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From the Legal Literature

Francesca Laguardia* and Erin Manning**

JUDICIAL RESISTANCE TO NEW YORK'S 2020 CRIMINAL LEGAL REFORMS

I. INTRODUCTION

The past ten years have seen a blizzard of calls for criminal justice reform, and a steady march of legislation passed in response to those calls.¹ Misdemeanors and pretrial detention have received particular attention.² Scholars argue that the use of cash bail and

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¹See, e.g., Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 817 (2016) ("There is a growing consensus across the U.S. political spectrum that the extent of incarceration in the United States is not just unnecessary but also unsustainable"); see also TRANSFORMING CRIMINAL JUSTICE: AN EVIDENCE-BASED AGENDA FOR REFORM 97 (Jon B. Gould & Pamela Metzger eds., 2022); Lynne Adelman, *Criminal Justice Reform: The Present Moment*, 2015 WIS. L. REV. 181; Emily Ahdieh, *The Deportation Trigger: Collateral Consequences and the Constitutional Right to a Trial by Jury*, 30 GEO. MASON U. CIV. RTS. L.J. 65 (2019); Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519, 531–34 (2020); Gabriel Chin, *Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions*, 102 MARQ. L. REV. 233, 234 (2018–19); Jamie Connolly, *Prosecutorial Discretion and Collateral Consequences: Rethinking the Alabama Rules of Professional Conduct*, 43 J. LEGAL PROF. 269 (2019); Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L. REV. 12 (2017); Henry F. Fradella & Christine S. Scott-Hayward, *Advancing Bail and Pretrial Justice Reform in Arizona*, 52 ARIZ. ST. L.J. 845 (2020); Zachary Hoskins, *Criminalization and the Collateral Consequences of Conviction*, 12 CRIM. L. & PHIL. 625 (2018); Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis 2019* UTAH L. REV. 1027; Eisha Jain, *The Mark of Policing: Race and Criminal Records*, 73 STAN. L. REV. ONLINE 162 (2021); Shannon M. Sliva, Elizabeth H. Porter-Merrill & Pete Lee, *Fulfilling the Aspirations of Restorative Justice in the Criminal System? The Case of Colorado*, 28 KAN. J.L. & PUB. POL'Y, 456 (2019). See generally NICOLE D. PORTER, SENT'G PROJECT, SUCCESS IN CRIMINAL LEGAL REFORMS, 2021, (Dec. 8, 2021) <https://www.sentencingproject.org/app/uploads/2022/09/Successes-in-Criminal-Legal-Reforms-2021.pdf> [<https://perma.cc/8QHG-ZWTW>].

²See, e.g., ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018); CHRISTINE SCOTT-HAYWARD & HENRY F. FRADELLA, PUNISHING POVERTY: HOW BAIL AND PRETRIAL DETENTION FUEL INEQUALITIES IN THE CRIMINAL JUSTICE SYSTEM (2019); Will Dobbie, Jacob

pretrial detention prejudice defendants unfairly, increasing recidivism, damaging the ability to prepare for trial, causing job loss, and risking their health, all while disparately impacting poor and minoritized populations.³

In response, states are reconsidering bail and pretrial detention.⁴ Several have restricted the use of cash bail, and one has entirely eliminated it, moving to a system of release or detention with no option for financial surety.⁵ Data suggests these reforms do not

Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201 (2018); Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J. F. 1098 (2019); Russell M. Gold & Ronald F. Wright, *The Political Patterns of Bail Reform*, 55 WAKE FOREST L. REV. 743 (2020); Kristine Hamann, *Time for Action: 10 Things Prosecutors Can Do Now*, A.B.A. CRIM. JUST., Spring 2021, at 1, 17; Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017); Cynthia E. Jones, *“Give Us Free”: Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 919 (2013); Sarah Ottone & Christine S. Scott-Hayward, *Pretrial Detention and the Decision to Impose Bail in Southern California*, 19 CRIMINOLOGY, CRIM. JUST. L & SOC’Y 24 (2018); Jessica A. Roth, *The Culture of Misdemeanor Courts*, 46 HOFSTRA L. REV. 215, 225 (2018); Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731 (2018). Samuel R. Wiseman, *Bail and Mass Incarceration*, 52 GA. L. REV. 235, 239 (2018); see also Alex Bender, Stephan Bingham, Mari Castaldi, Elisa Della Piana, Meredith Desautels, Michael Herald, Endria Richardson, Jesse Stout & Theresa Zhen, *Not Just a Ferguson Problem: How Traffic Courts Drive Inequality in California*, LAWS.’ COMM. CIV. RTS. S.F. BAY AREA (2015), <https://lccrsf.org/wp-content/uploads/2021/05/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-2015.pdf> [<https://perma.cc/H7UK-T2Z5>]; Brandon L. Garrett, Sandra Guerra Thompson, Dottie Carmichael & Songman Kang, *Monitoring Pretrial Reform in Harris County: Fifth Report of the Court-Appointed Monitor*, O’DONNELL MONITOR (Sept. 3, 2022), <https://sites.law.duke.edu/odonnellmonitor/wp-content/uploads/sites/26/2022/09/ODonnell-Monitor-Fifth-Report-v.26.pdf> [<https://perma.cc/9MRW-TS4S>]; JUST. POL’Y INST., BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL (2012), <http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf> [<https://perma.cc/RM7F-VEMV>]; CHRISTOPHER T. LOWENKAMP MARIE VANNOSTRAND & ALEXANDER M. HOLSINGER, LAURA & JOHN ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION 22 (2013), https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FN_L.pdf [<https://perma.cc/C8L7-8WL5>].

³ See SCOTT-HAYWARD & FRADELLA, *supra* note 2, at 129–51; Brandon L. Garrett, *Models of Bail Reform*, 74 FLA. L. REV. 879, 881 (2022); Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 368–69 (1990); Wiseman, *supra* note 2, at 239; Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1353–58 (2018).

⁴ Garrett, *supra* note 3, at 881–82; Christine S. Scott-Hayward & Henry F. Fradella, *Abolishing Bail*, in TRANSFORMING CRIMINAL JUSTICE: AN EVIDENCE-BASED AGENDA FOR REFORM 97 (Jon B. Gould & Pamela Metzger eds., 2022).

⁵ Garrett, *supra* note 3, at 881–82, 911–12; Scott-Hayward & Fradella, *supra* note 4, at 864–68; see also, e.g., 725 ILL. COMP. STAT. 5/110-1.5 (2021).

negatively impact public safety.⁶ Yet, some other states have suggested the use of bail should be increased, apparently in response to the wave of calls for legislation reducing the use of pretrial detention.⁷

The backlash to bail reform is an echo of the backlash experienced in other areas of criminal justice reform.⁸ Therefore, as bail practices are in flux across the country,⁹ bail reform provides a useful area to focus on in order to examine the interaction of reform and backlash—of legal change and resistance to that change. In *Judicial Resistance to New York's 2020 Legal Reforms*,¹⁰ Angelo Petrich, Director of Training at the Bronx Defenders, gives us a window into the challenges that face efforts at criminal justice reform.

Petrich offers vital insight into the murky details of lower court decisions. But his own position is on display as well, as he skims over relevant details that add context to the rulings he describes. His article is recounted and discussed below.

II. JUDICIAL RESISTANCE TO NEW YORK'S 2020 LEGAL REFORMS¹¹

Petrich begins by introducing the reader to New York's criminal

⁶Don Stemen & David Olson, *Is Bail Reform Causing an Increase in Crime?*, HARRY FRANK GUGGENHEIM FNDN. (2023), <https://www.hfg.org/wp-content/uploads/2023/01/Bail-Reform-and-Crime.pdf> [<https://perma.cc/C22B-EM79>]; Sishi Wu & David McDowall, *Does Bail Reform Increase Crime in New York State: Evidence from Interrupted Time-Series Analyses and Synthetic Control Methods*, — JUST. Q. — (in press) (advanced online publication available at <https://doi.org/10.1080/07418825.2023.2209145>). See generally Allie Preston & Rachael Eisenberg, *Cash Bail Reform Is Not a Threat to Public Safety*, CTR. AM. PROGRESS (Sept. 19, 2022), <https://www.americanprogress.org/article/cash-bail-reform-is-not-a-threat-to-public-safety/> [<https://perma.cc/5RXM-RYRJ>] (summarizing empirical data); Scott-Hayward & Fradella, *supra* note 4, at 864–68 (same).

⁷Garrett, *supra* note 3, at 883 (citing S.B. 6, 87th Leg., 1st Spec. Sess. (Tex. 2021)).

⁸See, e.g., Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245 (2023) (discussing generally the risk of backlash and the costs and benefits of various framings of criminal justice reform in order to avoid backlash); Carissa Byrne Hessick, *Pitfalls of Progressive Prosecution*, 50 FORDHAM URB. L.J. 973, 975 (2023) (“To be clear, progressive prosecutors will face opposition and backlash no matter what tactics they adopt.”); Miriam Aroni Krinsky, Justin Murray & Maybell Romero, *Preface: New Directions in Prosecutorial Reform*, 60 AM. CRIM. L. REV. 1369, 1377–80 (2023) (describing backlash to progressive prosecutors); Benjamin Levin, *Prosecuting the Crisis*, 50 FORDHAM URB. L.J. 989, 1006–08 (2023) (describing “[t]ough on crime backlash”); Marcia M. Ziegler, *32 Shots in the Dark: How Local Governments Can Increase Police Accountability When States Refuse To*, 74 MERCER L. REV. 1155, 1164, 1178 (2023) (discussing feared and actual backlash to criminal justice reforms).

⁹Garrett, *supra* note 3, at 811.

¹⁰Angelo Petrich, *Judicial Resistance to New York's 2020 Legal Reforms*, 113 J. CRIM. L. & CRIMINOLOGY 109 (2023).

¹¹Petrich, *supra* note 10, at 111.

justice reforms that came into effect in January of 2020.¹² New York's reforms included bail reform but also, importantly, created massive changes for criminal procedure by altering prosecutors' discovery obligations.¹³ The question of New York's discovery practices has received a great deal of attention in New York,¹⁴ but nowhere near the type of national attention that has been devoted to bail and pretrial detention issues.¹⁵ As Petrich notes, "The reforms included long-discussed changes to New York's criminal legal system and language that had been proposed by collaborative task forces and debated in iterations of other bills."¹⁶ These reforms responded to criticisms that prosecutors in New York could easily wait to provide important discovery materials until "the eve of trial" or even after the trial had begun.¹⁷ Delays in discovery forced defendants to consider plea bargains without knowing the strength of the case against them.¹⁸

Instead, the reforms required prosecutors to complete discovery before answering ready for trial, meaning that the prosecutors would continue to use up their limited speedy trial time until they had

¹²Petrich, *supra* note 10, at 111.

¹³Petrich, *supra* note 10, at 111.

¹⁴Petrich, *supra* note 10, at 111 n.5 (citing Beth Schwartzapfel, *Undiscovered: Defendants Say Evidence Laws Force Them To Take Pleas While "Blindfolded,"* MARSHALL PROJECT (Aug. 7, 2017, 10:00 AM), <https://www.themarshallproject.org/2017/08/07/undiscovered> [<https://perma.cc/5MZB-WU5A>] (detailing how NY is among the few states that allows discovery to be withheld by a prosecutor until immediately before jury selection); Joaquin Sapien & Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, PROPUBLICA: OUT OF ORDER (Apr. 3, 2013, 5:30 AM), <https://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody> [<https://perma.cc/NY54-FGMH>] (reporting how some prosecutors are able to routinely withhold exculpatory evidence or manipulate evidence because of the difficulty in punishing prosecutorial misconduct)); *see also* Kenneth Cooper, *Are New York's Bail and Discovery Reforms in Renewed Danger*, MINN. J.L. & INEQUALITY (Feb. 9, 2022), <https://lawandinequality.org/2022/02/09/are-new-yorks-bail-and-discovery-reforms-in-renewed-danger/> [<https://perma.cc/KD2E-HAAD>]; Julia Rubio & Linda Garza, *Commentary, Texas Prosecutor Calls for Discovery Reform in NY State*, N.Y.L.J. (Feb. 11, 2019), <https://www.law.com/newyorklawjournal/2019/02/11/open-discovery-benefits-police-and-prosecutors-to-o/> [<https://perma.cc/A42V-Q53Z>].

¹⁵*See, e.g.*, sources cited *supra* notes 2 and 3.

¹⁶Petrich, *supra* note 10, at 112 (citing N.Y. State Bar Ass'n, Rep. of the Task Force on Crim. Discovery 7-8 (2015); Assemb. 10137A, 2018 Gen. Assemb., 241st Sess. (N.Y. 2018)).

¹⁷Petrich, *supra* note 10, at 111.

¹⁸Beth Schwartzapfel, *"Blindfold" Off: New York Overhauls Pretrial Evidence Rules*, MARSHALL PROJECT (Apr. 1, 2019, 7:0 AM), <https://www.themarshallproject.org/2019/04/01/blindfold-off-new-york-overhauls-pretrial-evidence-rules> [<https://perma.cc/EZJ4-DCM3>]; *see also* Petrich, *supra* note 10, at 148.

provided all materials to defense.¹⁹ Although Petrigh barely mentions it, the reforms also specified multiple items of discovery that had to be provided to defense, broadening discovery requirements in the hopes that prosecutors would be pressured to abandon weaker cases more quickly.²⁰ In addition to these reforms, New York reformed its bail procedures to eradicate the use of monetary bail for a broad category of offenses and restricted the use of monetary bail in circumstances where individuals “were re-arrested or violated other conditions of release.”²¹

The reforms passed surprisingly easily, as part of a budget bill.²² They were the result of a very particular moment in New York history: a combination of years of criticism;²³ particular press attention to tragedies such as the suicide of 22-year-old Kalief Browder after three years of pretrial incarceration (including 700 days of solitary confinement) over a charge (that was ultimately dropped) of stealing a bookbag at sixteen years old;²⁴ strong cooperation between criminal justice reform groups, community groups, and defense organizations;²⁵ and an almost unheard of Democratic majority in the state legislature in the wake of the 2018 elections.²⁶ In fact, legislators attempting to fix these issues in New York’s discovery laws had “introduced bills more than a dozen times in the last 40 years, but the district attorneys association . . . always blocked the effort.”²⁷ Browder’s case, and subsequent suicide, brought renewed

¹⁹Petrigh, *supra* note 10, at 111–12.

²⁰See KRISTAL RODRIGUEZ, CTR. FOR CT. INNOVATION, DISCOVERY REFORM IN NEW YORK, MAJOR LEGISLATIVE PROVISIONS 1–3, (2020), https://www.courtinnovation.org/sites/default/files/media/document/2020/Discovery_NYS_Revised_2020.pdf [<https://perma.cc/J8DN-VPNX>].

²¹Petrigh, *supra* note 10, at 111.

²²Petrigh, *supra* note 10, at 112.

²³Petrigh, *supra* note 10, at 112 (citing Beth Schwartzapfel, *How New York Could Change the Game for Its Criminal Defendants*, MARSHALL PROJECT (Jan. 3, 2018, 5:40 PM), <https://www.themarshallproject.org/2018/01/03/how-new-york-could-change-the-game-for-its-criminal-defendants> [<https://perma.cc/P26V-WPYK>]; see also Schwartzapfel, *supra* note 18).

²⁴Petrigh, *supra* note 10, at 119–20 (citing *Remembering Kalief Browder*, NEW YORKER (June 3, 2016), <https://www.newyorker.com/news/news-desk/remembering-kalief-browder> [<https://perma.cc/7C3H-HCJE>]; Frazier Tharpe, “*We’re All in This Together*”: *Deion Browder on the Impact of His Brother Kalief’s Story*, COMPLEX (June 6, 2020), <https://www.complex.com/life/2020/06/deion-browder-kalief-browder-interview> [<https://perma.cc/Q5RQ-52JW>]); see also Jennifer Gonnerman, *Kalief Browder: 1993–2015*, NEW YORKER (June 7, 2015), <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015> [<https://perma.cc/WK93-2EX4>].

²⁵Petrigh, *supra* note 10, at 119–20.

²⁶Petrigh, *supra* note 10, at 121.

²⁷Schwartzapfel, *supra* note 18; see also Petrigh, *supra* note 10, at 121.

momentum.²⁸ After the reforms passed, however, backlash came swiftly,²⁹ and the reforms were soon diluted.³⁰

Petrigh describes judges' responses as a story of an obstructionist judiciary,³¹ intent on maintaining its own control of the system,³² protected by the slow nature of criminal justice oversight³³ and public backlash to reform.³⁴ He locates his examination of judicial pushback in the scholarship of organizational culture,³⁵ in particular the ability of low-level members of an organization to thwart reforms by manipulating "the mundane details of implementation."³⁶ He outlines the aspects of New York's judiciary that make it a culture that is unlikely to support reforms—due to the fact that judges in New York are elected, they are highly sensitive to bad press, and bad press often accompanies "going easy" on criminals.³⁷ Additionally, the reforms specifically targeted judicial discretion, thereby directly attacking judicial powers and authority.³⁸ The judiciary, therefore, was highly motivated to thwart the intended reforms.³⁹

²⁸Petrigh, *supra* note 10, at 120, 122.

²⁹See Nick Caloway, *Bail Reform: Jordan Randolph Indicted in Crash That Killed Long Island Man, 'I'll Be Out Tomorrow*, CBS News (Jan. 30, 2020, 5:25 PM), <https://www.cbsnews.com/newyork/news/jordan-randolph-indicted/> [<https://perma.cc/R234-FKNY>]; Greg Cergol, *LI Officials Try to Tie Bail Reform to MS-13 Case, Before Conceding No Link*, NBC 4 (N.Y.) (Feb. 7, 2020, 3:47 PM), <https://www.nbcnewyork.com/news/local/crime-and-courts/li-officials-bail-reform-law-to-blame-for-death-of-man-set-to-testify-in-ms-13-case/2280071> [<https://perma.cc/B96U-NKYU>]; Sarah Lustbader, *Prosecutors Blame Discovery Reform Law for Overtime, Tax Hikes, and a Murder*, THE APPEAL (Feb. 11, 2020), <https://theappeal.org/discovery-reform-law-gets-blamed-for-overtime-tax-hikes-and-a-murder/> [<https://perma.cc/26EG-T8TD>].

³⁰Petrigh, *supra* note 10, at 130–31.

³¹Petrigh, *supra* note 10, at 112, 115.

³²Petrigh, *supra* note 10, at 131–33.

³³Petrigh, *supra* note 10, at 117, 125.

³⁴Petrigh, *supra* note 10, at 130–31.

³⁵Petrigh, *supra* note 10, at 113–14, 116–24.

³⁶Petrigh, *supra* note 10, at 124. For a classic study "firmly rooted in organizational theory and open systems theory [that] describes the dynamics of the courthouse and emphasizes interdependencies, adaptation, institutional maintenance, and adversarial relationships in an effort to make sense of the process," see MALCOM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* (1979).

³⁷Petrigh, *supra* note 10, at 125, 127, 130 ("[A]rticles . . . continued to name judges who released individuals, and the ambiguity of the law, combined with a lack of clarity regarding who was ultimately responsible for its enforcement, left judges feeling exposed to political and media-driven pressure.").

³⁸Petrigh, *supra* note 10, at 132–33; Petrigh, *supra* note 9, at 146 ("The Chief Administrative Judge of the Bronx at the time . . . said, [t]he scope of removal of

Petrich offers several examples of the ways the judiciary challenged the original intent of the reform package. First, some judges made statements in opposition to bail reforms, calling them “stupid” and “against all common sense and wisdom.”⁴⁰ Another judge determined the reforms were unconstitutional, and refused to abide by them.⁴¹ Other judges avoided the requirements of the reforms by increasing the amount required in bail-eligible cases; while bail reform required judges to allow for partially secured bail (as opposed to insurance company bail bonds or full cash bail), judges setting bail required higher bail amounts when allowing partial security, thereby negating the effect of partially securing the bail amount.⁴² Overall, Petrich notes, average bail amounts increased 50% between 2019 and 2020.⁴³

Judges also refused to follow the recommendations of New York’s pretrial release assessment tool.⁴⁴ The tool has been found to be 90% accurate in determining whether a defendant will return to court, yet judges followed the recommendations of the tool only 44% of the time,⁴⁵ and even less often once “[a] nationwide increase in gun violence and a backlog . . . due to the COVID-19 pandemic led to a ‘backslide.’ ”⁴⁶

Petrich further notes official obstruction by New York City’s Office of Court Administration [hereinafter “OCA”].⁴⁷ The reform statute specifically and explicitly requires that people “arrested on a new case . . . be released pending a hearing on the re-arrest unless the new case was a violent felony.”⁴⁸ These hearings “are not summary proceedings” but must include “presentation of evidence . . . live witnesses, cross examination, and more than a summary finding of

judicial discretion on bail matters in this reform package is breathtaking.’ He urged then-Governor Cuomo and legislators to ‘reform the reform.’ ”).

³⁹Petrich, *supra* note 10, at 132–33.

⁴⁰Petrich, *supra* note 10, at 135.

⁴¹Petrich, *supra* note 10, at 136.

⁴²Petrich, *supra* note 10, at 138–39.

⁴³Petrich, *supra* note 9, at 138.

⁴⁴Petrich, *supra* note 10, at 140.

⁴⁵Petrich, *supra* note 10, at 140.

⁴⁶Petrich, *supra* note 10, at 142. It should be noted, however, that pretrial assessment tools can be highly problematic for a host of reasons, not the least of which is that their opaque (and sometimes proprietary) algorithms incorporate data tinged by racial biases that, in turn, leads to even more racially disparities in pretrial decision-making. See generally SCOTT-HAWARD & FRADELLA, *supra* note 2, at 77–128 (critiquing risk assessments); Scott-Hayward & Fradella, *supra* note 4, at 111–15 (calling for risk assessments to be “jettison[ed]”).

⁴⁷Petrich, *supra* note 10, at 144.

⁴⁸Petrich, *supra* note 10, at 144.

probable cause.”⁴⁹ In response, OCA circulated a memo creating a new procedure, whereby “whenever someone with an open case comes through arraignments for a new arrest, the person’s old case is advanced to the arraignment stage. The arraignment judge then issues a bench warrant for the client on the old case, even though the client is standing before the court.”⁵⁰ Through this procedure, the person can be detained on the bench warrant for the old case, bypassing the need for a separate hearing before the individual is detained.⁵¹

Finally, Petrigh describes the judiciary’s refusal to enforce New York’s new discovery requirements.⁵² He notes cases where judges have ignored the statute’s requirement that defense attorneys be allowed an adjournment to review late discovery materials, and have the option to accept a plea before it can be withdrawn.⁵³ Additionally, he states that judges have “refused to ‘charge’ speedy trial time until discovery is complete,” instead allowing prosecutors to stop the speedy trial clock by answering ready for trial when they have “attempted due diligence” or if they have good cause.⁵⁴ This decision was insulated by the slow nature of judicial review, twice determined to be “not ripe for review” and then rendered moot when the defendant’s pretrial detention ended (an example of the way slow oversight mechanisms in the courts facilitate judicial resistance).⁵⁵ Judges also ruled that challenges to discovery must be filed in writing, creating a catch-22 where the speedy trial clock stops running once defense attorneys challenge prosecutors’ compliance with discovery obligations, thereby giving up the very sanction they seek.⁵⁶

As solutions to these issues, Petrigh recommends that New York allow for expedited interlocutory appeals of bail and discovery determinations.⁵⁷ Additionally, he recommends that New York begin officially tracking judicial compliance with bail reforms.⁵⁸ He recommends further limiting judicial discretion on bail determinations and

⁴⁹Petrigh, *supra* note 10, at 144–45.

⁵⁰Petrigh, *supra* note 10, at 145.

⁵¹Petrigh, *supra* note 10, at 145–46.

⁵²Petrigh, *supra* note 10, at 147–59.

⁵³Petrigh, *supra* note 10, at 150.

⁵⁴Petrigh, *supra* note 10, at 154–55.

⁵⁵Petrigh, *supra* note 10, at 155.

⁵⁶Petrigh, *supra* note 10, at 155–57.

⁵⁷Petrigh, *supra* note 10, at 159–61.

⁵⁸Petrigh, *supra* note 10, at 162.

using the tools available in New York (judicial oversight from state-level leadership) to enforce the intent of reforms.⁵⁹

III. DISCUSSION

Petrich's article offers an important contribution to examinations of the successes and failures of criminal justice reform. As Petrich states, so often these reforms stand or fall on the mundane details of implementation,⁶⁰ and this is even more true in heavily discretionary areas and areas like bail and discovery that are inherently fact specific and difficult to generalize. It is rare that scholars or practitioners analyze these debates at the level of implementation rather than remote averages.

One of the most interesting questions to come out of Petrich's work is comparative. New York and New Jersey both passed strong bail reform statutes over a relatively short time period; the New York reforms passed in 2019, while New Jersey's were in 2017.⁶¹ But the New Jersey judges' bail recommendations remained much closer to those recommended by their pretrial release assessment tool, even though the two tools are similar in their accuracy rates.⁶² Petrich points out that New Jersey's judiciary might have been more involved in the reforms than New York's was, although New York's judiciary was well aware of the issue and was somewhat involved in the reform process.⁶³

But at the same time, Petrich seemingly misses important details. There are few available cases, but in the cases he relies on he neglects to note the clear reliance of judges on the fact that Petrich's favored solution to discovery challenges—charging prosecutors speedy trial time when it becomes clear that they failed to disclose some existing evidence that they did not have or know about earlier—would create a perverse incentive to hide evidence when it is found late.⁶⁴ He fails to mention that another case involved a defendant who had been sanctioned multiple times in multiple jurisdictions for failure to appear in court (leading to the judge in that case determining that the only thing that could ensure the defendant's appearance would be more burdensome than cash bail, unless a cash bail option was given).⁶⁵ Additionally, writing so close to the passage of these reforms, several of the available cases began

⁵⁹Petrich, *supra* note 10, at 163–73.

⁶⁰Petrich, *supra* note 10, at 124.

⁶¹Petrich, *supra* note 10, at 140.

⁶²Petrich, *supra* note 10, at 140–42.

⁶³Petrich, *supra* note 10, at 142–44.

⁶⁴*See People v. Nelson*, 67 Misc. 3d 313, 119 N.Y.S.3d 837, 840 (County Ct. 2020).

⁶⁵*People v. Johnston*, 67 Misc. 3d 267, 121 N.Y.S.3d 836 (N.Y. City Ct. 2020).

prior to the reforms, which affects judicial views as they confront prosecutors' overwhelm at new discovery obligations and the need to genuinely discover for themselves newly required evidence that they do not have in their own possession.⁶⁶

In the wake of these reforms, some of the first resistance to the reforms came from law enforcement and prosecutors who complained that they did not have sufficient resources to gather all the new discovery necessary to be turned over within the time frame of the statute.⁶⁷ The New York State Conference of Mayors stated they would have to hire staff to respond to the discovery requirements of the new law, and reports soon came in that prosecutors in New York were largely leaving their jobs in response to the overwhelming amount of paperwork now required.⁶⁸ It was in response to these and other considerations that New York's reforms were partially rolled back.⁶⁹

And of course, the backlash to New York's reforms was not solely in the judiciary and did not occur in a vacuum. New York's reforms went into effect mere months before the COVID-19 pandemic swept across the country.⁷⁰ Prosecutors and judges faced these new requirements as conditions in jails deteriorated and as it became harder to find police officers, forensics technicians, and other relevant witnesses in their offices, and as the nation as a whole panicked. At the same time, a staggering increase in violent crime made judges an easy target for the type of negative press Petrigh describes (although studies agree the increase was not influenced by bail reforms).⁷¹

Petrigh's description offers significant help in identifying the areas

⁶⁶*People v. Askin*, 68 Misc. 3d 372, 124 N.Y.S.3d 133 (County Ct. 2020).

⁶⁷N.Y.S. DIV. OF CRIM. JUS. SERVS., IMPLEMENTATION OF 2020 DISCOVERY LAW CHANGES: UPDATE 3 (2021) [hereinafter NYSDCJS, 2020 DISCOVERY], <https://www.criminaljustice.ny.gov/crimnet/ojsa/FINAL%20UPDATED%20Implementation%20of%202020%20Discovery%20Law%20Changes%20Report%2012-22-21.pdf> [<https://perma.cc/9FUR-5ZHT>]; see also Robert Anello, *Blindfold Removed from Justice in State Criminal Cases in 2020*, FORBES INSIDER (Jan. 8, 2020, 1:58 PM), <https://www.forbes.com/sites/insider/2020/01/08/blindfold-removed-from-justice-in-state-criminal-cases-in-2020/> [<https://perma.cc/7XG7-5Z6V>].

⁶⁸Lustbader, *supra* note 29; see also Jonah E. Bromwich, *Why Hundreds of NYC Prosecutors Are Leaving Their Jobs*, N.Y. TIMES (Apr. 3, 2022), <https://www.nytimes.com/2022/04/03/nyregion/nyc-prosecutors-jobs.html> [<https://perma.cc/K5Q2-GHNJ>].

⁶⁹Grace Ashford & Jonah E. Bromwich, *New York's Bail Laws, Reconsidered: 5 Things to Know*, N.Y. TIMES (Mar. 29, 2022), <https://www.nytimes.com/2022/03/29/nyregion/bail-reform-hochul-ny.html> [<https://perma.cc/FC6A-YAYB>].

⁷⁰N.Y.S. DIV. OF CRIM. JUS. SERVS., NYSDCJS, 2020 DISCOVERY, *supra* note 67, at 2.

⁷¹See Glenn C. Altschuler, Opinion, *Bail Reform, Crime Waves and the Fake News About Them*, THE HILL (May 21, 2023), <https://thehill.com/opinion/criminal-justice/4012841-bail-reform-crime-waves-and-the-fake-news-about-them/> [<https://perma.cc/>].

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where reforms are sidetracked, and the way that undermining occurs. But did judicial resistance in New York truly undermine the reforms, or was it part of the back and forth that constitutes legislative development and compromise? As the reforms are still standing, perhaps we should accept them as a win for reformers, rather than goading the judiciary further into an adversarial stance.

[cc/XRX4-738A](#)]; Wu & McDowall, *supra* note 6 (reporting that New York's bail reform law had a negligible effect on crime).