

A Means to an End: Assessing the Ability to Pay Bail

December 2019
Policy Brief

By Sandra van den Heuvel, Anton Robinson, and Insha Rahman

Across the United States, nearly half a million people are in jail at any given time because they cannot afford bail—the price of their freedom.¹ Historically, the terms “bail” and “bond” connoted pretrial release—on one’s own recognizance or a promise to return to court.² Almost 70 years ago, the U.S. Supreme Court held in *Stack v. Boyle* that bail is “the right to release pretrial.”³ Yet with notable exceptions in places like Washington, DC, New Jersey, and now New York State, today “bail” and “bond” are synonymous with money and pretrial detention in most courthouses throughout the country.⁴

How did this happen? In recent years money bail has been set more often and in higher amounts. From 1990 through 2009, as mass incarceration peaked, the use of bail for people charged with felonies increased from 53 percent to 72 percent of cases in large urban counties.⁵ Over the same period, the median amount of bail set steadily increased to \$11,700.⁶

Research demonstrates that money bail is fundamentally unfair and disproportionately burdens people of color and those with low incomes.⁷ Black people are not only more likely to have bail set, but at higher amounts: one study noted that bail was set higher by \$9,923 on average for Black people than for their white counterparts.⁸ Beyond the disparity in amounts, judges rarely if ever consider a person’s financial circumstances when setting bail. Instead, they often rely on a prosecutor’s bail request to inform their decisions.

Research shows that money bail is unnecessary and ineffective; jurisdictions that have enacted bail reform and no longer rely on money bail have excellent court appearance rates, fewer people in jail, and strong public safety outcomes.⁹ But given that the vast majority of courts across the country still use money bail, what can be done to mitigate its harm on the way to a more just pretrial system in which money bail is eliminated and pretrial detention is truly the last resort? In April 2018, the Vera Institute of Justice (Vera) developed and launched the Bail Assessment Pilot, a mini-demonstration project in arraignment courts in the Bronx and Queens, to challenge the use of bail without regard for a person’s ability to pay.

The bail system in New York

In New York State, the sole purpose of setting bail is to ensure that a person returns to court for future hearings. By law, judges must consider nine factors when setting bail—including a person’s character and reputation, employment and financial resources, prior criminal record, and failures to appear in court.¹⁰ But court actors too often overlook the possibility of releasing people on their own recognizance or under nonmonetary conditions. And people’s financial circumstances are rarely if ever taken into account when bail is set. Prosecutors in the courtroom request bail without any information about someone’s financial circumstances, defense attorneys rarely share specific information about their clients’ ability to pay, and judges routinely set bail at amounts higher than people can afford.¹¹

In lawsuits spanning the country, including one in Dutchess County, New York, “a lack of consideration” of a person’s ability to pay has been found to be “a violation of the equal protection and due process clause of the 14th Amendment and the . . . Constitution.”¹² In April 2019, New York State passed new bail laws that will go into effect in January 2020 and will dramatically reduce the use of bail on misdemeanor, nonviolent felony, and even some violent felony charges. But in the limited instances when bail may still be considered, judges must consider a person’s ability to pay and whether setting bail will cause “undue hardship.”¹³

A person’s ability to pay bail without undue hardship is based on two underlying principles—poverty should not result in pretrial detention simply because someone cannot afford to make bail and, in cases in which bail is paid, a person should have the capacity to do so without having to forgo paying for rent, groceries, child-care, or other regular expenses.¹⁴ Vera developed the Bail Assessment Pilot to provide concrete, individualized information about a person’s financial circumstances during the bail hearing. The pilot offers two pieces of vital information to the courts: one is the form of bail the person can afford (see “Types of bail in New York State” below) and the second is the amount of bail the person can reasonably pay. This information is based on a calculation of the person’s income, any public benefits they receive, ongoing expenses, and assets. Vera developed a tool—a “calculator” with about 30 questions to determine someone’s ability to pay bail—and hired a bail specialist to conduct an interview with the person arrested before the bail hearing in order to provide information to the court about how much and what type of bail someone could afford.

Types of bail in New York State

In 1970, the state legislature reformed New York’s bail laws to allow judges to consider forms of bail that are less restrictive than cash. New York State Criminal Procedure Law (CPL) § 520.10 allows for nine forms of bail. When bail reform goes into effect statewide in January 2020, in the limited cases in which bail may still be set, courts must set at least three forms. At least one of those forms must be a partially secured or unsecured bond.^a Historically, the practice in the state’s courts has been to impose only the two types of bail that are most onerous.

- **Cash bail.** This requires a person to pay the full bail amount to the court in cash. The money is returned at the end of a case, regardless of the final case outcome, if the person makes all court appearances.
- **Insurance company bail bond.** This requires a person to pay a 10 percent premium and other nonrefundable fees to a for-profit bail bond company and to satisfy conditions such as obtaining multiple payers and proof of employment. At the end of a case, regardless of the final case outcome, that premium and fees are not returned.

New York’s bail law has seven additional forms that are easier to afford because they do not require the “obligor”—the person responsible for the bond—to put up a large amount of money or pay nonrefundable premiums and fees.

- **Secured surety bond.** This requires an obligor other than the accused person to deposit personal or real property with the court to secure the person’s release, although the person accused may also serve as one of two or more obligors.
- **Secured appearance bond.** This requires the accused person to serve as the sole obligor and deposit personal or real property with the court to secure their release.

- **Partially secured surety bond.** This requires the obligor to be someone other than the accused person, although that individual may serve as one of two or more obligors. The obligor or obligors must provide a money deposit of no more than 10 percent of the bond, although a judge may set a smaller percentage for the up-front deposit amount.
- **Partially secured appearance bond.** This requires the accused person to serve as the sole obligor and to provide a money deposit of no more than 10 percent of the bond to secure release, although a judge may set a smaller percentage for the up-front deposit amount. An obligor is liable only for the remainder of the full bond amount if they do not appear in court, and bail is forfeited. If the person makes all court appearances, the initial deposit amount will be returned at the end of the case.
- **Unsecured surety bond.** This requires the obligor to be someone other than the accused person, although that individual may also serve as one of two or more obligors. No deposit of property or money is required up front; the person simply must promise to be liable for the full amount of the bond if they fail to appear at subsequent court dates and bail is forfeited.
- **Unsecured appearance bond.** This does not require the accused person to provide a deposit of property or money up front; the person simply must promise to be liable for the full amount of the bond if they fail to appear at subsequent court dates, and bail is forfeited.
- **Credit card.** This allows an obligor or obligors to pay the full bail amount to the court using a credit card. (The state legislature amended CPL § 520.10 in 1986 to authorize bail being posted this way.)

“Partially secured” means that an accused person must pay a percentage of a bond to the court to secure their release. “Unsecured” means that an accused person pays no money up front, but is liable for the full amount of a bond if they fail to appear at future court dates. See New York’s Criminal Procedure Law § 520.10.

How the pilot works

The Bail Assessment Pilot was launched in 2018 as a short-term mini-demonstration project to assess the impact of providing individualized information about ability to pay on judges’ bail-setting practices. The pilot will cease operation at the end of 2019, and a final report of the project’s findings will be released in 2020.

The Bail Assessment Pilot operates in the Bronx criminal court arraignment courtrooms—where bail hearings are conducted—on Tuesdays and Thursdays and in Queens criminal court arraignment courtrooms on Wednesdays and Fridays. It is staffed by a bail specialist, who is in the courtroom during the day shift and accepts referrals from defense attorneys for cases in which bail is likely to be set. All cases on those days, regardless of charge, prior criminal record, or any other factors, are eligible for assessment through the pilot.

The process has three simple steps.

1. **Referral.** Because the most recent data shows that New York City courts release 68 percent of all people arraigned citywide on their own recognizance and 3 percent to supervised release programs, Vera did not want to influence judges to consider bail in cases for which they otherwise would have released the person on their own recognizance.¹⁵ To that end, having defense attorneys

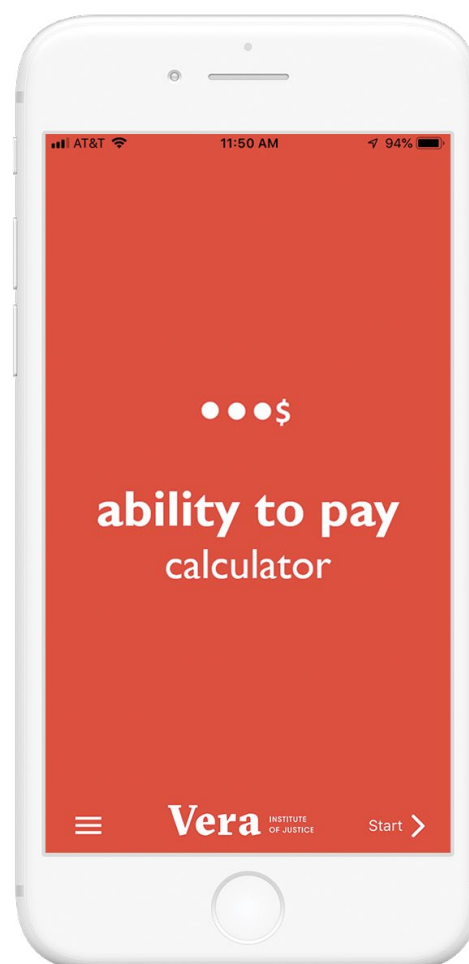
serve as gatekeepers and refer cases for which they believe bail will likely be set is an important safeguard to prevent overreach and net widening.

- 2. Interview.** Public defenders in arraignment courts make referrals to the Bail Assessment Pilot, where a specialist uses the bail calculator Vera developed (see “The bail ‘calculator’” below) to interview people awaiting arraignment. The bail calculator provides an estimate of the amount of bail the person can afford and suggests the form of bail most feasible for them. If a person has no ability to pay but identifies a friend or family member who can help with bail, the specialist contacts that person to ask about how much money they can contribute and provides that information to defense counsel and the court.
- 3. On-the-record assessment.** When asked by the judge or defense counsel, the bail specialist joins the public defender in a bail application by providing the person’s ability-to-pay assessment on the record—including the amount of bail and type of bail they can afford—before the judge makes a final bail decision. To guard against net widening, the bail specialist shares the assessment with the court only if the public defender makes a request and when it is clear that bail will be set. If a case looks as if it will result in release on recognizance or supervised release, the specialist’s assessment will not be provided on the record despite an interview having been completed.

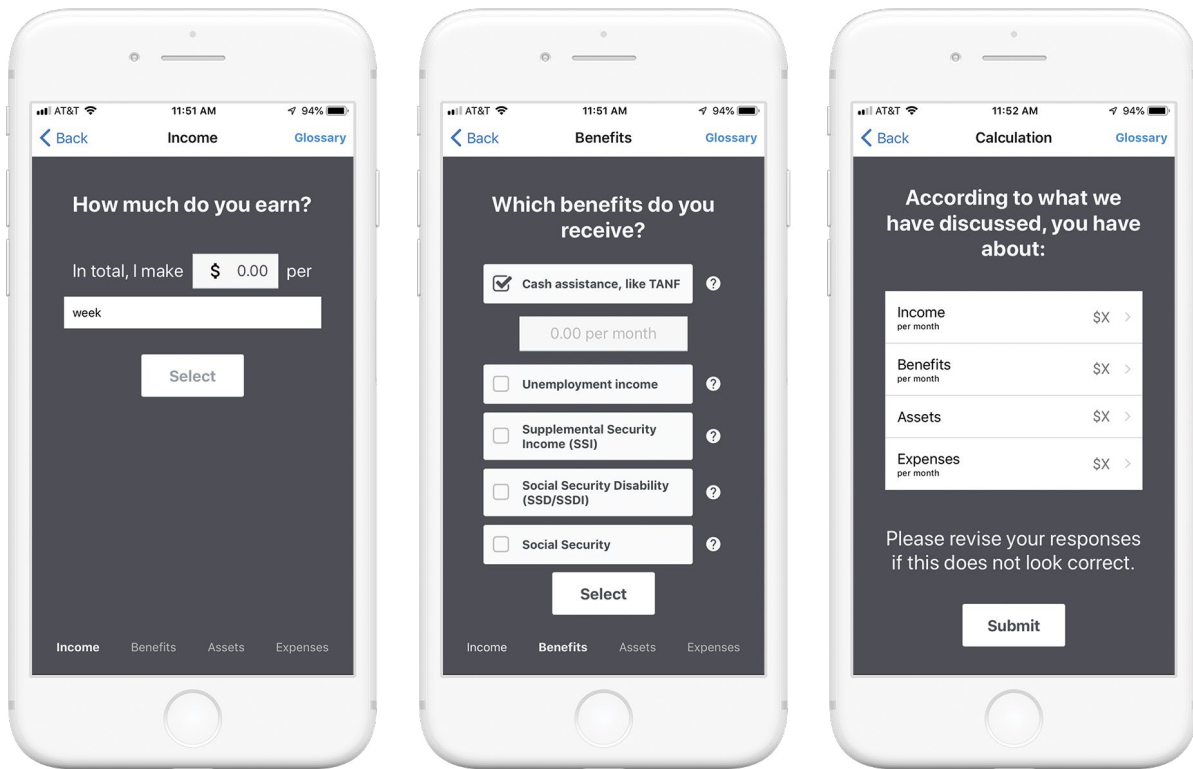
The bail “calculator”

To create a bail “calculator,” Vera partnered with Duke University’s Common Cents Lab, a behavioral science research institute that studies financial well-being for low- and moderate-income people.¹⁶ The tool has about 30 questions asked of a person or a family member to estimate how much bail someone can afford and in what form. (See “Types of bail in New York State” on page 2.) This calculated bail amount and form is considered the person’s “ability to pay.”

The calculator’s questions cover four aspects of a financial assessment—a person’s income from employment, their assets from savings or available cash or property, and any income from benefits, minus their ongoing living expenses. (See “Sample questions from the bail calculator” on page 5.) The amount of income and assets is totaled, and then the costs of ongoing living expenses are subtracted. The result is either a net amount of disposable income, no income, or a negative amount. A negative amount indicates that someone’s expenses are greater than their income and they have “no ability to pay.” Putting the amount of a person’s ability to pay on the record—whether it is \$8 or \$76 or \$550—forces the courts to confront whether pretrial release or pretrial detention is intended in each case and for every individual. That intent is



Sample questions from the bail calculator



reflected in whether the bail set is commensurate with the assessment: lower, potentially leading to release on recognizance; or higher, likely resulting in detention. When someone has no ability to pay bail in any form or amount, defense attorneys often indicate that setting any amount of bail would be “tantamount to remand”—that is, that it would effectively send someone to jail without any possibility of making bail.

The tool calculates both an amount and a form of bail for each person that are reasonably affordable and will not cause undue hardship. The calculator uses a graduated formula with income brackets that calculates lower bail amounts for people who have relatively less disposable income and slightly higher bail amounts for people with more disposable income. In addition to the bail amount, the calculator identifies the forms of bail a person has access to. For example, the tool will not suggest a credit card bail option for people who do not have credit cards. And the calculator makes a cash bail assessment only if cash is immediately available in savings or at home. Without assessing where someone keeps their money and if that money is immediately available, specifying an amount of bail in an inaccessible form can be just as detrimental as an unaffordable amount. To safeguard against inflated bail amounts, Vera analyzed the median bail amounts set in the Bronx and Queens for all charges and created a cap for any bail amount by charge. For example, if the third quartile of all bail set in the Bronx on a misdemeanor theft case is \$1,500, and the pilot assessed that the person charged with theft can afford \$2,250 bail, the bail specialist’s assessment on the record would still be capped at \$1,500 to safeguard against encouraging the courts to set higher bail than is customary.

Although ability to pay does not vary based on whether someone is charged with a misdemeanor or a felony, it is common practice for judges to set higher bail based on the severity of the charge. To reflect this reality, the bail calculator takes the charge into account when calculating the amount and type of bail the person can afford. Of the net disposable income, a lesser percentage is recommended for bail on a misdemeanor charge versus a higher percentage for bail on a felony charge. Because the calculation is still based on the person's net disposable income, both the misdemeanor and felony bail recommendation are still within that person's ability to pay and should not cause undue hardship.

Looking ahead

The individualized approach to calculating bail is a unique and important facet of the pilot's philosophy about assessing ability to pay and of the bail calculator itself. Without such an approach, it can be difficult to gauge undue hardship or how much bail is too much for a person to afford.¹⁷ The lessons learned from the Bail Assessment Pilot will be detailed in a research report to be published in 2020. Until then, the tools developed from the pilot still have immediate potential to change the use of bail, not only in New York, but nationwide in courtrooms where money bail is imposed daily. To accompany this brief report, Vera is releasing an online version of the bail calculator that defense attorneys, pretrial services officers, judges, and family members can use to help provide individualized assessments of a person's ability to pay bail. Incremental fixes, such as the Bail Assessment Pilot and the bail calculator, are important steps to making the use of bail less burdensome and punitive on the path to ending the use of money bail entirely.

Endnotes

- 1 Patrick Liu, Ryan Nunn, and Jay Shambaugh, *The Economics of Bail and Pretrial Detention* (Washington, DC: The Brookings Institution and The Hamilton Project, 2018), 14, <https://perma.cc/4QHJ-E9FP>.
- 2 Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (Washington, DC: U.S. Department of Justice, National Institute of Corrections, 2014), 21-23, <https://perma.cc/2QWS-BFG7>.
- 3 *Stack v. Boyle*, 342 U.S. 1 (1951).
- 4 Schnacke, *Fundamentals of Bail*, 2014, 21-23.
- 5 Liu, Nunn, and Shambaugh, *The Economics of Bail*, 2018, 5.
- 6 *Ibid.*, 7.
- 7 Cynthia E. Jones, “‘Give Us Free’: Addressing Racial Disparities in Bail Determinations,” *New York University Journal of Legislation and Public Policy* 16, no. 4 (2013), 919-962, <https://perma.cc/J49E-VXEJ>.
- 8 David Arnold, Will Dobbie, and Crystal S. Yang, *Racial Bias in Bail Decisions* (Princeton, NJ: Princeton University, 2018), 1, <https://perma.cc/J8EB-7TE6>.
- 9 Colin Doyle, Chiraag Bains, and Brook Hopkins, *Bail Reform: A Guide for State and Local Policymakers* (Cambridge, MA: Harvard Law School, 2019), 12-13, <https://perma.cc/A6PS-X5BG>.
- 10 Per N.Y. CPL § 510.30, “the court must consider the kind and degree of control or restriction that is necessary to secure his court attendance.” See <https://perma.cc/X7EX-KYGR>.
- 11 New York City Criminal Justice Agency (NYC CJA), *Annual Report 2017* (New York: NYC CJA, 2019), 23, <https://perma.cc/4Y7Q-CR8Z>.
- 12 *People ex rel. Desgranges on behalf of Kunkeli v. Anderson*, No. 90/2018 (Decision, Order, and Judgment, Sup. Ct. Dutchess Cty., January 31, 2018), <https://perma.cc/LPZ5-TTPV>.
- 13 Insha Rahman, *New York, New York: Highlights of the 2019 Bail Reform Law* (New York: Vera Institute of Justice, 2019), 13, <https://perma.cc/7ZFP-YQUX>.
- 14 There is no broadly accepted definition of “undue hardship.” Laws regulating child support payment and Americans with Disability Act regulations reference “undue hardship” without explicitly describing the set of conditions someone must meet to qualify. In the context of legal financial obligations, a 2018 Colorado state law states that “a defendant or a defendant’s dependents are considered to suffer undue hardship if he, she, or they would be deprived of money needed for basic living necessities, such as food, shelter, clothing, necessary medical expenses, or child support.” See Colo. Rev. Stat. § 18-1.3-702(4), <https://perma.cc/WDP6-NWGK>.
- 15 See NYC CJA, *Annual Report 2017*, 2019, 23.
- 16 For more information about the lab, go to <https://perma.cc/RKE9-4BEA>.
- 17 See N.Y. CPL § 510.30(1)(c).

For more information

© 2019 Vera Institute of Justice. All rights reserved.

To read more, visit www.vera.org/a-means-to-an-end. For more information about the Bail Assessment Pilot, contact Insha Rahman,

director of strategy and new initiatives, at irahman@vera.org, and Anton Robinson, senior planner, at arobinson@vera.org.

The Vera Institute of Justice is a justice reform change agent. Vera produces ideas, analysis, and research that inspire change in the systems people rely on for safety and

justice and works in close partnership with government and civic leaders to implement it. Vera is currently pursuing core priorities of ending the misuse of jails, transforming conditions of confinement, and ensuring that justice systems more effectively serve America’s increasingly diverse communities. For more information, visit www.vera.org.