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Criminal Justice Policy Review
2020, Vol. 31(6) 833–856

DOI: 10.1177/0887403419873018
journals.sagepub.com/home/cjp
SAGE

The Impact of Counsel at First Appearance on Pretrial Release in Felony Arraignments: The Case of Rural Jurisdictions

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Abstract

This article examines the impact of early provision of counsel on judges' pretrial release and bail decisions in two rural counties in upstate New York, in cases involving felony charges. This study builds upon previously reported research on misdemeanor cases. We note that although the stakes are higher in felony cases, few studies have investigated the dynamics of first appearance decisions at either level. We investigate the hypotheses that when defendants are represented by attorneys at their first appearances in court, (a) judges are more inclined to release on recognizance or under supervision, (b) judges impose less restrictive bail amounts, and (c) as a consequence, defendants spend less time detained prior to disposition. We find mixed support for these hypotheses, although some evidence that counsel at first appearance (CAFA) produces the expected outcomes. We conclude that the implementation of programs intended to ensure CAFA may be tempered by courthouse cultures, and that future research on court reform should include the study of rural jurisdictions.

Keywords

bail reform, rural crime, right to counsel, criminal court

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Introduction

Over the past 5 years, state policymakers and local court practitioners have been engaged in reforming pretrial practices at a level not seen since the 1960s. In 2018, for example, Alaska introduced a risk assessment tool for use in pretrial detention decisions and has since reduced both the number of people detained pretrial and the proportion from whom money bail was imposed (Alaska Criminal Justice Commission, 2018). New Jersey almost entirely eliminated money bail in 2017 and introduced a risk assessment tool to assess defendants prior to bail determinations (New Jersey Courts, 2019).

Reforms such as these are often driven by the immediate objective of improving the predictive accuracy of initial release and detention decisions, but they are backlit by growing concerns that pretrial detention, in many cases, serves no measurable purpose in increasing defendant accountability to the court or in reducing re-offending. The research resulting from these concerns has uncovered a troubling possibility: High rates of pretrial detention may be attributable, in part, to the absence of legal counsel at the postarrest proceedings where bail decisions are made (Boruchowitz, Brink, & Dimino, 2009; Harvey, Rosenfeld, & Tomascak, 2018; Smith & Maddan, 2011; Smith, Maddan, Price, & Tvedt, 2016).

Of course, the Sixth Amendment guarantees the right to counsel for those accused of crimes that could result in an incarcerative sentence, but the law is not settled on when that right begins.[1] In recent years, justice advocates have argued that the right to counsel should attach at the first court appearance, typically at the arraignment when an arrestee is first informed of the charges against him or her, asked to enter a plea, and subjected to a decision on pretrial release (on recognizance or under supervision) or assigned bail or bond to be posted to avoid pretrial detention (The Constitution Project, 2015; Sixth Amendment Center & Pretrial Justice Institute, 2014). These advocates, backed by the former U.S. Attorney General, Eric Holder, and the former chief judge of the New York Court of Appeals, the Honorable Jonathan Lippman, maintained that arraignment was a critical stage, one at which any defendant might, absent legal advice, make damaging statements or decisions at odds with legal best interests (Holder, 2012; Lippman, 2011). One might note, as well, that this is a critical point at which defendants might, unknowingly, fail to share information that would reassure judges of their reliability for appearing in court, not fleeing the jurisdiction, or refraining from actions that might produce more charges.

Why might counsel at this early stage matter, when these hearings are, in many courts, abbreviated affairs that involve little discussion or attention to defendants' circumstances? Advocates argue that it is at first court appearance—often immediately or shortly after arrest—that judges make critical decisions to release on recognizance (ROR), to set bail, or to remand defendants to jail pending later court dates. In a recent investigation of the impact of *counsel at first appearance* (*CAFA*) programs on bail decisions and outcomes in misdemeanor cases in these counties, we found that although patterns varied across jurisdictions, there was some evidence that defendants who had attorneys present at arraignment were more likely to be released on

recognizance, less likely to have high bail set, and therefore less likely to be jailed pending disposition (Worden, Morgan, Shteynberg, & Davies, 2018).

In this article, we assess the generalizability of those findings to felony cases. We report the findings of an evaluation of the impact of CAFA programs, adopted by chief public defenders, on bail decisions and outcomes in two rural counties in upstate New York. Like much of upstate New York, these jurisdictions encompass small population centers and multiple local jurisdictional courts that process misdemeanors and felony arraignments. In the following sections, we briefly review what we know about judicial decision-making around pretrial detention and the role of CAFA in those decisions. We also consider the applicability of those research findings to rural courts and stipulate hypotheses regarding the potential impact of CAFA in these jurisdictions. We then turn to empirical tests of those hypotheses, and the theoretical and policy implications of the findings.

The Pretrial Release Decision and CAFA

According to the American Bar Association, the pretrial release decision should be guided by three concerns. It should, first, "[provide] due process to those accused of crime" by imposing conditions which are the least restrictive possible through a transparent process. Second, where necessary, it should "[secure] defendants for trial" by detaining those who are a flight risk. And third, it may "[protect] victims, witnesses and the community from threat, danger or interference" by detaining those who would otherwise be dangerous (American Bar Association, 2007, p. 1).

Research suggests that judges' decisions on pretrial release rely on both legally relevant cues (such as seriousness of instant offense and prior record) and extralegal cues (Albonetti, 1991; Myers & Talarico, 1987; Steffensmeier, Ulmer, & Kramer, 1998). New York, like most other states, authorizes judges to consider community ties, mental state, firearm access, previous offenses and failures to appear, and the vulnerability of alleged victims[2] (Devers, 2011; Human Rights Watch, 2010; Shteynberg & Worden, 2019). But some studies suggest that judges' pretrial detention decisions may also be influenced by defendants' personal characteristics, such as race, ethnicity, and gender (Ottone & Scott-Hayward, 2018; Sacks, Sainato, & Ackerman, 2014; Turner & Johnson, 2005; Turner & Johnson, 2006). At the time of this writing, we do not know of any comprehensive examination of how upstate New York judges, and particularly those in rural town and village courts, use (or do not use) the many criteria that the law makes available for bail and release decisions.

How might CAFA influence judges' decisions about pretrial release and conditions, and with what consequences? From a pragmatic perspective, advocates argue, defense attorneys can efficiently collect the information that judges find useful in predicting flight risk as well as public safety risks. An unrepresented defendant may be frightened, flustered, or angry and may also misapprehend the purpose of the hearing itself. Counsel might supply information to a judge that speaks directly to the defendant's community ties or employment (Ottone & Scott-Hayward, 2018). Counsel might also establish the defendant's eligibility for, and even secure immediate enrollment in,

pretrial programming and diversion, justifying the case for release into the community. Furthermore, there is evidence that judges are influenced by prosecutors' recommendations on bail decisions (Dhami, 2002; Phillips, 2004), and in the absence of defense counsel's fact-finding and counterarguments, prosecutors' more restrictive recommendations may prevail.

Hence, one of the arguments for CAFA is that it can set in motion a series of decisions that reduce the likelihood that defendants will be detained, or detained unnecessarily, before their cases are disposed. An important corollary to this is the argument that defendants who are diverted from detention into treatment programs or supervision may, with family and community support, be less likely to be arrested for another offense in the short and long runs. There is reason to believe that many defendants who pose minimal flight risks and public safety risks are detained or released under conditions that are unnecessarily restrictive (Subramanian, Delaney, Roberts, Fishman, & McGarry, 2015). In turn, pretrial detention has been associated with adverse case outcomes for defendants. For example, Heaton, Mayson, and Stevenson (2017) concluded that compared with defendants at liberty, detained defendants may acquiesce to guilty plea offers simply to get out jail. There is also growing evidence that even a brief period of pretrial detention may have significant collateral consequences, in the form of loss of employment and, possibly, increased recidivism (Dobbie, Goldin, & Yang, 2018; Lowenkamp, VanNostrand, & Holsinger, 2013). If the test of pretrial decisions, particularly bail decisions, is to impose the least restrictive conditions on defendants who remain, until disposition, at liberty, any structural change in the decision process that might improve the predictive accuracy of these decisions is likely to improve defendants' prospects. Finally, some have hypothesized that the reduction of unnecessary pretrial detention can reduce jail populations and conserve community tax resources.

But few empirical studies have tested these expectations. We are aware of only three studies published in the last 50 years that systematically examined the effect of CAFA on bail decisions. In the first, authors of a three-site project adopted an experimental design whereby defendants facing felony charges were randomly assigned to receive representation within 24 hours, or at a later time, generally after several days or weeks (Fazio, Wexler, Foster, Lowy, Sheppard, & Musso, 1985). The study included both nonviolent cases and a variety of offenses classed as "serious" such as burglary and arson.[3] The results suggest that the impacts of CAFA on bail decisions were mixed. Although in one site the presence of counsel was associated with more frequent ROR, in the second site the result was in the opposite direction: More defendants were detained pretrial. In the third site, the associations between CAFA and bail outcomes were not statistically significant. The authors further noted that defendants with counsel at arraignment were more likely to obtain dismissals and charge reductions and were less likely to be sentenced to incarceration, although these patterns were not consistent across the three sites.

Colbert, Paternoster, and Bushway (2002) evaluated a program that provided representation to defendants at "bail review" hearings in Baltimore City Court. Held on the first business day following a person's arrest and detention, these hearings were in

fact defendants' second opportunity to plead their case for release. The study targeted a cross section of all arrestees in the city, and the cases were overwhelmingly misdemeanors.[4] Although bail review hearings were defendants' first *court* appearances, Maryland law provides for an immediate postarrest hearing before a lay commissioner, roughly half of which resulted in the release of the inmate at the time of the study. Noting that defendants usually were not represented by counsel at bail review hearings, the researchers provided representation using law students through a clinical program, following a randomized controlled trial design. Results were dramatic. The number of counseled defendants released unconditionally at bail review hearings was more than double that for uncounseled defendants. If required to pay bail, counseled defendants were asked to pay less, and achieved larger downward departures from Commissioners' original decisions. And counseled defendants were more satisfied with the bail process, thought their bail hearing officer made a more thoughtful decision, and indicated higher willingness to comply with bail conditions.

Worden, Morgan, Shteynberg, and Davies (2018) conducted a study comparing bail outcomes before and after a policy change providing counsel at all first appearances for misdemeanor defendants in three New York counties. New York law requires arrested defendants appear and be arraigned before a judge without unnecessary delay and uses its network of over a thousand local courts to be "on call" to perform that service. Thus, courts must perform arraignments at all times of day or night whether or not they are in session. The defenders in this study thus contended both with the logistical demand of having to provide representation in widely dispersed locations and with a diversity of locally tailored approaches to solving the problem of supplying counsel. The results varied across counties but were in a broadly consistent direction: One county saw a significant increase in unsupervised release, two saw reductions in bail amounts, and two saw reductions in pretrial detention periods.

Just one of the studies above, Fazio et al., 1985, explicitly focused on felony charges. We speculate that the most extensive impact on outcomes would be found in cases with lesser charges—misdemeanors—particularly in courts whose judges previously set relatively high bails for these types of cases. Judges may equate more serious felony charges with higher perceived risks of flight and recidivism, and a result be more resistant to defense lawyers' arguments about actual risks. Of course, from defendants' perspectives, the stakes of bail hearings are also higher. They face the possibility of a prison sentence and prolonged postincarceration supervision, fines, and fees, as well as the well-documented collateral consequences of a felony conviction and the stigma of incarceration. Indeed, early research documented practitioners' and policymakers' concerns about the importance of CAFA in felonies. For example, 20 years ago Colbert's original study of state and local practices revealed that some communities prioritized CAFA in felony but not misdemeanor arraignments (Colbert, 1998), and some counties in the upstate New York CAFA grant program elected to ensure counsel only for felony arrests (Worden, Davies, Shteynberg, & Morgan, 2017).

Even before these outcomes, early involvement of defense counsel may be of particular benefit to felony defendants. In many states, including New York, law enforcement is authorized to issue appearance tickets or summonses in minor cases, typically

directing the arrestee to appear in court on the next scheduled docket date. This creates at least a brief window during which a defendant can seek legal advice and prepare for the hearing. But felony arrests do not result in appearance tickets. Instead, most such arrestees are either transported directly to court or to a short-term holding cell pending arraignment, with little or no chance to prepare for the bail hearing. They have little opportunity to organize their thoughts, resources, or arguments about pretrial detention before they face the judge who makes that decision. Hence, this study focuses on cases where the highest (or only) charge is a felony.

The Adoption of CAFA in Rural Courts

More than 20 years ago, Douglas Colbert drew attention to the systemic absence of counsel by surveying public defenders in all 50 states (Colbert, 1998). He concluded that only eight states had a guarantee of counsel at bail hearings on the books. In the remaining states, either no such protection existed, or counsel was available only in large urban courts (Colbert, 1998). More recent inventories have concluded that just 14 states guarantee legal representation to the defendant at the appearances where such decisions are made (The Constitution Project, 2015; Lowenkamp et al., 2013). In the remaining states, the likelihood that a defendant will meet with a lawyer before approaching the bench continues to depend a great deal on whether the arraignment is in an urban jurisdiction, where public defense providers are typically present or on call, or in a small town or rural court, where few or no provisions for such representation are guaranteed.

In urban courts, particularly in large metropolitan areas, courtrooms are often staffed by public defenders during specified arraignment hours, and when an arrestee is brought to court during other sessions, a defender can be summoned to provide counsel and appear before the judge at the hearing. Working relationships among attorneys, judges, and court staff may be either quite stable (when practitioners have consistent courtroom assignments) or more variable, but most defendants pass through these bureaucratic courts identified more by their case files than by their individual circumstances. In these courts, therefore, CAFA may be, at least nominally, routine, but defendants may be nearly anonymous.

However, courthouse cultures in rural communities are often characterized as more informal and insular, and less bureaucratic, than their urban counterparts. Small-town courthouses may develop workgroup relationships that are familiar (if not collegial), in part because the workgroups comprising judges, attorneys, and staff may be acquainted not only with each other but also with defendants and complainants. Judges in particular may define their roles in terms of service to their communities, not merely processing caseloads (Clark & Worden, 2019; Landon, 1990; Ulmer, 1994). The role boundaries may be more blurry in rural courts. For example, where judges are not experts in criminal law, they may rely heavily on prosecutors, and even on law enforcement officers, for interpretations of law and recommendations for bail and pretrial release (Davies & Clark, 2018; Provine, 1986; and see Smith & Maddan, 2011).

Those who advocate for CAFA may encounter resistance in these courts, for two reasons. First, insisting on CAFA as a matter of policy may be at odds with court practitioners' definitions of their roles. In field research during the project reported here, we heard many times, from judges and clerks, as well as prosecutors and some defense lawyers, that not only were judges capable of protecting defendants rights and best interests, but also that injecting defense counsel might compromise the individual attention that judges sought to give those who appeared before them. Second, and more frequently, we were told that these rural counties could not overcome the challenges of resources, logistics, and geography that would be required to simply ensure that lawyers could be made available for both scheduled arraignments sessions and the many arraignments that took place in off-hours (Clark & Worden, 2019). The National Center for State Courts summarized the contrasts succinctly:

> Rural courts face different problems than their urban counterparts; they have to overcome obstacles such as large distances, outdated technology, a limited supply of resources and guidance, and reduced training opportunities. While rural courts benefit from having a smaller staff that promotes friendlier relationships with the litigants in the courtroom, many continue to face difficulties due to lack of funding and isolation (National Center for State Courts, 2019).

Hypotheses

We investigate the impact of the presence of CAFA on judges' bail and pretrial release decisions in felony arrests in two rural counties. In the analyses below, we compare bail decision and outcome patterns from periods before, and after, the adoption of CAFA initiatives in two counties. We test the following hypotheses:

Hypothesis 1: When defendants are represented at first appearance, judges will be more likely to release on recognizance or under supervision.
Hypothesis 2: When defendants are represented at first appearance, judges will set lower bail amounts for those who receive bail.
Hypothesis 3: When defendants are represented at first appearance, those for whom judges set bail will serve fewer days in jail prior to the disposition of their cases.

Research Methods, Data, and Measures

The Research Setting

In 2012, the New York State Office of Indigent Legal Services disseminated a request for proposals from counties to create and implement CAFA programs. Half of the state's 57 upstate counties applied for, and received, CAFA program funding. Many of those counties' programs, including the two that we analyze here, specifically targeted their programs to provide CAFA in rural town and village courts.

Like 30 other states, New York (outside of New York City) has two tiers of trial courts. Each county has a County Court that presides over felony adjudications, but misdemeanor adjudications (and early stages of felony proceedings) take place in 61 city courts and, within unincorporated rural and suburban townships and villages, in 1,215 justice courts. These justice courts are not courts of record, and they are not funded by the state's Unified Court System but are instead financed by local taxes. Altogether, they employ more than 2,000 judges, who are elected by their town or village voters. Unlike county and city court judges, town and village judges are not required to be licensed attorneys or hold law degrees, and most of them do not (although the state does require an 8-day training and certification course prior to taking the bench). Most of these judges' courts are in session only on specified days or evenings during the week, some as seldom as biweekly. Many of these judges' positions, like those of their clerks, are part-time.

These conditions pose particular challenges for ensuring counsel at arraignments in rural courts. First, the law requires that defendants be arraigned without unnecessary delay, usually within 24 hr. Absent special arrangements, the law requires that an arrestee be arraigned in the jurisdiction where the offense allegedly took place or an adjacent jurisdiction if it is more convenient (New York CPL, Title H, §140.20, 2014). In city courts, which are in session during regular work hours and often at specified hours on weekends as well, judges routinely arraign defendants as they are brought into court, whereas those who are arrested when court is not in session are held in city police department lockups until court reopens. But in rural and suburban areas, the process can look very different. When court is not in session, law enforcement must contact a local judge and transport the arrestee to his or her court. Many do not have the option of holding the arrestee until the next regular court session, as that session could be many days away, and few small police agencies have temporary holding facilities.[5] By law, on felony charges, local court judges cannot ROR or set bail unless the district attorney's office has been given an opportunity to make a bail recommendation. These judges' discretion is also restricted, in felony charges, when the charges include an A felony and when, according to computer-generated rap sheet, it appears that the defendant had two or more prior felony convictions. Until the adoption of CAFA programs, neither public defenders nor prosecutors were typically present at these hearings, but only the prosecutor was afforded the option of influencing the judge.

In 2014, the first and fourth author applied for, and received, funding to study six counties' CAFA programs (from among those funded by NY ILS). For this investigation of rural counties' processing of felony cases, we identified two counties that were predominantly rural and that targeted their CAFA programs toward providing representation in town and village courts, which we refer to by the pseudonyms, Hudson County and Lake County.[6] These counties are similar in many respects. Both have poverty rates that hover around 9%. They have similar crime rates (between 1,200 and 1,500 property crimes per 100,000 population; NYS Division of Criminal Justice Services, 2019). Like most upstate counties, outside those that are home to larger cities such as Albany, Rochester, Syracuse, and Buffalo, Hudson and Lake County voters

tend to favor Republican candidates in state and national elections. Finally, these two are among the majority of upstate counties (25 of 57) that have only one or two incorporated cities whose "urban" populations total to less than 50,000.[7] In Hudson County, approximately 85% of its 300,000 residents live in 30 rural towns and villages, and the remaining 15% live in two small cities. About a quarter of Lake County's 100,000 residents live in one of its two small cities, and the remainder live in the county's approximately 15 townships and villages.

Although Hudson and Lake Counties are quite similar demographically, their CAFA programs were structured somewhat differently. Both counties, like most in upstate New York, rely primarily on an Office of the Public Defender, with the Office of the Conflict Defender as a secondary agency, to provide indigent defense counsel. The CAFA programs designed by those Public Defenders were developed to provide representation primarily to defendants arrested and arraigned in towns and villages. In both counties, CAFA programs had operated informally in the small city courts (both county seats) before the Indigent Legal Services grant program, so the new initiatives that were funded were developed for outlying jurisdictions. As such, they were designed to overcome the obstacles presented by rural geography, caseload patterns, and politics.

Hudson's proposal called for extending CAFA to the much smaller city court and approximately two thirds of the town and village courts so that they could provide CAFAs 24 hours a day, 7 days a week. They launched their CAFA program at the end of 2013, hiring additional legal staff to be available for callouts to the town and village courts throughout the week. Lake County's first foray into providing CAFA began in 2012, when a city court judge, in collaboration with the county sheriff, began holding weekend sessions to arraign City Court defendants arrested on Fridays and Saturdays (outside ordinary City Court hours); occasionally, the sheriff transported arrestees to these arraignment sessions from adjacent townships. Soon after, the Chief Public Defender developed and implemented the Lake County CAFA initiative to provide representation for all town and village arrestees at these consolidated sessions, and eventually the second City Court adopted this model, though largely for its own arrestee population.

The Hudson County pre-CAFA and CAFA samples include cases in which the highest charge was a felony, during time spans that capture (a) the period directly prior to the adoption of CAFA in the town and village courts and (b) relevant periods of time after the implementation of the CAFA programs.[8] We excluded from the sample those cases that were violations of probation or parole and those cases in which the primary charge was a vehicle or traffic offense. In Hudson County, the sample included all eligible felony cases that were opened by the public defender's office in the calendar year 2013 (prior to the CAFA program) and all cases that were opened during 2014 and the first 5 months of 2015. This produced Hudson County samples of 166 (pre-CAFA) and 248 (post-CAFA).

In Lake County, where the CAFA program was rolled out, over time, across geographic areas, we identified the pre-CAFA sample to include cases in all courts within the county: both the two small city courts (before and after the initial central

arraignments were begun) and all the towns and villages that were incorporated into the centralized arraignment program after receipt of Indigent Legal Services (ILS) program funding. The pre-CAFA period includes cases opened during 4 months in 2012. We identified the CAFA sample to include felony cases, in those same jurisdictions, that were opened between May and November 2013 and between August and November 2014.[9] This produced samples of 61 pre-CAFA cases and 121 CAFA cases.

Data were coded from two primary sources in each county. Both public defender offices recorded case information in the widely adopted Public Defender Case Management System (PDCMS), a program developed and distributed by the nonprofit New York State Defenders Association. This program was intended to record basic descriptors of defendants and charges and to permit detailed records of events as they developed across each case. Although the Hudson and Lake offices used this program in somewhat different ways, in both sites it provided information on defendants' sex, age, race, ethnicity, and highest charge level at arrest. Data on release decisions, bail amounts, and pretrial detention duration were coded from county jail databases. In Hudson County, a county information technology expert downloaded jail records for our sample periods directly from the jail database (with the jail administrator's permission). However, in Lake County, the public defender's office had "lookup" access to jail records, and while we could not download those data, we could code information manually from the office's output. This labor-intensive practice required that we code only a sample, selected randomly, of cases (approximately 43% of a total of 420 cases coded from the PDCMS).

Data and Measures

Hudson County's and Lake County's aggregate felony caseloads are, not surprisingly, demographically quite similar (see Table 1). In both sites, the samples comprise about 75% male defendants. Lake County had a slightly higher percentage of White defendants than did Hudson. Data on defendants' charges were reliably present in program files.[10] The higher the charge level, the fewer cases there were in each sample in both counties. There were no A felonies in these samples. Level E and D felonies dominated the dockets in both counties; Lake County had a slightly higher percentage of Level E cases than Hudson County.[11] We report these distributions to assess the comparability of pre-CAFA and CAFA cases in each county, and we note that none of these differences reached conventional levels of statistical significance (.10).

The dependent variables in this study include three outcomes regarding the bail and pretrial release process:

(1) *Judges' decisions to release at arraignment or to set bail.* At a defendant's first appearance, judges may (a) ROR, permitting the defendant to remain free pending the next court appearance; (b) release under pretrial supervision (usually by the county probation office or a pretrial services office); (c) set bail and/or bond (within broad discretionary ranges); or (d) remand to jail with no immediate opportunity to post bail. After setting aside those cases that resulted

Table 1. Defendant and Case Characteristics in Two CAFA Programs.

Defendant and case characteristics	Hudson County		Lake County	
	Pre-CAFA $n = 166$	Post-CAFA $n = 248$	Pre-CAFA $n = 61$	Post-CAFA $n = 120$
Sex				
Male	73.5%	75.0%	72.1%	76.7%
Female	26.5%	25.0%	27.9%	23.3%
	$\gamma = .039$ (*ns*)[a]		$\gamma = .119$ (*ns*)	
Age				
18-20	13.2%	14.1%	17.5%	17.5%
21-25	29.5%	23.0%	19.3%	24.6%
26-30	15.7%	17.3%	17.5%	21.9%
31-35	12.0%	10.9%	10.5%	7.9%
36-45	14.4%	21.0%	14.0%	11.4%
46+	15.0%	13.6%	21.1%	16.6%
	$\gamma = .056$ (*ns*)		$\gamma = -.097$ (*ns*)	
Race/ethnicity				
White	57.2%	54.4%	61.7%	68.0%
Latino	9.6%	14.9%	14.9%	12.0%
Black	33.1%	30.6%	23.4%	20.0%
	$\gamma = .014$ (*ns*)		$\gamma = -.119$ (*ns*)	
Highest felony charge				
B	6.0%	6.0%	4.9%	5.8%
C	10.8%	8.5%	9.8%	14.2%
D	40.4%	38.7%	29.5%	22.5%
E	42.8%	46.8%	55.7%	57.5%
	$\gamma = -.072$ (*ns*)		$\gamma = -.012$ (*ns*)	

Note. CAFA = counsel at first appearance.
[a]Entries represent gamma followed by level of statistical significance.

in immediate disposition or in remand to jail, we dichotomized the judge's decision to release or set bail, set to 0 if released (on recognizance or under supervision)[12] or to 1 if bail was set.

(2) *How much bail?* If bail is set, the judge's second decision is to determine the amount that the defendant must provide to secure release. New York does not have a uniform bail schedule that establishes standards for bail amounts based on offense levels, nor did these counties. We captured the categorical variation in bail amounts as follows: (a) US$0 (no bail set; released on recognizance), (b) US$100 to US$1,000, (c) US$1,001 to US$2,500, (d) US$2,501 to US$5,000, (e) US$5,001 to US$10,000, (f) US$10,000 to US$25,000, and (g) US$50,000 or more. There were few cases with bails that were not set exactly on one of these cutoffs; fewer than 20%, in each county, were set amounts between these cutoffs (e.g., US$500 or US$7,500).[13]

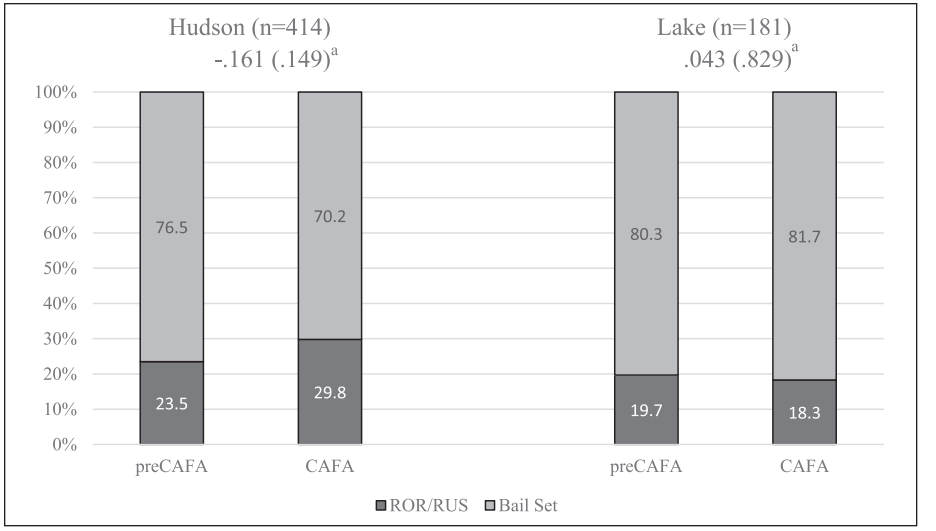

Figure 1. Percentage of defendants released on recognizance versus set bail.
Note. CAFA = counsel at first appearance; ROR = release on recognizance; RUS = release under supervision.
[a]Entries represent gamma followed by level of statistical significance.

(3) *How much time did defendants spend in pretrial detention?* In both counties, defendants on whom bail was imposed had the opportunity to avoid being booked in the jail by paying bail at the courthouse. Defendants who were not released at arraignment and were not able to make bail immediately were transported and booked, and they may have spent from 1 day to their entire predisposition period in jail. We created an ordinal measure for time spent in pretrial detention, which distinguishes between no time at all, very brief (1-3 days) stays, stays from 4 to 14 days, from 15 to 60 days, from 61 to 120 days, from 121 to 180 days, and greater than 180 days.

Findings

We first examined the percentage of defendants released on recognizance compared with those who had bail set at their arraignment (Figure 1). In Hudson County, the percentage of defendants released at arraignment increased from 23.5% to almost 30%, although that association did not reach a conventional level of statistical significance.[14] In Lake County, there was a negligible shift, in the direction opposite that hypothesized, in the rate of releases without bail.

Next, we examined the bail amount set for all defendants, with those released at arraignment assigned a US$0 bail amount (Figure 2). There was a significant difference in Hudson County between the pre-CAFA and CAFA periods—bail amounts decreased overall in the CAFA period. This is, of course, in part due to counting

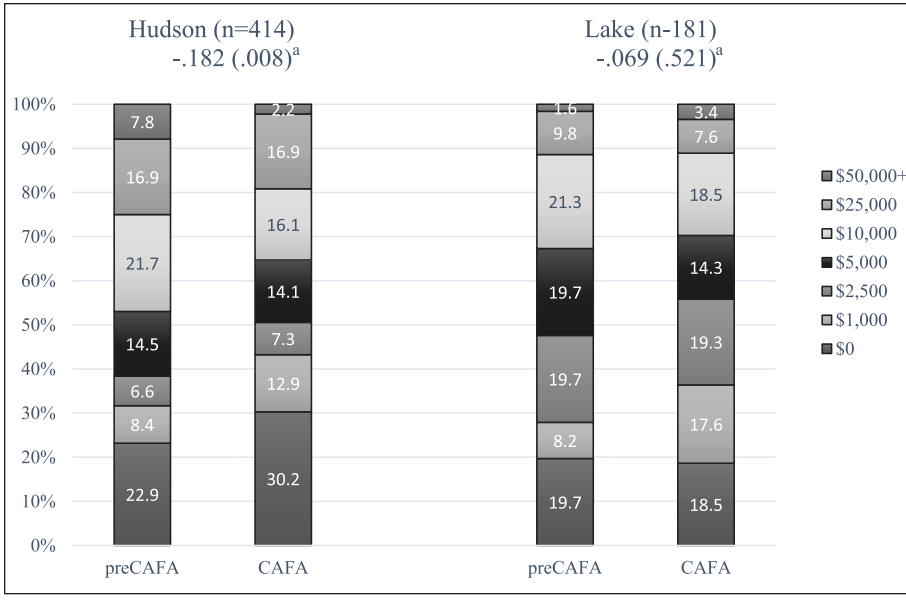

Figure 2. Percentage of defendants with bail set: seven categories.
Note. CAFA = counsel at first appearance.
[a]Entries represent gamma followed by level of statistical significance.

non-bailed, released defendants as having US$0 bails. But if one were to disregard the possibility that judges were giving the benefit of the doubt, by offering ROR or release under supervision (RUS), to defendants who looked (or were represented by their attorneys) less risky during the CAFA period, it is yet the case that of the remaining defendants, 48% were given bail amounts below US$10,000 during CAFA, compared with 38% before CAFA.[15]

In Lake County, the differences in distributions, although in the hypothesized direction, did not reach statistical significance. This is largely due to the fact that at the higher ranges the distributions were very similar. Nearly identical percentages of defendants had bail imposed of US$25,000 or more. However, it is worth noting that twice as many defendants faced a bail of about US$1,000 after CAFA than before (17.6% vs. 8.2%).

Our third analysis examined the changes in the percentage of defendants detained pretrial, again breaking down time spent in jail pretrial into seven categories (Figure 3). Again, the practical logic behind these hypotheses was that the presence of counsel would improve some defendants' chances for ROR, but if that failed, counsel could argue for setting bail at levels that defendants could afford. The impact of CAFA programs would therefore, in part, be assessed not only in terms of judges' discretionary decisions but also in terms of defendants' capacity to clear the bail requirements and reduce the time spent detained before trial.

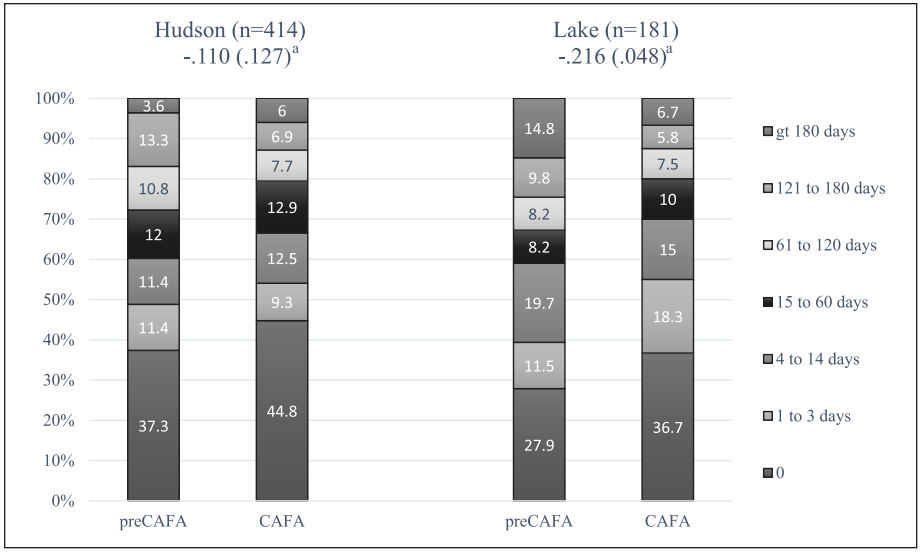

Figure 3. Percentage of defendants detained pretrial: seven categories.
Note. CAFA = counsel at first appearance.
[a]Entries represent gamma followed by level of statistical significance.

The results from Hudson County suggest that CAFA may have had these predicted effects. A larger percentage of defendants spent 0 days incarcerated after the CAFA program was adopted (45% vs. 37%), presumably resulting from a combination of more releases on recognizance and more bails set within reach of defendants' finances. At the higher end of pretrial detention, 28% of pre-CAFA defendants spent more than 60 days detained pretrial (our highest three categories), whereas about 21% of CAFA defendants endured that duration of detention. The statistical association approaches, but does not reach, conventional levels of significance.

In Lake County, the difference across samples was in the predicted direction (and reached statistical significance). Moreover, the difference presents as a modest but steady ripple toward briefer periods of detention. Significantly more defendants avoided pretrial detention altogether (30% more, comparing 27.9% with 36.7%), and 18.3% in the CAFA sample were detained only 1 to 3 days (compared with 11.5% in the pre-CAFA sample). Furthermore, the highest durations of pretrial detention, more than 60 days, were experienced by 32.6% of defendants who did not have CAFA, but by 20% of those who did have CAFA.

These results suggest that CAFA programs may not have uniform effects across communities, a finding that echoes our earlier investigation of misdemeanor charges in these same courts (Worden et al., 2018). In a previously published article, we observed in Hudson County a statistically significant increase in ROR decisions, reductions in bail amounts, and reductions in pretrial detention durations in misdemeanors. As reported above, we found similar patterns for felony cases in that county

(those coefficients' failure to reach comparable statistical significance is largely due to the differences in misdemeanor and felony sample sizes). In Lake County, we previously found that RORs increased in misdemeanor cases, but we did not find that pattern in felonies. Levels of bail did not appear to be altered by CAFA in either category of cases, but the duration of pretrial detention dropped notably for both misdemeanors and felonies. These patterns suggest that the impact of CAFA played out similarly across case types, but differently across jurisdictions.

This leads us to ask how these counties' courthouse cultures might have shaped their adaptations to this reform. Early observers recognized that the decentralized and fragmented structure of trial courts leads them to develop distinctive "local legal cultures"—norms, expectations, and customs that reflect a durable history of exchanges and interactions among court actors (Church, 1985; Eisenstein & Jacob, 1977; Eisenstein, Flemming, & Nardulli, 1988). Because in most states judges and prosecutors have considerable discretion and little oversight, these cultures are likely to differ across otherwise similar jurisdictions. Although we did not have the opportunity to conduct systematic ethnographic research in these counties, we did compile detailed recent histories of their courts based on local media reports and conducted interviews, informal focus groups, and court observations. Below we offer some reflections on what might account for our findings (and what future researchers should investigate).

In both Hudson and Lake Counties, progressive chief public defenders strongly endorsed the CAFA program and worked with other criminal justice personnel—judges and sheriffs, particularly—to ensure that the programs got established. In neither county did the District Attorney or local law enforcement strongly oppose the initiatives. However, in both counties, town and village court judges pushed back against the expectation that they would accommodate the public defenders. In Hudson County, where assistant public defenders were dispatched across the jurisdictions as needed, local judges initially objected to the delays that they anticipated while waiting for lawyers to arrive. When the Chief Public Defender demonstrated that the new protocol did not meaningfully delay court hearings, however, the judges accepted the program. Hence, in Hudson, the new protocol consisted of the inclusion of a missing actor—the defense attorney—in the arraignment processes across multiple town and village courts. We were told (and in one large town court observed) that it was rare for a prosecutor to be present in the town and village court arraignments, though in felony cases it was customary for the judge or court clerk to solicit a bail recommendation from the District Attorney by phone.

The results from Hudson data suggest that the presence of attorneys had, albeit modestly, the intended and expected effects: more ROR outcomes, along with a downward shift in bail amounts, and a resultant reduction in pretrial detention patterns. Our interviews with public defenders in that county suggested that they felt that the opportunity to advocate for less restrictive outcomes made a difference in how judges made decisions. They also noted (as did other lawyers in the research sites) that at arraignments, judges may have been reassured by the knowledge that the defendants were almost immediately assigned to the Public Defender's office, which could then take on

some responsibility for reminding them about future court dates and otherwise monitoring their behavior.

In Lake County, the initial phase of adoption of CAFA in 2012 overlapped with another innovation, the gradual development of centralized weekend arraignment sessions for arrests in the two small cities, when those courts were not in session. By later that year, the Public Defender had arranged to have those sessions regularly staffed by attorneys. By 2013, the centralized arraignment model had been expanded to accommodate town and village courts, and at about the same time, the Public Defender's office had secured ILS grant money to extend the CAFA program into the town and village courts. Initially, town and village judges resisted having "their" cases arraigned by outsider judges (even though the cases were usually returned to those courts for continuing adjudication).[16] However, that resistance was overcome as the judges found they were less frequently called out late at night and on weekend to arraign arrestees.

Hence, as Lake County town and village judges yielded their arraignments to the centralized model, the City Court judge who took on most of those cases may have played a significant role in creating the patterns of outcome arraignments. This possibility makes interpreting the pre-CAFA and CAFA comparisons more challenging, because about one third of the cases involved arrests in the two cities. Hence, we investigated the possibility that outcomes were attributable, in part, to the involvement of that City Court judge in arraignments, not to the absence or presence of defense lawyers' decisions. Small sample sizes preclude a detailed breakdown and analysis of all three outcomes variables, so we focused our attention on the first, the decision to release or to set bail. We compared those decisions not only across the pre-CAFA/CAFA condition but also across jurisdictions, comparing *city court arrest cases* (that we could reliably assume to have been arraigned by the City Court judge) and *town and village court arrest cases*, which would have been largely arraigned by town and village judges prior to CAFA, but more commonly handled in the centralized arraignments, by the City Court judge, after CAFA was adopted. Of the 65 arrests made in the city courts' jurisdiction, and largely arraigned by that judge, the post-CAFA cases exhibited a slight increase in ROR (from 13% to 17%). About a year later, when centralized arraignments had spread to the remainder of the county, and CAFA was underway, the sample's 116 town and village court defendants (again, often arraigned by the City Court judge) were released without bail 19% of the time. Interestingly, the rate for town and village judges' decisions prior to these changes had been higher (24%). One admittedly speculative possibility for Lake County's seeming stasis in Table 1, then, is that the key City Court judge, while nudged toward less restrictive bail decisions as CAFA was beginning in his court, nonetheless established a fairly consistent release rate as he took on outlying town and village arraignments, and that standard happened to be less generous than what his town and village colleagues applied in their own courts, pre-CAFA.[17]

Regardless of the lack of association between CAFA and bail decisions, we observe overall that significantly more Lake County defendants managed to avoid pretrial detention: 39% were detained no more than 3 days (or not at all) prior to CAFA, but

55% fall into this category post-CAFA. Again, we can only speculate on the dynamics. It is possible that the presence of lawyers helped judges in making more informed decisions; perhaps they released more people who presented as low-risk, but balanced that by setting more restrictive bail for everyone else. Perhaps more plausibly, the attorneys present at arraignment may have taken responsibility for facilitating bail posting by reaching out to family members, explaining the process for posting bail online for a relative, and exploring possibilities for diversion.

Discussion and Conclusion

We present these findings with some cautionary notes. The analyses reported here are best understood as exploratory, insofar as the data on which they are based rely on only two counties' courts. These courts generate small samples of felony cases. Although overall the samples are quite similar on case and defendant characteristics that we could measure, we did not have access to data at the individual level (such as prior record) that would have permitted case-level modeling of the impact of CAFA. While the research sites were generally representative of rural and small-town counties in upstate New York, our simple comparison of the two counties' experiences in implementing CAFA leads us to recommend more, not less, historical and observational approaches to explaining court behavior, to understand the processes, accommodations, and compromises that may be the key to successful implementation of reforms. That said, the study has implications for ongoing research on some seldom-studied dimensions of criminal adjudication. First, procedural reforms such as CAFA, that alter the balance of power and influence in the courtroom and that may change the pace of decision-making, will be adapted to local conditions by local actors, so one-size-fits-all policy initiatives are unlikely to produce similar patterns across jurisdictions. Sometimes these new initiatives are home-grown. For example, we learned that the Hudson County Public Defender had been practicing CAFA in the City Court for years before grant money was made available to expand the program throughout the county. Similarly, the Lake County City Court judge began centralizing off-hours arraignments before that model was contemplated in most rural counties; that model facilitated the adoption and extension of the Public Defender's CAFA plan. We also observed initial resistance to CAFA programs, even when funded by state grants. Hence, understanding case outcomes, and ultimately estimating the effectiveness or impact of new policies, should be paired with a careful study of local courthouse cultures and their receptivity to change.

Second, we have suggested above that CAFA's value may come from the increased amount and accuracy of information that an attorney may elicit from a client, organize for a judge, and weave into a credible narrative that serves to justify release or lower bail. Much of the advocacy for CAFA policies stems, reasonably, from concerns about overuse of pretrial detention and its negative effects on defendants. But if CAFA functions this way, it has the potential to improve pretrial processes in other ways as well. Early assignment of attorneys may improve defendants' chances for diversion or treatment and may improve the predictive accuracy of judges' decisions about flight risks and re-offending. Our field research during the early stages of this project offers some

anecdotal support for that perspective, but confirmation of these conjectures should be sought through more extensive and systematic observation of court proceedings and interviews with judges, lawyers, and, importantly, defendants.

Third, we note that interpreting results on the impact of new programs is not as simple as reporting and relying upon tests of statistical significance. When samples are small, as was the case in this study, and when samples are not randomly drawn, such tests may of course offer some guidance about the likely replicability of the results if more or larger samples could be drawn. But for the nonacademic audiences who funded and participated in this study, the practical questions to be answered are (a) did the findings support the expectations? (b) and if so, how much difference did CAFA make? In a conversation with one of the public defenders, we shared our preliminary findings and offered a brief explanation of *p* values. The attorney responded that in deciding whether CAFA should be continued or expanded, he did not need to feel 95% confident that the results would replicate; he would settle for 75%.

Fourth, we emphasize the importance of studying rural courts and criminal justice systems. Many (and probably most) recent publications on court decision-making have been based on urban jurisdictions or have encompassed statewide administrative data sets.[18] These studies are valuable, but the problems faced by urban courts—heavy caseloads, stifling bureaucracy, and anonymity—are different from the problems faced by rural courts. Rural jurisdictions have geographically scattered populations (and limited, if any, public transportation), as well as limited resources for pretrial services and diversion programs. A recent report on the practice of law in rural jurisdictions in New York concluded that attorneys are scarce, their expertise is more generalized than specialized, and their caseloads are high. Furthermore, they often encounter conflicts of interest in small communities where many people are acquainted with each other through schools, businesses, or churches (Perlman, 2019). State policymakers may base their legislation and funding on models of court environments that are more appropriate for cities than for rural areas.

Finally, we suggest that after decades of intentional reforms (and perhaps less planned changes in practices) aimed at increasing convictions and punishment, today's court scholars have the opportunity to investigate a growing list of reforms that are aimed at reversing unnecessary convictions and incarceration and in augmenting due process safeguards and establishing channels for diversion and reintegration. Between the beginning and the completion of the upstate CAFA study, the New York state legislature and governor, along with relevant state agencies, have proposed and passed policies that will expand CAFA across the state, increase the number of defendants eligible for public defense, greatly reduce reliance on cash bail, liberalize discovery rules, and allow for expungement of some criminal records. New York is not alone in these ventures. But advocates' enthusiasm for these changes must be tempered by realistic assessment of the prospects for full implementation and evaluation of their real impacts once implemented.

Acknowledgments

The authors acknowledge, with appreciation, the contributions of research project interns Victoria Farrell, Katie Rhee, Christina O'Dea, Alyssa Clark, and Molly Strauss.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) disclosed receipt of the following financial support for the research, authorship, and/or publication of this article: This project was supported by Award 2014-IJ-CX-0027 from the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice. The principal investigator on the project is Alissa Pollitz Worden, and the coprincipal investigator is Andrew L. B. Davies. The opinions, findings, and conclusions or recommendations expressed in this article are those of the authors and do not reflect those of the Department of Justice or those of the New York State Office of Indigent Legal Services.

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Notes

1. It is up to state and, ultimately, federal courts to address the first question, and currently states' policies and practices vary. In Rothgery v. Gillespie County, TX (2008), the U.S. Supreme Court held that a defendant's first appearance marks the beginning of adversarial court proceedings and triggers the Sixth Amendment right to counsel, regardless of a prosecutor's involvement in that appearance. In 2010, the New York Court of Appeals, citing *Rothgery*, in *Hurrell Harring et al. v. State of New York*, held that the plaintiffs had been unconstitutionally denied counsel at first appearance (citing *Gideon v. Wainwright*, 1963). The ultimate settlement of that case, in October 2014, required that the five implicated counties overhaul their indigent defense programs, including, among other requirements, plans for ensuring that counsel is present at all first appearances.
2. New York criminal procedure law (CPL § 510.30, 510.31) enumerates the following issues that judges must consider when making bail decisions: the defendant's "character, reputation, habits and mental condition"; "employment and financial resources"; "family ties and the length of his residence if any in the community"; "criminal record if any"; "record of previous adjudication as a juvenile delinquent"; "previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution"; and "the vulnerability of alleged victims (e.g., family members, persons against whom an order of protection had been issued), firearm possession or use." Finally, judges should consider the likelihood of conviction and the likely sentence upon conviction.
3. Fazio et al. indicate they classified offenses as "serious" if they fell into "Class I" but do not define Class I. Elsewhere, they note burglary and arson are examples of serious offenses.
4. Colbert et al. do not report the specific proportion of cases in their data set that were misdemeanors, although their research instrument suggests they did collect those data. Instead they point to court system statistics suggesting more than 90% of cases statewide were misdemeanors.
5. In New York, only about half of the counties' jails are authorized, by state law, to hold arrestees who have not been arraigned before a judge.

6. In these respects, these two counties were quite typical of those that adopted counsel at first appearance (CAFA) programs in 2014. The four remaining counties were not included in this study inasmuch as (a) two of them served predominantly suburban towns and villages, surrounding large urban centers; (b) the third was dedicated only to the county's small City Court, not the surrounding towns and villages; and (c) the fourth county had unusually long disposition times, and hence at the time this article was developed had not produced cleaned and complete data for analysis.
7. Eleven counties have city populations, distributed across one to six cities, of more than 50,000; 21 have no incorporated cities at all.
8. We excluded two categories of cases: those that were disposed at arraignment (less than 1% of the sample), and those that resulted, at arraignment, in remand to jail or other detention facility (less than 2% of the sample). Remands—judicial decisions to place the defendant in jail, with no opportunity for setting bail—typically result from the state's predicate felon law that requires judges to remand defendants without if they were previously convicted of two or more Class A, B, or C felonies (New York Penal Law Code, Article 530, 2008). Defendants might also be remanded if they were in violation of parole or probation conditions, or if they were wanted for other serious charges at the state or federal level at the time of arrest.
9. Because the CAFA program was instituted at two different time periods in the two small cities (2013 and 2014), we collected these samples to correspond to those time spans.
10. Of course, some defendants faced multiple charges or multiple counts of the same charge. Unfortunately, information on additional charges was not consistently available in both sites across samples, so we rely here on the top charge.
11. In New York, there are five classes of felonies. Class A felonies can result in life imprisonment. Maximum prison sentences for the other categories are 25 years for B, 15 years for C, 7 years for D, and 4 years for E felonies. Some Class A and B felonies can result in probation sentences of 25 years or life; C, D, and E felony convictions can result in probation terms of up to 5 years. Probation sentences for C, D, and E felonies are set, with some exceptions, at 3- to 5-year terms. Felony convictions can also result in fines up to US$100,000 and surcharge costs up to US$325 (New York State Senate, 2018; New York Penal Code, Article 10, 2008). There were no bails set below US$100 or between US$25,000 and US$50,000).
12. We note that judges' decisions to release under supervision carries important implications for both flight risk and public safety risks. However, in both counties, during the time periods studied, fewer than 2% of cases were released under supervision, so for practical purposes they were combined with the released on recognizance category.
13. We acknowledge that along with bail, judges have the discretion to set bond. However, information on bond amounts was not regularly reported in either county's public defender database.
14. Goodman and Kruskal's gamma statistic was chosen for these analyses as most variables are clearly ordinal (the order of categories matters, but not the difference between category values), and the gamma statistic was designed specifically to be used for tests of significant differences in analyses involving ordinal variables (Goodman & Kruskal, 1954).
15. Detailed calculations available from authors. We divided the percentage in each bail category by the non–release on recognizance (ROR) percentage to arrive at the distributions excluding those who were released on recognizance.
16. This concern was not unique to Lake County. When a nearby county more recently moved toward a centralized arraignment program, town and village judges expressed skepticism

as well. As reported in a local newspaper, the vice president of the Cayuga County Magistrates Association, the Hon. Mark DiVietro, when asked about the pros and cons of having judges authorized to arraign defendants arrested "outside their normal jurisdiction," said, "We don't know the people. Or we don't know if they're a frequent flyer in this town when we're dealing with them." The reporter added that the judge thought "a judge from one town might not be as informed while doing an arraignment about a defendant from somewhere outside their normal jurisdiction" (Catalfamo, 2019).

17. Again, we caution that this interpretation is speculative. Results available from authors.
18. But see Kang-Brown and Subramanian (2017), Levin and Haugen (2018), McKeon and Rice (2009), and Pruitt, McKinney, and Calhoun (2015).

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