

SAME GAME, DIFFERENT RULES

Eyes on 2020: Lessons From the First
100 Days of New York's Bail Reform



**COURT
WATCH
NYC**

This report is dedicated to everyone fighting for abolition, especially those fighting from the inside and their loved ones.

WHAT IS COURT WATCH NYC?

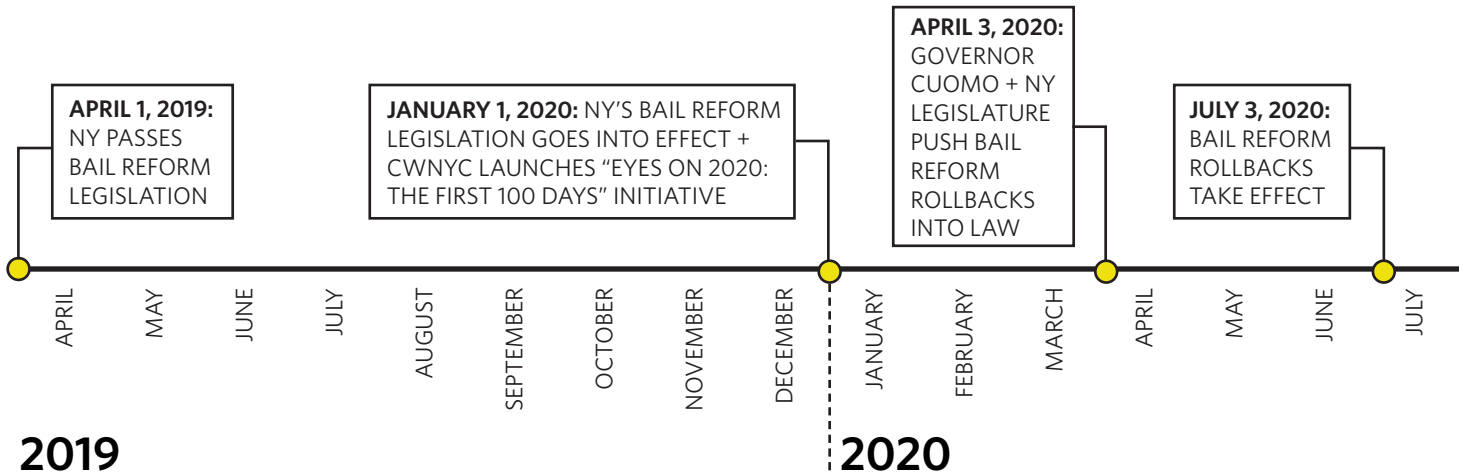
Court Watch NYC harnesses the power of New Yorkers to organize for transformative change toward abolition. We watch court proceedings, shift power in the courtroom, report what we see, and hold court actors accountable to ending the injustices in the criminal punishment system that target Black, brown, indigenous, immigrant/migrant, TGNC and queer communities.

As the eyes and ears of accountability in New York City courtrooms, we collect real-time data of what is actually happening in courtrooms and capture the narratives not reflected in official accounts.

Court Watch NYC is a collaborative project between the Brooklyn Community Bail Fund, 5 Boro Defenders, and VOCAL-NY.



BACKGROUND



On April 1, 2019, New York State passed bail reform legislation to limit money bail and ensure pretrial freedom for thousands of New Yorkers accused of most misdemeanors and nonviolent felonies.¹ This legislation came after years of pressure from directly impacted people and advocates fighting to abolish money bail and pretrial detention—systems which often led to the loss of a job, unemployment, eviction, and death; robbed people of their right to a fair trial; and negatively impacted the outcomes of their cases. We recognize that this legislation ended money bail for some people, meaning thousands of people were able to return to their homes; however, it left the unjust systems of money bail and pretrial detention in place for many others, creating a harmful dichotomy between who is worthy of freedom and who is not. It further created the illusion that bail reform was reducing the power of the carceral state when in fact, in many ways, the reforms further legitimized it.²

Our findings from over 360 hours observing 937 people churn through criminal court arraignments between January 1 to March 10, 2020 underscore the ways that racism permeates every aspect of this system and the need to abolish it.

Within the first 100 days of its implementation, we saw the tensions and contradictions inherent to bail reform. On one hand, bail reform successfully lowered the number of cases in which bail was set, allowing thousands of New Yorkers to return home. At the same time, bail reform also expanded the reach of the criminal punishment system by giving the police, prosecutors, and judges insidious new ways to monitor and control people. Though we acknowledge these modest reforms as attempts to catalyze change, as a project striving towards prison abolition we also see that these laws were band-aid solutions that failed to fully dismantle the fundamentally oppressive logic of our current systems.

New York's 2019 bail law went into effect on January 1, 2020. That same day, Court Watch NYC (CWNYC) launched "Eyes on 2020: The First 100 Days," an initiative which focused on closely monitoring criminal court arraignments in Manhattan, Brooklyn, and Queens for the first 100 days of 2020 in order to understand how prosecutors and judges were implementing the new law. This report is a culmination of those efforts.

Our findings from over 360 hours observing 937 people churn through criminal court arraignments from January 1 to March 10, 2020 underscore the ways that racism permeates every aspect of this system and the need to abolish it. **Specifically, we found that:**

- Racial disparities throughout the arraignment process persisted under bail reform. Black New Yorkers were much more likely to be arrested, charged with bail-eligible offenses, subjected to bail and release under onerous conditions, and less likely to be released on their own recognizance, as compared to white New Yorkers.
- Prosecutors and judges often ignored requirements of the new law. Even when they followed the new guidelines, judges and prosecutors consistently pushed for the most punitive conditions available.
- Circumventing the intent of the law, judges overwhelmingly set partially secured bond amounts above both the cash bail and bail bond amounts, likely preventing many from getting free.
- Prosecutors appeared to use their power and discretion to upcharge people in order to incarcerate people pretrial. Again, a trend seen disproportionately among Black accused people, demonstrating the enormous dangers and racist implications of prosecutorial and judicial discretion.
- Lastly, while bail reform led to a decrease in the overall prevalence of bail, it led to an increase in other forms of carceral control.

Although New York’s 2019 bail reform did not eliminate money bail or pretrial detention—keeping a harmful, racist system in place for thousands of Black and brown New Yorkers—it did mean fewer people were forced to plead guilty to spare themselves from spending months awaiting trial. It meant fewer people losing their jobs or their housing, fewer caregivers separated from their children, and fewer people exposed to unhealthy and unsafe conditions in jail. Bail reform meant that about 6,800 fewer people statewide were subjected to the trauma of pretrial detention, and fewer people were subjected to the deadly COVID-19 outbreak that ravaged through local jails, prisons, and detention centers.³ Bail reform arguably chipped away at a system that unjustly denies the presumption of innocence to thousands of Black, brown, indigenous, immigrant/migrant, TGNC and queer New Yorkers. As Court Watchers, we saw the difference this made in just three months.

Despite these gains, on April 3, 2020 at 3:30 AM Governor Cuomo and the New York State Legislature voted to pass rollbacks to the new law during a terrifying and deadly pandemic.⁴ The move was a clear capitulation to

a campaign of racist fear-mongering and misinformation about the presumed negative consequences of the law, propagated by everyone from pundits and media outlets to law enforcement and politicians (including Governor Cuomo himself).⁵ The rollbacks are not small tweaks: these changes represent a significant retreat that will undoubtedly lead to a major uptick in incarceration, specifically a projected 16% increase in pretrial detention in New York City.⁶

The bail reform rollbacks take effect in early July 2020. Given our findings from the first 100 days of New York’s bail reform—where we saw judges and prosecutors leverage any opportunity they had to set bail on the most oppressed amongst us—**we have every reason to believe that judges and prosecutors will exploit the expanded discretion granted to them by the rollbacks to incarcerate thousands more Black and brown people in the process.** Further, we recognize that the purported connection between pretrial detention and community safety is a show of smoke and mirrors to distract from the fact that pretrial detention happens exclusively to those who are unable to pay bail (are richer people automatically “safer”?) and unwilling to engage in coercive plea bargaining and sentencing. We know that prisons are sites of immense violence and we know that incarceration inflicts trauma without solving the underlying social inequities that produce what the prison-industrial complex (PIC) calls “crime,” so we cannot see how laws that promote detention in prisons serve any purpose besides reproducing the oppressive and racist logic of the criminal punishment system.

This report is an attempt to assess the impact of bail reform, the lessons we learned, and a window into the volumes of work still to be done. It investigates the ways that our system targets Black, brown, trans, poor, queer, and migrant communities. It observes abolition as not just a concept, but as a guiding principle for social movements. It affirms what community members and organizations have been saying regarding the necessity of shrinking the size of the criminal punishment system by taking away the power of judges and prosecutors alongside calls to defund the NYPD. This report, above all, emphasizes the importance of adopting abolitionist principles by giving light to the multitudes of untold stories of state violence against Black and brown bodies. We recognize that silencing the powerful voices of mar-

ginalized people fighting for their humanity is a way that the state maintains power while escaping accountability. We hope that in reflecting on what we have learned, we are clearer about where to go from here.

2019 BAIL REFORM AND 2020 ROLLBACKS

New York's 2019 bail reform legislation restricted prosecutors and judges from setting money bail on New Yorkers accused of misdemeanors and nonviolent felonies (with some critical exceptions), but it did not eliminate bail. Further, it expanded the reach of the criminal punishment system by giving police, prosecutors, and judges insidious new ways to monitor and control people, while framing them as more "humane."

Specifically, New York's 2019 bail reform legislation:

- Guaranteed pretrial liberty for people charged with most misdemeanors, nonviolent felonies, and two statutorily "violent" felonies. People accused of most violent felonies and some misdemeanors like sex offenses and domestic violence contempt (violating an order of protection) were still eligible for bail. It's important to note that while a group of people were eligible for bail, the law did not require prosecutors and judges to request or set bail.
- Required arresting officers to issue an appearance ticket (similar to a summons) for most people charged with misdemeanors or Class E felonies, with significant exceptions. For example, if an officer expects that an order of protection will be issued where there is a domestic violence or sex offense allegation, or the officer believes the person could benefit from immediate medical or mental health care.
- Encouraged judges to release people ineligible for money bail on their own recognizance unless they pose "a risk of flight." Then the judge could set non-monetary conditions—but whichever condition they choose must be the least restrictive to ensure the individual's return to court (e.g. supervised release, enhanced court date reminders, travel restrictions). Judges must explain their decision on the record or in writing.
- Required judges to not only consider each individual's ability to pay bail before setting bail, it required

While we value the tangible improvements in the lives of many individuals, we cannot barter the freedom of some people or that of others.

them to set at least three forms of bail, out of the nine total forms, including partially secured bond or unsecured bond, which are considered less onerous because they require less or no money down upfront and don't involve dealing with predatory bail bond companies.⁷

- Mandated that the court wait 48 hours before issuing a warrant if someone misses a court date and must try and contact them before issuing the warrant.
- Allowed the courts to change someone's release conditions and set bail if they believe the person "persistently and willfully failed to appear," violated an order of protection, or was charged with a felony and arrested on another felony, among others.
- Encouraged judges to lessen non-monetary conditions at subsequent appearances if the person accused complied with the conditions of their release.

While New York's 2019 bail reform legislation eliminated the option for judges to set money bail on most misdemeanors and nonviolent felonies so thousands of people could go home pretrial, it did not fully eliminate cash bail. It also expanded the reach of the criminal punishment system by giving police, prosecutors, and judges additional ways to monitor and control people pretrial, and reinforced a dichotomy between those who are deemed worthy of freedom and those who are not. People accused of misdemeanor sex offenses and criminal contempt for violating orders of protection in alleged domestic violence cases could still be detained pretrial on money bail. Further, people accused of various "nonviolent felonies" could also still be held in on money bail or even held in without the possibility of release (i.e. remanded). Finally, "violent felonies" and non-drug class A felonies (except for major trafficking allegations) continued to be money bail and remand-eligible. The law also gave judges wide latitude to impose new forms of supervision on people fighting their cases on the outside.

As soon as the law passed, activists were concerned that it further entrenched the distinction between “violent” and “nonviolent,” which would likely be most harmful for Black people, who bear the burden of racial profiling, overcharging, and the harshest bail outcomes. Unfortunately, this is exactly what we saw during the first 100 days of bail reform. While we value the tangible improvements in the lives of many individuals, we cannot barter the freedom of some people for that of others. Everyone deserves freedom from cages, the presumption of innocence, safeguards to protect our liberty, and a system that does not make freedom contingent on wealth.

Even before we began the “Eyes on 2020” initiative, it became clear that the movement to end pretrial detention would be up against efforts aimed at undermining bail reform. A few tragic isolated acts of violence were attributed to the changes in the law. Politicians started to back off from their support.⁸ Police unions coordinated to undermine and intimidate the democratic process, using manufactured data to justify their claims.⁹

Despite our hope that bail reform would go even further than it did, in April 2020, Governor Cuomo and the New York State Legislature voted to roll back bail reform. The bail rollbacks contained provisions to expand non-monetary sanctions including travel restrictions, expand profiteering and surveillance of communities of color (e.g. the allowance of for-profit electronic monitoring), and increase judicial discretion so judges can set bail on a slew of additional charges that were not eligible for bail under New York’s 2019 reforms. Making more people eligible for bail means the incarceration of thousands more Black and brown people statewide, elucidating once again the state’s deep-standing commitment to denying our most marginalized community members their basic human rights to freedom, safety, and dignity.

METHODOLOGY

We generated the insights in this report from 937 arraignments across Brooklyn, Queens, and Manhattan between January 1 and March 10, 2020. Data for these cases was collected by 59 Court Watch NYC volunteers (aka “Court Watchers”) over 120 three-hour shifts in arraignment courtrooms and a team of experienced Court Watchers reviewed and compiled individual entries for analysis. For the purposes of uncovering year-over-year trends, our data also include 778 cases we observed in 2019.

Our data capture information about the charges, the plea negotiations, and the interactions between prosecutors, defense attorneys, and judges that determined the securing orders imposed on individuals during their first court appearance (i.e., bail, remand, release with or without conditions). We used significance testing to investigate our hypotheses about the arraignment process and the impact of bail reform, and any findings included in our report are rooted in these statistics.

Our race and age data is based on Court Watchers’ individual and subjective perceptions, which is not free from bias. While we recognize that this bias may influence our data, we ultimately feel that Court Watcher demographic observations are relevant insofar as they likely approximate the kind of subjective perceptions that impact and bias the way police patrol communities and arrest certain individuals, the kinds of requests prosecutors make, and the decisions judges reach.

It is also important to note that because watchers wear conspicuous yellow CWNYP t-shirts, courtroom actors are aware they are being watched. Through conversations with court actors and public defenders, we recognize that prosecutors and judges often shift their behavior and decisions in our presence, by being more “lenient.” We say this to acknowledge that the general trends we highlight in this report might be more severe in reality than we project, not less.



As you read this report, remember that we are only in courtrooms a fraction of the time, and for every story we recorded there are thousands more untold.

FIRST 100 DAYS OF BAIL REFORM

Despite a largely inefficient, incomplete, and inadequate implementation of the new law, bail reform kept more New Yorkers free from pretrial detention. At the same time, our data suggest that bail reform also expanded the reach of the criminal punishment system by giving police, prosecutors, and judges new ways to monitor and control people before trial.

We saw clear racial disparities play out at every stage of the arraignment process: who police choose to arrest, the charges and requests pursued by prosecutors, and the securing orders set by judges.

FINDINGS

- Racial disparities in the arraignment process persisted under bail reform.
- Judges and prosecutors consistently sought the most restrictive pretrial conditions.
- Prosecutors and judges often ignored the requirement to consider an individual's ability to pay bail.
- Bail amounts increased substantially after bail reform went into effect in 2020, even when controlling

for the narrower set of charges eligible for bail.

- Circumventing the intent of the law, judges overwhelmingly set partially secured bond amounts above both the cash bail and bail bond amounts, likely driving business to predatory bail bond companies and preventing many from getting free.
- Prosecutors used their power and discretion to up-charge people in order to incarcerate more people pretrial.
- Bail reform led to a decrease in the overall prevalence of bail, but an increase in other forms of carceral control.

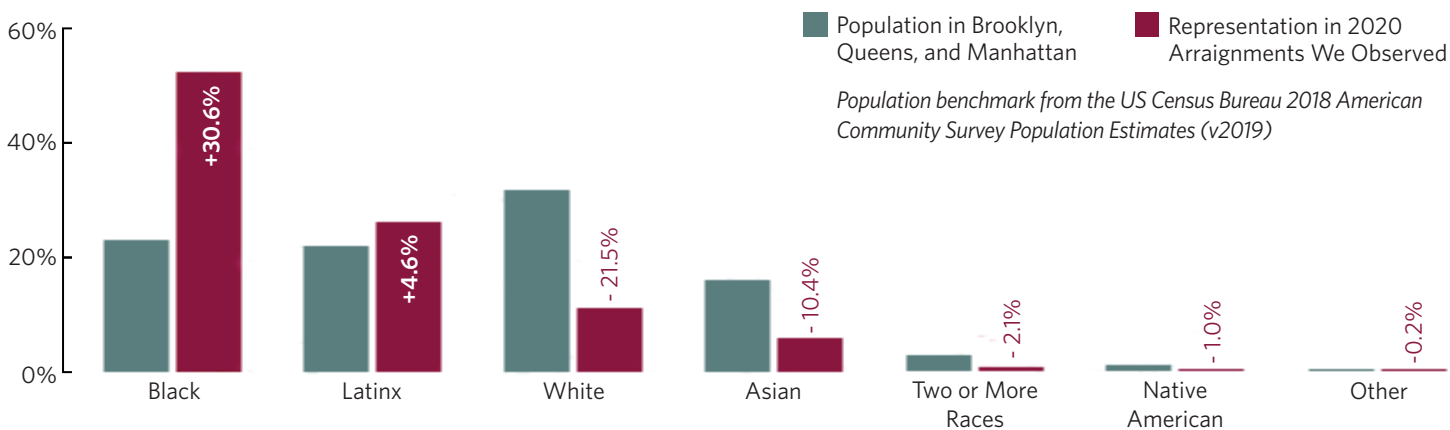
FINDING #1: RACIAL DISPARITIES PERSISTED UNDER BAIL REFORM

"Racism, specifically, is the state-sanctioned or extralegal production and exploitation of group-differentiated vulnerability to premature death."

- Ruth Wilson Gilmore

Our findings during the first 100 days of bail reform from January to March 2020 underscored the ways that racism permeates every aspect of the criminal punishment system.¹⁰ We saw clear racial disparities play out at every stage of the arraignment process: who police choose to arrest, the charges and requests pursued by prosecutors, and the securing orders set by judges.

BLACK AND LATINX NEW YORKERS ARE OVERREPRESENTED IN THE CRIMINAL LEGAL SYSTEM



Our data show that police and prosecutor discretion disproportionately penalizes New Yorkers who are Black and Latinx by forcing them into the criminal punishment system at rates far higher than their representation in the city's demographics. For example, while only 17% of Manhattan's population is Black, roughly 57% of the individuals who Court Watchers saw arraigned in Manhattan were Black. These same disparities played out across all three boroughs Court Watchers observed, with Black and Latinx New Yorkers consistently over-represented compared to New Yorkers of other races.

Judges' decisions further compound the racial disparities seen at earlier stages in the arraignment process, including who is arrested and arraigned, as well as the types of offenses people are charged with. **For example,**

JUDGES SET BAIL NEARLY TWICE AS OFTEN FOR BLACK PEOPLE COMPARED TO OTHERS



in cases where the accused person was charged with a bail eligible offense, judges chose to set bail in 40% of cases where the accused person was Black, as compared to 24% of cases where the accused person was of another race. In half of all cases in which judges set bail, the person accused of the crime was a Black man between the ages of 16-34.¹¹ In these cases—as with all cases—prosecutors and judges could have used their discretion to release these individuals on their own recognizance, but instead chose to subject people to the injustice of money bail and trauma of pretrial jailing.

These same racist outcomes persisted in the non-monetary conditions that prosecutors requested and judges imposed. With fewer opportunities to set bail in 2020, judges decided to release people with conditions such as mandated programs and supervised release at a far greater rate, and the effects of these decisions disproportionately impacted Black people. When a Black person was

released without bail in 2020, they were 38% more likely to have conditions imposed on them than a person of another race. Strikingly, this effect was even more pronounced for what are considered lower level charges. For example, when a prosecutor brought a case with a Class A Misdemeanor as the top charge in 2020, Black people were released on their own recognizance at a lower rate than people of any other race and judges were more than **twice** as likely to set conditions upon release if the person accused was Black.

Even though the judge makes the final decision for securing orders, the prosecutor holds enormous power over the outcomes in arraignments. This is a substantial driver of discrimination in the process because the prosecutor's consent is crucial to the outcome for each person arraigned: In 2020, judges released people on their own recognizance in 99% of cases where the prosecutor consented to release on recognizance (ROR), but only 41% of cases where they didn't.

When a case was eligible for bail in 2020, the prosecutor's influence also played a critical role in deciding who would be held in pretrial detention. Judges set bail on 35% of the cases eligible for bail under the reform law, but that rate jumped to 53% when the prosecutor requested that bail be set, serving as a critical lever for the transmission of racial bias from prosecutors to carceral outcomes. The dollar amount that the judge set for bail was also highly correlated with the amount that the prosecutor requested for the case: the higher the amount requested by the prosecutor, the higher the amount the judge set.

The product of this interplay between police, prosecutors, and judges is a criminal punishment system where Black New Yorkers are much more likely to be arrested, charged with bail-eligible offenses, and subjected to bail or onerous conditions upon release than their white counterparts.

FINDING #2: JUDGES AND PROSECUTORS CONSISTENTLY SOUGHT THE MOST RESTRICTIVE PRETRIAL CONDITIONS

Our data show that prosecutors use their discretion to seek to detain as many people as possible.

New York’s bail reform meant that prosecutors and judges were required to treat bail and pretrial detention as a last resort. Offenses that are eligible for bail are also offenses that are eligible for non-bail alternatives, like ROR. In other words, **just because prosecutors and judges could request or set bail on these bail-eligible charges does not mean they are required to do so.** Nonetheless, we watched prosecutors overwhelmingly use bail like the first line of defense whenever technically allowed. This means that in **nearly 70% of cases where they were legally permitted, prosecutors seized the opportunity to detain someone pretrial.** Even when defense attorneys pointed out that their clients could not afford any amount of bail, prosecutors and judges argued that bail was necessary. On the first day of bail reform, a prosecutor requested that the judge set \$5,000 bail. The defense attorney pointed out that bail was not the least restrictive means to ensure the accused returns to court. The judge set \$5,000 anyway.

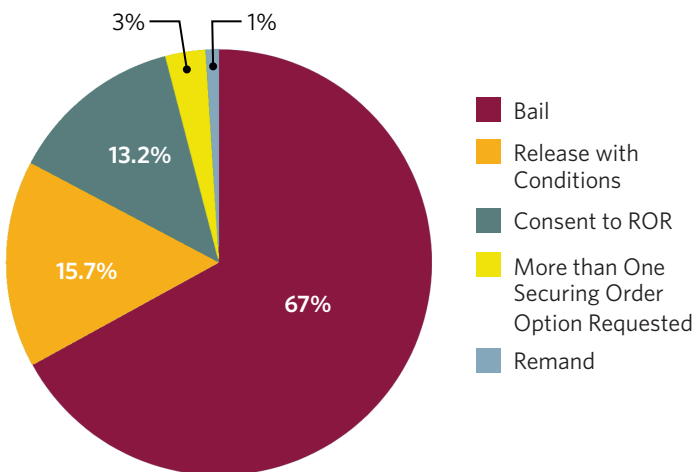
FINDING #3: PROSECUTORS AND JUDGES OFTEN IGNORED THE LEGAL REQUIREMENT TO CONSIDER AN INDIVIDUAL’S ABILITY TO PAY BAIL

New York’s 2019 bail reform law required judges to consider an accused person’s ability to pay before setting bail. **Court Watch data show that prosecutors and judges overwhelmingly ignored this requirement—requesting and setting bail without consideration of whether the bail amount would force someone to remain detained simply because they were too poor to buy their freedom.** Court Watchers did not hear judges affirmatively mention an accused person’s ability to pay in over 75% of cases. Even in cases where defense attorneys asserted that an individual could not pay any bail, judges set bail.

JUDGES SET BAIL EXCEEDING
\$10,000

IN NEARLY HALF OF CASES IN 2020. HIGH BAIL AMOUNTS CONTINUE TO DISPROPORTIONATELY AFFECT BLACK AND LATINX PEOPLE

PROSECUTORS OVERWHELMINGLY REQUEST BAIL ON CASES WHENEVER PERMITTED



When bail was set, it was overwhelmingly set in the amount of thousands of dollars—and often set in the tens of thousands. Judges set cash bail exceeding \$2,500 in 92% of cases in 2020, and half of those amounts were \$10,000 or greater. Our observations show that as long as an individual is charged with a bail-eligible offense, disproportionate power in the hands of judges and prosecutors meant they would continue to request and set bail.

Further, high bail amounts continue to disproportionately affect Black and Latinx people, and men of color more broadly. Of all the people we saw subjected to bail in 2020, 87% were men of color, and of the 62 individuals in those cases who were Black or Latinx, judges set cash bail in the tens of thousands or hundreds of thousands of dollars for 28 of them. In the same period, we saw just five white people get bail set on their case. Not a single one exceeded \$10,000.

FINDING #4: BAIL AMOUNTS INCREASED SUBSTANTIALLY AFTER BAIL REFORM WENT INTO EFFECT

Our data also reveal that bail amounts increased at an alarming rate between 2019 (pre-bail reform) and when bail reform went into effect January 1, 2020 when controlling for the narrower set of charges eligible for bail. The median cash bail amount requested by prosecutors for bail-eligible cases in 2020 was \$25,000, compared to \$15,000 in 2019 for that same set of charges.

THE MEDIAN BAIL AMOUNT INCREASED SUBSTANTIALLY FROM 2019-2020

67%

INCREASE IN BAIL SET BY PROSECUTORS

50%

INCREASE IN BAIL SET BY JUDGES

Following suit, the median cash bail amount that judges ultimately set was \$7,500 in 2020, compared to \$5,000 in 2019—again, only considering cases with charges that were eligible for bail both before and after the reform.

FINDING #5: JUDGES OVERWHELMINGLY SET HIGH PARTIALLY SECURED BOND

New York's 2019 bail reform law requires judges to not only consider each individual's ability to pay bail when the judge chooses to set bail, it also requires judges to set at least three forms of bail, one of which has to be either partially secured bond or unsecured bond. Partially secured and unsecured bonds are less onerous than cash bail and commercial bail bonds because they require less or no money upfront and don't involve contracting with predatory bail bond companies.¹² For partially secured bonds, a person can be freed on bail by paying a small percentage of the full amount (up to 10%), but would be on the hook for the full amount if they did not return to court. Unsecured bonds do not

require money upfront, and similarly require the person pay the full bond amount if they miss a court date and bail is forfeited.

Although the law required judges to set these additional forms of bail, it did not specify that judges must set all three forms of bail in the same amount. Judges and prosecutors quickly discovered a loophole that undermined the spirit of the new law. There was nothing stopping judges from setting the third "affordable" option at a vastly higher amount than the two traditional options, such that the amount someone would have to pay to get out of jail would be the same.

In cases like these, when judges set the partially secured bail amount higher than both the cash bail and bail bond amount, the partially secured bond option becomes more onerous than intended by the bail reform law. The likely result is that more people remain in jail unable to purchase their freedom, and the multi-billion dollar commercial bail bond industry rakes in more business.

This is exactly what we saw. Judges overwhelmingly set partially secured bond amounts above both the cash bail and bail bond amounts. **In the majority of cases where bail was set, judges set the partially secured bond at three times the cash bail amount or higher; and in nearly 40% of cases the judge set the partially secured bond amount at least two times the bail bond amount.**

In January 2020, a man was arraigned in a hospital gown for assault. The accused was in a methadone program, had a full time job, had a place to stay, and was eligible for supervised release. The ADA requested \$25,000 bail. The judge set \$25,000 bail bond, \$25,000 cash, or \$100,000 partially secured bond at 10%. The partially secured bond amount of \$100,000 at 10% meant that the man would have to pay \$10,000 for his freedom versus a maximum of \$1,760 to a for-profit bondsman (who may also illegally overcharge, require collateral and other conditions).¹³ The partially secured bond option is intended to make bail less onerous, not make predatory bail bond companies seem more appealing.

PERCENTAGE OF CASES WHERE PARTIALLY SECURED BOND (PSB) WAS SET EQUAL TO OR A MULTIPLE ABOVE THE CASH BAIL AND BAIL BOND AMOUNTS

	= 1x	> 1x	2x +	3x +	4x +	5x +	6x +	7x +	8x +	9x +	10x +
PSB vs Cash	15.3%*	84.7%	78.0%**	54.2%	33.9%	23.7%	13.6%	3.4%	3.4%	1.7%	1.7%
PSB vs Bond	50.0%	50.0%	36.5%	7.7%	5.8%	5.8%	0.0%	0.0%	0.0%	0.0%	0.0%

* In only 15.3% of all cases, the partially secured bond amount was equal to the cash bail amount.

** In 78% of cases, the partially secured bond amount was set two or more times higher than the cash bail amount.

FINDING #6: PROSECUTORS APPEARED TO USE THEIR POWER AND DISCRETION TO INCARCERATE MORE PEOPLE PRETRIAL

Black people accused of a crime saw an uptick in charges that remained eligible for bail under the reform law, suggesting that prosecutors may be strategically shifting which charges they bring in order to incarcerate more people pretrial. While judges can no longer set bail on every case, prosecutors can still use their power and discretion to bring charges that circumvent the restrictions in a discriminatory manner.¹⁴ For example, the prosecutor could choose to charge a Black person with a violent felony robbery—a bail-eligible offense—for tussling with a store security guard during a minor shoplift, while only charging a white person who had engaged in similar conduct with a non bail eligible petit larceny misdemeanor.

“In cases like these, when judges set the partially secured bail amount higher than both the cash bail and bail bond amount, the partially secured bond option becomes more onerous than intended. The likely results are that more people remain in jail unable to purchase their freedom, and the multi-billion dollar commercial bail bond industry rakes in business.”



UPTICK IN THE NUMBER OF CHARGES FOR BLACK ACCUSED PEOPLE FROM 2019-2020

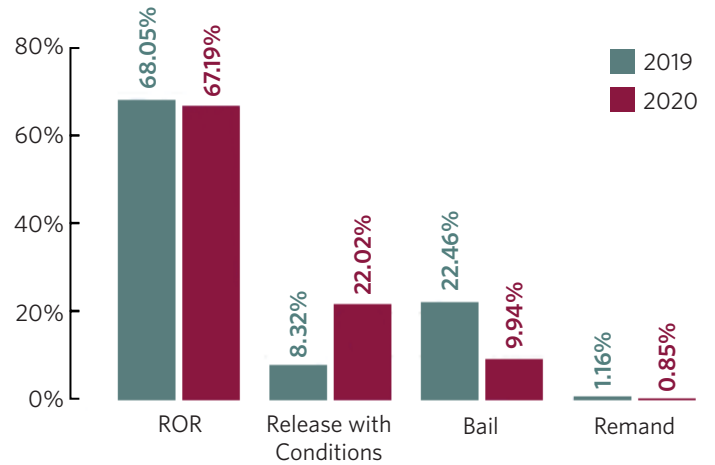
38% INCREASE FOR ALL CHARGES THAT REMAINED ELIGIBLE FOR BAIL UNDER BAIL REFORM

88% INCREASE IN CHARGES OF ASSAULT IN THE SECOND¹⁵

FINDING #7: BAIL REFORM LED TO AN INCREASE IN NON-MONETARY FORMS OF CARCERAL CONTROL

Our data point to the contradictions inherent to bail reform. On the one hand, bail reform successfully lowered the number of cases in which bail was set, allowing many New Yorkers to return home before their trials. At the same time, it also appears that bail reform spurred an increase in various forms of conditional release, expanding the reach of the criminal punishment system by giving the police, prosecutors, and judges additional ways to monitor and control people.

BAIL REFORM LED TO DECREASE IN PREVALENCE OF BAIL BUT INCREASE IN RELEASE WITH CONDITIONS



“The prosecutor asked for supervised release...sometimes after complaining that she couldn’t ask for bail, and the judge granted it every time...It seemed like supervised release was just being used as a substitute for bail.”



New York State’s bail reform meant fewer people would be forced to plead guilty so they wouldn’t have to spend months awaiting trial. It meant fewer people losing their jobs or their housing, fewer caregivers separated from their children, and fewer people exposed to unhealthy and unsafe conditions in jail. However, we also saw how judges and prosecutors too often pushed for the most punitive options possible under bail reform and outright ignored the law’s new requirements. We saw the ways in which the criminal punishment system continued to produce racist outcomes through the arraignment process and we witnessed the enormous dangers and racist implications of prosecutorial and judicial discretion.

Ultimately, the first three months of bail reform reinforces our indignation with a system that always finds a way to inflict maximum harm when given the opportunity, and it underscores the unequivocal need to go beyond reforms and dismantle that system.

BAIL REFORM ROLLBACKS

WHAT WE CAN EXPECT LOOKING AHEAD

In April 2020, after months of propaganda and fear mongering carried out by law enforcement and right-wing media—and in the middle of an unprecedented global health crisis—New York State legislators voted to roll back bail reform in order to expand the power of systems actors, and increase the number of marginalized, Black and brown New Yorkers subjected to incarceration and profiteering. These changes were quietly pushed through in the midst of the COVID-19 public health crisis, even as infection rates on Rikers Island were more than five times higher than the rest of New York City—the “epicenter” of the pandemic—and a staggering 39 times higher than the rest of the United States.¹⁶

Bail reform rollbacks take effect in early July 2020. These rollbacks will keep thousands of New Yorkers in jail pretrial in the midst of a pandemic—individuals who would have gone home to their loved ones, communities, and daily lives if bail reform had not been rolled back.¹⁷

Specifically:

- The bail reform rollbacks expand the group of charges that prosecutors and judges can request and set bail on, giving them the power to set bail on new major categories of charges including (but not limited to): felony drug charges, burglary in the second degree (if the person is accused of entering a living area), and certain misdemeanors that involve identifiable harm to person or property while the person who is accused is out on a charge of the same category. The ambiguity of the phrase “identifiable harm to a person or property” could include anything from a physical assault to shoplifting. See footnotes for full list of expanded bail-eligible charges.¹⁸
- The rollbacks permit judges to now impose additional non-monetary sanctions including travel restrictions, mandatory counseling and treatment programming, and requiring people to prove diligent efforts to remain employed or in school.
- Unlike the original reforms passed in 2019, which

prohibited counties from contracting with for-profit electronic monitoring companies, the bail rollbacks allow counties to use for-profit electronic monitoring companies as long as all contact with the person accused is done by the government and/or nonprofit organizations. Even though the cost of the e-shackle cannot be transferred to the individual, this change expands the power of private, for-profit interests to take a financial stake in the surveillance and criminalization of marginalized New Yorkers.

Given our observations, we have every reason to believe these issues will not only persist, but will be exacerbated by the expanded discretion granted to prosecutors and judges by the rollbacks.

Whenever we saw cases where bail reform took incarceration off the table, prosecutors consistently requested the harshest punishments allowable under the new laws and judges consistently used their discretion to impose the heaviest possible conditions for release. All the while, poor people and Black and Latinx New Yorkers continued to be arrested, charged, and arraigned at disproportionately high rates. Given our observations, we have every reason to believe these issues will not only persist, but will be exacerbated by the expanded discretion granted to prosecutors and judges by the rollbacks.

It is alarming that while we watched prosecutors and judges bemoan their inability to incarcerate—while simultaneously circumventing the law by setting bail at unaffordable amounts and potentially even upcharging people in order to incarcerate them pretrial—New York State legislators voted to expand the number of people eligible for bail and pretrial incarceration, less than six months into the original reforms. That means that thousands more people, the majority of them Black and Latinx, will be subjected to the trauma and collateral consequences of pretrial detention—consequences which

turned acutely life-threatening in the midst of a deadly pandemic.

While judges were limited in the number of people they could set bail on, we watched them pivot to placing people under other forms of surveillance and control through release conditions. Now, less than six months later, these judicial powers have been expanded even further. And it will soon begin to prop up industries that profit off of the surveillance and criminalization of marginalized New Yorkers. Further, since these rollbacks passed, we have seen Manhattan DA Cy Vance request that Governor Cuomo use his executive powers to further expand bail-eligible charges in response to protests against systemic racism and brutality.¹⁹

Whenever we saw cases where bail reform took incarceration off the table, prosecutors consistently requested the harshest punishments allowable under the new laws and judges consistently used their discretion to impose the heaviest possible conditions for release. All the while, poor people and Black and Latinx New Yorkers continued to be arrested, charged, and arraigned at disproportionately high rates. Given our observations, we have every reason to believe these issues will not only persist, but will be exacerbated by the expanded discretion granted to prosecutors and judges by the rollbacks.

“In one case, an older man with vision loss from diabetes was released on his own recognizance after the prosecutor requested \$15,000 bail. This is one outcome that allowed a very vulnerable person to avoid jail and the countless risks associated with it. But without the full dismantling of prisons, we know that the criminal punishment system will continue to detain and punish as many people as possible, with no regard for their dignity or health, in a way that does greatest harm to black, brown, and poor New Yorkers. There is no greater evidence of this than the City and State’s callous disregard for the lives of those who are detained in the midst of the current pandemic.”



THE FIGHT CONTINUES

"Prisons do not disappear problems, they disappear human beings."

- Angela Davis

The criminal punishment system is designed to reinforce and perpetuate oppression, racism, violence, and death. Therefore, it cannot be reformed or reimagined. But it can be dismantled, defunded, and abolished. Abolition calls for the restructuring of daily life, a reconstitution of the way we live. It recognizes the disproportionate harm the prison industrial complex causes Black and brown people and their communities. Abolition demands the undoing of imprisonment, policing, and surveillance and welcomes alternative forms of accountability, government spending, and societal power.²⁰

Any reforms to the system should lay important groundwork for progressive and structural change. They should thoroughly address the racist origins of our justice system, they should divest capital from the inhumane punishment system and invest it back into communities, and they should work toward an equitable future by challenging our perceptions and ways of life.

Court Watch NYC found that New York's short lived bail reform was a step forward to ensure pretrial freedom for thousands of New Yorkers, but it also left the unjust systems of money bail and pretrial detention in place for many others. Time and time again, we saw bail reform enable people to keep their health, careers, and families intact. We also watched as prosecutors and judges openly circumvented the new laws and we saw the vast expansion of other forms of carceral control that further legitimize the carceral state. Ultimately, we expect that the rollbacks passed by the New York State Legislature will further exacerbate the structural inequalities that the most vulnerable New Yorkers face daily.

Our observations from the first 100 days of bail reform affirm what community members and organizers have been saying regarding the necessity of shrinking the size of the criminal punishment system by taking away the power of judges and prosecutors. These tumultuous six months of 2020 have laid bare the inequities, injustices, and inherent racism of all the systems that seek to govern us. It's never been more clear that these systems must be abolished so that we can create something new. Our eyes remain on 2020 and beyond, and we are resolute and determined to seize this moment to work toward safety and justice for all.



GLOSSARY

We recognize that using the language of the prison industrial complex (PIC) can uphold its legitimacy. However, given that our work is shining a light on the inner workings of the system, we have used certain terms for the sake of clarity.

Abolition (h/t Critical Resistance): PIC abolition is a political vision with the goal of eliminating imprisonment, policing, and surveillance and creating lasting alternatives to punishment and imprisonment. From where we are now, sometimes we can't really imagine what abolition is going to look like. Abolition isn't just about getting rid of buildings full of cages. It's also about undoing the society we live in because the PIC both feeds on and maintains oppression and inequalities through punishment, violence, and controls millions of people. Because the PIC is not an isolated system, abolition is a broad strategy. An abolitionist vision means that we must build models today that can represent how we want to live in the future. It means developing practical strategies for taking small steps that move us toward making our dreams real and that lead us all to believe that things really could be different. It means living this vision in our daily lives. Abolition is both a practical organizing tool and a long-term goal.

Arraignment: The initial court proceeding, following arrest and processing, in which the person accused of a crime is brought before the judge, officially informed of the charges against them and asked to enter a plea of not guilty or guilty. In New York City, it is also the first opportunity for a securing order to be set.

Assistant District Attorney / ADA: see **prosecutor**

Bail: A securing order where the person accused of a crime must pay some form of money in order to be released pending their trial. If they appear at all of their court dates, the money will be returned. The judge sets bail largely based on the recommendation of the prosecutor, and under bail reform, must set at least three different forms, including either a partially secured or unsecured bond. Since the 1970s, New York law provides for nine forms of bail. While there are many types of bail permitted in New York City, the forms we see most of-

ten are cash bail, insurance company bail bond, partially secured bond and credit card bail. For more information on how to pay bail in New York State, visit: <https://brooklynbailfund.org/ny-bail-info>

Cash bail: One of the most common forms of bail. Requires the individual to pay the full amount of bail to the court. If the accused person returns for all of their court dates, the payer is entitled to a full refund of the cash bail amount.

Credit card bail: A judge must set this form of bail in order for an individual to be able to pay by credit card. Similar to other forms of bail, if the accused person appears for all court dates and bail isn't forfeited, they are entitled to a refund.

Charges: the set of laws the government accuses an individual of having broken.

Defense Attorney: A lawyer representing the person accused of a crime - they are either hired by the accused person or appointed to them by the court. Appointed defense attorneys are usually from local agencies (Legal Aid Society, New York County Defender Services, Brooklyn Defenders, Bronx Defenders, etc.)

Felony: Rated from A through E in order of "seriousness" (with A felonies being the most "serious" and potentially punishable by life sentences without the possibility of parole).

Insurance company bail bond: One of the most common forms of bail. This form of bail involves contracting with a for-profit bail bond company, which acts as the surety. When working with a bail bondsman, an individual pays a non-refundable fee (usually around 10% of the total bail bond amount). Bail bondsmen almost always require the individual to put up additional collateral, which the bondsmen are legally required to return at the end of the accused person's case. Bondsmen typically also set additional requirements, which can include in-person check ins, call ins, etc.

Jail: A locally-run facility (e.g. Rikers Island) where people are incarcerated for sentences under a year, or in pre-sentence because they are unable to pay bail or have been remanded.

Judge: An official who decides cases in court. In New York State, judges can be elected or appointed, and judges serving in Criminal Court may be either. They make decisions about securing orders, court dates, sentencing, etc.

Misdemeanor: Charge punishable by up to 364 days in city jail. Considered a lower-level offense.

Non-monetary release conditions: Conditions set on a person accused of a crime for release before their trial, ostensibly to “ensure their return to court.” The most common condition we see is Supervised Release, a program where the accused person checks in with program staff in person and/or by phone. In order to be eligible for Supervised Release, a person accused of a crime must be assessed and approved by the nonprofit that facilitates the program, which varies by borough. Other non-monetary release conditions may include a court-mandated program (e.g. a Treatment Readiness Program), driver’s license suspensions, screening for substance dependency, or electronic monitoring.

Prison Industrial Complex (h/t Critical Resistance): The prison industrial complex (PIC) is a term we use to describe the overlapping interests of government and industry that use surveillance, policing, and imprisonment as solutions to economic, social, and political problems. Through its reach and impact, the PIC helps and maintains the authority of people who get their power through racial, economic, and other privileges. There are many ways this power is collected and maintained through the PIC, including creating mass media images that keep alive stereotypes of people of color, poor people, queer people, immigrants, youth, and other oppressed communities as criminal, delinquent, or deviant. This power is also maintained by earning huge profits for private companies that deal with prisons and police forces; helping earn political gains for “tough on crime” politicians; increasing the influence of prison guard and police unions; and eliminating social and political dissent by oppressed communities that make demands for self-determination and reorganization of power in the U.S.

Partially secured bond: Requires a surety to deposit up to 10% of the total partially secured amount to the court. Judges can specify the number of sureties required to post bond. If the accused person doesn’t return for all of their court dates and bond is forfeited, the payer(s) must pay the remaining balance. The surety must be approved by the court, and proof of income and/or assets are typically required.

Prosecutor: Also known as the Assistant District Attorney (ADA) or “The People.” A lawyer who conducts the case against the person accused of a crime.

Release on recognizance (ROR): A securing order under which an individual is released without conditions, meaning the accused person is free to leave and come back to future court dates on their own.

Remand: In the arraignment context, this means that a person accused of a crime is detained with no opportunity to pay bail or be otherwise released before their trial. This commonly happens in homicide cases, as well as in instances where the person accused of a crime has an outstanding warrant out of the supreme court or a drug treatment court.

Securing Order: the determination made by the judge, informed by the prosecutor, on whether the person accused of a crime will be released on their own recognizance, have non-monetary conditions set on their release, have monetary bail set or be remanded.

Unsecured bond: Unsecured bond does not require any money upfront. A surety must be approved by the court and must fill out paperwork (often including proof of income and/or assets) promising to pay the full amount of the bond. If the accused person misses a court date and bond is forfeited.

Upcharge: Allegations that are actually misdemeanors but because of a person’s history could be “bumped up” to a felony. Examples include gravity knife possession, and shoplifting cases where a person has a prior history with a store and has signed a trespass notice so a minor shoplift case could be charged as a burglary resulting in mandatory state prison.

Violations: Non-criminal charges

ENDNOTES

1. See: <https://www.budget.ny.gov/pubs/archive/fy19/exec/fy19artVII/PPGGArticleVII.pdf>
2. Survived and Punished. "Preserving Punishment Power." 2020. Accessed at: <https://www.survivedandpunishedny.org/wp-content/uploads/2020/04/SP-Preserving-Punishment-Power-report.pdf>
3. Pauly, Madison. "To Arrest the Spread of Coronavirus, Arrest Fewer People." March 12, 2020. Accessed at: <https://www.motherjones.com/crime-justice/2020/03/coronavirus-jails-bail-reform-arrests/>
4. See: https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=S07506&term=2019&Summary=Y&Text=Y
5. Center for Community Alternatives and Citizen Action. "Sending New Yorkers to Jail: Police Unions, Campaign Contributions and the Political Fight to Rollback Bail Reform." 2020. Accessed at: <http://www.communityalternatives.org/wp-content/uploads/2020/06/sending-new-yorkers-to-jail.pdf>
6. Center for Court Innovation. "Bail Reform Revisited: The Impact of New York's Amended Bail Law." 2020. Accessed at: https://www.courtinnovation.org/sites/default/files/media/document/2020/FactSheet_CCI_Bail_Reform_Revisited_05272020.pdf
7. Office of the New York City Comptroller. "The Public Cost of Private Bail: A Proposal to Ban Bail Bonds in NYC." 2018. Accessed at <https://comptroller.nyc.gov/reports/the-public-cost-of-private-bail-a-proposal-to-ban-bail-bonds-in-nyc/>
8. Lustbader, Sarah. "Pushback on New York's Bail Reform Reflects Fear, Ignorance." The Appeal, Jan. 9, 2020. Accessed at: <https://theappeal.org/pushback-on-new-yorks-bail-reform-reflects-fear-ignorance/>
9. Offenhartz, Jake. "Public Defenders Allege NYPD Is Inventing A Crime Spike To Kill Bail Reform." Gothamist, March 5, 2020. Accessed at: <https://gothamist.com/news/public-defenders-allege-nypd-inventing-crime-spike-kill-bail-reform>
10. Please see the Methodology regarding our race and age data.
11. Please see Methodology.
12. Brooklyn Community Bail Fund. "License & Registration, Please..." June 2017. Accessed at: https://static1.squarespace.com/static/5824a5aa579fb35e65295211/t/594c39758419c243fdb-27cad/1498167672801/NYCBailBondReport_ExecSummary.pdf
13. For more information on how to pay bail in New York, visit: <https://brooklynbailfund.org/ny-bail-info>
14. While we're unable to make any concrete conclusions on upcharging because bail reform was rolled back before clear patterns could emerge, based on what we saw in our data from the first few months of bail reform, it looks like this was the case.
15. In 2020, 25.44% of Black people we observed in arraignments faced one of the charges which remained eligible for bail under the reform law, compared to 18.45% in 2019 for the same set of charges. In 2020, 5.02% of Black people we observed in arraignments had a top charge of Assault in the 2nd, compared to 9.42% in 2019.
16. Legal Aid Society. COVID-19 Infection Tracking in NYC Jails. 2020. Accessed at: <https://legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails/>
17. Ben-Menachem, Jonathan. "Cuomo's Bail Reform Reversal Risks Explosive Coronavirus Spread in Jails." Slate, April 1, 2020. Accessed at: <https://slate.com/news-and-politics/2020/04/cuomo-bail-reform.html>
18. P.L. § 140.25(2) "where the defendant is charged with entering the living area of the dwelling", P.L. § 230.34, P.L. § 230.34-a, P.L. § 470.22, P.L. § 470.21, P.L. § 263.10, P.L. § 263.15, P.L. § 121.11, P.L. § 135.10, P.L. § 120.04-a, P.L. § 120.04, P.L. § 120.00 when charged as a hate crime, P.L. § 150.10 when charged as a hate crime, P.L. § 120.12 if the person who is accused had been previously convicted of assault of a person less than 11 years old, P.L. § 265.01-a, P.L. § 155.42, P.L. § 460.20, P.L. § 470.20, Cor. L. § 168-t, P.L. § 260.10, P.L. § 215.55, P.L. § 215.56, P.L. § 215.57, P.L. § 205.05, P.L. § 205.10, P.L. § 205.15, Any charge that is alleged to have caused the death of another person
19. Krisel, Brendan. "Manhattan DA Wants NYC Looting Suspects Held Without Bail: Report." Patch, June 4, 2020. Accessed at: <https://patch.com/new-york/new-york-city/manhattan-da-wants-hold-nyc-looters-without-bail-report>.
20. Critical Resistance. "What is the PIC? What is Abolition?" Accessed at: <http://criticalresistance.org/about/not-so-common-language/>