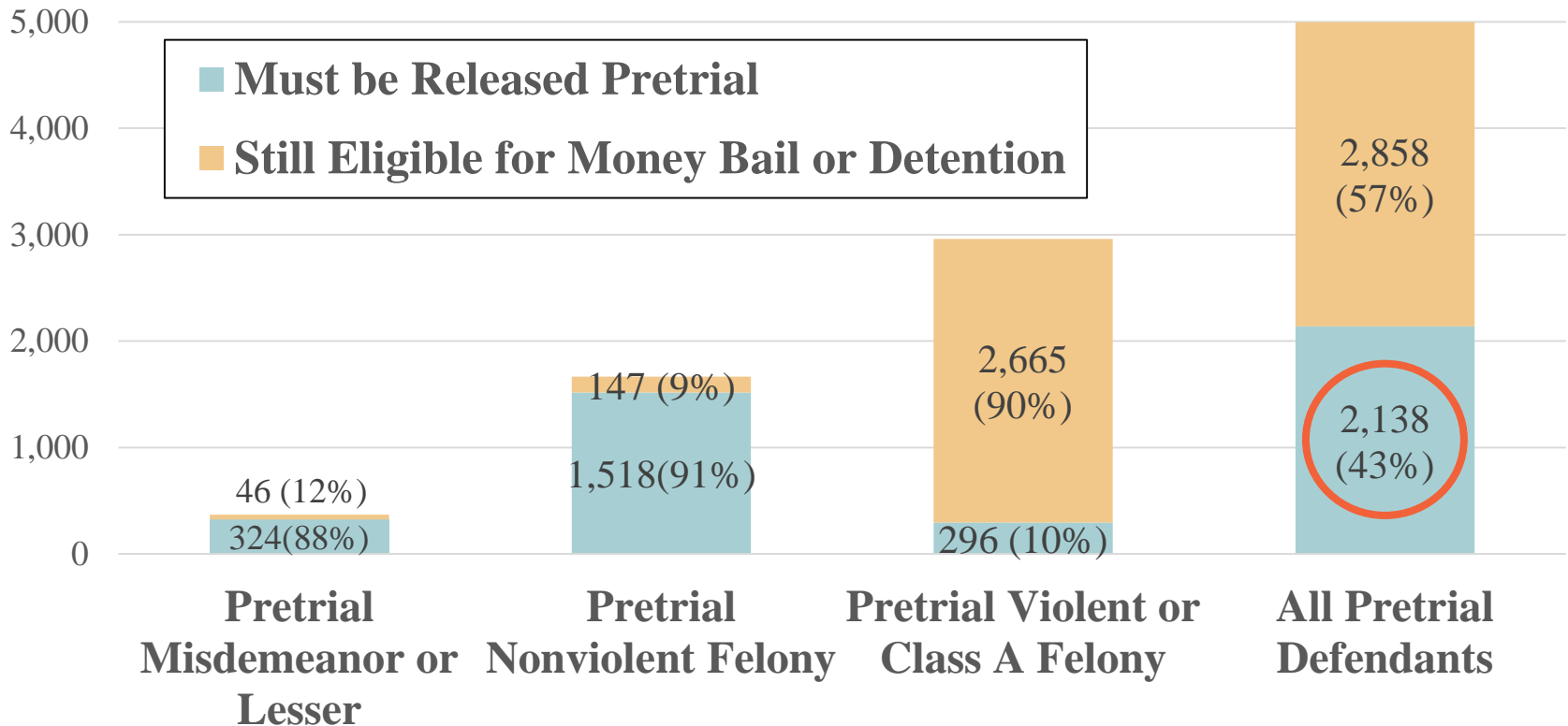
The New York City Jail Population: *Total = 7,822 on April 1, 2019*

The New York City Jail Population on April 1, 2019



Minimum Impact of Bail Reform: Based on April 1, 2019 Jail Population

The New York City Jail Population on April 1, 2019



Source: New York City Department of Correction data via NYC Open Data (analysis by the Center for Court Innovation). The pretrial jail population reflected in this chart omits defendants whose pretrial detention resulted from a parole violation.

For More Information

Bail Reform in New York: Legislative Provisions and Implications for New York City
(<https://www.courtinnovation.org/publications/bail-reform-NYS>).