THE POLITICAL PATTERNS OF BAIL REFORM

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I. INTRODUCTION

Massive and persistent protests across America in 2020 seek reform of criminal legal systems, even amidst pandemic conditions.[1] Many of these reforms focus on systemic racism in *policing*.[2] But policing is not the only reform agenda and is far from the only place where race matters in criminal law. Pretrial detention has huge repercussions on the lives of those arrested, and those consequences create racial disparities.[3] Pretrial detention can jeopardize employment, housing, and child custody; it can inflict serious psychological harm on defendants, their loved ones, and entire

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Videos from three of the four panels are available here: http://wakeforest lawreview.com/2019/09/2020-spring-symposium-bail-reform/.

1. The New York Times, *2 Officers Shot in Louisville Protests Over Breonna Taylor Charging Decision*, N.Y. TIMES (Sept. 24, 2020), https://www.nytimes.com/2020/09/23/us/breonna-taylor-decision-verdict.html; Jenna Wortham, *A 'Glorious Poetic Rage*,*'* N.Y. TIMES (June 5, 2020), https://www.nytimes.com/2020/06/05/sunday-review/black-lives-matter-protests-floyd.html.

2. Wortham, *supra* note 1.

3. *See* Jenny Carroll, *The Due Process of Bail*, 55 WAKE FOREST L. REV. 757, 771, 773 (2020).

communities.[4] Pretrial detention also makes defendants more likely to plead guilty and to face longer sentences.[5]

And yet pretrial detention stands out from the crowd of criminal law issues because meaningful reform has occurred in this space over the last few years, as several articles in this symposium issue describe.[6] Although the federal government has been sclerotic on the question of pretrial release (as it is in most of the criminal law), state and local governments have responded to better ideas, one jurisdiction at a time.[7] Better pretrial release practices depend on the robust collection and use of local data.[8] They also require buy-in from local judges, clerks of court, prosecutors, defense counsel, law enforcement, jail administrators, and community corrections officials.[9] Because so many key resources and actors work at the local level in American criminal law, it is not surprising that successful results happen locally, even if state or federal legislation, funding, and leadership could prove helpful to these reform efforts.[10]

In this introduction to the symposium issue, we make a few observations about the politics of pretrial-release reform. First, reforms in different places do not all share the same objective. Some

4. *See, e.g.*, *id.* at 772, 775; Douglas Colbert, *"With a Little Help From My Friends:" Counsel at Bail and Enhanced Pretrial Justice Becomes the New Reality*, 55 WAKE FOREST L. REV. 795, 818 (2020).

5. Carroll, *supra* note 3, at 773.

6. *See, e.g.*, Lauryn P. Gouldin, *Reforming Pretrial Decision-Making*, 55 WAKE FOREST L. REV. 857, 858–59 (2020); *see also* Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 949 (2020).

7. *See* Baughman, *supra* note 6, at 949 (collecting citations of change to bail reform laws); *see also e.g.*,, 2014 N.J. Sess. Law Serv. Ch. 31 (reforming state law to largely abandon bail in favor of increased reliance on risk-assessment tools); William E. Crozier et al., *The Transparency of Jail Data*, 55 WAKE FOREST L. REV. 821, 824–25 (2020) (discussing Durham, North Carolina's system before 2019 reforms); Spencer Merriweather, Dist. Att'y, Mecklenburg Cnty., Address at the Wake Forest Law Review Symposium (Jan. 31, 2020) (explaining that a bail schedule presumes the appropriateness of secured bail and thus his office has moved instead to a release conditions matrix with no such presumption).

8. *See, e.g.*, Jessica Smith, *Bail in North Carolina*, 55 WAKE FOREST L. REV. 907 (2020).

9. *See* Ronald F. Wright, *Persistent Localism in the Prosecutor Services of North Carolina*, 41 CRIME & JUST. 211, 243–47 (2012).

10. *See, e.g.*, Crozier et al., *supra* note 7, at 841–42 (discussing the efficacy of the District Attorney's Office in Durham, North Carolina, in implementing low cash bail and pretrial diversion options for release); *General Order No. 18.8a, Procedures for Bail Hearings and Pretrial Release*, CIR. CT. OF COOK CNTY., ILL. (2017), http://www.cookcountycourt.org/Portals/0/Orders/General%20Order%20No.%2018.8a.pdf (requiring judges to consider defendants' ability to pay bail and requiring judges who set bail to do so in an amount that the defendant "has the present ability to pay" and requiring consideration of defendant's financial resources in determining bail amounts, which must not be "oppressive" in light of the availability of such resources).

places seek less pretrial detention, while others wish to reduce or eliminate the use of cash bail that releases dangerous wealthy people and incarcerates people solely for being poor.[11] Some replace money bail with heavier use of algorithmic risk-assessment instruments.[12]

Second, there is no single sequence of reforms or even homogenous set of reforms in the pretrial liberty realm. The recent proposal from the Uniform Law Commission ("ULC") might eventually become a uniform statutory floor nationwide.[13] But it remains to be seen how many state legislatures will adopt that thoughtful proposal. And even if it were adopted nationwide, some jurisdictions—particularly Democratic-leaning urban areas—would nonetheless pursue more ambitious reforms, as places like Durham County, North Carolina, have demonstrated recently.[14] Other localities might choose entirely different reforms to layer on top of the statutory framework in their states. Pretrial-detention reform is not a single train, where all passengers can move down the same reform track, encountering the same stopping points in the same order, continuing only forward, with each local system free to get off at any stop.

Even though there is no single sequence of reforms for local actors to follow, familiar patterns appear as changes occur. Certain reform outcomes tend to happen together in tandem. Moreover, identifiable local coalitions tend to work together to advocate for distinct bundles of reform.[15] Despite the enormous local variety in pretrial release practices (and in criminal justice more generally), it is possible to generalize about the politics of reform.

II. THE CHALLENGE OF VOLUME

The sheer volume of caseloads—particularly in large urban jurisdictions—poses various obstacles to reform.[16] As the articles in this symposium issue indicate, some release devices require careful

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11. *See, e.g.*, Crozier et al., *supra* note 7, at 853 (discussing Durham, North Carolina's mechanism of low cash bail); *see also* ODonnell v. Harris County, 892 F.3d 147, 163 (5th Cir. 2018).

12. *See, e.g.*, KY. REV. STAT. ANN § 431.066 (West); N.J. STAT. ANN. § 2A:162-17 (West).

13. *See* UNIF. PRETRIAL RELEASE & DET. ACT (UNIF. L. COMM'N 2020), https://www.uniformlaws.org/viewdocument/as-approved-act-2020-july?CommunityKey=1f21d61c-06fe-4959-9979-287da3bd7c00&tab=librarydocuments.

14. *See, e.g.*, Crozier et al., *supra* note 7, at 831–33 (discussing Durham's Judge's bail policy reforms and Durham's District Attorney's Office bail policy reforms).

15. *See,* Smith, *supra* note 8, at 912–14.

16. Baughman, *supra* note 6, at 962–63; Gouldin, *supra* note 6, at 883–84; *see also* Russell M Gold, *Jail as Injunction*, 107 GEO. L.J. 501, 548–51 (2019) (explaining why this volume objection is not persuasive as a justifiable objection to reform).

and costly attention to individual cases and thus cannot easily scale up to meet the needs of massive court systems.[17] But volume is not an insurmountable obstacle to pretrial-detention reform, even in large jurisdictions. It is possible to reduce custodial arrests or release defendants before any judicial hearing happens; that choice early in the process decouples the quantity of cases filed in the criminal courts from the quantity of pretrial-detention decisions that judges face.[18]

Some of the most important high-volume reforms involve changes to arrest and citation practices.[19] The ULC's recent innovations drive at these objectives.[20] These innovations include proposed model legislation to prohibit arrests for misdemeanors or noncriminal offenses punishable by six-months' imprisonment or less, subject to some exceptions.[21] In some states, such a limit on the arrest power would not mark a significant change from the status quo.[22] Similarly, for some defendants who have already been arrested, stationhouse release would narrow the volume of cases presented to a judge for a ruling on whether a defendant should be detained pretrial.[23]

The simple notion behind these reforms is that when fewer defendants must come before a judge for a pretrial-detention determination, judges then have enough time for more thoughtful handling of the remaining detainees.[24] Each case can receive more individualized attention and resources—such as early arrival of defense counsel (or even social workers)[25]—and individualized treatment rather than the two-minute hearings governed by bail schedules in days (hopefully) past.[26]

Judges' self-interest favors overdetention, which remains an obstacle to bail reform in practice.[27] The harms of unnecessarily detaining a defendant can be significant, but those harms are not

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17. *See, e.g.*, Gouldin, *supra* note 6, at 881–84.

18. *Id.* at 887.

19. *See, e.g.*, UNIF. PRETRIAL RELEASE & DET. ACT § 201 (UNIF. L. COMM'N 2020), https://www.uniformlaws.org/viewdocument/as-approved-act-2020-july?CommunityKey=1f21d61c-06fe-4959-9979-287da3bd7c00&tab=librarydocuments.

20. *Id.*

21. *Id.* § 201(c).

22. In North Carolina, police already issued citations in lieu of arrest for nearly 88 percent of misdemeanors. *See* Smith, *supra* note 8, at 920.

23. *See* Gouldin, *supra* note 6, at 887.

24. *See id.* at 879–85.

25. *See* Paul Heaton, Enhanced Public Defense Improves Pretrial Detention Outcomes and Reduces Racial Disparities 9 (July 2020) (unpublished manuscript) (on file with authors) (describing a pilot program by The Defender Association of Philadelphia where social workers met with defendants shortly after arrest to help de-escalate them and gather information that could be used during a bail hearing).

26. *See supra* note 7 and accompanying text.

27. *See* Gouldin, *supra* note 6, at 868.

salient or perhaps even visible to judges or voters.[28] By contrast, a judge may hurt her own reelection prospects if she releases a defendant who then commits a violent crime while on pretrial liberty.[29]

Effective reforms must account for the incentives that make judges care more about false negatives than false positives when they predict future misconduct by defendants.[30] Thus, reforms have the most impact when they are mandatory in particular classes of cases. For example, risk-assessment tools that use algorithms can identify detained individuals who pose a low risk of reoffending; the law could mandate releasing these defendants based on a promise to appear or an unsecured bond.[31]

Some categorical rules are better than others. The desire to avoid the crush of case volume led many jurisdictions to adopt bail schedules where judges set cash bail largely by reference to a chart designating standard bail amounts for each crime.[32] Such bail schedules, however, do not account for defendants' ability to pay and thus unlawfully discriminate against the poor;[33] bail schedules have thus fallen out of widespread use over the past few years. Even when such schedules remain in use, small changes to those schedules can offer modest but meaningful reform. A chart dictating a secured bail amount for a particular offense necessarily presumes that cash bail should indeed be set as the defendant's release condition—baking this widespread default into the system.[34] To address this concern, Mecklenburg County, North Carolina, removed secured bail from its renamed "release conditions matrix."[35] That is the sort of modest reform that can meaningfully shift defaults across a large volume of cases.

After the various high-volume techniques reduce the number of cases to a manageable few, more time intensive and individualized practices become feasible. The goal of providing individualized attention to cases would benefit from giving lawyers to defendants—either as a matter of statute, practice, or the Sixth Amendment.[36] In cases with nonviolent accusations, defendants are five times more likely to be released on recognizance or assigned affordable bail if represented by counsel.[37] The disparity is even starker for violent

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28. *See id.*
29. *See id.* at 868 n.60.
30. *See id*. at 890–91.
31. *Cf.* Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417 (2016) (arguing against judicial discretion regarding pretrial detention).
32. Gouldin, *supra* note 6, at 883.
33. ODonnell v. Harris County, 892 F.3d 147, 161–63 (5th Cir. 2018).
34. Merriweather, *supra* note 7.
35. *Id.*
36. *See* Colbert, *supra* note 4.
37. *See id.* at 803.

crime accusations. Some types of risk assessments also depend on rich information about individual arrestees, and this thoughtful and individualized use of risk assessment instruments has much to commend it.[38] Principles of due process (if coherently interpreted and applied) can also ensure some nationwide consistency for pretrial practices among this smaller group of cases.[39]

Statutes in many places already tell judges to impose the least restrictive conditions sufficient to ensure the defendant's appearance and prevent further harm to the community in the interim.[40] Individualized consideration of a smaller subset of cases could involve pretrial services and take seriously those statutory mandates. Existing algorithmic tools, however, consider only the defendant's risk without any conditions.[41] Risk-needs-responsivity tools that seek to determine a defendant's risk level if a particular condition were imposed do not yet exist in this space. Such treatment would better respect defendants' procedural due process rights in this context where error costs are massive.[42]

III. LOCALIZED REFORMS, RECOGNIZABLE PATTERNS

Localism has been extraordinarily important in bail reform. Local level reforms play two different roles. The first is to allow local governments to protect civil liberties and public safety more vigorously than state law mandates. Thus, bail reform has gone further in a heavily Democratic county like Durham County, North Carolina, than in more moderate or Republican counties.[43] Second, local governments have played a role as laboratories of experimentation to provide data that makes stakeholders more comfortable about the prospects of statewide reform. That was the

38. Sarah L. Desmarais, Professor, N.C. State Univ. Applied Soc. & Cmty. Psych. Program, Address at the Wake Forest Law Review Symposium (Jan. 31, 2020).

39. *See* Carroll, *supra* note 3, at 791–93.

40. *See, e.g.*, 18 U.S.C. § 3142(b)–(c).

41. *See* Gouldin, *supra* note 6, at 890–91.

42. *See* Carroll, *supra* note 3, at 791-93.

43. Dist. Att'y's Off., Durham Cnty., N.C., 16th Prosecutorial District Internal Pretrial Release Policies (May 21, 2019), https://www.scribd.com/document/411746062/Pretrial-Release-Policies-16th-Prosecutorial-District; Fourteenth Jud. Dist., In Re: Policies Relating to Bail and Pretrial Release Policies for the Fourteenth Judicial District (Feb. 28, 2019), https://www.nccourts.gov/assets/documents/local-rules-forms/doc00035220190228104156.pdf?TJovsG8m.Ls084_nIPtQuRj5139IHwSH; *see also* Joe Killian, *Durham Prosecutors No Longer Seeking Cash Bail in Most Cases*, PROGRESSIVE PULSE (May 29, 2019), http://pulse.ncpolicywatch.org/2019/05 /29/durham-prosecutors-no-longer-seeking-cash-bail-in-most-cases/ (describing reforms from the district attorney's office exceeding what the court required). There are no similar initiatives to which we could cite from Wake Forest's home county of Forsyth County, North Carolina, for instance.

story with Brooklyn, for instance, when it demonstrated how to request bail less frequently in misdemeanor cases without harming public safety.[44]

And yet it is not our view that pretrial detention should eventually look the same from county to county.[45] Bail reform has seen—at least thus far—a triumph of federalism, with states and localities able to take different paths.[46] Voters in Durham who elected Satana Deberry to end cash bail should get what they want on that score.[47] Counties across the country vary dramatically, not only in political will for reform, but also in size and the related issues that size entails. In North Carolina, for instance, Hyde County has a population of 5,230, while Mecklenburg County has more than a million people.[48] A judge in Hyde County need not be nearly as worried as a judge in Mecklenburg about overwhelmed dockets, yet the district court in Hyde County does not convene frequently because of its low volume.[49] Similarly, larger counties may have pretrial services or other entities that help ensure defendants' appearances—the historical function of bail.[50]

We view localism and the ability for prosecutors (and indeed elected judges) to take different approaches as embedded in the decentralized fabric of the American criminal legal system (to call it

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44. *See* Eric Gonzalez, Brooklyn District Attorney, Justice 2020: An Action Plan for Brooklyn, BROOKLYN DIST. ATT'YS OFF. (2020), http://brooklynda.org/wp-content/uploads/2019/03/Justice2020-Report.pdf. Some cities similarly led the way on statewide discovery reform by showing that no parade of horribles followed. Wright, *supra* note 9, at 235 (explaining that open-file discovery statewide in North Carolina followed after the state's big cities had employed a similar approach); Rob Abruzzese, *Brooklyn DA Pushes Major Reform in Evidence Disclosure*, BROOKLYN DAILY EAGLE (Mar. 4, 2019), https://brooklyneagle.com/articles/2019/03/04/brooklyn-da-calls-for-discovery-reform-in-op-ed/.

45. *See* Smith, *supra* note 8, at 915–16.

46. Localism is a characteristic of many areas of criminal practice. *See* Wright, *supra* note 9, at 258–59.

47. *See* Virginia Bridges, *Durham County DA Tells Prosecutors to Seek Cash Bonds Only in 'Rare Circumstances,'* NEWS & OBSERVER (May 28, 2020, 5:27 PM), https://www.newsobserver.com/news/local/article230880909.html (discussing District Attorney Deberry's announced policies while in office); Sarah Willets, *What Will Durham's New Sheriff and District Attorney Do in Their First 100 Days?*, INDY WEEK (Oct. 17, 2018, 3:56 PM), https://indyweek.com/api/content/fc131ce4-d22d-11e8-8b17-120e7ad5cf50/ (discussing District Attorney Deberry's promises as a candidate).

48. *See* Smith, *supra* note 8, at 915.

49. *Id.* at 916; *Criminal Calendars for Hyde County*, N.C. JUD. BRANCH, http://www1.aoc.state.nc.us/www/calendars/Criminal.jsp?county=HYDE (last visited Nov. 27, 2020) (listing entire daily docket for criminal district court).

50. *See* Caitlin Fenhagen, Dir., Crim. Just. Res. Dep't, Orange Cnty., N.C., Address at the Wake Forest Law Review Symposium (Jan. 31, 2020); Merriweather, *supra* note 7.

a "system" only for the sake of convenience).[51] Contrary to some scholars, we view prosecutors' obligation as running to their local constituencies, albeit to varying degrees.[52] Gouldin's essay highlights that a community would likely tolerate different levels of risk of pretrial release for different sorts of criminal allegations.[53] So too would different communities quite likely have different thresholds for risk altogether. That, we think, is as it should be.

That said, localized reform makes it difficult to gather meaningful data to compare one place with another or to measure local success against whatever metrics of success the local actors choose. Crozier and his colleagues argue in their essay that robust and multifaceted data are difficult to obtain, even by researchers with sophisticated webscrapers, and even in a county that posts information about its jail population on its website.[54] Indeed, the lack of information makes it hard for constituents to know whether reforms have been effective; the lack of transparency obscures for voters which of the many players in the system have effectuated reforms and which have stalled them. Perhaps the information deficit has been part of the explanation for why Philadelphia hasn't seen the dramatic level of change that District Attorney Larry Krasner's campaign promised in connection with pretrial release.[55]

Office size and structure might also make supervision challenging.[56] Not only is it difficult for the public to obtain sufficient information to evaluate performance, but actors inside the system might find it impossible to evaluate the work of their own offices.[57] Judges may not see all of the good outcomes of defendants they allow back into their communities. Instead, judges may see the occasional

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51. *See* Sara Mayeux, *The Idea of "The Criminal Justice System,"* 45 AM. J. CRIM. L. 55, 56–57 (2018).

52. *See* Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 76, 79–81 (2011); Ronald F. Wright, *Prosecutors and Their State and Local Polities*, 110 J. CRIM. L. & CRIMINOLOGY (forthcoming 2020); Ronald F. Wright, Kay L. Levine & Russell M. Gold, *Preface*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION (Ronald F. Wright et al. eds., forthcoming 2021).

53. *See* Gouldin, *supra* note 6, at 892; *see also* Megan T. Stevenson & Sandra G. Mayson, The Blackstone Ratio for Preventative Detention (Mar. 19, 2020) (unpublished manuscript) (on file with authors).

54. Crozier et al., *supra* note 7, at 846.

55. *See* Aurélie Ouss & Megan Stevenson, Bail, Jail, and Pretrial Misconduct: The Influence of Prosecutors 1–3 (Jan. 20, 2020) (unpublished manuscript), https://papers.ssrn.com/abstract=3335138 (showing that release rates remain unchanged even though use of secured bail has dropped significantly).

56. *See* Lauren Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 537–39 (2020).

57. *See* Crozier et al., *supra* note 7, at 824.

bad outcome when the defendant appears again in the courtroom facing new charges.[58]

IV. BROAD REFORM COALITIONS WITH COMPLEMENTARY CONCERNS

Effective changes to pretrial-release practices do not generally happen at the stroke of the pen of one actor. Instead, pretrial-detention reform has succeeded because the interests of different actors converge, including groups who prioritize different things: public safety for some; cost for others; and civil liberties, fairness, and equality for still others.[59] Put differently, bail reform has plenty to recommend it for law and order types, libertarians, and progressives. And that confluence of interests has built political coalitions that can succeed at the local or even state level (more quickly in some locations than in others). In New Jersey, for instance, statewide bail reform legislation essentially eliminated money bail while also permitting the state to detain dangerous defendants without the possibility of bail.[60] In so doing, New Jersey created bipartisan reform with staying power.[61]

Cost is an important driver of reform because it facilitates a political coalition of fiscal conservatives and liberals.[62] Indeed, reforms in Mecklenburg County, North Carolina, began when county commissioners saw the need to build a fourth jail facility and subsequently approached the prosecutor's office about changing their practices to alleviate the need for such expenditures.[63] Concerns about cost and about the public safety implications of a system that

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58. *See* Colbert, *supra* note 4, at 818; Gouldin, *supra* note 6, at 868.

59. *See* Smith, *supra* note 8, at 907–12.

60. *See* N.J. STAT. ANN. § 2A:162-17 (West).

61. *See* Darcel D. Clark et al., *Opinion | Why We Need to Reform New York's Criminal Justice Reforms*, N.Y. TIMES (Feb. 25, 2020), https://www.nytimes.com/2020/02/25/opinion/new-york-bail-reform.html (group of district attorneys advocating for New York to adopt bail reforms similar to New Jersey's); Jamiles Lartey, *New York Rolled Back Bail Reform. What Will the Rest of the Country Do?*, MARSHALL PROJECT (July 21, 2020) https://www.themarshallproject.org/2020/04/23/in-new-york-s-bail-reform-backlash-a-cautionary-tale-for-other-states (contrasting New York's rollback with New Jersey's stable reform).

62. *See*, *e.g.*, Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 811 (2005); Russell M. Gold, *Prosecutors and Their Legislatures, Legislatures and Their Prosecutors*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION (Ronald F. Wright, Kay L. Levine & Russell M. Gold eds., forthcoming 2021); Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980-2000*, 29 CRIME & JUST. 39 (2002).

63. *Id.* The potential lack of such a conversation is a real risk of dividing budgets for prosecutors' offices from jail budgets. *See generally* Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should the Prosecutors Control the Jails*, 51 WAKE FOREST L. REV. 677 (2016).

allows dangerous but wealthy defendants to go free[64] have facilitated bail reform not only in California and New York, but also in Indiana, Kentucky, and Utah.[65]

Different actors take the lead in different places. Although the judiciary took the first steps toward reform in Durham, North Carolina, the newly elected prosecutor took still larger steps after that.[66] The success of impact litigation in Houston enabled private litigants to contribute to the forward momentum.[67] Similarly, Doug Colbert's essay highlights the role (and indeed obligation) of prosecutors to recommend release in appropriate cases and the effect of such recommendations on deflecting public pressure from judges.[68] Indeed, that essay could go further and embrace the idea that prosecutors should help facilitate systemic reform to replace widespread pretrial detention, particularly of the poor, with systems that actually make their communities safer.[69]

We would be remiss, however, if we suggested that changes to pretrial-release practices always moved toward less detention or even less use of money bail. The year after New York eliminated bail for most offenses, it had already walked back some of that progress.[70] The political dynamics of that unwinding are familiar to observers of criminal law. Reform opponents highlighted a small number of instances where a defendant (presumed innocent) who was free on pretrial liberty harmed someone.[71] Exploiting one particular

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64. *See* Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 864 (2016) (explaining that "if a court views a defendant as being a high risk for committing a new crime on release, it does not seem appropriate to simply set a high price for release" because "[d]angerous defendants do not become less dangerous by paying bail").

65. Baughman, *supra* note 6, at 949 (collecting primary sources); Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 307–10 (2018) (describing Kentucky's role as a "shining example" and leader in bail reform that embraces risk-assessment tools).

66. *See* Crozier et al., *supra* note 7, at 824–25.

67. ODonnell v. Harris County, 892 F.3d 147, 161–63 (5th Cir. 2018).

68. Colbert, *supra* note 4, at 808–09.

69. *See* R. Michael Cassidy, *(Ad)Ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 LOY. U. CHI. L.J. 981, 983 (2014) (arguing that prosecutors have an obligation to support systemic reform that advances societal ends as part of their minister of justice obligation).

70. *See, e.g.*, Melissa Gira Grant, *The Shock Doctrine Came for Bail Reform*, NEW REPUBLIC (Apr. 7, 2020), https://newrepublic.com/article/157205/shock-doctrine-came-bail-reform (describing the 2019 reforms and 2020 partial rollback in New York).

71. *See* Colbert, *supra* note 4 (describing undue focus on single cases by those opposing reform); Jesse McKinley, *The Bail Reform Backlash That Has Democrats at War*, N.Y. TIMES (Feb. 14, 2020), https://www.nytimes.com/2020/02/14/nyregion/new-york-bail-reform.html (describing bail reform opponents' use of a few anecdotes to push for rollbacks); *see also* Rebecca Rosenberg et al., *Hate Crime Suspect Tiffany Harris Arrested for Third Time in One Week*, N.Y. POST

instance—particularly one involving a Black person—to push criminal law in a more punitive direction or attack an opposing candidate is an old playbook.[72] Anecdotes obscure the far less salient success stories of defendants free in their communities, participating in everyday civic life and earning a living.

Bail reform is not just a story of the judges and lawyers who operate the machinery of criminal justice.[73] It is also a story of grassroots efforts and community organizing. As just one example, consider the role that revolving bail funds play as a means of social resistance to courtroom "insiders" who incarcerate too many people of color during the pretrial stage.[74] Community organizers on the left care deeply about public safety, just as do people elsewhere on the political spectrum.[75] But their definition of public safety is a broader one that recognizes and cares about the social harms of policing and incarceration.[76] The symposium panelists put it this way:

> Kristie Puckett-Williams: [I]f you really want to talk about public safety, what makes us safe is getting to the root of the issues. Poverty is the root of the issue. People are poor, right, and so that really is the issue. I mean, what is at the issue of poverty? White supremacy and antiblackness, and so unless we are willing to address the systemic issues of white supremacy, how it continues to show up, and how antiblackness shows up every single day, then we really aren't concerned with public safety, we are concerned with maintaining the status quo, and maintaining the systems that we've always maintained.
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> Mary Hooks: Mm-hmm (affirmative), yes. And I'll add capitalism in there too, right?
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> Puckett-Williams: Yes, definitely.

(Jan. 1, 2020), https://nypost.com/2020/01/01/hate-crime-suspect-tiffany-harris-arrested-for-third-time-in-three-days/ (offering one anecdote and photographs of a Black woman who allegedly committed repeated offenses in a short time period).

72. Ads in the presidential campaign of 1988 about Governor Dukakis furloughing Willie Horton were neither the first nor the last such instance, but they are perhaps the most infamous. *See generally* TED GEST, CRIME & POLITICS: BIG GOVERNMENT'S ERRATIC CAMPAIGN FOR LAW AND ORDER (2001) (describing historic formulation of crime policy within the United States).

73. *See generally* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012) (describing the expert and popular contributions to criminal legal systems over time in the United States).

74. *See generally* Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (2017) (analyzing community bail funds as a conduit for community voice).

75. Jocelyn Simonson, Professor of L., Brooklyn L. Sch., Address at the Wake Forest Law Review Symposium (Jan. 31, 2020).

76. *Id.*

> Hooks: Because we didn't get all of that as part of the big scheme. And I think one of the things that we're clear about when we talk about the public safety conversation, we were in different rooms going to the mat about this public safety and seeing that a lot of cities give 30, 40 if not more, of their money to public safety, which is often times going right into the hands of police officers, and a little bit to the fire departments. But for the most part, it's being absorbed into the police, that over-police and criminalize, and do all the things, and completely destabilizing communities.
>
> Puckett-Williams: And so a big part of public safety, and I echo what you're saying, is about making sure that folks have adequate housing. It is about making sure that folks have meaningful work, that folks are able to raise and support their families and their children, you know what I mean, in communities that aren't being bombarded by the police, or by ICE, and by all these other booby traps that come in to snatch our people away. And so I think that there's a—we have to change the paradigm and the language, because putting more police in our communities is not generating public safety. Being able to stabilize those communities that have been divested in for so long, for so long, is where the magic is at.
>
> Hooks: And so yeah, public safety, I think we have to think about it from a completely different standpoint, because if we're relying on the police to be able to do that, then we are up a creek without a paddle, because it's not going to happen.[77]

Bail reform is an important starting place to improve people's lives and the health and safety of communities. But it is merely a starting place in this larger enterprise, as one of the panelists explained:

> Hooks: I just want to add real quick too, because we know that bail and that pre-trial detention, it's hot, it's hot right now. And that might be as far as you're willing to go on the freedom train, you're like, "This is all I'm going to do, the rest of that stuff I don't want to have nothing to do with it." But don't undermine those who have a longer game vision than you do.
>
> Shelton McElroy: That's right.
>
> Hooks: Because our North Star says that we are trying to build a creative world, that does not operate with jails, cages, court, all of it, that is the North Star. And that might not be your jam, but do not stop the train from moving friends.

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77. Cmty. Voice Panel, Address at the Wake Forest Law Review Symposium 9 (Jan. 31, 2020) (transcript on file with Wake Forest Law Review).

> McElroy: That's right.
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> Hooks: Do not. Do your part to the extent in which you can, and when you . . . –once it gets too radical for you, go and step off honey. Go and step off, give a little gas money so the train can keep moving. But the work must continue. And to be clear, that is the North Star, and again get off where you feel comfortable, and I would even challenge you if you said that, but I'm just giving you an escape plan . . . giving you an out. But that's where we're headed, and don't undermine the efforts to get there, even if that's not where you're at politically, and if that's not the world that you can envision, and because your vision isn't there, that's fine, but go as far as you can. Go as far as you can.[78]

Bail reform serves as an entry point for some to broader decarceral or abolitionist reform agendas.[79] For those who view systemic racism as unavoidable in the criminal legal system and in incarceration, it is a natural response to abolish the criminal legal system.[80] Mary Hooks, in explaining her view of the harms that criminal law tries to address, outlined a vision of American criminal law to which reformers could strive:

> Hooks: I have a few thoughts, and I think that once we, and we will, dismantle pretrial detention, I think what we also—part of the work of social justice actors and revolutionaries is not to not just dismantle a thing, but to also build a thing, right? And so we have that challenge of having to do both at the same time. And so once we dismantle this thing, then we have an opportunity, and should even now, begin to invest in other alternatives and creating new status quos.
>
> So for instance, in my mind, say a fight breaks out, and hopefully people don't get arrested, but let's just say they get arrested, whatever, and they're sitting in jail and they've been cooling off for two minutes, or two hours, whatever, and then it's like, "Okay, cool, how about before this even gets to the judge, that you all have an off ramp to go and get mediation from a community clinic, or for community-based mediation service, where you all can actually sit and have a different level of conversation about it. Where you all could bring in other community members and stakeholders, to be able to address the harm that was caused, if one was identified, and be able to figure out, do we go and continue as restitution?" Do you know

78. *Id.*

79. Mary Hooks, Co-Dir., Southerners on New Ground, Address at the Wake Forest Law Review Symposium (Jan. 31, 2020).

80. *Id.*; Kristie Puckett-Williams, Manager, Statewide Campaign for Smart Just., ACLU of N.C., Address at the Wake Forest Law Review Symposium (Jan. 31, 2020).

> what I mean? Are we able to look at other models of, "Hey I know I stole your bike, but I'm willing to give you three free car washes for the next months." Do you know what I mean?
>
> I think we have to be radical in our imagination in the way in which we think about harm. And I know for some folk it might be like, "That sounds ridiculous," but I do think that we have to be on a path and journey to figure out and understand, one, that we're humans and we're going to cause harm. We're going to cause harm to each other, and there is no perfect victim, there is no perfect whatever, everybody in this room on this panel, has caused harm and has been harmed. Let's be clear about that. And many of us, some, whatever, may or may not have been caught for the shit you done did.[81]

Much as Mary Hooks suggests about *individuals'* reactions to reforms, ideas such as abolition of prison or criminal courts will likely tack too far for many *communities*. Although San Francisco may do more to address root causes of crime to promote public safety, rural Alabama might stay closer to the status quo. But reforms in one city or state can provide a model for other places that wish to take bold reform steps. This explains how both New Jersey and Kentucky have proven influential across the country on bail reform.[82] Still other counties will do no more than is required of them—perhaps explicitly considering the defendants' ability to pay instead of relying in a rote way on bail schedules. Different places will resolve these problems in their own distinctive ways that match the heterogeneity of America. A lack of consensus does not end in paralysis. And that is a virtue of decentralization in American criminal law.

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81. Hooks, *supra* note 79.

82. Sandra Mayson, Assistant Professor of L., Univ. of Ga. Sch. of L., Address at the Wake Forest Law Review Symposium (Jan. 31, 2020) (explaining that some jurisdictions are coalescing around the New Jersey model).