

# Advancing Just and Equity in the New York State Courts: The Crucial Policymaker Role of the Next Chief Judge

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## Introduction

The next Chief Judge of the State of New York can advance justice, equity, and community safety by fulfilling two critical leadership roles: (1) steering the Court of Appeals and interpreting state law in ways that [safeguard the rights](#) of all New Yorkers, including those vulnerable to discrimination and abuse; and (2) offering visionary policy initiatives forged from their values, driven by hard evidence, and made effective by partnering with other leaders and experts.

**Each of the past three chief judges acted on important policy issues in their official capacity:**

- **The Hon. Judith Kaye** fully implemented the core recommendation of her [Commission on Drugs and the Courts](#) to launch a drug treatment court in every county.
- **The Hon. Jonathan Lippman** established a [task force](#) and secured new funding for civil legal services to indigent individuals; he also [strongly advocated](#) for the State's [Raise the Age](#) reform, while piloting the [Adolescent Diversion Program](#).
- **The Hon. Janet DiFiore** commissioned a [report](#) by former Homeland Security Secretary Jeh Johnson documenting institutional racism in the courts and recommending related reforms.

While an adept administrator could shepherd impactful reforms extending to all corners of the State court system, **this policy brief highlights four urgent issues regarding the pursuit of equal justice in the *criminal courts***. They are: (1) pretrial reform; (2) right to a speedy trial; (3) racial equity; and (4) Rikers Island (as well as jails statewide).

## Pretrial Reform

New York's [reformed bail law](#) (amended in [2020](#) and [2022](#)) has significantly reduced bail and pretrial detention for people presumed innocent of a crime. In 2020, about [24,000 fewer people](#) across the State faced bail and about 19,000 fewer were detained before trial. **Yet evidence points to [incomplete implementation](#) by the courts.** It is possible that judges [have been influenced](#) by [unproven claims](#) linking reform to a spike in violent crime that coincided with the pandemic and took place in [many cities](#) seeing no bail law changes. The next chief judge will have an opportunity to elevate fairness and strengthen execution of the law through a number of strategies.

**Credibly Assessing Flight Risk.** The bail statute includes a presumption—in all cases—that people will be released on their own recognizance unless they pose a credible “*risk of flight to avoid prosecution.*” Yet in most of the State, judges lack a reliable means of assessing flight risk. In New York City, a validated [Release Assessment](#) exists. If it was [followed consistently](#), judges would likely release on recognizance up to [85% of people](#)—including nearly **75%** charged with a violent felony. This reflects the empirical fact that few New Yorkers skip court; and even fewer seek to deliberately flee prosecution.

In 2019, only **15%** of people in NYC and **17%** in the rest of the State [missed a court date](#). In 2020, those figures were **8%** and **19%**. Further, NYC data indicates that **8%** of people in 2019 and **5%** in 2020—including just **6%** charged with a violent felony—both missed a court date and had not returned to court after 30 days. **Despite the rarity of willful flight, 2021 state data indicates that when faced with a violent felony allegation, judges released people on recognizance in only 24% of NYC cases and 13% outside NYC.**

► **Recommendations for the next chief judge:**

- Provide all judges presiding over arraignments with **validated tools, guidelines, and recurring training** for assessing an individual’s likelihood of returning for future court appearances. Retrain judges on NYC’s [validated release assessment](#), while working with public officials and researchers to devise tools or reliable guidelines for other counties.
- Issue a directive that judges review the results of a release assessment (if available) and **state their reasons on-the-record** when departing from a validated tool’s recommendation.
- Caution against money bail or detention on **first arrests** (indicating by definition that an individual has no record of missing court) absent verified aggravating factors, such as an out-of-state warrant.

**Prioritizing Affordable Bail.** Although the law requires judges to look at “individual financial circumstances” and whether money bail poses “undue hardship,” both [statewide](#) and [NYC research](#) indicates that bail continues to be unaffordable. When [judges set bail in 2021](#), only **10%** of people in NYC and **11%** elsewhere could pay it at arraignment. Seemingly at odds with statutory language, this outcome may reflect that judges have not received guidance on assessing ability to pay.

► **Recommendations for the next chief judge:**

- Provide an **ability to pay tool** to use before setting bail, much like tools to assess child support, loan payments, or public benefits eligibility. [One tool](#) for the bail context is publicly available.
- Disseminate an **ability to pay bench card** to judges in every criminal courtroom on how to meaningfully consider people’s ability to pay bail, as [Michigan](#), [North Carolina](#), [Ohio](#), and [Washington](#) have done. Guidance should include factors defining **indigence**, including homelessness, receiving public assistance, and having an income at or slightly above poverty (e.g., 125% or less) to assist courts in determining if the individual has **no ability to pay bail**.
- Institute **automatic hearings to ease bail for people who have been unable to pay it** as of their first post-arraignment appearance. To promote quality implementation, each local jurisdiction could designate a Supreme Court judge to hold such hearings as part of their existing calendar. This initiative could build on one [launched by former Chief Judge Jonathan Lippman](#) in 2015.

**Addressing Disparate Decisions.** Decisions about whether people presumed innocent are released or have to pay bail are inconsistent across communities and courtrooms. For example, in 2021 judges set bail or remand [more often outside than inside NYC](#) on misdemeanors (13% v. 6%), nonviolent felonies (32% v. 24%), and violent felonies (72% v. 53%), alike. In 2020, individual [NYC judges](#) ranged widely from setting bail or remand in as few as **23%** to as many as **71%** of bail-eligible violent felonies.

► **Recommendations for the next chief judge:**

- Provide training and written guidance to judges on best practices for aligning their decision-making process with statutory requirements. For example, the chief judge could guide arraignment judges towards a ***two-step deliberative process capable of fostering more consistent decision making***. First, judges would assess whether a “risk of flight” exists. Second, if flight risk is established, judges would then turn to the law’s mandate to set only the ***“least restrictive conditions”*** necessary for reasonably assuring court attendance. This separated second step could foster more focused consideration of whether pretrial supervision or other conditions might suffice to assure return to court *before resorting to money bail*.<sup>1</sup>
- ***Train judges on the underused “mandatory programming” option included in the statute*** (e.g., used in under 100 NYC cases in all of 2021) for cases when they might otherwise set bail. People whose flight risk stems from housing insecurity, mental health concerns, or drug treatment needs could be diverted to court-monitored services and treatment—a more intensive option than supervision alone that avoids the harms of bail and pretrial detention.
- Convene judges representing different regions of the State to ***discuss potential gaps in pretrial services*** and needed interventions that would enable them to release more people.
- ***Conduct periodic reviews regarding variations in pretrial decisions by county and courtroom*** to verify and report to the public on whether new tools and standards are, in fact, increasing the consistency of decisions. Metrics could examine decision variability for each charge severity; first arrest or not; prior warrant or not; race/ethnicity; percent of cases in which judges adhered to a validated release assessment (if one exists); and pretrial outcomes like bail payment rates. In tandem, aid individual judges by offering them data on their own decisions.

## Right to a Speedy Trial

Since 1975, state court policy has been aligned with [national standards](#) to resolve indicted felonies within 180 days. However, [ingrained delays](#) in New York City and potentially elsewhere in the State have thwarted the right to a speedy trial and [delayed justice](#) for victims.

In the [pre-pandemic year of 2019](#), just **35%** of NYC’s felony indictments were resolved within 180 days. The average time from an indictment to a disposition was **10.4 months**. It took even longer to resolve cases when people exercised their constitutional right to a trial, instead of agreeing to a plea deal—an average of **18.3 months** citywide and **almost two years (23.3 months)** in the Bronx.

[National experts](#) have found that judges can reduce delay by shortening adjournment times, setting firm interim deadlines for each case, holding attorneys accountable for meeting them; and ensuring each court date is a “meaningful event.” A [best practice pilot in Brooklyn](#) led **80%** of indicted felonies to be disposed in ten months, compared to **60%** for a matched comparison group. The pilot reduced average adjournments from one appearance to the next from **30 to 22 days**.

► **Recommendations for the next chief judge:**

- ***Plan and implement known best practices, described above***, adapted to each county through local stakeholder engagement.

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<sup>1</sup> This recommendation (and select others) distill content from a [previous report](#) coauthored by the current principals.

- **Establish a new statewide initiative similar to [Justice Reboot](#)**, a discontinued project involving stakeholder collaboration, in-depth research, and data-driven reforms to address case delay. Researchers could also study outcomes in counties across the State to better identify jurisdictions outside NYC experiencing successes or challenges in their case processing performance.
- **Support crime victims**, who are similarly denied justice when there is delay, by developing better mechanisms to accurately answer their questions. A recent [inquiry](#) found that during the pandemic, victims in NYC were unable to obtain updates from the court about pending cases.

## Racial Equity

In 2020, a [report](#) by former Homeland Security Secretary Jeh Johnson and a related report from the [Judicial Friends Association](#) paint a disturbing portrait of institutional racism in the New York State courts. **Secretary Johnson concluded, “The sad picture that emerges is, in effect, a second-class system of justice for people of color in New York State.”** Among other findings, these reports document: a significant lack of diversity on the bench and in court administration leadership relative to the State’s demographics; overtly racist behavior by court officers toward court users and attorneys of color; an implicit message of disrespect for indigent people’s time; and abysmal conditions in NYC courts (described as having a “‘dehumanizing’ and ‘demeaning’ cattle-call culture”) that predominantly serve Black and Brown people. These recent in-depth reports of disparate treatment are accompanied by disparities in case outcomes, as evidenced by the data.

- **Conviction and Sentencing:** In NYC, the Data Collaborative for Justice [has documented](#) significant racial disparities in convictions (and their known [collateral consequences](#)). [Research also found](#) that of those convicted in 2019, **22%** of Black, **18%** of Hispanic/Latinx, and **16%** of white people were incarcerated at sentencing, an inequitable result that persisted even after controlling for people’s charges and criminal history.
- **Bail Decisions:** Although NYC’s release assessment shows [no empirical relationship](#) between race and court attendance, [judges set bail](#) or remanded **61%** of Black people compared to **41%** of white people facing violent felony charges in the fourth quarter of 2020, representing three times the disparity that had existed in 2019 and earlier in 2020.<sup>2</sup>
- **Jail Populations:** Because people in local jails are mostly held before trial, the downstream effect of disproportionate bail decisions is disproportionate incarceration. For example, compared to **24%** of the general population, NYC’s jail population is **61%** Black (up from **56%** in 2019). In the fourth quarter of 2020, Black people’s jail admission rate was **6.0 times higher** than non-Latinx white people in NYC and **6.1 times higher** in the rest of the State; both figures point to [greater disparities](#) than in 2019.

These disparities are not solely the result of court policies and practices. They also reflect historic segregation, underinvestment in predominantly Black and Brown communities, and inequitable policing practices, among other factors. Nonetheless, the courts have a role in addressing racial bias and disparities in the criminal process. While the court system has taken [laudable first steps](#), persistent disparities call for a continued—and strengthened—focus on racial equity.

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<sup>2</sup> Statewide, an upcoming Data Collaborative for Justice report will show that among both nonviolent and violent felony cases in 2021, bail-setting was consistently higher for Black than white people in NYC, the suburbs, and upstate.

► **Recommendations for the next chief judge:**

- **Implement strategies that directly target racial disparities in judicial decision-making.** While we assume most judges have no desire to make biased decisions, given research cited above, they might benefit from clear guidelines and unbiased tools to reduce documented [discriminatory outcomes](#) in the status quo.
- **Designate senior policy staff with demonstrated racial justice expertise to address racially disparate outcomes.** Presently, the court system has no single point-person or office to equitably implement bail reform or reduce over-incarceration—areas showing sizable disparities. Designated staff could develop data-driven policies to promote greater racial equity in concrete court outcomes—and could coordinate with local equal justice committees (established by court leadership in 2020) and stakeholders in other agencies to strategize on effective action.
- **Have an independent monitor release periodic reports documenting progress, failures, and challenges towards reducing institutional racism, as Jeh Johnson recommended.** Judge DiFiore [filled this role](#) initially, but no independent report has been issued. While the court system released an [internal report](#) documenting steps taken, an outside monitor could be appointed to perform this task and ensure public transparency.
- **Institute policies that consider court users' time and availability.** The courts could provide time-certain appointments or shorter windows for court appearances to help disproportionately indigent and Black and Brown court users avoid the [delegitimizing effects](#) of lost days waiting in court; and courts could notify users in advance when their appearance is not required.

## Rikers Island

The courts have a significant role to play in mitigating the [humanitarian crisis](#) at Rikers Island, evidenced by the [18 deaths in custody](#) through ten months of [2022](#). **Although courts do not run Rikers Island, decisions made in the courts could limit the number of people exposed to these dangerous conditions.** NYC's daily jail population has been increasing, from **3,809** held on April 29, 2020 to [around 5,900](#) currently—of whom **84%** are held pretrial for an average of **286 days**. Over half the population (51%) has needed mental health services.

**These issues are not unique to NYC.** The State's jail population also increased from [7,240](#) people held on an average day in April 2020 to [16,016](#) as of October 2022—an **over 120%** increase that is undoubtedly creating challenges for correctional systems statewide.

► **Recommendations for the next chief judge:**

- **Authorize full court participation in [population review teams](#) described in pending [New York City Council legislation](#).** These multidisciplinary teams identify individual incarcerated people suitable for either pretrial release (often with supervision or treatment conditions) or a prompt case disposition; study local jail populations; and recommend changes to policy and practice.
- **Institute a system of regular bail reviews** for every individual incarcerated at Rikers—beginning with the early hearing noted above for people unable to afford their initial bail amount. Defense attorneys, supervised release staff, or other service providers could

collaborate on release plans involving supervision and/or treatment—***with service providers invited to address the court on-the-record.***

- Mandate a case review of any individual reaching the ***180-day mark held in jail while awaiting trial***, with a goal of either ordering prompt release under suitable conditions or setting a firm timeline through trial; and track data on outcomes of this review.
- Designate a judge in each borough, alongside a protocol and case review process that involves the assigned prosecutor and defense attorney, to hear release requests for people with ***serious medical conditions***, as determined by Correctional Health Services (CHS).

## Conclusion

The selection and confirmation of the next chief judge presents a timely moment to enhance public trust in the [administration of justice](#). A visionary leader will be able to make great strides in addressing problems that are undermining justice, racial equity, and safety in the criminal justice system and our communities. While not exhaustive, this policy brief highlights several critical problems in need of attention and some potential solutions for the chief judge to consider. The next leader of the New York State courts will have a unique opportunity to address challenges in a thoughtful, data-driven, transparent, and collaborative fashion, drawing on strong partnerships with stakeholders both inside and outside the court system.

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