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Judicial Resistance to New York's 2020 Criminal Legal Reforms

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JUDICIAL RESISTANCE TO NEW YORK'S 2020 CRIMINAL LEGAL REFORMS

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"[Bail reform] imperils the court's ability to properly and efficiently administer justice . . . . [B]y stripping judges of necessary discretion to control the appearance of a defendant, the legislature improperly interfered with the judiciary's capacity to fulfill its constitutional mandate."[1]

"[T]his Court finds it difficult to conclude that legislators would be unconcerned with [the] 'disastrous consequences' wrought by [this] legislation."[2]

"The [bail] law is stupid."[3]

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As a matter of disclosure, the author of this piece works as a public defender for the Bronx Defenders and served as counsel on several of the cases mentioned within this article. The author's perspective and insight are informed by his ongoing representation of clients involved in litigation within New York's criminal legal system.

[1] People v. Johnston, 121 N.Y.S.3d 836, 845 (N.Y. City Ct. 2020) (declaring bail reform unconstitutional as applied).

[2] People v. Erby, 128 N.Y.S.3d 418, 421 (N.Y. Sup. Ct. 2020) (analyzing the 2020 discovery reform law). [Conflict of interest disclosure: The author was the defense attorney of record who litigated *Erby* and the successive writs.]

[3] Molly Crane-Newman, *Manhattan Judge Says 'The Law is Stupid' Upon Releasing Man Under New Criminal Justice Reforms*, N.Y. DAILY NEWS (Dec. 11, 2019, 7:18 PM), https://www.nydailynews.com/new-york/manhattan/ny-manhattan-judge-max-wiley-stupid-20191212-oaw2trjhujbotaf423jedjchmq-story.html [https://perma.cc/K7XG-PTHY] (citing Judge Maxwell Wiley's comment regarding 2020 bail reform during a December 11, 2019 arraignment court appearance).

INTRODUCTION

In January 2020, a series of criminal legal reforms went into effect in New York state that drastically changed criminal procedure. The reforms' stated goals were to reduce the population in pretrial detention, improve defense access to discovery, and strengthen the accused's right to a speedy trial.[4] The reforms implemented a new bail scheme to address the issues with pretrial detention in New York. Previously, judges had the power to impose monetary bail in any case, with a loose set of factors to guide the decision-making.[5] The new system divided all criminal charges into two categories—charges which are eligible for monetary bail and those that are not—thereby

[4] S. 1738, 2019 Leg., Reg. Sess. (N.Y. 2019).

[5] Under the pre-2020 bail process, judges could set monetary bail on any non-felony case and could set monetary bail or remand on any felony case. *See* N.Y. CRIM. PROC. LAW § 530.20(1)(b) (McKinney 1979).

removing judicial discretion to set bail in many cases.[6] It also created a more restrictive process for setting monetary bail on individuals who were at liberty and then were re-arrested or violated other conditions of release.[7]

The reforms also drastically changed New York's pre-trial discovery scheme. Critics had long pointed at New York's criminal discovery laws as outdated because prosecutors could provide most discovery materials on the eve of trial, or even after the commencement of trial, with few repercussions.[8] The new discovery scheme created a stricter timeline for prosecutors to provide discovery, created explicit sanctions for failing to do so, and, perhaps most importantly, tied the discovery obligations to New York's speedy trial statute as a means of enforcement.[9] 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.[10] Years of scrutiny, studies, and popular anecdotal stories led to a critical mass of popular support for changing New York's antiquated discovery scheme and onerous bail laws.[11] The reforms had relatively little media attention paid to them as they were being negotiated and drafted.[12]

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[6] *See* N.Y. CRIM. PROC. LAW § 530.20(1)(a) (McKinney 2020) (enumerating charges where a judge is authorized to set monetary bail and requiring release under non-monetary conditions for every other charge).

[7] *See* N.Y. CRIM. PROC. LAW § 530.60(2)(b)–(c) (McKinney 2020).

[8] *See* 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); *see also* 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).

[9] *See* N.Y. CRIM. PROC. LAW § 245.50(1), (3) (McKinney 2022).

[10] *See, e.g.*, N.Y. STATE BAR ASS'N, REP. OF THE TASK FORCE ON CRIM. DISCOVERY 7–8 (2015); *see also* Assemb. 10137A, 2018 Gen. Assemb., 241st Sess. (N.Y. 2018).

[11] *See* 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/GLV6-SP5E].

[12] INSHA RAHMAN, VERA INST. OF JUST., NEW YORK, NEW YORK: HIGHLIGHTS OF THE 2019 BAIL REFORM LAW 4 (2019), https://www.vera.org/downloads/publications/new-york-new-york-2019-bail-reform-law-highlights.pdf [https://perma.cc/R7R5-5KUY].

Ultimately, these reforms were passed quickly and easily through the process of amending the Criminal Procedure Law (C.P.L.) through a budget bill.[13]

Around the time the reforms were slated to go into effect, numerous groups came out in opposition to the changes. Actors in the criminal legal system, including chief judges, some district attorneys, court administrators, and police unions, gave public responses opposing the reforms through the press and political avenues.[14] Separately, judges dealing with the criminal cases also opposed the reforms through the ordinary process of interpreting and implementing the new statutes.[15] Judges in misdemeanor and felony courts who oversaw the cases directly affected by these reforms formed a major impediment to the implementation of the reforms.[16] Individually, judges interpreted the statutes in a variety of ways, as would be expected. But, in some instances, the interpretations of the reforms ran contrary to the intent of the legislature and the plain text of the statute.[17] Sometimes judges openly struck down the legislation as unconstitutional, and other times judges read statutes in a way that negated the effects of the reforms.[18] Administrative court leadership also implemented procedures to bypass the newly-imposed limitations on the judiciary.[19] The political process continued to play out in early 2020 resulting in a partial rollback in April of that year, but judges had already found ways to block the legislation's intended effect.[20] Although the

[13] News Release, Assembly Speaker Carl E. Heastie, SFY 19–20 Budget Includes Critical Criminal Justice Reform Legislation and Funding (Apr. 1, 2019), https://nyassembly.gov/Press/files/20190401a.php [https://perma.cc/B99W-KDG6].

[14] *See New York Police, Prosecutors Seek Changes to Criminal Justice Reform Laws*, WGRZ (Dec. 9, 2021), https://www.wgrz.com/article/news/crime/new-york-police-prosecutors-seek-changes-criminal-justice-reform-laws/71-20966f33-8b97-4ce7-bbd1-352311bdbf19 [https://perma.cc/SE6J-YXB5] (detailing lobbying efforts by police departments and district attorney's offices to modify discovery reform and rollback bail reform).

[15] *See Johnston*, 121 N.Y.S.3d at 845; *Erby*, 128 N.Y.S.3d at 421; Crane-Newman, *supra* note 33. For further examples, see *infra* Section II.

[16] *See* sources cited *supra* note 15.

[17] *See* sources cited *supra* note 15.

[18] *See, e.g.*, *Johnston*, 121 N.Y.S.3d at 845.

[19] See, for example, Memorandum from Justin Barry, Chief Clerk, N.Y. State Unified Ct. Sys., Operational Directive No. 2020-04 (Mar. 9, 2020), a directive from the Office of the Chief Administrative Judge of the Unified Court System of the State of New York that circumvents the process in N.Y. CRIM. PROC. LAW § 530.60 for detaining individuals who are re-arrested [hereinafter OCA Directive 2020-04]. This is discussed further in Section II.D, *infra*.

[20] *See infra* Section II.D.

April rollbacks left much of the new bail scheme intact, judges continued to resist the scheme with practices that circumvented aspects of the law.[21]

Scholars have examined judiciaries as organizations with their own culture and considered how this organizational culture can form a significant impediment to the implementation of reforms.[22] There is a strong connection between judicial culture and a reform's ability to accomplish its stated goals. Some go so far as to state that most reforms will fail because of the difficulty in altering judicial culture.[23] These studies sometimes focus on legislators misunderstanding the actual effects of legislation when it was drafted, or on the failure to account for particularities in a law's implementation by undervaluing the fragmentation, adversarial nature, and lack of resources of trial courts.[24] Scholars have focused on overlooked consequences or unexpected effects that the drafters failed to properly account for.[25] But as discussed by Malcolm Feeley, reforms also fail due to the judiciary's intentional mis-implementation of the legislation. In such instances, reforms fail not because those who planned the reform or those who wrote the law did not account for certain unintended consequences, but because the judges who must give force to the reform do not agree with the *intended* consequences.[26]

This paper seeks to build on the scholarship of judicial organizational culture and examine a significant example of the phenomenon of judicial resistance in the context of New York's 2020 criminal legal reforms. These reforms implicate the legislature's curtailment of judicial discretion to

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[21] *See, e.g.*, MICHAEL REMPEL & JOANNA WEILL, CTR. FOR JUSTICE INNOVATION, ONE YEAR LATER: BAIL REFORM AND JUDICIAL DECISION-MAKING IN NEW YORK CITY 32 (2021), https://www.courtinnovation.org/sites/default/files/media/document/2021/One_Year_Bail_Reform_NYS.pdf [https://perma.cc/K4AR-QE6W] (comparing bail data rates before and after rollbacks to show that when controlling for charge, judges actually increased the average *amount* of bail set between pre-reform and post-reform time periods).

[22] Brian J. Ostrom & Roger A. Hanson, *Understanding Court Culture Is Key to Successful Court Reform*, *in* FUTURE TRENDS IN STATE COURTS 55, 58–59 (2010).

[23] *See* MALCOLM M. FEELEY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL 198–99, 201 (1983).

[24] *See* Alissa Pollitz Worden, Andrew L. B. Davies, Reveka V. Shteynberg & Kirstin A. Morgan, *Court Reform: Why Simple Solutions Might Not Fail? A Case Study of Implementation of Counsel at First Appearance*, 14 OHIO ST. J. CRIM. L. 521, 525–28 (2017) (focusing on the organizational and resource barriers that were overcome to allow counsel at first appearance to be implemented in upstate New York).

[25] *See id.* at 527–28; s*ee also* JEFFREY L. PRESSMAN & AARON WILDAVSKY, IMPLEMENTATION 123 (3d ed. 1984).

[26] *See* FEELEY, *supra* note 23, at 198–99 (discussing how value conflicts between judges and reformers may lead judges to thwart a reform through "the mundane details of implementation at the lowest levels of organization").

accomplish the reform's goals. This provides a unique opportunity to identify intentional judicial obstruction, and how and why it is carried out. Placing the judicial response within the scholarship would be illuminating in reexamining Feeley's and others' theses and in expanding the premises to current real-world reforms. This examination reveals how the New York judiciary's organizational culture makes it particularly susceptible to narratives concerning public safety, which forms a significant motivation for judicial obstruction to reforms.

Part I creates a framework to define whether these judicial interpretations are obstructionist and to provide some background on both the nature of obstruction and its possible causes. Part II examines specific examples of when judges circumvented the reforms and looks to New York's judicial culture to see if it can account for how and why this obstruction occurred. Part III examines whether any larger lessons or solutions can be learned for future criminal legal reforms to anticipate such impediments and preemptively address them.

I. CONTEXTUALIZING JUDICIAL OBSTRUCTION

A. DEFINING JUDICIAL RESISTANCE

In order to examine examples of judicial obstruction, it is necessary to set guidelines for what constitutes opposition to reform as compared to the normal process of interpreting any new statute that may have a constitutional defect or be unclear. Stated opinions or public statements opposed to the reforms can help demonstrate the intent of a particular judge. For example, the judges in *Johnston* and *Erby* were explicit that they disapproved of the reforms in their decisions bypassing them.[27] But, in the absence of such statements it is not as straightforward to categorize judicial action as obstructionist. No matter how clear a statute may seem, a judge wields incredible power to interpret it. In the absence of appellate court rulings, different judges can interpret the same statute with radically different outcomes.[28] This is especially true for new statutory language and other significant changes that come along with reform.[29] There are straightforward

[27] People v. Johnston, 121 N.Y.S.3d 836, 845 (N.Y. City Ct. 2020); People v. Erby, 128 N.Y.S.3d 418, 421 (N.Y. Sup. Ct. 2020).

[28] Some court decisions lament the disparate outcomes and seek clarity from appellate courts on the reforms. *See, e.g.*, People v. Portillo, 153 N.Y.S.3d 758, 780 (N.Y. Sup. Ct. 2021). Notably, this decision found that the lack of clarity meant it would be inappropriate to impose sanctions on the prosecution despite the court finding they failed to comply with discovery requirements. *Id.*

[29] *Id.*

examples of when a judge states, while striking down a statute or refusing to enforce one, that they are doing so because of a disagreement with the statute. This intentionally open opposition can be an attempt to show dissatisfaction with a law to publicly encourage change. A common example is federal judges who either refuse to impose sentences within the mandatory minimums or impose a required sentence but voice their opposition to doing so.[30] But it is much harder to categorize a judge's decision as an act of resistance against the legislature when the judge is not making their intention clear.

Scholars who examine how to categorize judicial actions in this way often use the term "judicial activism."[31] However, this is a problematic concept to discuss or define. Judicial activism is an ambiguous term that can be used to signal a decision that someone disagrees with, rather than a meaningful designation.[32] But, there are judicial actions that interfere with some readings of the judicial role in our system of checks and balances. Attempts to be clear and consistent in the definition of judicial activism have led some to focus not on the outcome of the judicial decision, but instead, on the effect that decision has on the actions of other branches of government or on precedent.[33] Based on this standard, an activist judge is not determined by an outcome, such as imposing shorter prison sentences or keeping people in jail pending trial. Rather, activism is evaluated by whether the judge is negating legislation by striking it down as unconstitutional, bypassing it through some other mechanism, or ignoring precedent.[34]

This paper uses this definition to determine whether the examples are normal interpretation or, instead, opposition to reform. A judicial action is obstructionist if it involves judicial interference in the legislative process by striking a statute down as unconstitutional, bypassing a statute's effect, or ignoring precedent.[35] By interpreting the statutes to have no effect at all, or by finding ways to bypass their stated effect, the judges oppose reforms in a way that is beyond the ordinary process of interpreting and applying the statute. Finally, these judicial actions can be revealed to be obstructionist by

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[30] Jessica A. Roth, *The "New" District Court Activism in Criminal Justice Reform*, 72 N.Y.U. ANN. SURV. AM. L. 187, 195, 199, 257 (2018).

[31] *Id.* at 190–91.

[32] *Id.* at 190.

[33] *See id.* at 191.

[34] *See id.* at 190–92. In essence, this paper examines an instance of "traditional" activism that Jessica Roth differentiates from in her examination of "new" activism.

[35] Of course, a statute can be unconstitutional, but that does not change the analysis. The point is not whether judges are being disingenuous in opposing a statute; it is merely that judges are willing, motivated, and able to block the implementation of reform.

looking at the context for these decisions, the remarks of judges on the reforms, and the statements of judicial leadership.

B. JUDICIAL RESISTANCE DUE TO REACTIONARY COURT CULTURE

An examination of New York's court system and the background for the reforms will allow us to examine the role of the judiciary's culture in either supporting or subverting reforms. Court system culture has been studied as part of the broader study of organizational culture. Malcolm Feeley has made observations about how the organizational structure of criminal courts can affect numerous aspects of court business that cannot be accounted for in the formal or legal frameworks that establish the courts.[36] Courts are structured uniquely compared to most other organizations because of the need to give some measure of autonomy to individual judges to manage their cases and make individual decisions.[37] Courthouses are more like a loose confederation of individual judges than a single unified organization.[38] Court leadership can still vary greatly, with some fostering independence and others favoring a standard operating procedure.[39] The norms of the judiciary––in particular, its structural style, both formal and informal—account for a great many idiosyncrasies of a court system. Judicial culture can be a powerful factor in reforms, and judicial leadership can either facilitate or prevent reforms from taking effect.[40]

Judicial culture exists in individual courthouses as much as in any organization, but the structure and nature of judicial organization can make it difficult to change.[41] This is due, in part, to the nature of judicial independence. But the law is an inherently conservative institution, with principles like stare decisis serving to prevent drastic change through the

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[36] *See* FEELEY, *supra* note 23, at 18.

[37] *See* BRIAN OSTROM & ROGER HANSON, NAT'L CTR. FOR STATE CTS., ACHIEVING HIGH PERFORMANCE: A FRAMEWORK FOR COURTS 18–19 (2010) (detailing among the key principles of administrative management for courts that judges be able to give cases individual attention and that judges, rather than court managers, retain control of case decision-making).

[38] Gordon M. Griller, *Governing Loosely Coupled Courts in Times of Economic Stress*, *in* FUTURE TRENDS IN STATE COURTS 48, 48 (2010) (describing individual judges as "individual elements [that] display a relatively high level of autonomy vis-à-vis the larger [court] system").

[39] Ostrom & Hanson, *supra* note 22, at 56–57.

[40] *Id.* at 55.

[41] Jessica A. Roth, *The Culture of Misdemeanor Courts*, 46 HOFSTRA L. REV. 215, 225 (2018).

judiciary.[42] Similarly, the inertia of judicial administrators and the culture of shared values and norms can make changes difficult to implement.[43] The structure of many court systems, along with the inherent nature of judicial autonomy, makes it difficult to alter cultural norms quickly or in one single phase.[44]

The system of appellate review may seem to be a powerful tool in correcting judicial obstruction of legislation. But, as discussed in Part III on possible solutions, the lengthy, delayed, and oftentimes piecemeal process blunts the impact of appellate courts. Given the nature of appellate review, the deference given to certain decisions, and the opacity of judicial reasoning, many instances of interpretation of a new reform will not reach higher courts for years, if at all. Broad powers are given to the trial level judiciary in interpreting a new law in the first instance.[45] This leads Feeley and others to warn that changing the law broadly without accounting for judicial culture, judicial incentives, and courts' powers is a recipe for, at best, half-hearted implementation.[46]

One of the significant factors raised by Ostrom and Hanson in examining how judicial culture impacts reform efforts is the impetus for the reforms—whether it originated in the judiciary or externally.[47] At first glance, New York's 2020 reform originated outside of the judiciary and appeared to have little input from judges or judicial leadership compared to other recent major reforms that were met with less judicial resistance.[48]

For example, recent bail reform in New Jersey was a several-years-long process and involved all three branches of government as well as a public referendum.[49] It originated when Governor Chris Christie called for an

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[42] *Id.* at 230 n.99 (noting "the importance of 'stability and continuity' to the judiciary and describing it as the branch of government 'slowest to change' because of its reliance on precedent") (quoting GREG BERMAN, JOHN FEINBLATT & SARAH GLAZER, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE 104 (2005)).

[43] Ostrom & Hanson, *supra* note 39, at 55 ("Any organization (including a court) operates the way it does because the people in the organization want it that way . . . . [C]ourt practices are slow to change.").

[44] *See* Roth, *supra* note 30, at 232–34.

[45] *See* FEELEY, *supra* note 23, at 198.

[46] *Id.* at 198–99 (discussing the need to alter deep-rooted court incentives to make reforms persist).

[47] *See* Brian J. Ostrom & Roger A. Hanson, *Understanding and Diagnosing Court Culture*, 45 CT. REV. 101, 109 (2008).

[48] *See* Stuart Rabner, *Chief Justice: Bail Reform Puts N.J. at the Forefront of Fairness*, NJ.COM (Jan. 9, 2017, 2:33 PM), https://www.nj.com/opinion/2017/01/nj_chief_justice_bail_reform_puts_nj_at_the_forefr.html [https://perma.cc/9ASF-S7UB].

[49] *Id.*

examination in 2012.[50] Most of the substantive proposals were drafted by a joint judiciary committee assembled the following year, composed of judges, prosecutors, and defenders. The legislature then passed these recommendations into law, and the public agreed to adopt them via referendum.[51] The change in New Jersey came slowly, with input from the judiciary and lengthy notice periods.

This reform is mostly considered a success for reducing the population of those incarcerated pretrial while maintaining appearance rates.[52] But for our purposes, what matters more is that the New Jersey bail reforms were uniformly implemented and consistently applied by the judiciary. Courts met the timing requirements for deciding release in 99.6% of cases, releasing 93.5% of individuals, and only setting monetary bail for 102 out of a potential 44,383 individuals.[53] As discussed further below, release rates were increased and brought in line with release recommendations.[54] These results were largely in line with the intention of the reforms and the stated goals of reforms.[55]

But there has been widespread criticism on all sides about the merits of the reforms. Some criticize the release rates under the new law that increased recidivists arrested while awaiting trial.[56] Others criticize the dangerousness assessments for being inaccurate and racially biased.[57] But regardless of the

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[50] *Id.*

[51] *Id.*

[52] Press Release, Roseanne Scotti, Drug Pol'y All., New Jersey Judiciary Releases Annual Bail Reform Report, With Additional Key Statistics (Apr. 2, 2019), https://drugpolicy.org/press-release/2019/04/new-jersey-judiciary-releases-annual-bail-reform-report-additional-key [https://perma.cc/Z8C6-CW6H].

[53] *Id.*; GLENN A. GRANT, N.J. CTS., CRIM. JUST. REFORM REP. TO THE GOVERNOR & THE LEGISLATURE 7 (2018), https://www.njcourts.gov/sites/default/files/2018cjrannual.pdf [https://perma.cc/JD8T-GLDZ].

[54] *See infra* Section II.B.

[55] *See infra* Section II.B.

[56] *See* Nicholas Pugliese, *Bail Bond Industry Mounts Another Attack on N.J. Reforms*, NORTHJERSEY.COM (Aug. 7, 2017, 6:00 AM), https://www.northjersey.com/story/news/new-jersey/2017/08/07/bail-bond-industry-mounts-another-attack-n-j-reforms/539366001/ [https://perma.cc/M5BZ-2FXA] (detailing lawsuits and public statements by bail bonds agencies and victims rights organizations to New Jersey's bail reform due to released individuals committing new offenses); *see also* Colleen O'Dea, *Rethinking NJ Bail Reform to Keep Suspects Charged With Gun Crimes Off Streets*, N.J. SPOTLIGHT NEWS (May 5, 2022), https://www.njspotlightnews.org/2022/05/bail-reform-gun-crimes-suspects-behind-bars-changes [https://perma.cc/9LD2-UEFU] (detailing efforts of some mayors to increase pretrial detention of people charged with gun crimes).

[57] Reuven Blau, *New Jersey No-Bail System Eyed by New York Leaders Reckons With Bias Risk*, THE CITY (Mar. 6, 2020, 3:05 AM), https://www.thecity.nyc/justice/

merits of the reforms, the implementation by the judiciary occurred in line with the legislature's stated intent and the plain language of the statute.[58]

In contrast to New Jersey's reforms, New York's reform was driven by the state legislature and enacted in a single sweeping legislative change through a budget action.[59] New York's reforms were largely movement-based, spurred on by defense organizations, community groups, and criminal justice reform groups.[60] The framework for a substantial portion of the changes was initially drafted in response to the mass movements and protests that resulted from the focus on mass incarceration rates and trial delays in New York City in particular.[61] A series of bills were first proposed in 2017, one of which was titled Kalief's law, a reference to Kalief Browder, who spent three years incarcerated pre-trial before the charges against him were dismissed.[62] While Browder's incarceration ended in 2013, his case received renewed focus after his suicide in 2015, which was attributed to the trauma he suffered during his lengthy period of solitary confinement at Rikers Island.[63] Protests and media attention surrounding Kalief Browder's case brought attention similar situations and reinforced a movement to reform New York's criminal procedure laws.[64] This political motivation to pass reforms originated outside the judiciary.

However, the substance of the reforms was not new, and the suggested proposals were not created independently of the judiciary. The language of the legislation was based on proposals that had been discussed for years prior to the turning of the political tide in favor of reform.[65] For example, the Chief

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2020/3/6/21210469/new-jersey-no-bail-system-eyed-by-new-york-leaders-reckons-with-bias-risk [https://perma.cc/3KMA-X2K7].

[58] *See* discussion *infra* Section I.B.

[59] Heastie, *supra* note 13.

[60] *See 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].

[61] *See* Tharpe, *supra* note 60; *Remembering Kalief Browder*, *supra* note 60.

[62] Assemb. 3055A, 240th Gen. Assemb., Reg. Sess. (N.Y. 2017); *see also* Tharpe, *supra* note 60.

[63] Tharpe, *supra* note 60.

[64] *See id.*

[65] *See, e.g.*, CHIEF JUDGE JONATHAN LIPPMAN, N.Y. STATE UNIFIED CT. SYS., STATE OF THE JUDICIARY 2013 3–6 (2013), http://ww2.nycourts.gov/sites/default/files/document/files/2018-03/SOJ-2013.pdf [https://perma.cc/3C7L-G9YT] (detailing the need for bail reform and overviewing several plans); Press Release, N.Y. State Unified Ct. Sys., New York Justice Task

Judge of the New York Court of Appeals creates an annual report and address on the state of the judiciary that provides an overview of issues and areas for reform.[66] As early as 2013, the Chief Judge of the New York Court of Appeals raised a proposal for bail reform in his State of the Judiciary Address.[67] The proposals in this report would become the basis for an assembly bill, which itself became the basis for the 2020 reforms.[68] In 2017, state assembly members and Governor Cuomo again proposed various bail reform measures, many of which contained identical provisions removing judicial power to set bail in large categories of cases.[69] A Justice Task Force composed of judges and other New York actors examined bail and made recommendations for reform in a 2019 report.[70] Although there were various suggestions, this report also suggested eliminating cash bail for misdemeanor and non-violent felony charges, which the reforms ultimately did.[71]

Likewise, the changes to the discovery statute were discussed for years before they were implemented. The New York State Bar Association ("NYSBA") convened a task force in 2014 comprised of judges, prosecutors, professors, and defense attorneys to draft proposals for discovery reform.[72] These committees led to concrete proposals, many of which also became assembly bills.[73] Although the NYSBA discovery bill was crafted through input from district attorneys, it was defeated by the District Attorney's Association of the State of New York ("DAASNY"), who ultimately dissented from the task force proposal and then lobbied Republicans in the State Senate to oppose it.[74] The Task Force, including the judicial representatives on the committee, argued forcefully against the DAASNY's

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Force Issues Report on Bail Reform (Feb. 11, 2019), https://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PR19_05.pdf [https://perma.cc/NF9Y-ZE2E] (proposing the elimination of cash bail for misdemeanors and non-violent felonies); N.Y. STATE BAR ASS'N, *supra* note 10, at 31–34, 36–37, 50 (proposing revisions to the discovery statute that include automatic discovery, timeframes, and sanctions for failure to provide discovery).

[66] *State of Our Judiciary*, N.Y. CT. APP., https://nycourts.gov/ctapps/soj.htm [https://perma.cc/L88C-9MHK].

[67] LIPPMAN, *supra* note 65, at 4–5.

[68] Assemb. 10137A, 2018 Gen. Assemb., 241st Sess. (N.Y. 2018) (creating a system of monetary bail eligible and ineligible charges, expanding non-monetary release options, and requiring mandatory rehearings whenever monetary bail is set).

[69] *Id.*

[70] N.Y. STATE UNIFIED CT. SYS., *supra* note 65.

[71] *Id.*

[72] N.Y. STATE BAR ASS'N, *supra* note 10, at 1.

[73] Assemb. 3055A, 240th Gen. Assemb., Reg. Sess. (N.Y. 2017); S. 1998A, 2017 Leg., Reg. Sess. (N.Y. 2017); S. 5988A, 2015 Leg., Reg. Sess. (N.Y. 2015).

[74] N.Y. STATE BAR ASS'N, *supra* note 10, at 76–107 (detailing dissenters' opposition).

dissent and in favor of passing the discovery reforms they had spent months discussing and drafting.[75]

The reforms finally became law in 2020 when New York's historically conservative legislative bodies gained a Democratic majority in the November 2018 election, allowing the reforms to pass in 2019 without requiring significant Republican support.[76] Prior to this period, New York's Senate had been controlled by Democrats for only three years since World War II.[77] This new period of Democratic control of the Assembly, Senate, and Governor's office allowed the long-discussed criminal legal reforms to be drafted and passed.[78] The process was not a long, deliberative back-and-forth, perhaps because legislators did not have that luxury and instead seized what might have been a rare window of opportunity. But the substance was based on the proposals that had been discussed for years in various venues and with substantial input from many parties, including the judiciary.[79]

The same defense organizations and community actors who created the political pressure to pass the law also played a role in its drafting.[80] While a political compromise in many respects, the reforms did succeed in achieving many of the goals of the mass criminal legal reform movements.[81] By the time the reforms were enacted, New York's political landscape appeared amenable to some reform. The Browder case and others caused many actors in the criminal legal system, and even some district attorney's offices, to come out in favor of some degree of reform.[82]

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[75] *Id.* at 121–33.

[76] Jesse McKinley & Shane Goldmacher, *Democrats Finally Control the Power in Albany. What Will They Do With It?*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/nyregion/democrats-ny-albany-cuomo-senate.html [https://perma.cc/H46H-VFLR].

[77] *Id.*

[78] *See id.*

[79] *See, e.g.*, N.Y. STATE BAR ASS'N, *supra* note 10, at 5; LIPPMAN, *supra* note 65, at 4–5 (detailing the need for bail reform and overviewing several plans).

[80] Memorandum from the N.Y. State Ass'n of Crim. Def. Laws., Memorandum in Support (2019), https://cdn.ymaws.com/nysacdl.org/resource/resmgr/legislation/discoverymemonysacdl.pdf [https://perma.cc/2FQW-WGD8].

[81] *New York's New Bail Reform Model*, VERA INST. OF JUST.: STATE OF JUST. REFORM 2019, https://www.vera.org/state-of-justice-reform/2019/bail-reform [https://perma.cc/JBB6-W8LJ].

[82] Denis Slattery, *Advocates for Criminal Justice Reform Accuse Prosecutors, State Task Force of Falling Short on Bail Changes*, N.Y. DAILY NEWS (Mar. 4, 2019, 6:00 AM), https://www.nydailynews.com/news/politics/ny-pol-criminal-justice-reform-legislation-discovery-bail-20190228-story.html [https://perma.cc/L65M-K293] (highlighting the

While the idea for reform in New York's 2020 criminal legal amendments did not originate in judicial leadership, the judiciary was included in the discussion and responded to the political and popular opinions on pretrial detention and discovery. For example, Chief Judge Lippman's report on bail reform and the NYSBA Committee's report on discovery reform both formed a basis for the language of the 2020 reforms.[83]

Opponents of the reforms argued that most of the judiciary, as well as the public, were essentially left out of the discussion because the release of the draft of the actual text and the passage of the bill occurred so quickly.[84] Senator Jacobs, one of the bill's opponents, noted what he considered unprecedented judicial concerns during a debate on the bill before its passage into law.

> A few days ago, about a week and a half ago, a number of judges in my area invited all the elected officials, their staffs, to come and meet with them to get their thoughts and to express their [. . .] concerns about the criminal justice measures that were being discussed in the budget. In all the time I've been in elected office, I've never heard of members of our local judiciary calling electeds to talk to them about how serious they took these changes and the concerns of them. Asking other of my colleagues who have been in elected office longer than I, they also don't recollect such a meeting. That meant a lot to me that these individuals, from a variety of parties, a variety of backgrounds, all came together to express their concerns.[85]

Looking back at Ostrom and Hanson's analysis, this did not bode well for New York's reforms. However, there are many reasons to believe that this narrative of a rushed and non-deliberative process is inaccurate. As discussed above, various forms of reform, many of which ended up in the final laws, were contemplated for years on various committees that included many members of the judiciary. In terms of the final language of the reforms, while some drafting was worked out on a shortened timeline, court leaders did participate in public hearings, including the Chief Administrative Judge for the Courts of New York, Lawrence Marks.[86] When asked about the

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positions on which district attorneys' offices supported bail reform, such as eliminating cash bail for most offenses, increasing pretrial release services, and leaving out a consideration of dangerousness in release decisions).

[83] N.Y. STATE BAR ASS'N, *supra* note 10, at 5; LIPPMAN, *supra* note 65, at 4–5.

[84] On the day of the reform's passage, a sponsor responded to a question of when the language of the reforms was actually released to the public and the judiciary by saying, "The specific language that is in this bill before us today was released this afternoon. However, as indicated by Chief [Administrative] Judge Lawrence Marks during the public protection hearing, discovery reform is something that we've been talking about for 25 years." *Joint Legislative Hearing in the Matter of the 2019–2020 Executive Budget on Public Protection*, S. 1738, 2019 Leg., Reg. Sess. 2958 (N.Y. 2019).

[85] *Id.* at 2656–57.

[86] *Id.*

discovery reform proposals, Marks indicated, "[T]he court system as an institution has supported broader and earlier criminal discovery for over 25 years, and maybe longer."[87] Marks made similar remarks welcoming the changes to speedy trial and bail reform to end the "inherently discriminatory practices" of the current system.[88]

Ostrom and Hanson highlight criteria that make reforms more likely to be successfully incorporated into the judicial culture.[89] While the organic process of movement-based political reform in New York was not judicially led, the judiciary was involved in the years-long dialogue and the creation of the schemes that came to pass.[90] The legislative sessions for the reforms were brief but involved hearings at which judicial leadership testified about the implementation of the proposed new reforms.[91] The lack of judicial inclusion may not be the reason for later judicial resistance. The focus on whether judicial leadership was included in the discussion, the enactment, and the broader implementation of the law is a proxy for the ultimate issue.

The issue that Ostrom and Hanson identify is whether the legislation properly accounted for judicial norms and values.[92] If the ultimate product was not palpable to judges, regardless of their input, that could still account for judicial resistance itself and provide a tool for resistors to legitimize their actions. Ostrom and Hanson discussed more than just notice to the judiciary and an opportunity to be heard. For reforms to be successful, communication between the drafters of the reforms and judiciary stakeholders should result in a meeting of the minds, or at least an acknowledgement of the judiciary's values and the incorporation of these values into the final law.[93] This inclusion is necessary because Ostrom and Hanson recognize that "[t]he existing culture of judges and managers shapes the application of policies and procedures in virtually all areas of court work."[94] This is a continuation of Feeley's observation that if reforms do not alter judicial incentives or meet judicial values, they will be thwarted by "the mundane details of implementation at the lowest levels of organization."[95] Court leadership may have agreed, but judges are individuals with their own opinions on how the

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[87] *Id.* at 40.

[88] *Id.* at 44.

[89] Ostrom & Hanson, *supra* note 22, at 58.

[90] *See, e.g.*, N.Y. STATE BAR ASS'N, *supra* note 10, at 1; LIPPMAN, *supra* note 65, at 4.

[91] *Joint Legislative Hearing*, *supra* note 84, at 2598.

[92] Ostrom & Hanson, *supra* note 39, at 55.

[93] *Id.*

[94] *Id.*

[95] FEELEY, *supra* note 23, at 199.

court system should function and how laws should be upheld.[96] Successful changes to the administration of law require acknowledging and responding to the entrenched set of values that exists in a judiciary. Otherwise, "[b]y not taking shared values and beliefs into account, proposed reforms risk meeting with a lack of engagement and subtle (or not-so-subtle) resistance."[97]

Even if New York's reform process did have sufficient contribution from the judiciary, the judiciary may not have been particularly enthused with the method or the aims of the reforms. As Feeley, Roth, and Ostrom and Hanson all emphasize the importance of a legislature accounting for judicial norms, perhaps it should not be a surprise that the judiciary reacted against the New York reforms. The change may have caused the judiciary to feel that the law was imposed on them, rather than coming from the judiciary's motivation to reform criminal procedure. It may simply have been contrary to the views of some judges. An examination of when and how judges opposed the reforms in Part II can lead us to understand why they did so, and how to prevent this situation from occurring in future reforms.

C. JUDICIAL RESISTANCE DUE TO THE COURT SYSTEM'S SENSITIVITY TO POLITICAL AND MEDIA RESPONSE

New York's judicial organizational culture is sensitive to political and media feedback, which makes New York's judiciary uniquely susceptible to open obstruction.[98] The nature of judicial job security in New York state court and the incentives placed on judges means that the trial level judiciary is unlikely to act in a politically unpopular manner.[99]

In New York, state judges are mostly elected to finite terms for trial level courts, though in many instances they can also be appointed by the governor or the mayor.[100] The process is complicated, since for Supreme Court positions, which handle trial level felony matters, there is no primary system. Instead, a party convention decides which judicial candidates will be

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[96] *Id.* at 198.

[97] Ostrom & Hanson, *supra* note 39, at 55.

[98] Bryce Covert, *Bail Reform Helps Countless People. Why Don't We Hear More of Their Stories?*, APPEAL (Jul. 19, 2022), https://theappeal.org/bail-reform-success-stories-media-coverage [https://perma.cc/P23V-V29A] (noting judges who have indicated they will not release individuals for fear of ending up in newspaper articles about if that individual reoffends).

[99] Roth, *supra* note 41, at 230 (detailing how even for unelected positions, judges who "'rock the boat'" or are perceived as soft on crime can face serious negative consequences).

[100] *Judicial Selection in the Courts of New York*, FUND FOR MODERN CTS., https://moderncourts.org/programs-advocacy/judicial-selection/judicial-selection-in-the-courts-of-new-york [https://perma.cc/CS3B-C25S].

on the ballot.[101] The end result for our consideration is the same: becoming a judge in New York requires political support from a political party, the governor, the mayor, and/or from voters. Judicial posts have finite terms, and while there is a presumption of reappointment and greater success for incumbents seeking reelection, it is not guaranteed.[102] Therefore, job security for a judge requires public, political party, and/or gubernatorial or mayoral approval. It is easy to see why Governor Cuomo's shift in position and the media pushback to the reforms would make it difficult for a judge to support and implement the reforms.[103] The legislature may be able to pass the law, but they cannot guarantee that judges who enforce that law will keep their jobs.

Ostrom and Hanson developed a rubric to characterize the organizational culture of a court system.[104] It places actors on a grid with an axis for sociability and an axis for solidarity. The resulting four quadrants categorize the common types of judicial organizational cultures: communal, networked, autonomous, and hierarchal.[105]

Judicial culture is created by more than a court system's literal organizational structure, although that is a factor. New York's courts may appear to be independent and autonomous since judges technically have final say over the outcomes of their cases, and no judge can intervene in another judge's decisions.[106] But the formal and informal culture of New York courts provides a greater constraint on judicial decision-making and a strong reason for judges to follow judicial leadership suggestions.[107] Judges are selected and placed in positions based on mechanisms both internal and external to the judiciary.[108] This gives great power to New York state and New York City executive branches and judicial leadership to move judges and place them in court houses, courtrooms, and even court systems (civil, family, criminal) that are more or less desirable.[109] Through these administrative

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[101] *Id.*

[102] *Id.*

[103] Roxanna Asgarian, *The Controversy Over New York's Bail Reform Law, Explained*, VOX (Jan. 17, 2020, 8:30 AM), https://www.vox.com/identities/2020/1/17/21068807/new-york-bail-reform-law-explained [https://perma.cc/DX6S-TJR5].

[104] Ostrom & Hanson, *supra* note 47, at 105.

[105] *Id.*

[106] Griller, *supra* note 38, at 48.

[107] NYCOURTS.GOV, RULES OF THE CHIEF JUDGE § 1.0, https://ww2.nycourts.gov/rules/chiefjudge/01.shtml [https://perma.cc/R6EL-LH9X].

[108] *Id.*

[109] *Id.* § 1.1 (vesting in the Chief Administrative Judge, with consultation with the relevant appellate department, the power to set hours, court terms, court parts, and the assignments of judges to parts).

assignments, a judge appointed or elected to New York City criminal court can still be placed in civil court against their wishes, or required to staff the domestic violence part exclusively, for example.[110] Even among just criminal positions, there is great variation in the possible postings, certain county placements are preferred, and generally, placement in felony and trial parts carries the highest prestige.[111] These powers even allow the administrative judge to strip elected or appointed trial level judges of their staff, courtroom, and cases.[112] This means that New York's judicial structure can become incredibly hierarchal depending on the nature of the Chief Judge, the Office of Court Administration, and the political administrations.[113] If these actors choose to use their powers to influence matters beyond that of routine court management, they wield incredible power over trial level judges.

Structural incentives informed by public safety narratives undoubtedly affect judicial responses, and certainly seemed to do so with regards to the reforms. In New York City, this pressure is quite apparent, and a connection between these narratives and judicial action is easily traceable. New York Post articles routinely single out judges who release people charged with violent offenses.[114] If someone reoffends while at liberty, it is common for a

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[110] *Id.*; *see also* Marco Poggio, *Can New York's Tangled Court System Be Fixed?*, LAW360 (Mar. 11, 2022, 8:06 PM), https://www.law360.com/articles/1470476 [https://perma.cc/6E4B-LN5J] (reporting some criticism of DiFiore's attempts to restructure the courts which would allow administrative judges even more power in moving assigned judges geographically and across court systems by subject matter).

[111] For a public example of this process being used to punish a judge, see Jan Ransom, *A Judge Refused to Hire a Party Boss's Aide: A Demotion Followed*, N.Y TIMES (Sept. 7, 2019), https://www.nytimes.com/2019/09/07/nyregion/judge-armando-montano.html [https://perma.cc/5B6T-WGQS].

[112] *Id.*

[113] *Id.*

[114] A google search reveals countless such articles highlighting a judge's decision to release someone as unsafe and unwise. *See, e.g.*, Joe Marino & Bruce Golding, *Ex-Con Who Went on Lam Thanks to Soft-on-Crime NYC Judge Busted in Puerto Rico*, N.Y. POST (July 13, 2022, 5:07 PM), https://nypost.com/2022/07/13/ex-con-who-fled-nyc-after-no-bail-release-busted-in-puerto-rico [https://perma.cc/M4RX-2JMB]; Larry Celona & Bruce Golding, *Manhattan Judge Frees Alleged Looter Busted in Bloody Attack on NYPD Cop*, N.Y. POST (June 12, 2020, 1:39 PM), https://nypost.com/2020/06/12/nyc-judge-frees-alleged-looter-accused-in-bloody-attack-on-nypd-cop [https://perma.cc/RD6K-758J]; Bruce Golding, Larry Celona & Reuven Fenton, *Convicted Killer Released Without Bail by Judge with Political Connections*, N.Y. POST (Oct. 23, 2019, 10:08 PM), https://nypost.com/2019/10/23/convicted-killer-released-without-bail-by-judge-with-political-connections [https://perma.cc/7H3Y-XK55]; Larry Celona, Rebecca Rosenberg, Kevin Sheehan & Jorge Fitz-Gibbon, *Bronx Judge Cut Teen Loose After Murder Rap, Slashing*, N.Y. POST (Dec. 28, 2020, 6:37 PM), https://nypost.com/2020/12/28/bronx-judge-cut-teen-loose-after-murder-rap-slashing [https://perma.cc/6Y9R-6FAQ]; Rebecca Rosenberg, *Controversial Bronx Judge Releases*

swell of articles to name the judge who released them and to call for that judge's removal, recall, or lack of reappointment.[115]

At first glance, this pressure may seem inapplicable to the reforms. In fact, the legislative political action should serve to shield judicial decision-making and provide judges with cover to implement the intended reforms.[116] But the political will to pass the reforms proved short-lived, or perhaps it was easier to muster support for a single act than it was to sustain continued political support for the changes. The legislative changes enacted in April 2019 were slated to go into effect on January 1, 2020.[117] At the time of passage, the need for reforms and the general idea was relatively uncontroversial.

It is strange that the actual passage of the reforms was relatively unremarkable. Insha Rahman remarked as much in the July 2019 Vera report analyzing the bills which, at the time, seemed to have been enacted relatively smoothly.[118] Rahman posits this may be because more extreme measures, like eliminating cash bail entirely, were already implemented in California, which made New York's own reforms relatively mild in comparison.[119] Also, the political will to pass the reforms was well-established given the media attention on Kalief Browder and the wave of progressivism that led to a Democratic majority in the first place.[120] Criticism of bail and discovery

Alleged Rapist Without Bail, N.Y. Post (Aug. 10, 2020, 4:50 PM), https://nypost.com/2020/08/10/controversial-bronx-judge-releases-alleged-rapist-without-bail [https://perma.cc/Q477-6DAT].

[115] *See, e.g.*, sources cited *supra* note 114. Another example of this is Lorin Duckman. *See* Clyde Haberman, *The Case for Duckman as a Scapegoat*, N.Y. TIMES (July 14, 1998), https://archive.nytimes.com/www.nytimes.com/library/national/regional/071498ny-col-haberman.html [https://perma.cc/BT89-SMCJ]. Judges will acknowledge this pressure informally, with one colleague of the author relaying that a judge commented at a bench conference, "No judge has ever lost their job for setting bail on someone."

[116] FEELEY, *supra* note 23, at 202–03 (discussing how passing a law can be popular and lead to short term benefits through the *Hawthorne* effect among other things, but it can be difficult to meaningfully evaluate a reform). This opacity would seem to shield judges from criticism, especially as they are merely carrying out the reform passed by others.

[117] S. 7505B, 2020 Leg., Reg. Sess. (N.Y. 2020); News Release, Assembly Speaker Carl E. Heastie, SFY 19–20 Budget Includes Critical Criminal Justice Reform Legislation and Funding (Apr. 1, 2019), https://nyassembly.gov/Press/files/20190401a.php [https://perma.cc/TL5C-9GQ8].

[118] RAHMAN, *supra* note 12, at 7.

[119] *Id.*

[120] *Remembering Kalief Browder*, *supra* note 60.

became increasingly mainstream in light of certain cases and the results of scrutiny on bail practices.[121]

Bail funds in New York had been operating for years and revealed that judges did a very poor job estimating if someone was likely to return to court.[122] In the first iteration of the Bronx Freedom Fund, the organization secretly paid bail for 120 individuals.[123] The Freedom Fund posting the bail meant that the individuals were not posting any money and were not liable for any monetary loss if they failed to return. If the judges had been correct in setting bail as the least restrictive means to ensure someone's return to court, these individuals should have had a return rate close to zero. Instead, 93% of the individuals returned to every court date.[124] When given the power to set bail, even when restricted by relatively progressive language requiring the lowest bail to be set, judges set bail too high and did so too often. Data and anecdotal accounts tipped the issue of bail so substantially in favor of reform that the discussion was not about whether bail reform was necessary, but rather, how to structure it.[125] Ultimately, as Rahman points out, the debate around the bail reform was relatively minimal.[126]

But between the reform's passage and the date of its enactment, prosecutors, police unions, and judicial leadership, including the Chief Judge of New York—herself a former prosecutor—spoke out with renewed criticism.[127] New York Police Department ("NYPD") and Police Benevolent Association ("PBA") spokespersons began to caution against the new reforms and predict a rise in violent crime once they went into effect.[128] In

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[121] *See* Schwartzapfel, *supra* note 11 (describing Governor Cuomo's recent support of discovery reform as part of a larger trend towards more open discovery following scrutiny on the issue).

[122] *See* Denis Slattery, *'Bronx Freedom Fund' Pays Bail So Poor Misdemeanor Defendants Can Avoid Jail Time*, N.Y. DAILY NEWS (Oct. 31, 2013, 5:26 PM), https://www.nydailynews.com/new-york/bronx/jail-free-courtesy-bronx-fund-article-1.1503164 [https://perma.cc/TVK2-BFHC].

[123] *Id.*

[124] *Id.*

[125] Schwartzapfel, *supra* note 11.

[126] RAHMAN, *supra* note 12, at 7.

[127] *See* Bernadette Hogan & Carl Campanile, *New York's Chief Judge Demands Judges Have Leeway in No-Bail Law*, N.Y. POST (Feb. 26, 2020, 8:15 PM), https://nypost.com/2020/02/26/new-yorks-chief-judge-demands-judges-have-leeway-in-no-bail-law [https://perma.cc/7UXW-FCD5].

[128] *Criminal Justice Advocates Respond to Misleading NYC PBA Ad*, NEW YORKERS UNITED FOR JUST. (Mar. 10, 2020), https://nyuj.org/resources/criminal-justice-advocates-respond-to-misleading-nyc-pba-ad/ [https://perma.cc/X5VY-4CG3] (detailing a NY PBA ad painting the reforms as "pro-crime" and warning New Yorkers of an impending crime wave that police would be powerless to prevent).

public forums, Governor Cuomo largely sided with these talking points, stating that the reforms went too far and endangered the safety of New York residents.[129] Sensational articles warned that bail reform would result in a flood of violent crime.[130] Perhaps relatedly, public approval for the new law dropped sixteen points between the passage and its actual enactment.[131]

Media pieces that singled out the reforms as responsible for an incident were misinformed, based on law enforcement talking points, and later retracted. Often these incidents predated or were unrelated to the reforms themselves.[132] A report found that media stories frequently parroted anti-reform perspectives with only law enforcement sources, contained inaccurate information, and perpetuated dehumanizing and racist language.[133] Even though many stories were ultimately retracted or disproven, this coverage damaged the public and political approval for the reforms and created pressure to repeal them.[134] The articles also 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.[135]

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[129] *See* Asgarian, *supra* note 103.

[130] *Id.*

[131] *Id.*

[132] *See* Robert Gavin, *Albany Teens Plead Guilty in Shooting of Boy, 3, at Day Care Center*, TIMES UNION (Feb. 19, 2020, 10:43 AM), timesunion.com/news/article/Two-Albany-teens-free-until-sentencing-in-15065652.php [https://perma.cc/HW4C-DR3U] (originally blaming bail reform for the release of two teens pending sentence, although the reforms did not alter the scheme for release pending sentence and left discretion with the sentencing court); Nick Caloway, *Bail Reform: Jordan Randolph Indicted in Crash That Killed Long Island Man, 'I'll Be Out Tomorrow'*, CBS N.Y. (Jan. 30, 2020, 5:25 PM), https://newyork.cbslocal.com/2020/01/30/jordan-randolph-indicted [https://perma.cc/7V7L-EFUD] (blaming a deadly accident on a judge having no choice but to release him for an earlier violation of his ignition interlock device, even though bail reform did not prevent detention for failing to abide by sentences such as ignition interlock devices); Greg Cergol, *LI Officials Try to Tie Bail Reform to MS-13 Case, Before Conceding No Link*, NBC 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/SU29-HV3R] (blaming discovery reforms for a witness' death even though the reforms allow protective orders and one had been granted in the case, preventing the accused from learning the witness' contact information).

[133] LAURA BENNETT & JAMIL HAMILTON, FWD.US, FREEDOM, THEN THE PRESS: NEW YORK MEDIA AND BAIL REFORM 8–11 (2021), https://36shgf3jsufe2xojr925ehv6-wpengine.netdna-ssl.com/wp-content/uploads/2021/06/Bail_Reform_Report_052421-1.pdf [https://perma.cc/YCE6-QXLA] (examining several media case studies and comparing them to the actual law to reveal the inaccuracies, whereas the media often relied on law enforcement's interpretation of why reform was to blame and failed to scrutinize further).

[134] *See* Asgarian, *supra* note 103.

[135] *Id.*; BENNETT & HAMILTON, *supra* note 133, at 5; Covert, *supra* note 98.

This pushback began when the reforms were enacted in April of 2019 and continued for months. Shortly after the January 2020 reforms went into effect, law enforcement and district attorneys lobbied the Governor to roll back the reforms.[136] These efforts partially succeeded. The legislature rolled back some of the reforms less than four months after their enactment. Governor Cuomo leveraged his popularity amid the nascent COVID-19 pandemic to pressure Democratic legislators to support the rollbacks.[137]

The rollbacks were only a partial revision, however. The legislative rollback left intact the changes for determining bail, but expanded the scope of bail by adding charges that were bail eligible and including new provisions that allowed a judge to set bail regardless of the charge.[138] Similarly, for the discovery reforms, the April 2021 rollback left the new scheme largely intact, but gave the prosecution a bit more time to comply with their obligations and a few more explicit statutory exceptions.[139] Another partial rollback occurred in April 2022. Again, the new structures were left in place and only minor changes were made to exceptions for discovery and to some categories of bail eligibility.[140]

But even if the reforms remained largely intact, the political back-and-forth and media pressures emboldened or reinforced resistance in the judiciary. Politicians spoke openly about the foolhardiness of the reforms and the desire to roll back the measures at the same time the judiciary had to begin implementation.[141] These media pieces and reactionary response affected the incentives of judges. This context helps illuminate the reason for the judicial actions below and frames them as true acts of resistance.

Ultimately, the quick passage of the reforms did not prevent opposition but merely shifted the battleground from the legislature to the courts. This

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[136] *See* Zachary Evans, *Cuomo, N.Y. Lawmakers to Rollback Some Bail Reform Measures Following Police Criticism*, NAT'L REV. (Apr. 2, 2020, 1:24 PM), https://www.nationalreview.com/news/cuomo-n-y-lawmakers-to-rollback-some-bail-reform-measures-following-police-pushback [https://perma.cc/8LKA-W4A3].

[137] *See* Nick Pinto, *America's Crisis Daddy Andrew Cuomo Exploits Coronavirus Panic to Push Bail Reform Rollback in New York*, INTERCEPT (Mar. 25, 2020, 1:43 PM), https://theintercept.com/2020/03/25/coronavirus-andrew-cuomo-new-york-bail-reform [https://perma.cc/4JQG-BQHX].

[138] *See* Beth Fertig, *What the New Rollbacks to Bail Reform Mean in New York*, GOTHAMIST (July 2, 2020), https://gothamist.com/news/what-new-rollbacks-bail-reform-mean-new-york [https://perma.cc/24LU-PKS6].

[139] *Id.*

[140] S. 8006C, 2022 Leg., Reg. Sess. (N.Y. 2022), https://www.nysenate.gov/legislation/bills/2021/S8006 [https://perma.cc/66RR-3EZ4] (rephrasing the exceptions for speedy trial to be charged to a prosecutor when discovery is not provided, expanding the factors that allow bail to be set, and reclassifying certain charges and circumstances as monetary bail eligible).

[141] Asgarian, *supra* note 103.

also reinforces that, even if the process provided opportunities for input from the judiciary, judges still retain the power to continue to hold the process hostage after the implementation of the reforms, just as Ostrom and Hanson noted.[142] Further, when that deliberative process signals a lack of public or political approval for the reforms, judges are particularly incentivized to do what they can to minimize the reforms for the sake of their own careers.

D. JUDICIAL CULTURE'S FOCUS ON RETAINING JUDICIAL POWER

There is a final aspect of New York's 2020 criminal legal reforms that directly implicates judicial culture and can explain the reasons for potential opposition. Both the bail reforms and discovery reforms achieve their objectives through the reduction of judicial discretion.[143] The bail reforms aimed to reduce the pretrial jail population by making categories of cases completely ineligible for bail.[144] Previously, judges always had the option to set bail on any case.[145] Likewise, the discovery reforms sought to make discovery an automatic process with materials and timelines laid out and largely predetermined sanctions for failure to comply.[146] At least some judges opposed the reforms specifically because of the impact it had on judicial discretion.[147]

This complicates the analysis of judicial culture. Feeley, as well as Ostrom and Hanson, suggests that reformers should convince the judiciary of the benefits of change, incentivize them to accept reforms, and learn their preferences to accommodate them in the reforms.[148] But these reforms also implicate judicial power. Does Ostrom and Hanson's proposal necessitate judges willingly accepting a reduction in their own judicial power? Or does it mean reforms that diminish judicial discretion will always be held hostage by the judiciary? Conversely does a reduction in discretion mean that such

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[142] Ostrom & Hanson, *supra* note 39, at 55.

[143] *Compare* N.Y. CRIM. PROC. LAW § 530.20 (McKinney 1979) *with* N.Y. CRIM. PROC. LAW § 530.20 (McKinney 2022).

[144] N.Y. CRIM. PROC. LAW § 530.20 (McKinney 2022).

[145] N.Y. CRIM. PROC. LAW § 530.20 (McKinney 1979).

[146] N.Y. CRIM. PROC. LAW § 245.10 (McKinney 2020); N.Y. CRIM. PROC. LAW § 245.20 (McKinney 2020); N.Y. CRIM. PROC. LAW § 245.80 (McKinney 2020).

[147] *See, e.g.*, John Whittaker, *Judges Welcome Discretion in Bail Reform Talks*, POST-JOURNAL (Feb. 7, 2022), https://www.post-journal.com/news/page-one/2022/02/judges-welcome-discretion-in-bail-reform-talks [https://perma.cc/KCU6-J66S] ("[Chief Administrative Judge] Marks was asked by both Democrat and Republican legislators about his thoughts on bail reform. Marks consistently answered that judges favor additional discretion.").

[148] FEELEY, *supra* note 23, at 198–99.

reforms do not need buy-in from the judiciary, since, in theory, their role in implementation should be more minimal?

Malcolm Feeley addressed the issue of reforms subverted through the reintroduction of discretion, in a process he referred to as adaptation.[149] The judiciary will still find ways to resist changes because they necessarily must retain broad powers in certain capacities.[150] In this way a judge's administrative power, such as the ability to calendar a case, can undo a substantive reform—a change in the speedy trial law, for example.[151] Hopefully, some examples of opposition can illustrate how the reduction of judicial discretion played out, whether judges were more motivated to oppose the reforms, and whether they were able to successfully oppose them.

The instances of opposition discussed below reveal that the issues are intertwined: the judges rebelled against both the substantive changes and the diminishment of their discretion in certain matters.[152] These few examples also illustrate that the scholarship's underlying point remains true. Even when the reforms entail a reduction in judicial discretion, judges are able to circumvent these reforms in numerous ways. As will be discussed in Part III, any solution to this problem must acknowledge the varying motivations and methods of resistance.

II. EXAMPLES OF OPPOSITION

This paper examine several instances of judicial opposition to the January 2020 criminal legal reforms. Much of this resistance came in the form of judicial decisions that are unpublished or that circumvent the reforms indirectly through routine powers, such as adjournments. This is due to the nature of trial level criminal cases in New York and the nature of the reform data-gathering process.[153] The lack of data and appellate review is discussed in Part III on solutions, but regardless, this paper does not seek to be a comprehensive empirical analysis of judicial decisions. Rather, looking at a few illustrative cases will reveal the opportunity that exists for the judiciary

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[149] *Id.* at 121.

[150] *Id.*

[151] See *infra* Section II.D for an example of this exact circumstance occurring.

[152] *See, e.g.*, People v. Johnston, 121 N.Y.S.3d 836, 845 (N.Y. City Ct. 2020); People v. Erby, 128 N.Y.S.3d 418, 421 (N.Y. Sup. Ct. 2020).

[153] New York's original January 2020 reform had no reporting requirement. A reporting requirement was added in the March 2020 amendments, but it did not go into effect until July 2021. Nonetheless, this paper is not a statistical analysis of the efficacy of the reforms, but a look at how they have been received by the judiciary in their actions and opinions to see what role judicial culture plays in encouraging opposition.

to obstruct the implementation of reform, which allows us to more concretely examine how and why this is occurring.

A. SETTING EXCESSIVE MONETARY BAIL

The reforms significantly altered the scheme for setting bail in New York in a manner that directly and explicitly limited previously expansive judicial discretion on the issue of bail. Before the 2020 amendments to the bail statute, judges had nearly unfettered power to set bail, loosely guided by certain factors that they were to consider.[154] This old bail scheme allowed a judge to set monetary bail on any case, whether it was a felony, misdemeanor, or even a non-criminal violation, and in any circumstance, including someone's first arrest.[155] The judge had to consider factors that would determine whether someone was a flight risk, and the judge could only set bail as necessary to ensure a person's return to court.[156] But there was no requirement of articulating the basis for setting bail. There were also several forms of monetary bail that could be set, aside from direct cash bail or an insurance company bail bond.[157] But judges were free to explicitly reject any forms from consideration.[158] A bail determination could be reviewed as excessive under an abuse of discretion standard.[159] This was a challenging standard to meet because a judge did not have to articulate why they were setting bail.[160] Therefore, a reviewing court would have to find the abuse of discretion occurred because there was no possible connection between the amount of bail set and the bail statute's justification of ensuring someone's return to court.[161]

The new bail statute creates a different scheme. First, it lists categories of offenses, which are most misdemeanors and non-violent felonies, where

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[154] N.Y. CRIM. PROC. LAW § 510.30 (McKinney 2020).

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *See* People *ex rel.* McManus v. Horn, 967 N.E.2d 671, 674 (2012) (holding that the pre-reform bail statute required two forms of bail but that a judge was free to select any forms in any amount, although that could make the two forms functionally identical if the two selected were cash and fully secured bond).

[159] N.Y. CRIM. PROC. LAW. § 530.30 (McKinney 1971) (providing a mechanism for a Supreme Court Judge to review bail setting de novo, but only once and only if the initial bail setting was by a criminal court); N.Y. C.P.L.R. 7002 (McKinney 2021) (codifying a writ of habeas corpus procedure through New York State Court).

[160] N.Y. CRIM. PROC. LAW § 430.20 (McKinney 2020).

[161] Peter Preiser, *Practice Commentaries*, N.Y. CRIM. PROC. LAW § 510.20 (McKinney 2020).

judges cannot set monetary bail at all.[162] Based on the new framework, a judge first must determine if a case is bail eligible based on the charge, or bail eligible based on a specific circumstance, such as someone being re-arrested.[163] Even if a case is found to be bail eligible, a judge is then instructed by the statute to set the least restrictive means to ensure someone's return to court.[164] Finally, if a judge determines monetary bail is necessary, the statute requires a judge to place the justification on the record as to why no other condition of release, such as a pretrial program or electronic monitoring, could satisfy the court.[165] The new statute also requires a judge to set bail in several forms, with one form being either partially secured bond or unsecured bond.[166] Partially secured bond has been an acceptable form of bail in New York for decades, but the practice was rarely used.[167] Instead, the "traditional practice" in all New York courts was to set only cash bail and insurance company bond, which required the same amount of money but subjected the payor to the fees and terms of bail bonds companies.[168] This new requirement sought to alleviate the fees that payors faced, to simplify the process by allowing payment in court, and to make bail of the same amounts easier to pay.[169]

As discussed above, there was widespread and varied opposition to the reforms' alteration of the bail statute in media and political forums.[170] The changes were also met with various forms of resistance by judges. Some judges followed the law but vocally opposed it while doing so. In a Manhattan arraignment immediately before the enactment of the law, a judge made several comments that he disagreed with releasing individuals but that he was doing so because the new bail statute required it.[171] The judge

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[162] N.Y. CRIM. PROC. LAW § 530.40 (McKinney 2022).

[163] *Id.*

[164] *Id.*

[165] N.Y. CRIM. PROC. LAW § 530.40(4) (McKinney 2022).

[166] N.Y. CRIM. PROC. LAW § 520.10(2)(b) (McKinney 2020).

[167] INSHA RAHMAN, VERA INST. OF JUST., AGAINST THE ODDS: EXPERIMENTING WITH ALTERNATIVE FORMS OF BAIL IN NEW YORK CITY'S CRIMINAL COURTS 2 (2017), https://www.vera.org/downloads/publications/Against_the_Odds_Bail_report_FINAL3.pdf [https://perma.cc/AF6F-BXFY] ("The traditional practice in the courts, however, is to ignore [partially secured or unsecured] options and impose only the two most onerous forms of bail to make: cash bail and insurance company bail bond.").

[168] *Id.*

[169] *Id.*

[170] Asgarian, *supra* note 103.

[171] *See* Molly Crane-Newman, *Manhattan Judge Says 'The Law is Stupid' Upon Releasing Man Under New Criminal Justice Reforms*, N.Y. DAILY NEWS (Dec. 11, 2019, 7:18 PM), https://www.nydailynews.com/new-york/manhattan/ny-manhattan-judge-max-wiley-

indicated on the record in open court that "the law is stupid" and that his actions in following it went "against all common sense and wisdom."[172] The judge's blunt language drew media attention, but the general tone of resistance was hardly an anomaly. As judges were required to perform the bail analysis on the record, some took the opportunity to wipe their hands of the issue, saying that they were constrained in their decision-making based on the bail law.[173]

In Albany, a city court judge went further and invalidated the new reforms as unconstitutional because it prevented him from setting bail when he believed monetary bail was the least restrictive means to ensure the accused's return to court.[174] He found that "the legislature improperly interfered with the judiciary's capacity to fulfill its constitutional mandate."[175] This was because "[b]ail is a part of the court's inherent power to efficiently control the course of a criminal proceeding."[176] He concluded that "[t]he legislature exceeded its authority by mandating that a court may never impose cash bail in non-qualifying offenses . . . ."[177] Having found the statute unconstitutional, the judge then set monetary bail for that individual despite the statute not listing the charge as bail eligible.[178] Although there are mechanisms for challenging detention in these circumstances, they are problematic, can be slow, and often become moot before being adjudicated.[179] The judge opposed the reforms because of the role they played in limiting judicial power and openly contradicted the letter and spirit of the

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stupid-20191212-oaw2trjhujbotaf423jedjchmq-story.html [https://perma.cc/K7XG-PTHY] (citing Judge Maxwell Wiley's comment regarding 2020 bail reform during a December 11, 2019 arraignment court appearance).

[172] *Id.*

[173] *Id.*; *see also* Michelle L. Price, *Lee Zeldin, GOP Nominee for NY Governor, Attacked on Stage at New. York Campaign Event*, PBS: NEWS HOUR (Jul. 22, 2022, 9:14 AM), https://www.pbs.org/newshour/politics/lee-zeldin-gop-nominee-for-ny-governor-attacked-on-stage-at-new-york-campaign-event [https://perma.cc/Z3P9-5DT3] (citing a senior court clerk who stated that "under the state law, 'The judge had no choice but to release him on his own recognizance.'").

[174] People v. Johnston, 121 N.Y.S.3d 836, 845 (N.Y. City Ct. 2020) (declaring bail reform unconstitutional as applied).

[175] *Id.* at 277.

[176] *Id.* at 275.

[177] *Id.* at 271.

[178] *Id.*

[179] *See, e.g.*, People *ex rel.* McAdoo v. Taylor, 818 N.Y.S.2d 847, 848 (2006) (holding that appeal of writ is moot after petitioner's release). In *McAdoo*, the petitioner filed a writ in May 2005, it was denied in September 2005, he appealed and was then released in February 2006. The appeal was heard in July 2006 and denied as moot. Given that *Johnston* involved a misdemeanor which carries a maximum of a year in jail, it seems unlikely that a writ on the issue could ever reach a higher court before becoming moot.

reforms in order to retain that judicial power.[180] As discussed in Section I.D, this complicates the standard analysis of judicial culture. Did this judge have to be brought into the conversation about the reforms and convinced in order to prevent his open opposition? Or is removing his discretion a sufficient way to prevent opposition, assuming that appellate courts ultimately uphold the reforms and reverse decisions such as his? Either way, this was a brazen instance of resistance both in its general nature and the clarity of the opinion.

These acts of resistance continued well after the partial rollbacks. In the Bronx in May 2021, a judge set bail in a non-violent, bail-ineligible case where an individual allegedly vandalized multiple synagogues.[181] This example also highlights the political and media interplay with judicial interpretation of the reforms. In this case, the media made a request to observe the proceedings, which the judge granted.[182] The case garnered attention because the acts of vandalism against synagogues were investigated and ultimately charged as a hate crime.[183] The prosecution made a lengthy record about the egregiousness of the acts but recommended supervised release for the accused individual because bail was clearly not allowed under the law, since the offense was not among those enumerated.[184]

The judge rejected that recommendation and set bail, although the judge's reasoning was unclear at best.[185] The district attorney called a supervisor, who appeared on the record and reiterated and explained that bail was not allowed.[186] The defense attorney also laid out that the bail law was not ambiguous or open to interpretation—either a statutory charge was listed as monetary-bail-eligible, or it was not.[187] The charges under the complaint were simply not listed under those that are bail eligible.[188] But the judge insisted that he retained the power to set bail and did, in fact, set monetary bail.[189] This was ultimately undone hours later by an informal mechanism

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[180] People v. Johnston, 121 N.Y.S.3d 836, 845 (N.Y. City Ct. 2020).

[181] Kevin Sheehan & David Meyer, *Bronx Judge Defies DA, Sets Bail for Jewish Center Vandal*, N.Y. POST (May 2, 2021, 5:27 PM), https://nypost.com/2021/05/02/judge-slams-da-for-not-requesting-bail-for-jewish-center-vandal [https://perma.cc/YJY2-L7YH].

[182] Transcript of Arraignment at 2, People v. Burnette, No. CR-006370-21BX (May 2, 2021) (referencing the application by news media to observe the proceedings and take photographs).

[183] Sheehan & Meyer, *supra* note 181.

[184] Transcript of Arraignment at 8, People v. Burnette, No. CR-006370-21BX (May 2, 2021).

[185] *Id.* at 15-17.

[186] *Id.* at 12-13.

[187] *Id.* at 11, 18.

[188] *Id.*

[189] *Id.* at 15-17.

that exists to review a bail determination, and the individual was released under supervision.

News articles applauded the bail setting judge as heroic for standing up to hate crimes.[190] New York City Mayor Bill de Blasio was among those who supported the judge's unlawful actions.[191] In the context of the judicial culture discussed above, this is perhaps the clearest example of the structural incentives for a judge to oppose bail reforms. The judge was supported for opposing the law by the same politicians that could decide his continued employment.

In the examples above, judges openly defied the plain text of the bail reform, but other instances of opposition are more subtle. Judges also opposed the law by compensating in instances when they did have discretion to set bail. Unfortunately, the formal reporting and tracking of the effects of the reforms on bail was not mandated until July 2021, eighteen months after the enactment of the changes.[192] But smaller scale studies have shown that judges bypass the bail requirement with their discretionary bail setting power by setting partially secured bond at higher amounts than cash bail.[193]

A Court Watch study revealed that judges actually increased the amount of bail set on bail-eligible cases after the bail reforms went into effect.[194] A sample study of the same set of bail-eligible charges for 2019 compared to 2020 found that judges increased bail amounts by 50%, from an average bail of $5,000 to $7,500.[195] That same study found that when cases were not bail-eligible, judges accounted for the reduced percentage of bail cases by substituting an equal number of cases with non-monetary conditions rather than release.[196]

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[190] Julia Marsh, Reuven Fenton & Bruce Golding, *De Blasio Praises Judge Who Tried to Jail Alleged Bronx Synagogue Vandal*, N.Y. POST (May 3, 2021, 1:28 PM), https://nypost.com/2021/05/03/bill-de-blasio-backs-judge-who-tried-to-jail-alleged-synagogue-vandal [https://perma.cc/K4YS-DA23].

[191] *Id.*

[192] Steven Yoder, *New York Watchdogs Lack Data to Track Judges' Compliance with Bail Reform*, APPEAL (Sept. 9, 2020), https://theappeal.org/new-york-judges-bail-reform [https://perma.cc/Z8LK-38DP].

[193] Akash Mehta, *A Broken Bond: How New York Judges Are Getting Around Bail Reform*, CITY: CTS. (Oct. 12, 2020, 3:00 AM), https://www.thecity.nyc/2020/10/12/21512018/new-york-judges-getting-around-bail-reform-bond [https://perma.cc/5AHG-BCGS].

[194] CT. WATCH NYC, SAME GAME, DIFFERENT RULES 10 (2020), https://www.courtwatchnyc.org/reports [https://perma.cc/535U-LKPS].

[195] *Id.*

[196] *Id.* at 12.

Judges also opposed the reforms by using the discretionary bail setting power they retained to bypass the new partially secured bail requirement.[197] Partially secured bail is a form of bail meant to allow a guaranteeing individual to be liable for a certain amount set by the judge after paying a percentage as a down payment. This allows a guarantor to pay a percentage to the court without a fee, rather than going through a bail bonds company to pay fees or having the entire amount available in cash. For example, when a judge sets $1,000 bail, if they set it in cash form, then someone must place $1,000 cash as collateral. If they set the amount as an insurance company bond, then a bail bond company could post the amount after someone pays them a percentage, usually 10% but more for small amounts and less for large amounts, as well as a fee. But with a partially secured bond, the surety pays a judge a set percentage of the bail amount, up to 10%, directly to the court with no fee. In these cases, the money is returned if someone appears in court until the conclusion of the case, except for the bail bonds company fee. The requirement of a partially secured bond was added because, in regular practice, judges used insurance company bail bonds much more regularly than partially secured bonds, even though the latter was shown to be equally effective in securing return to court.[198]

Judges circumvent this requirement by setting partially secured bond in a higher amount, undercutting its very purpose. The same Court Watch study found judges set partially secured bail higher than other forms in 85% of cases.[199] Judges also set partially secured bond higher than a bail bond in half the cases, even though the only difference between the two is the large fees charged by bail bondsmen.[200] There is no difference in the monetary liability for a surety who posts either bond. Judges also set partially secured bond at an amount two or more times higher than that of cash bail in 78% of cases.[201] Since judges technically set partially secured bond as a form of bail, they are not violating the statute. But they circumvent its intention by requiring partially secured bond in the first place. One judge, who declined to set a higher amount for the different forms of bail, noted that the practice negates a section of the law, making it so that it has no meaning, as well as contravening the clear intent of the legislature in passing this requirement.[202]

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[197] *Id.* at 10–11.

[198] *Id.*

[199] *Id.*

[200] *Id.* at 10.

[201] *Id.* at 11.

[202] *See* People v. Portoreal, 116 N.Y.S.3d 514, 526 (N.Y. Sup. Ct. 2019) (holding that setting PSB at an amount significantly higher than the other forms of bail "would appear to

Despite the judge believing the practice is a clear contravention of the reforms, the Court Watch study shows that this practice is the norm in New York City courthouses and occurs in the vast majority of cases.

B. JUDGES FAILING TO FOLLOW PRETRIAL RELEASE ASSESSMENT RECOMMENDATIONS

Statistics on pretrial release cases in New York reveal that judges failed to follow the pretrial release recommendations that were meant to be a normalizing force to reduce judicial overreach in bail setting.[203] New York has long had a pretrial release assessment, and the assessment tool was modified in 2020 to increase its accuracy and sensitivity.[204] It is as effective a tool as can exist in the vague science of predicting someone's return to court. It is accurate in close to 90% of cases in predicting a person's likelihood to return to court.[205]

Yet, judges followed the recommendation for release in only 44% of violent felonies following the reforms.[206] Recommendations were more closely followed for misdemeanors and non-violent felonies, where bail was often not at a judge's discretion.[207] But in the cases where discretion was retained, judges ignored the recommendation for release more often than they followed it, despite the success rate for the CJA instrument being close to 90%.[208] Overall, judges detained 12% of all individuals charged with crimes despite the assessment recommending detention in only 7% of cases.[209]

This is also significant in contrast to other comparable states. The 2017 New Jersey reforms discussed above also relied heavily on pretrial release recommendations to reduce pretrial jail populations and standardize judicial

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fly in the face of the intent of the Revised Bail Law. Plainly, the Legislature intended that some defendants who cannot afford an insurance company bail bond should still be able to afford a partially-secured surety bond; otherwise, the provision of the Revised Bail Law mandating the availability of partially-secured surety bonds would have no practical meaning.").

[203] REMPEL & WEILL, *supra* note 21, at 15.

[204] LUMINOSITY & UNIV. OF CHI.'S CRIME LAB N.Y., UPDATING THE N.Y. CITY CRIM. JUST. AGENCY RELEASE ASSESSMENT 33 (2020), https://www.nycja.org/assets/Updating-the-NYC-Criminal-Justice-Agency-Release-Assessment-Final-Report-June-2020.pdf [https://perma.cc/7A9C-WPMR].

[205] *Id.*

[206] REMPEL & WEILL, *supra* note 21, at 15.

[207] *Id.*

[208] *Id.*

[209] *Id.*

decision-making.[210] There are many differences in the process, most notably that New Jersey factors dangerousness into the calculation.[211] But the risk assessment tools are largely comparable in their accuracy and the percentage of cases in which they recommend release versus detention.[212]

While New York's pretrial assessment does not include future dangerousness as a factor, its recommendation may vary on whether the current charge is a violent felony or not. This largely mirrors how New Jersey factors in future dangerousness.[213] Both states group individuals into tiers and make recommendations based on the tier. In New Jersey, the highest-level tier, which is the strongest recommendation for release, corresponds to an 84% chance to return to court. In New York, the highest-level tier where release is recommended corresponds to a 93% return rate.[214]

New Jersey's pre-trial assessments recommended detention in 5% of cases, which is similar to New York's recommendation of detention in 7% of cases.[215] This is especially similar when one considers that there is an intervening level in New Jersey's recommendation scale that does not exist in New York, with 2% of individuals in New Jersey recommended for home detention.[216]

In New Jersey cash bail is rarely imposed, and the most common options are release, release to a pretrial services agency, or detention.[217] Conversely in New York, cash bail is a common condition for release.[218] But this is accounted for by including cases where cash bail was set and paid as

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[210] GLENN A. GRANT, N.J. CTS., CRIM. JUST. REFORM REP. TO THE GOVERNOR & THE LEGISLATURE 24 (2019), https://www.njcourts.gov/sites/default/files/cjrannualreport2019.pdf [https://perma.cc/8BL9-X7FZ] [hereinafter GRANT 2019].

[211] AM. CIV. LIBERTIES UNION OF N.J., NAT'L ASS'N OF CRIM. DEF. LAWS. & N.J. OFFICE OF THE PUB. DEF., N.J. PRETRIAL JUST. MANUAL 22 (2016), https://www.nacdl.org/getattachment/50e0c53b-6641-4a79-8b49-c733def39e37/the-new-jersey-pretrial-justice-manual.pdf [https://perma.cc/UN3Z-G86B] [hereinafter N.J. PRETRIAL JUST. MANUAL].

[212] *Id.* at 11*;* LUMINOSITY & UNIV. OF CHI.'S CRIME LAB N.Y., *supra* note 204, at 31.

[213] *See* REMPEL AND WEILL, *supra* note 21, at 14 (noting that NY's CJA only recommends release for a violent felony if the percentage change of returning to every court date is above 90%); N.J. PRETRIAL JUST. MANUAL, *supra* note 211, at 9–11.

[214] N.J. PRETRIAL JUST. MANUAL, *supra* note 211, at 8; LUMINOSITY & UNIV. OF CHI.'S CRIME LAB N.Y., *supra* note 204, at 24.

[215] N.J. PRETRIAL JUST. MANUAL, *supra* note 211, at 11; LUMINOSITY & UNIV. OF CHI.'S CRIME LAB N.Y., *supra* note 204, at 31.

[216] N.J. PRETRIAL JUST. MANUAL, *supra* note 211, at 11.

[217] *Id.*

[218] REMPEL & WEILL, *supra* note 21.

"release."[219] In most cases where bail is set, an individual remains detained. This is largely because of the reality that judges set monetary bail in amounts that are untethered from an ability for someone to pay, despite the bail statute's wording.[220]

Despite the similar percentage of recommendations with similar chances of return, there are drastic differences in how the judiciaries adhere to these recommendations. In 2020, New York judges detained 12% of individuals accused of crimes, and in New Jersey judges detained 6%.[221]

The time after the reforms were enacted was also marked by a change in political climate in both jurisdictions. A nationwide increase in gun violence and a backlog in both jurisdictions due to COVID-19 pandemic led to a "backslide" in both jurisdictions.[222] But overwhelmingly New Jersey judges continued to follow the recommendations, while New York judges saw a drastic decrease in their already poor performance of following recommendations.[223] Notably for all time periods, the pretrial assessments remained the same, recommending detention in 7% of cases in New York and 5% of cases in New Jersey.[224] In the first half of 2020, New York judges detained individuals in 10% of cases.[225] But in the second half of 2020 the rate of compliance with recommendations dropped even further in New York, with 16% of individuals being detained.[226] New Jersey saw a much smaller uptick, with 5.9% of individuals detained in 2019, increasing to 6.9% in 2020.[227]

The Center for Court Innovation, which analyzes New York court data and administers pretrial supervision services, attempted to find some explanations for these changes. Given the timing, the Center believed a shift in "judicial culture" occurred largely spurred by rhetoric against the reforms

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[219] *See Pretrial Release Data Dashboard*, N.Y. STATE UNIFIED CT. SYS., https://ww2.nycourts.gov/pretrial-release-data-33136 [https://perma.cc/ZE5A-3K8J] (click on "Pretrial Release Data Dashboard").

[220] N.Y. STATE DIV. CRIM. JUST. SERVS., SUPPLEMENTAL PRETRIAL RELEASE SUMMARY TABLES 2019–2021, at 12 (2022).

[221] GLENN A. GRANT, N.J. CTS., CRIM. JUST. REFORM REP. TO THE GOVERNOR & THE LEGISLATURE 33 (2020), https://www.njcourts.gov/sites/default/files/courts/criminal/2020cjrannual.pdf [https://perma.cc/U2V3-JMEZ] [hereinafter GRANT 2020]; REMPEL & WEILL, *supra* note 21.

[222] REMPEL & WEILL, *supra* note 21, at 3.

[223] *Id.*

[224] *Id.*

[225] *See* REMPEL & WEILL, *supra* note 21, at 9 exhibit 2.3.

[226] *Id.*

[227] GRANT 2020, *supra* note 221, at 33.

that emerged in the middle of 2020.[228] They also believed COVID-19 and the accompanying court delay and uptick in certain crimes was responsible, but only partially.[229] Looking at New Jersey by comparison, which also faced much of the same COVID-related consequences, seems to support their conclusions.[230] This suggests that New York's judiciary was greatly attuned to the public dialogue on bail reform and violence.

The differences in the judicial responses to each reform may help explain this divergence in results. As discussed in Section I.B, the reforms in New Jersey were championed by judicial leadership every step of the way. The Chief Justice of New Jersey, Stuart Rabner, supported the reforms from the outset and has continued to provide updates in support of the reforms. In New York, as discussed in Section II.A, judicial leadership largely criticized the reforms or was silent at best.

It is even possible to see the difference in attitude towards bail reform in the public-facing media of the two court systems. New Jersey's website has a page about the reforms.[231] It contains an explanatory video, statements by the Chief Judge in support of the reforms, and a collection of mandated data that is explained as indicative of the reforms' success.[232] And finally, there is a collection of opinion pieces and articles on the reforms, but only those that have positive conclusions.[233]

The New York Court System website has no such section. New York also mandated that the judiciary collect data on the reforms, just as in New Jersey. But this data is found in an unnamed section of the website with no explanation or context.[234] Likewise, there is no collection of positive news articles and opinion pieces. There is certainly no statement from the Chief Judge or other judicial leadership praising the reforms. In fact, there are few public statements by judicial leadership in New York in support of the reform, and most have criticized the reforms and responded dismissively to concerns by the legislators who passed the reforms.[235]

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[228] REMPEL & WEILL, *supra* note 21, at 10.

[229] *Id.*

[230] GRANT 2020, *supra* note 221, at 33.

[231] *See Criminal Justice Reform Information Center*, N.J. CTS., https://www.njcourts.gov/courts/criminal/reform.html [https://perma.cc/SX5L-9YRA].

[232] *Id.*

[233] *Id.*

[234] *See Pretrial Release Data*, N.Y. STATE UNIFIED CT. SYS., *supra* note 219.

[235] *See, e.g.*, David Brand, '*Reform the Reform'—Judges Call for Changes to State Bail Law*, BROOKLYN DAILY EAGLE (Feb. 7, 2020), https://brooklyneagle.com/articles/2020/02/07/reform-the-reform-judges-call-for-changes-to-state-bail-law/ [https://perma.cc/UW6X-WTKS].

Despite early success and judicial compliance with the goals of the reforms, New Jersey has not been immune from the trend of reforms failing at implementation. In 2021, the number of individuals detained pretrial in New Jersey increased even more and 9% of people charged were detained.[236] That was New Jersey's fourth year of implementing its reform, and it is possible Feeley's observations of the difficulties in routinizing reforms has finally caught up to New Jersey.[237] It remains to be seen if this is a continuation of a temporary shift or an undoing of New Jersey's progress. Either way, when examining New York and New Jersey, the similarities in the reforms, the differences in judicial attitudes to the reforms, and the differences in judicial compliance with the initial reforms are notable. These trends are certainly not dispositive given the differences that cannot be accounted for, but they support the idea that the lack of acceptance by New York judiciary played a role in its failure to comply with the reforms at the very outset.

C. INCARCERATING INDIVIDUALS FOR A RE-ARREST WITHOUT A PROPER HEARING

Aside from individual decisions, there was a larger scale judicial response that impeded the bail reforms. In the wake of bail reform, New York City's Office of Court Administration ("OCA") imposed a new directive[238] on re-arrests that provided a procedure for judges in arraignments that bypassed the statutory scheme. The new reform statute required people arrested on a new case to be released pending a hearing on the re-arrest unless the new case was a violent felony. The statute explicitly requires a hearing before bail can be revoked in a case when the basis for such revocation is a new arrest.

The statute defines these new hearings and provides procedural safeguards to individuals accused of having re-offended while at liberty. These hearings must be based on relevant, admissible evidence and are not summary proceedings.[239] Unlike in the past, when a judge could simply take notice of the fact that a new arrest occurred or that a new finding of probable

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[236] N.J. CTS., CRIM. JUST. REFORM STATS. 2021, at 9 (2021), https://www.njcourts.gov/courts/assets/criminal/cjrreport2021.pdf?c=Ac8 [https://perma.cc/L58W-QVSN] (detailing overall pretrial detention rates in New Jersey).

[237] FEELEY, *supra* note 23, at 201 (noting that "[n]ew programs experience a rapid loss of moral fervor: charismatic spokespeople are replaced by bureaucrats [. . .] young and enthusiastic staff age and become more security conscious; co-optation and adaptation become necessary for survival.").

[238] OCA Directive 2020-4.

[239] *See* N.Y. CRIM. PROC. LAW § 530.60(2)(c) (McKinney 2020).

cause had been made on the new arrest through a hearing or indictment, this new hearing requires an evidentiary process.[240] The statute sets the procedure for the hearings to allow the presentation of evidence, testimony of witnesses, and opportunities for defense cross examination.[241] With some limited exceptions, these hearings require live witnesses, cross examination, and more than a summary finding of probable cause based on an arrest or the fact of indictment.[242]

The statute provides that only in the case of a re-arrest for a violent felony or class A felony may a person be held before a hearing, and even then, only for seventy-two hours without good cause.[243] For every other charge, an individual accused of re-offending while at liberty must remain at liberty until a hearing concludes by a finding of clear and convincing evidence that the individual re-offended.[244] In sum, someone who is re-arrested is entitled to a hearing before they can be incarcerated, unless the new charge is a violent felony or class A felony, in which case it permits incarceration for seventy-two hours until a hearing is held. This makes sense given the overall structure of the law, since in such circumstances the new case would be bail eligible anyway.[245] Thus, this is an important distinction for cases where the new arrest is not bail eligible. In those cases, a judge cannot incarcerate someone on the new case itself—they must go through this process to set bail on the old case instead. The process requires a full evidentiary hearing, with the subject matter of the hearing being the new arrest.[246] Only if there is clear and convincing evidence to believe the new crime occurred can the judge set bail or remand on the old matter due to the violation of the release condition that the person not commit a new offense.[247]

But the Office of Court Administration created a new procedure to bypass the change in the statute to allow judges to detain people on non-bail eligible re-arrests and without a full evidentiary hearing. Under the new OCA procedure, provided for by an official memo circulated to all judges, whenever someone with an open case comes through arraignments for a new

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[240] *See id.*

[241] *Id.*

[242] *Id.*; *see also* Peter Preiser, Practice Commentaries, N.Y. CRIM. PROC. LAW § 530.60 (McKinney 2020).

[243] *See* N.Y. CRIM. PROC. LAW § 530.60(2)(e) (McKinney 2020).

[244] *Id.*

[245] *See* N.Y. CRIM. PROC. LAW § 530.20(1)(b)(i), (iv) (McKinney 2022).

[246] *Id.*

[247] N.Y. CRIM. PROC. LAW § 530.60(2)(b) (McKinney 2020).

arrest, the person's old case is advanced to the arraignment stage.[248] The arraignment judge then issues a bench warrant for the client on the old case, even though the client is standing before the court.[249] The warrant, which is usually issued to secure someone's appearance who is not before the court, can be a basis to remand a client, even on a non-bail-eligible offense or a non-violent re-arrest.[250] It also allows someone to be detained for more than seventy-two hours and potentially without a hearing.[251] This process, which uses warrants in a new manner not utilized before the reforms, essentially gives judges power to hold a defendant at their discretion on any case, rather than follow the statutory procedure for a new arrest.[252]

This process bypasses the text of the statute and the intent of the legislature.[253] It allows the person to be held on their old case, through a warrant, even though no hearing has occurred for that case to determine probable cause for the new arrest, and even though the arraignment judge cannot hear live testimony or receive evidence on the new case to establish probable cause.[254] By using the court's warrant power to bypass the new requirement, the judge is using an established judicial power to undercut the new reforms, much like with the setting of partially secured bond at a higher amount than bail bond,[255] or the exercise of adjournment power to force trials to begin without complete discovery.[256] This particular instance was initiated and implemented by judicial leadership.[257] The direct effect of this practice may only have altered the outcome in a handful of cases. But the broader effect on the judicial culture is more profound, as court leadership signaled to judges that creative means of bypassing the reforms were encouraged.

The Chief Administrative Judge of the Bronx at the time, publicly challenging this aspect of bail reform, said "The scope of removal of judicial discretion on bail matters in this reform package is breathtaking."[258] He urged

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[248] *See* OCA Directive 2020-4 (setting a procedure whereby an open case is advanced to arraignments when an individual is re-arrested on a new, non-bail eligible offense, to allow bail to be set on the original offense).

[249] *See id.*

[250] *See id.*

[251] *See id.* at 1.

[252] *See id.*

[253] *See* OCA Directive 2020-4 (allowing a judge to review a securing order on an open case at an arraignment without an evidentiary hearing).

[254] *See id.*

[255] *See supra* Section II.A.

[256] *See infra* Section II.D.

[257] *See* OCA Directive 2020-4.

[258] Brand, *supra* note 235.

then-Governor Cuomo and legislators to "reform the reform."[259] This aspect of the bail reform was mostly not amended in either of the subsequent amendments, and the framework for felony re-arrests remains largely the same. But in the meantime, through this directive, OCA found a way to undo this portion of the reforms without legislative actions. In so doing, they likely encouraged and reinforced judges to carry out a multitude of individual determinations that ran contrary to the spirit of the reforms.

D. NOT IMPOSING DISCOVERY SANCTIONS

Judges resisted the discovery reforms by failing to give force to the new sanctions for prosecutorial failure to meet discovery requirements. Previously, discovery in New York criminal cases was ranked among the most restrictive in the country.[260] The statute provided few timelines other than requiring the district attorney to provide materials before the commencement of trial. The made New York one of only ten states that allow discovery so late.[261] In practice, discovery often trickled to the defense piecemeal, with the most helpful or relevant discovery often being revealed immediately before jury commencement.[262] There were also few sanctions for discovery being provided late, such as midtrial, since the remedy was preclusion.[263] If the evidence was favorable for the defense, such as impeachment materials or something the prosecution would not use anyway, then preclusion would not be a favorable remedy. Judges were authorized in certain cases to impose more stringent remedies, such as precluding evidence based on a discovery violation or dismissing the charges.[264] But these were rarely imposed, which is understandable given their drastic nature and that the disclosures would often occur midtrial, when it may be more expeditious to allow the jury to perform their function than to intervene as a judge.[265]

The new discovery statute significantly altered this scheme. The statute outlined the materials for prosecutors to provide in discovery, the timelines for doing so, and the sanctions for failing to comply.[266] The newly amended

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[259] *Id.*

[260] *See* Beth Schwartzapfel, *Defendants Kept in the Dark About Evidence, Until It's Too Late*, N.Y. TIMES (Aug. 7, 2017), https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html [https://perma.cc/6J2H-62JP].

[261] *See id.*

[262] *See id.*

[263] *See id.*

[264] *See id.*

[265] *See id.*

[266] N.Y. CRIM. PROC. LAW § 245.10 (McKinney 2022); N.Y. CRIM. PROC. LAW § 245.10 § 245.80 (McKinney 2020).

New York C.P.L. § 245 provides a much clearer and more stringent timeline for providing discovery. In the original version, the timeline was static at fifteen days after arraignment in all instances, though extensions could be given for materials that were particularly voluminous.[267] However, in the April 2020 partial rollback, this was modified to be twenty days for individuals in custody and thirty-five days for individuals at liberty.[268]

The discovery law also creates clear and expansive requirements for what the prosecution must provide to the defense.[269] The section enumerates the materials that must be provided by the prosecution, and even begins with the broad catch-all provision that the prosecution must provide to the defense "all items and information that relate to the subject matter of the case and are in the possession, custody or control of the prosecution or persons under the prosecution's direction or control."[270] The section then goes on to provide certain materials that are specifically included in this broad category, though it is noted to not be an exhaustive list.[271]

The reforms explicitly limited discretionary areas of compliance by the prosecution and created a process to challenge discovery compliance. New York's reforms did not go so far as to require true open file discovery, discovery deposition of witnesses, or other discovery schemes that could have gone farther in providing defense access to discovery. As a result, much of the task of deciding what must be turned over or what exists is still left to the prosecution. This includes the determination of what constitutes exculpatory material per *Brady v. Maryland*.[272] But, the new discovery statute addresses the issue with the ambiguity of what is exculpatory by providing a detailed list of what constitutes these materials, and also a requirement that even if no physical document exists, the information constituting *Brady* material must still be disclosed.[273] To ensure discovery

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[267] N.Y. CRIM. PROC. LAW § 245.10(1) (McKinney 2019).

[268] N.Y. CRIM. PROC. LAW § 245.10(1)(a)(i)–(ii) (McKinney 2020).

[269] N.Y. CRIM. PROC. LAW § 245.20 (McKinney 2022).

[270] N.Y. CRIM. PROC. LAW § 245.20(1) (McKinney 2022).

[271] *Id.*

[272] *See* Miriam H. Baer, *Timing* Brady, 115 COLUM. L. REV. 1, 12 (2015).

[273] All evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case, that tends to: (i) negate the defendant's guilt as to a charged offense; (ii) reduce the degree of or mitigate the defendant's culpability as to a charged offense; (iii) support a potential defense to a charged offense; (iv) impeach the credibility of a testifying prosecution witness; (v) undermine evidence of the defendant's identity as a perpetrator of a charged offense; (vi) provide a basis for a motion to suppress evidence; or (vii) mitigate punishment. Information under this subdivision shall be disclosed whether or not such information is recorded in tangible form

compliance, the statute then requires the prosecution to certify what they have provided is a complete accounting of the discovery.[274] If the defense takes issue with the prosecution's discovery disclosures after the prosecution says they complied, the defense can challenge the certificate of compliance.[275] Even still, it may be impossible to know if the prosecution failed to turn over evidence unless the existence of that material otherwise becomes known to the defense.

However, altogether the scheme is not subjective or vague. It creates a thorough and detailed accounting of what must be turned over and when and provides a system for the defense to challenge the prosecutor's discovery decisions.[276] By defining the timelines, the requirements for provided materials, and the limits to discretionary compliance, the reforms create a clear set of rules that must be followed by the prosecution.

After defining these discovery obligations, the statute lays out sanctions for late discovery.[277] Here the statute necessarily introduces judicial discretion by setting standards for when the courts may sanction a prosecutor.[278] Simply being dilatory alone is insufficient for sanctions under this section. Instead, sanctions require the aggrieved party to demonstrate prejudice, or in the case of missing or destroyed evidence, demonstrate that the material would have been relevant.[279] However, the section makes clear that when the prosecution has been late under the set timelines, the defense is entitled to an adjournment in all circumstances so that discovery can be reviewed, and the accused can make an informed decision between the offer and trial.[280] The statute states, "Regardless of a showing of prejudice the party entitled to disclosure shall be given reasonable time to prepare and respond to the new material."[281] This also is consistent with other portions of the statute that require the prosecution to provide all discovery at least three days before a guilty plea to a crime on a complaint and at least seven days before

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and irrespective of whether the prosecutor credits the information. The prosecutor shall disclose the information expeditiously upon its receipt and shall not delay disclosure if it is obtained earlier than the time period for disclosure in subdivision one of section 245.10 of this article. N.Y. CRIM. PROC. LAW § 245.20(1)(k) (McKinney 2020).

[274] N.Y. CRIM. PROC. LAW § 245.50(1) (McKinney 2022).

[275] N.Y. CRIM. PROC. LAW § 245.50(4) (McKinney 2022).

[276] N.Y. CRIM. PROC. LAW § 245.10 (McKinney 2022); N.Y. CRIM. PROC. LAW § 245.20 (McKinney 2020).

[277] N.Y. CRIM. PROC. LAW § 245.80 (McKinney 2022).

[278] *Id.*

[279] *Id.*

[280] *Id.*

[281] N.Y. CRIM. PROC. LAW § 245.80(1) (McKinney 2022).

a guilty plea to a crime on an indictment.[282] The new statute enforces this requirement by sanctioning late discovery. These sanctions include requiring the Prosecution to re-extend any offers that were withdrawn before providing discovery , or entitling the defense to a presumptive preclusion of any materials not in their possession before the expiration of any guilty plea and allows for even harsher sanctions depending on the circumstances.[283]

These discovery provisions instruct that when the prosecution provides discovery after the stated timelines, the defense is entitled to an adjournment both to review the materials for a potential trial and to accept a plea before it can be withdrawn.[284] However, judges have ignored this provision and forced defense attorneys to proceed to trial when discovery had been provided after the required deadline.[285] During one such appearance, an attorney cited missing discovery and challenged the prosecution's statement of readiness.[286] The prosecution replied that they recently provided some new materials, including new body camera footage, and that other documents could not be turned over because they did not seem to exist.[287] The attorney then cited to the provision entitling him to an adjournment to review those materials and deal with the new revelation of certain materials not existing, but was denied.[288] The discovery statute requires all discovery to be provided at least "seven calendar days prior to the expiration date of any guilty plea offer."[289] Yet judges were still forcing individuals to choose between starting a trial or taking a plea moments after receiving discovery. The judge indicated to the defense counsel that since a jury panel still had to be called to come upstairs to begin the trial, "[Counsel would] have time before the jury is selected to review that."[290]

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[282] N.Y. CRIM. PROC. LAW § 245.25 (McKinney 2020).

[283] *Id.*

[284] N.Y. CRIM. PROC. LAW § 245.80(1) (McKinney 2022); N.Y. CRIM. PROC. LAW § 245.25(2) (McKinney 2020).

[285] As this involves the routine adjourning of cases which trial judges do not write opinions on, there are currently no written decisions on the issue. Perhaps eventually an appellate court may reach whether the failure to provide an adjournment is error, but that would require a final conviction and an appeal alleging prejudice from the failure to provide an adjournment based on a discovery violation. The length of time it takes appellate courts to reach matters of first impression after reforms, and the likelihood most issues will be moot by then, is an issue discussed in Section III.

[286] *See* Transcript of Calendar Call, People v. Baldwin, No. 2019BX033151 (N.Y. Crim. Ct., Feb. 6, 2020).

[287] *Id.*

[288] *See id.* at 9 (citing to N.Y. CRIM. PROC. LAW § 245.80 (McKinney 2020)).

[289] N.Y. CRIM. PROC. LAW § 245.25(2) (McKinney 2020).

[290] Transcript of Calendar Call, People v. Baldwin, No. 2019BX033151 (N.Y. Crim. Ct., Feb. 6, 2020).

These sorts of actions sidestep the reforms by using the court's mostly unquestionable power to decide adjournments and control its calendar. There are few practical limitations on the power of a judge to adjourn a case for trial or to begin a trial and few ways to challenge or review such a decision. The new discovery statute is at odds with this judicial power, since it places limitations on when the defense can be forced to begin a trial over their objections if discovery is incomplete. However, some judges have ignored this conflict and bypassed the discovery requirements to continue to use their power to control their calendar as a tool for plea bargaining purposes.[291]

Judges have also read in requirements for sanctions or created excuses for late discovery that do not exist in the statute, which undermines its very purpose.[292] Judges have found a certificate of compliance valid, even with missing items, so long as the prosecution has "substantially complied."[293] Judges have also determined that sanctions are discretionary despite the language of "shall"[294] and have applied prejudice standards to the charging of speedy trial time.[295] The April rollbacks added some new ambiguity to this analysis by adding new exceptions for prosecutorial disclosure.[296] The increased discretion made it even easier to bypass the discovery requirements. The rollbacks did not include proposed language to allow for exceptions for "substantial compliance" or adding a relevance standard, yet judges continued to read in such exceptions.[297]

Despite the initial clarity of the discovery statute and the reduction of judicial discretion to determine whether certain burdens have been met to

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[291] *See id.* (denying defense request for an adjournment and requiring the trial to start).

[292] In numerous cases, judges have exercised discretion not clearly given in the reforms to simply deem Prosecution Certificates of Compliance valid, sometimes even when materials were simply not turned over in the first instance with a certificate. These judges have read in excuses of "reasonableness," "substantial compliance," or "prejudice." *See, e.g.*, People v. Portillo, 153 N.Y.S.3d 758, 780 (N.Y. Sup. Ct. 2021); People v. Nelson, 119 N.Y.S.3d 837, 840 (N.Y. Cnty. Ct. 2020); People v. Askin, 124 N.Y.S.3d 133, 139 (N.Y. Cnty. Ct. 2020); People v. Gonzalez, 130 N.Y.S.3d 262 (Table), at 4 (N.Y. Sup. Ct. 2020); People v. Davis, 134 N.Y.S.3d 620, 630–31 (N.Y. Crim. Ct. 2020); People v. Solano, No. 2019BX019412, slip op. at 4 (N.Y. Crim. Ct. 2021).

[293] *Solano*, slip op. at 4; *see also* People v. Rivera, No. CR-08908-21BX, slip op. at 3 (N.Y. Crim. Ct. 2021).

[294] *See Nelson*, 119 N.Y.S.3d at 839.

[295] *See id.* at 840.

[296] N.Y. CRIM. PROC. LAW § 245.10(B) (McKinney 2022) (as amended by 2020 N.Y. Sess. Laws Ch. 56 (S. 7506-B) at 349, enacted Apr. 3, 2020) (allowing extensions whenever the "discoverable materials are exceptionally voluminous" or are "not in the actual possession of the prosecution," among other carveouts).

[297] CTR. FOR CMTY. ALTS., ROLLBACKS TO BAIL AND DISCOVERY REFORM IN THE 2020 BUDGET 3 (2020), http://www.communityalternatives.org/wp-content/uploads/2020/06/budget-bills-overview.pdf [https://perma.cc/TH9K-GQQE].

justify the imposition of sanctions, courts have managed to undercut various portions of the new discovery reforms. Just as Feeley, Ostrom, and Hanson warned, the broad managerial powers of courts are a powerful tool that can either further reform or, as the examples above show, create serious obstacles.[298]

E. FINDING EXCEPTIONS TO NOT CHARGE SPEEDY TRIAL TIME

In some instances, judges have also refused to "charge" speedy trial time until discovery is complete. This issue is related to discovery sanctions but is a distinct statutory provision running in parallel to the discovery sanctions section.[299] The new statute did not directly change New York's speedy trial statute.[300] However, the reforms significantly altered the way time is accrued against the prosecution by tying the discovery obligations to the speedy trial clock.[301]

The pre-2020 speedy trial statute in New York only "charges" time against the prosecution in certain instances. First, time is charged when the prosecution is in a "pre-readiness" posture and has not yet become ready to proceed at all through indictment or information.[302] After the prosecution becomes ready, they are only charged when an adjournment is due to the prosecution not being prepared for trial on a given court date, and even then, only for as long as the prosecution states they need to become ready.[303] In reality, this means that the six months that a prosecution has in speedy-trial time for a felony can stretch out for years. The most significant moment is the initial statement of readiness, which previously only required the prosecution to say they were ready after the filing of an indictment or conversion of a misdemeanor case to an information.[304]

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[298] FEELEY, *supra* note 23, at 194–201; Ostrom & Hanson, *supra* note 39, at 58.

[299] N.Y. CRIM. PROC. LAW § 245.50(3) (McKinney 2022); *see also* N.Y. CRIM. PROC. LAW § 245.80 (defining sanctions).

[300] N.Y. CRIM. PROC. LAW § 30.30 (McKinney 2020) (unchanged by subsequent legislation); *see also Joint Legislative Hearing in the Matter of the 2019–2020 Executive Budget on Public Protection*, S. 1738, 2019 Leg., Reg. Sess. 2958 (N.Y. 2019) (not amending § 30.30).

[301] N.Y. CRIM. PROC. LAW § 245.80(3) (McKinney 2020) (adding a new requirement of certifying discovery before the prosecution can state ready for trial).

[302] *See* People v. McBee, 655 N.Y.S.2d 294, 295 (Kings Cnty. Sup. Ct. 1997); *see also* People v. Kendzia, 64 N.Y.2d 331, 337 (1985).

[303] *See* People v. Jaquez, 146 N.Y.S.3d 742, 749 (N.Y. Sup. Ct. 2021) ("[P]ostreadiness requests for adjournment are charged only until the date the People request . . . .").

[304] *Id.* (citing People v. Barden, 55 N.E.3d 1053, 1057 (N.Y. 2016)) ("[T]he People can stop the prereadiness clock at any time, simply by declaring their actual readiness . . . .").

The new statute means that prosecutors can no longer say they are ready for trial, and thereby stop the speedy trial clock immediately upon the inception of a case.[305] Instead, they must comply with discovery obligations before being able to state that they were ready.[306] The statute accomplishes this through a separate subsection on trial readiness that is unrelated to the preceding sections on timelines and does not require any showing, such as prejudice or exceptions for good cause.[307] Instead, this section tethers discovery compliance to the speedy trial requirement in general, not just as a sanction for late discovery or upon a showing of prejudice. The statute uses powerful language to define how speedy trial interacts with the discovery obligations. It states:

> Notwithstanding the provisions of any other law, absent an individualized finding of exceptional circumstances by the court before which the charge is pending, the prosecution shall not be deemed ready for trial for purposes of section 30.30 of this chapter until it has filed a proper certificate pursuant to subdivision one of this section.[308]

This phrasing explicitly excludes the effect of any law that would abrogate the charging of speedy trial time for failure to provide discovery.[309] This illustrates the legislature's intent to connect speedy trial to discovery, which was explicitly mentioned by the bill sponsors.[310] This also suggests that the legislature foresaw possible attempts to undercut this requirement by creating or applying exceptions from other areas of the speedy trial law.[311] The standard is also an unusually high one, requiring exceptional circumstances, and only as it relates to the case at hand. Finally, the word

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[305] *Id.* at 750 ("After January 1, 2020, the People could not be ready, and could not be found to be ready . . . until they filed a certificate of compliance with discovery.").

[306] *See* N.Y. CRIM. PROC. LAW § 245.50(3) (McKinney 2022).

[307] *Id.*

[308] N.Y. CRIM. PROC. LAW § 245.50(3) (McKinney 2022). Although the language of this section was changed slightly in the April 2020 "rollbacks" of the criminal legal reform, this language was in effect at the time the case example below was decided. *See* People v. Erby, 128 N.Y.S.3d 418, 421 (N.Y. Sup. Ct. 2020). The changes to the law, if anything, seem to strengthen this standard and apply an exception that is inapplicable here.

[309] N.Y. CRIM. PROC. LAW § 245.50(3) (McKinney 2022).

[310] Heastie, *supra* note 13 ("[The discovery amendments] require that the government certify it has met disclosure obligations before a statement of readiness is accepted.").

[311] The "notwithstanding the provisions of any other law" language is strong and exceptional language. *See* Cisneros v. Alpine Ridge Group, 508 U.S. 10, 18 (1993) ("As we have noted previously in construing statutes, the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section. Likewise, the Courts of Appeals generally have interpreted similar 'notwithstanding' language . . . to supersede all other laws, stating that '[a] clearer statement is difficult to imagine.'") (internal citations omitted).

"shall" reinforces that this is not a discretionary or circumstantial connection, and that a judge must charge the prosecution speedy trial time until they file a valid certificate of compliance upon fulfilling their discovery obligations.[312] The April amendments to the discovery law arguably made this section even more stringent, changing "exceptional" to "special," a standard that exists nowhere else in the penal law or criminal procedure law, but which, in New York's delinquency law under the Family Court Act, is considered a "stringent" burden.[313]

Along with the statutory language, the legislative intent is also clear. The sponsors' statement for the bill that originated the reform language indicates:

> Kalief's Law will ensure that a statement of 'readiness' is real by tying it to discovery requirements, requiring the People to possess evidence that they are in fact 'ready' for trial while allowing for flexibility when the facts merit additional time. According to a 2014 New York Law Journal article, 'A solution to the intertwined problems of extended pretrial incarceration and discovery delay is to *reunite the concepts of trial readiness and discovery compliance*.'[314]

Despite this, some New York judges have recently refused to read the statute as imposing speedy trial time for failure to file a valid certificate of compliance.[315] In perhaps the first case to issue a published decision on the new discovery law, the judge engaged in a policy analysis and examined the effect of the new law on the criminal legal system.[316] The judge refused to charge the prosecution speedy trial time despite a lack of a certificate of compliance since such a reading would result in cases being dismissed and accused individuals going free, stating, "[T]his Court finds it difficult to conclude that legislators would be unconcerned with 'disastrous consequences' wrought by [this] legislation."[317] The judge went on to detail examples of prosecutors finding the requirements too onerous. The judge believed a prosecutor who had attempted due diligence but failed to meet the burden put upon him by C.P.L. § 245 should not face a sanction or be charged speedy trial time. The judge then indicated that "powerful policy

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[312] The bill's drafter, Assembly Member Heastie, also refers to this as a new "requirement" of stating ready. *See* Heastie, *supra* note 13.

[313] Merril Sobie, *Practice Commentaries*, N.Y. FAM. CT. § 340.1 (McKinney 2022) ("Unlike CPL 30.30, Family Court Act § 340.1 is a true 'speedy trial' provision, in that both its language and its underlying purpose are directed toward bringing the accused juvenile to trial within a specified period (barring 'special circumstances') . . . .").

[314] Sponsor's Memorandum from Jamaal T. Bailey, N.Y. State Sen., in support of S. 1738, 2019 Leg., Reg. Sess. (N.Y. 2019) (emphasis added).

[315] *See, e.g.*, People v. Askin, 124 N.Y.S.3d 133, 138–39 (Nassau Cnty. Ct. 2020).

[316] *See* People v. Erby, 128 N.Y.S.3d 418, 421 (N.Y. Sup. Ct. 2020).

[317] *Id.* at 629. *But see* People v. Jaquez, 146 N.Y.S.3d 742, 749 (N.Y. Sup. Ct. 2021).

considerations" raised by the prosecution would make the defense's literal reading of § 245 problematic as it would require the prosecution to continue to be charged for a speedy trial violation until they certified that their discovery was complete.[318]

The decision goes on in dicta to establish several ways the requirement can be bypassed, by finding due diligence on the prosecutor's part, or by applying the higher standards required for sanctions onto the speedy trial section (and thereby not charging speedy trial at all unless the defense is actually prejudiced by a late disclosure), or by finding good cause to alter the timelines.[319] Though ultimately decided on a rather narrow legal issue, the decision urges the legislature to change the law and provides arguments for prosecutors to make if they seek to avoid the implications of the new discovery law.[320]

The decision could not be appealed given the lack of interlocutory appeals on bail issues, but it was challenged through a writ of habeas corpus with the intention of that proceeding then allowing an appeal.[321] The writ was rejected twice for not yet being ripe as the trial judge was finalizing a written motion.[322] A third judge finally decided the issue on the merits and found the initial judge had not abused his discretion.[323] This was a prerequisite to appeal, but as the writ was pending appeal, the accused individual posted bail and was released, rendering the appellate decision on his unlawful detention moot and requiring counsel to withdraw the motion.[324] The difficulty in seeking appellate review of lower court interpretations of the reforms is discussed further in Section III.A below.

F. IMPOSING REQUIREMENTS THAT PREVENT MEANINGFUL DISCOVERY ENFORCEMENT

Finally, judges and judicial leadership imposed requirements on the discovery process that acted to further erode the reforms. As indicated above, the main consequence for failure to provide discovery is charging speedy trial time against the prosecution. Judges began to impose a requirement that any challenge to discovery be filed in writing. This requirement places the defense in a situation where, to assert their discovery rights, they must then file a motion which stops speedy trial time from accruing. If the prosecution

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318 *Erby*, 128 N.Y.S.3d at 422.

319 *Id.*

320 *Id.*

321 People *ex rel.* Petrigh v. Brann, No. 400136/2020 (N.Y. App. Div. filed May 20, 2020).

322 *Id.*

323 *Id.*

324 *See, e.g.*, People *ex rel.* McAdoo, 818 N.Y.S.2d 847, 848 (2006).

does not turn over discovery, and the defense waits for speedy trial time to accrue before challenging the certificate and filing for a speedy trial dismissal, judges deny those motions because of the defense "lying in wait."[325] Alternatively, if the defense immediately challenges the discovery in writing as soon as practicable, judges find that the act of challenging discovery stops the speedy trial clock, meaning that no meaningful sanction is possible.[326]

Even if the defense notifies the prosecution informally through emails that discovery is missing and only files a motion after repeated failure, judges have refused to charge speedy trial time.[327] In one egregious case, the defense made a specific demand for a physical examination of a complaining witness to be turned over and was told by the prosecution that no such examination existed.[328] A year later on the eve of trial, the prosecution turned over the exculpatory examination, and the defense challenged the Assistant District Attorney's discovery compliance because they had failed to provide it sooner.[329] The motion to charge speedy trial time was denied because a sooner challenge had not been brought, and the defense was accused of "laying in wait."[330]

Large scale judicial resistance to discovery also grew over time.[331] In December 2021, Brooklyn Supervising Judge Keisha Espinal issued an order that explicitly limited discovery challenges in the borough by imposing a new requirement.[332] The memorandum precluded defense challenges to discovery unless the defense first drafted a joint letter with the district attorney identifying the items at issue within a certain time frame, a restriction that does not exist in the statute and was created by the supervising judge.[333] The memorandum did not cite to any legal authority to impose the requirement,

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[325] *See* People v. Randolph, No. 2326-2019 (N.Y. Sup. Ct. June 29, 2021) (order charging the People with only 94 days of trial readiness delay).

[326] People v. Silva, No. 02185-19 (N.Y. Sup. Ct. Oct. 26, 2021) (finding that although the Prosecution failed to provide required discovery and therefore speedy trial time should be charged, that the motion to challenge discovery compliance stopped the speedy trial clock based on binding pre-reform precedent).

[327] *See, e.g.*, People v. Irizarry, No. 1352/19 (N.Y. Sup. Ct. Sept. 13, 2021).

[328] *Id.*

[329] *Id*.

[330] *Id*.

[331] George Joseph, *Brooklyn Judge Curbs Defendants' Rights to Challenge DAs On Evidence Sharing*, GOTHAMIST (Nov. 30, 2021), https://gothamist.com/news/brooklyn-judge-curbs-defendants-rights-to-challenge-das-on-evidence-sharing [https://perma.cc/NKZ5-7PU7] (detailing how a new borough-wide order undermined the defense's ability to challenge lacking discovery).

[332] *Id.*

[333] *Id.*

but a court spokesperson later indicated that it came from the catch-all language allowing "a court to order 'measures or proceedings designed to carry into effect the goals' of the law."[334]

This may appear to be a reasonable attempt at judicial compromise at first glance. However, it directly thwarts the purpose of the reforms in creating a framework where the burden for discovery falls on the prosecution with continued consequences in the form of speedy trial time or sanctions.[335] The memorandum undermines this framework because the requirement to confer and agree on discovery issues within a certain amount of time shifts the burden back to the defense to identify issues with the prosecution's discovery, just as the old system did.[336] The NSYBA memorandum highlighted the need for automatic discovery to prevent needless demands by the defense and to also avoid situations where the prosecution believes evidence is immaterial because they do not know or understand the defense's theory.[337] The conferral requirement is a reintroduction of a type of defense demand for discovery that NYSBA and the drafters of the new discovery statute rejected.[338]

The memorandum's strict timeframe for the defense to raise a challenge also clashes with the speedy trial enforcement mechanism of the discovery statute. If the prosecution and defense do not agree on a letter before the next court date, the challenge would be waived, and the only recourse for the defense would be to file a motion within Judge Espinal's newly imposed timeframe.[339] But as discussed above, doing so stops the speedy trial clock for the prosecution, which is why many defense attorneys would wait until speedy trial time had run to file a discovery challenge and only informally communicate with prosecutors to inform them of missing discovery.[340]

The statute incentivizes a prosecutor to be diligent, because if they file deficient discovery, then speedy trial time could continue to run against them. After Espinal's order, a prosecutor has no such incentive, because if they file deficient discovery, they can wait for the defense to raise it and will suffer

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[334] *Id*.

[335] *Id.* (citing Yung-Mi Lee, Legal Director of Brooklyn Defender Services' Criminal Defense Practice, saying that Judge Espindal's plan "impermissibly shifts the burden to the defense to request discovery that by law should automatically be provided by the DAs.").

[336] Schwartzapfel, *supra* note 8.

[337] *See* N.Y. STATE BAR ASS'N, *supra* note 10, at 5.

[338] *Id.*

[339] Joseph, *supra* note 331.

[340] *Id*.

no consequence until then.[341] This new requirement undid the very structure imposed by the statute, which mandated automatic discovery and tied this requirement to the speedy trial statute as an enforcement mechanism.[342] It also had no basis in the law other than the general catch-all powers judges retained to manage discovery and encourage communication between the parties.[343]

Unlike the piecemeal chipping away by judges, this borough-wide memorandum drew attention from the legislators who enacted the reform law and led to a public heated argument between the legislators and the judiciary.[344] A drafting assemblyman, Joseph Lentol, criticized the new requirement, stating, "The law is very explicit. That's what needs to be followed, not the dictates of a human being so that the intent of discovery could be thwarted."[345] Other assemblymen indicated they found the language "troubling" and cautioned that it "contradicts the legislature's intent and the very spirit of the [discovery] law," and they were hoping for a discussion with the judges on how to prevent the erosion of the reforms.[346]

Rather than modifying these new requirements, judicial leadership in Brooklyn dug in further, and a court spokesperson dismissed legislative criticism. Referring to the legislators, the spokesperson indicated:

> If all the self-appointed judicial scholars and armchair judges sought to come to Brooklyn Criminal Court and see Judge Espinal's innovative initiative in action before declaring it improper and subject to reversal, then they would be a part of our continuing efforts for normalization of court operations and eradication of case backlogs, not an impediment.[347]

Brooklyn's court leadership never withdrew this requirement of a written objection and held it up as a model for other boroughs to implement.[348]

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[341] In *Silva*, the court acknowledges the outcome that by moving to challenge deficient discovery the defense actually prevents the very remedy they seek, but the Court considered itself bound by pre-reform caselaw on how speedy trial time is calculated and invited an appellate court to revisit the issue. People v. Silva, No. 02185-19 (N.Y. Sup. Ct. Oct. 26, 2021). In a catch-22, by not challenging discovery in this way, other judges have said the defense waives any right to a remedy as well. *See e.g.*, People v. Randolph, No. 2326-2019 (N.Y. Sup. Ct. June 29, 2021).

[342] N.Y. CRIM. PROC. LAW § 245.10 (McKinney 2022); *id.* § 245.50 (McKinney 2022).

[343] Joseph, *supra* note 331.

[344] George Joseph, *Lawmakers Accuse Brooklyn Judge of Subverting NY's Landmark Discovery Reforms*, GOTHAMIST (Dec. 2, 2021), https://gothamist.com/news/lawmakers-accuse-brooklyn-judge-of-subverting-nys-landmark-discovery-reforms [https://perma.cc/7VPV-6C3V].

[345] *Id.*

[346] *Id.*

[347] *Id.*

[348] *Id.*

Though no other borough explicitly imposed this requirement through OCA memorandum, the same reasoning is used in judicial opinions such as *Randolph* and *Irizzary* and is further proof that judges and judicial leadership worked to obstruct the reforms. [349] This was a direct curtailment of the reforms but also caused symbolic harm by publicly showcasing judicial leadership's opposition. As noted in the article on the public disagreement, "Brooklyn's new initiative may reflect a growing trend within New York's judiciary to shoot down attempts to penalize prosecutors for missing evidence."[350]

III. PROPOSED ACTIONS

A. EXPEDITED, INTERLOCUTORY APPEALS

A potential solution to address certain types of judicial resistance to reforms is expedited interlocutory appeals. Generally, a person accused of a crime in New York cannot take an interlocutory appeal from an unfavorable decision. A case must be final before an appellate court can review the judgment, which can render an issue moot by the time an appeal is eligible to be heard.[351] Not only that but often the issue is not addressed on the merits at the appellate stage because of a harmless error analysis. Even if other actors in the judicial system believe that the examples of resistance above are improper, the opportunities to challenge these actions are limited.

For example, judicial bypass of bail requirements and procedures for re-arrests would be difficult to raise to an appellate court. The violations of the statute are moot once a proper hearing is conducted on a re-arrest or if the accused is able to pay bail or takes a plea.[352] Even if there was an extended period of unlawful custody, there is no remedy for release once the actual hearing is conducted and the statute complied with. While there is a body of *habeas corpus* case law to challenge and then appeal pretrial detention, the timeframe makes it so that an appellate court may never be able to address the violations committed in the pretrial process.[353] Appeals entail a long and complicated process that can often be decided on procedural grounds rather

[349] People v. Randolph, No. 2326-2019 (N.Y. Sup. Ct. June 29, 2021)*;* People v. Irizarry, No. 1352-19 (N.Y. Sup. Ct. September 13, 2021).

[350] Joseph, *supra* note 331.

[351] People *ex rel.* Chakwin v. Warden, 63 N.Y.2d 120, 123 (1984).

[352] *See, e.g.*, People *ex rel.* McAdoo v. Taylor, 818 N.Y.S.2d 847, 848 (N.Y. App. Div. 2006); s*ee also* People *ex rel.* Patterson v. Krapf, 162 N.Y.S.3d 918, 921 (N.Y. Sup. Ct. 2022).

[353] *See* McAdoo, 818 N.Y.S. at 848; *see also* Patterson, 162 N.Y.S. at 921.

than the merits of someone's wrongful incarceration.[354] Finally, most cases resolve with a plea deal, and most pleas include a waiver of the right to appeal certain issues, making appellate review unlikely in the current scheme.[355] Expanding and expediting opportunities for appeal would drastically change the number of cases where meaningful review occurs.

The New York criminal legal reforms do allow for expedited review of certain issues.[356] For example, under the new discovery statute, prosecutors can avoid disclosure with a protective order.[357] Ordinarily, there would be no appellate ruling on protective orders until a case became final and was appealed after conviction, but the new discovery statute created an expedited review scheme.[358] This new procedure allows protective orders to be appealed immediately by either side to a single appellate judge of the intervening appellate court.[359] This judge reviews briefings, hears informal arguments, and then issues an expedited opinion.[360]

A body of case law now exists that provides clarity in the protective order context that does not exist for other areas of the reforms.[361] These interlocutory appeals allowed appellate judges to stop the lower courts' practices of granting blanket requests for any grand jury minutes to be kept from an accused person[362] or allowing ex parte applications for protective

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354 *See, e.g.*, People *ex rel.* Petrigh v. Brann, No. 400136/2020 (N.Y. App. Div. filed May 20, 2020).

355 Barbara Zolot, Opinion, *The Government Tool You've Never Heard of That Conceals Police Misconduct*, N.Y. L.J. (Sep. 18, 2020), https://www.ils.ny.gov/files/NYLJ.Appeal%20Waivers.pdf [https://perma.cc/QXU5-CS5A] (advocating for a challenge to the widespread practice of waivers of rights to appeal because they undermine the ability of appeals courts to correct trial court practices concerning suppression and other legal issues).

356 *See* N.Y. CRIM. PROC. LAW § 245.70(6) (McKinney 2020).

357 N.Y. CRIM. PROC. LAW § 245.70 (McKinney 2020).

358 N.Y. CRIM. PROC. LAW § 245.70(6)(a) (McKinney 2020).

359 *Id.*

360 *Id.*

361 *See, e.g.*, People v. Swift, No. 62172, slip op. at 1 (N.Y. App. Div. Jan. 27, 2020) (reversing lower court grant of a protective order that kept materials from being possessed by the accused person). In contrast, the speedy trial decisions discussed above in *Irizarry*, *Silva*, and *Erby* could not be appealed interlocutory and, in fact, are unlikely to ever reach an appellate court, since most pleas involve a waiver of right to appeal.

362 *See, e.g.*, People v. Mena, No. M-526, slip op. at 1 (N.Y. App. Div. Jan. 31, 2020) (order permitting defense counsel to give the defendant a copy of grand jury testimony and rejecting lower court reasoning that grand jury secrecy meant all grand jury minutes may automatically be kept from someone accused of a crime).

orders in all cases,[363] just to name a few examples. This shaped future requests and altered the practices of trial level judges and district attorneys.

A similar expedited review scheme for other issues could help prevent some fringe readings of the statute. Before a binding case is decided based on a new statute, a person accused of a crime could have a right to an expedited review by a single judge. Like the protective order decisions, these reviews would be brief and fact-specific, but could still provide guidance and winnow away extreme cases. This would also serve as a stop gap until an appellate court received an opportunity to review the decision as a matter of first impression. This would also allow more flexibility in responding to the creative and unforeseen actions of some judges. The clarity it would provide to prosecutors would also aid in ensuring that the prosecutors are complying with the new requirements, while also limiting the likelihood of widespread reversible convictions occurring during the period when new reforms are still being interpreted.[364]

Appellate review does not reach every issue. The OCA directive allowing an accused individual to be held pending a hearing, the judicial refusal to grant adjournments, and the judicial abrogation of the discovery sanctions are issues that shape the implementation of the reforms but may never reach appellate review.[365] Nevertheless, appellate review can shape issues beyond the immediate case by supporting the legitimacy of the legislation, clarifying provisions, and correcting lower court interpretations that undercut the reforms.

B. TRACKING JUDICIAL COMPLIANCE

The media scrutinize judicial decision-making, and more recently cover those stories in the context of the reforms.[366] Mostly, outlets focus on the negative effects of the reforms and single out when individuals are released, although there are certainly stories covering the positive aspects.[367] This is a haphazard monitoring system and, as discussed above, is most likely an

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[363] *See, e.g.*, People v. Bonifacio, 117 N.Y.S.3d 702, 705 (2020) (rejecting lower court reasoning that a protective order application could be ex parte simply by virtue of involving materials that the prosecution seeks to have protected).

[364] *See, e.g.*, *Swift*, No. 2020-00417; *Bonifacio*, 117 N.Y.S.3d at 705.

[365] *See* Zolot, *supra* note 355 (discussing the power of waivers of appeal in precluding review of most issues by higher courts). Also, as Roth notes, this issue is even worse in misdemeanor courts where "for a variety of reasons—including the relative brevity of most sentences imposed—very few defendants [. . .] file an appeal or seek collateral review of their convictions." Roth, *supra* note 41, at 236 n.130.

[366] Ostrom & Hanson, *supra* note 47, at 104-05.

[367] *Id.*

incentive for judges to oppose the reforms.[368] A formal monitoring system by the court leadership or a third-party nonprofit or agency could set up a mechanism to monitor the court's compliance.

As an example, New Jersey mandated yearly reports to the legislature and governor from the judiciary accounting for the status of the bail reforms.[369] New York imposed a similar requirement on its judiciary in the April 2020 amendments, but this did not go into effect until July 2021.[370] The accounting and transparency did not lead to significant changes in judicial resistance, such as the withdrawal of OCA's directive on re-arrests. New York courts are now collecting this data and generating reports, but more must be done to ensure this data is used to monitor judicial compliance with the reforms in a meaningful way.[371] There should be oversight either from court leadership if they have the will to do so, from another agency with some manner of enforcement powers, or from the public directly.[372] Whatever the method, it is important that the data collection carries consequences for the judiciary's efforts at implementation, rather than merely being posted to a website and ignored.

C. ELIMINATION OF JUDICIAL DISCRETION

The most straightforward, but also potentially most problematic, solution would be to eliminate the opportunity for judicial resistance by even further curtailing judicial discretion. While perhaps not a good solution, given the other issues that would arise, it is worth consideration as a direct solution, as it would eliminate the possibility of certain types of judicial resistance.

One example where this solution seems potentially feasible at first glance is partially secured bail. As the Court Watch report above showed, judges circumvented the partially secured bail requirement by setting a higher partially secured bail amount, undoing the benefit of this form of

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[368] Roth notes various ways that even unelected judges who appear "soft on crime" are still vulnerable to the public opinion, given that appointments, budgets, and other actions by related actors can negatively impact the judges' power. Roth, *supra* note 41, at 230.

[369] GLENN A. GRANT, N.J. JUDICIARY, CRIM. JUST. REP. TO THE GOVERNOR & LEGISLATURE 2, 20 (2017), https://www.njcourts.gov/sites/default/files/2017cjrannual.pdf [https://perma.cc/G8AJ-HZYY].

[370] N.Y. EXEC. LAW § 837-u (McKinney 2022).

[371] Roth, *supra* note 41, at 231.

[372] Roth, *supra* note 41, at 227–29 (examining how the nature of misdemeanor criminal court amplifies the ways organizational culture can impede reforms, and urging incremental reforms, collaboration with local court leadership, and continued data monitoring).

bail.[373] As other judges have noted, this is clearly a violation of the intention of the bail law.[374]

There are a few ways to eliminate discretion in this way in order to prevent circumvention of the legislature's intention. Judges could be required to set bail in the same amount, despite the format of the bond. In such a system, judges would set the same amount for a bail bond provided by an insurance company and a bond paid directly to the court. However, this would not prevent judges from merely setting bond amounts higher for both––raising the insurance company bond to match the partially secured amount, rather than lowering the partially secured bond.

Another option is that discretion could be removed entirely by setting pre-determined bail amounts based on charges or criminal history. Other jurisdictions have set bail tables that accomplish this, sometimes without an initial court hearing since there is no judicial discretion in the process.[375] However, this method would likely be onerous to individuals accused of a crime because it eliminates judicial discretion to set a lower bail, and it does not allow for explanations of circumstances that may account for someone's history or previous failure to appear, among other factors. This would also make it difficult to account for an individual's ability to pay, which would only serve to further increase pretrial jail populations, instead of accomplishing the aim of the reforms.

Finally, discretion could be removed, and the pre-determined outcomes could all mandate release even more regularly. However, such a system removing any ability for a judge to detain someone accused of a crime would be a stark departure from current practice.[376] The current New York system already removes discretion in practically every non-violent offense. But, as several examples above illustrated, judges find ways to set bail in those cases regardless.[377] In New Jersey, judges retained the ability to remand a defendant, yet saw greater compliance with the law and a reduction in the pretrial jail population despite retaining judicial discretion.[378] Limiting

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[373] CT. WATCH NYC, s*upra* note 194.

[374] People v. Portoreal, 116 N.Y.S.3d 514, 526 (N.Y. Sup. Ct. 2019).

[375] Patrick Orsagos, *A Tour of Bail: How Other States Have Reformed the Money Bail System*, W. VA. PUB. BROAD. (Aug. 23, 2021, 12:05 PM), https://www.wvpublic.org/top-stories/2021-08-23/a-tour-of-bail-how-other-states-have-reformed-the-money-bail-system [https://perma.cc/LH85-2EFM] (detailing states that have reformed bail, including Ohio which shifted to requiring judges to follow predetermined bail schedules).

[376] *See* People *ex rel.* McManus v. Horn, 967 N.E.2d 671, 674 (N.Y. 2012).

[377] *See supra* Sections II.A, B, C.

[378] *See supra* Section II.B.

judicial discretion to set bail does not answer the problem of uneven implementation of bail reform.

In other areas of the reform, curtailing discretion seems even less feasible or desirable. Oftentimes, doing so would not be constitutional, and in others, it would simply not be practicable. Certainly, there is no way to remove judicial power in interpreting a statute or making determinations of good cause or due diligence. It would be challenging to make certain statutes like the speedy trial discovery section any clearer or to remove any exceptions for the prosecution to not provide discovery that they simply cannot obtain. It would also not be practical to limit the court's ability to control its own calendar, even though that power gives courts leeway in undercutting timeframes or sanctions.

While removing discretion altogether is not feasible, it is still worth considering the effect of discretion within the few sections of the reforms where it is retained. A report estimating the projected increase in jail populations from the April rollbacks pointed to the creation of several new ambiguous criteria for setting bail that required judicial interpretation.[379] The report from the Center for Court Innovation, a non-profit agency retained by the Unified Court System for research and monitoring, estimates the effect of statutory changes on pretrial jail populations. The Report points to judicial discretion as a possible factor increasing pre-trial jail populations and warns that increasing the ambiguous categories in the rollbacks means that "[j]udges may engage in more inclusive interpretations of certain discretionary provisions regarding who is bail-eligible"[380] The Report goes on to acknowledge that judges may feel pressure to adopt these expansive interpretations because of perceived increases in violent crime or concerns regarding public perception in releasing individuals accused of certain offenses.[381]

Notably, the amendments added more ambiguous statutory language than the original law. Perhaps the loss of political will made it difficult to attain the same clarity in mandating release or perhaps the legislature was trying to accommodate the judiciary's discomfort at having lost its customary discretion. But as the Center for Court Innovation Report points out, adding ambiguous statutory justifications for setting bail without more is an

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[379] MICHAEL REMPEL & KRYSTAL RODRIGUEZ, CTR. FOR CT. INNOVATION, BAIL REFORM REVISITED: THE IMPACT OF N.Y.'S BAIL LAW ON PRETRIAL DET. 17 (2020), https://www.courtinnovation.org/sites/default/files/media/document/2020/Bail_Reform_Revisited_050720.pdf [https://perma.cc/6MXG-KWTS].

[380] *Id.*

[381] *Id.*

invitation for judges to expand the scope of bail eligible offenses.[382] These predictions proved true, and a follow-up report by the Center for Court Innovation found that the amendment allowing bail to be set when it involved "harm to an identifiable person or property" increased bail because it did not define harm and allowed judges to expand eligible cases.[383] The report found that 85% of the increase in new bail cases after the April 2020 amendment was attributed to the addition of this single provision.[384] Even if eliminating more judicial discretion is not desirable, efforts could be made to limit ambiguous provisions that can be exploited, like those added in the April 2020 rollbacks.[385]

Based on the initial results for pretrial incarceration and the projected result from returning some discretion, it appears that the effectiveness of New York's reforms is tied to the removal of discretion itself. The level of discretion was balanced well in the initial reforms from a results-oriented perspective, given that subsequent reintroductions of discretion have increased the number of cases where bail is set. The removal of judicial discretion may be one reason for judicial resistance, but it may be a worthwhile tradeoff if it still results in an overall more effective and uniformly implemented reform.

D. ACCOUNTING FOR (AND SCRUTINIZING) JUDICIAL CULTURE

The final possible solution returns to the two root causes for this obstruction discussed in Part I: New York's court culture and its sensitivity to political pressure.[386]

The political and media pressure on judges is a major force acting on judicial behavior, independent from the written law or structure of a court system.[387] The judge discussed in Part I, who commented that setting bail is the safer career choice for a judge, may seem cynical, but this commentary reflects the actual incentives imposed on judges by the political system and the media.[388] Judges in New York have been removed, have lost elections, or have been placed in undesirable positions for being too lenient.[389] But it is

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[382] *Id.*

[383] REMPEL & WEILL, *supra* note 21.

[384] *Id.*

[385] *Id.*

[386] *See supra* Section I.C.

[387] Roth, *supra* note 41, at 230.

[388] Covert, *supra* note 98.

[389] Recently, judges who were written about negatively for lenience in the Bronx youth part, a relatively prestigious felony part assignment, were each removed from that court part

difficult to find situations where a New York judge faced such a consequence for being too harsh. Numerous *New York Post* articles criticize judges for releasing an individual, often based on information released by police unions and district attorneys' offices.[390] But there are many fewer articles on the even more numerous success stories of bail reform.[391] Even with the infamous case of Kalief Browder, the judges who set bail and continued to deny release are not even named in the initial reporting about Mr. Browder's lengthy and unjust pretrial incarceration.[392]

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shortly after the articles were written—first, Judge Denis Boyle, and then Judge Naita Semaj. *See* Jorge Fitz-Gibbon, *Controversial NYC Judge Denis Boyle No Longer Handling Youth Cases*, N.Y. POST (Feb. 2, 2022, 2:17 PM), https://nypost.com/2022/02/02/controversial-nyc-judge-denis-boyle-no-longer-handling-youth-cases [https://perma.cc/J63V-2438]; Tina Moore, Larry Celona, Dean Balsamini & Melissa Klein, *'Agenda-Driven Judge' Who Cut Teen Rapper C Blu Loose Is Partially Responsible for NYC Crime Surge*: *Source*, N.Y. POST (May 21, 2022, 6:41 PM), https://nypost.com/2022/05/21/judge-who-cut-c-blu-loose-is-partially-responsible-for-nyc-crime-surge-source [https://perma.cc/S6PX-R9XD]. Administrators denied that motivation and indicated that Judge Boyle was moved at his own request and Judge Semaj was moved to an equally important court part. *See also* Daniel Leddy, *Brock Turner Case and Judge Titone's Blunt Warning (Commentary)*, STATEN ISLAND LIVE (Sep. 12, 2016, 3:06 PM), https://www.silive.com/opinion/danielleddy/2016/09/brock_turner_case_and_judge_ti.html [https://perma.cc/4BUM-WKB4].

[390] *See*, *e.g.*, Joe Marino & Bruce Golding, *Ex-Con Who Went on Lam Thanks to Soft-on-Crime NYC Judge Busted in Puerto Rico*, N.Y. POST (July 13, 2022, 5:07 PM), https://nypost.com/2022/07/13/ex-con-who-fled-nyc-after-no-bail-release-busted-in-puerto-rico [https://perma.cc/258U-T5YX]; Larry Celona & Bruce Golding, *Manhattan Judge Frees Alleged Looter Busted in Bloody Attack on NYPD Cop*, N.Y. POST (June 12, 2020, 1:39 PM), https://nypost.com/2020/06/12/nyc-judge-frees-alleged-looter-accused-in-bloody-attack-on-nypd-cop/ [https://perma.cc/7EES-968R]; Bruce Golding, Larry Celona & Reuven Fenton, *Convicted Killer Released Without Bail by Judge with Political Connections*, N.Y. POST (Oct. 23, 2019, 10:08 PM), https://nypost.com/2019/10/23/convicted-killer-released-without-bail-by-judge-with-political-connections [https://perma.cc/883W-M8XJ]; Larry Celona, Rebecca Rosenberg, Kevin Sheehan & Jorge Fitz-Gibbon, *Bronx Judge Cut Teen Loose After Murder Rap, Slashing*, N.Y. POST (Dec. 28, 2020, 6:37 PM), https://nypost.com/2020/12/28/bronx-judge-cut-teen-loose-after-murder-rap-slashing [https://perma.cc/4MJQ-HF2E]; Rebecca Rosenberg, *Controversial Bronx Judge Releases Alleged Rapist Without Bail*, N.Y. Post (Aug. 10, 2020, 4:50 PM), https://nypost.com/2020/08/10/controversial-bronx-judge-releases-alleged-rapist-without-bail [https://perma.cc/Q477-6DAT].

[391] Covert, *supra* note 98 ("Though instances of people committing crimes while on pretrial release are the incredibly rare exceptions to the rule, they become 'the dominant story that's being told, even when it's not based in facts' . . . .'"). This is partially due to the confidentiality issues and fear of speaking presented by an open case, but also because compared to the occasional sensational bad situation, for bail reform "the reality is that success often looks far more mundane." *Id.*

[392] Jennifer Gonnerman, *Before the Law*, NEW YORKER (Sep. 19, 2014), https://www.newyorker.com/magazine/2014/10/06/before-the-law [https://perma.cc/4JDG-VPD3].

Since job security ultimately rests with the public, a political party, or the governor, judges in New York are attuned to the political will for reform.[393] In court cultures like New York, reforms work when judges are either responding to the political will, like legislators, or when they feel that they are insulated from that will enough to be truly independent to do what is fair and right under the law.[394]

Feeley made this issue of incentives central to successful reforms.[395] He acknowledged that, along with fragmentation and resource issues, some reforms fail at the implementation stage due to value conflicts and because judges disagree with the intended result.[396] If it is not possible to have a meeting of the minds, then "to be successful, reformers must ultimately alter the incentives of those whose behavior they wish to change."[397] But what would that look like in this context, when the incentives are shaped by the politics of New York's judicial selection process? Short of a reshaping of the judicial appointment structure, there are perhaps two means of altering incentives: ensuring clear and consistent messaging and enforcement from judicial leadership and applying continued scrutiny on the judiciary by reform leaders, whether that be politicians or the movements that spurred reform.

When the new reform laws went into effect, judicial seminars and trainings were scheduled to help judges understand the new law.[398] However, these substantive trainings would not necessarily have done much to foster a culture that was receptive to the reforms if the underlying issue was perverse incentives rather than a lack of understanding. The trainings were coordinated and run by the Office of Court Administration, who often opposed the reforms, both informally from statements of court leadership and officially through its actions, such as the memorandum that bypassed the reformed procedure for re-arrests and the discovery order that limited defense challenges.[399] Teaching a judge the particularities of a law is just as likely to give them ammunition to bypass it as it is to encourage them to follow it.[400]

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393 Leddy, *supra* note 389.

394 Roth, *supra* note 41, at 230.

395 FEELEY, *supra* note 23, at 191–92.

396 *Id*. at 198. ("New policies emphasizing one set of values do not neutralize long-held views to the contrary.")

397 *Id.* at 198–99.

398 Whittaker, *supra* note 147 (referring to an assertion by Chief Judge Marks that "judges have received extensive training on the original legislation and the 2020 revisions through a mix of in-person training at judiciary seminars and online training modules.").

399 Brand, *supra* note 235; OCA Directive 2020-04.

400 *See* also FEELEY, *supra* note 23, at 199. Feeley mentions that it is in the most mundane implementation of a law that judges retain the power to undermine it. *Id.*

As one legislator commented to Chief Judge Marks when discussing the sufficiency of judicial trainings on reforms, in "some cases, judges know the law but apparently purposefully flout it."[401]

The OCA also undermined the reforms through directives that bypassed the newly-created restrictions for bail on re-arrested individuals and stymying the efforts of defense attorneys to enforce the discovery reforms.[402] Along with their direct effects, these directives also obstructed the reforms more broadly by signaling to individual judges that judicial leadership at the highest levels was opposed to the reforms and willing to resist the new law openly and directly.[403] Judicial leadership must take measures to ensure compliance with the law, but instead is supporting obstruction through these actions. At a recent hearing on the reforms, a legislator who lamented this "inconsistent application" of the new laws asked Chief Judge Marks, "What are the consequences for those judges who flout the law?" and was met with a response from Marks that denied judges did such a thing at all.[404]

Even though widespread judicial agreement with every law should not be a prerequisite to its passage, an acknowledgement of judicial opposition is important. The reality is that the judiciary has the means of holding the implementation process hostage. Feeley suggests that, "[a]lthough the idea for reform can start with policy advocates on the outside, or higher level judges within the state judiciary, the idea is unlikely to succeed without the commitment of leadership within each courthouse."[405] Roth also notes that including the lowest level stakeholders in the process can go a long way in allowing reforms to succeed, stating, "When those actors do not feel that their concerns have been heard, they can resort to various measures—including 'avoidance, evasion, and delay'—to avoid change. But if they are made to feel part of the process, they are more likely to cooperate."[406]

An open dialogue is not enough if state-level judicial leadership does not persuade, incentivize, or pressure individual courthouse leadership to accept reforms, who then must do the same to influence individual judges.[407]

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[401] Whittaker, *supra* note 147.

[402] OCA Directive 2020-04; Joseph, *supra* note 331.

[403] In regards to judicial resistance to change, Roth stated, "The key is to identify which if any cultural assumptions and artifacts are hindering the desired change, and focus on those." Roth, *supra* note 41, at 228. The OCA memo was an example of what happens when those assumptions are not addressed. The positive feedback of symbolism that Roth and Feeley discuss can accompany successive reforms instead turns into a negative feedback cycle, with OCA's actions becoming a symbol to inspire further obstruction.

[404] Whittaker, *supra* note 147.

[405] Roth, *supra* note 41, at 230 (citing FEELEY, *supra* note 23, at 36).

[406] *Id.* at 227 (quoting FEELEY, *supra* note 23, at 55).

[407] *Id*. at 230.

But such a dialogue with the top judiciary would at least reinforce that they are implementing the political will, despite any political fights or media backlash. Dialogue about the reforms may incentivize the judiciary to support them by shoring political will and affecting popular opinion, but it is not the only or even perhaps surest way to get at the actual incentives themselves.

This discussion of reforms in the political arena is beneficial in its own right. It is preferable to have the fight for reforms in the political arena of a state legislature rather than in a subconsciously politically-motivated courthouse.[408] In the courts, judges can sabotage reforms while remaining unclear in their motivations.[409] They may disagree with reforms, or feel political pressure, but be unwilling to say so explicitly and, instead, find arcane means of hobbling reforms.[410] Few judges engage in a political conversation as the judges in *Johnston* or *Erby* did.[411] Mostly, judges find legal bases to bypass the law that are within their discretion. Examples of this type of opposition are the use of adjournment power to bypass discovery requirements,[412] the imposition of higher standards for discovery sanctions,[413] the expansion of bail eligible cases,[414] and bypassing the requirement of partially secured bail.[415] Further, judges usually couch their reasoning in the particularities of the case before them, which makes the reasoning of a case a poor avenue to discuss broad systemic reforms. It is far more preferable to have the conversation about reform in a political forum where the language and intent of the law is being addressed, rather than in the interpretive process where judges then have broad powers to surreptitiously undermine the legislation.

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[408] FEELEY, *supra* note 23, at 222 (quoting STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS (1974)) ("[A] quest for rights is most likely to be effective as part of a political effort, not as a substitute for politics.").

[409] Feeley devotes some time to the dangers of reform through litigation, although he concludes courts can still play an important role as the impetus of some reforms. He collects examples from critics that illustrate that "courts possess neither the competence nor the capacity to resolve social issues." *See* FEELEY, *supra* note 23, at 211 (citing DONALD L. HOROWITZ, THE COURT AND SOCIAL POLICY (1977)).

[410] *See supra* Sections II.D, II.E.

[411] *Compare* People v. Johnston, 121 N.Y.S.3d 836, 845 (N.Y. City Ct. 2020) *and* People v. Erby, 128 N.Y.S.3d 418, 421 (N.Y. Sup. Ct. 2020) *with* Transcript of Calendar Call, People v. Baldwin, No. 2019BX033151 (N.Y. Crim. Ct., Feb. 6, 2020).

[412] *See* discussion *supra* Section II.D.

[413] *See* discussion *supra* Section II.E.

[414] *See* discussion *supra* Section II.C.

[415] *See* discussion *supra* Section II.A.

Roth and others suggest the solution to prevent eternal dialogue but still account for judicial feedback is more incremental reform that builds through successive iterations.[416] However, it appears that the political situation in New York would not allow this.[417] There was a strong movement-based demand for reform and a new political basis to enact it.[418] This was different than the methodical, multi-step process of reform in New Jersey.[419] But there is no reason to believe New Jersey's method afforded more opportunities for judicial input. Instead, New Jersey may face less judicial opposition because of the continuing scrutiny in the reporting requirement and the ongoing support by both judicial leadership and the governor who is responsible for judicial appointments.[420]

It is also hard to believe that additional discussion would have prevented judicial resistance. Judicial leadership and various committees had already discussed both bail and discovery reforms for years.[421] At a certain point, discussion needs to end, and change needs to be enacted. However, legislators should remain cognizant of the role judicial culture plays in the successful implementation of reforms so they can work to account for norms and values that may interfere with their efforts when a complete meeting of the minds is not possible.[422] This can continue after passage with reporting requirements, monitoring, and subsequent legislation to close gaps that appear.[423] It is important for politicians to understand that a political victory is not the end of the line, given the powers of the judiciary in implementing the new law.[424]

Rather than hoping to completely resolve all issues ahead of implementation, reformers should plan on a long-term process. But, in the meantime, judges should be sheltered from the negative incentives to resist

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[416] Roth, *supra* note 41, at 228 ("[R]eform should be pursued through incremental measures that are problem-focused and attuned to local context.").

[417] McKinley & Goldmacher, *supra* note 76 (detailing how rare the moment was in 2018 when Democrats gained political power in Albany).

[418] Tharpe, *supra* note 60.

[419] *See* Rabner, *supra* note 48.

[420] *See, e.g.*, *id.*; Sara Dorn, *New Jersey Gov. Chris Christie Defends Bail Reform*, CLEVELAND.COM (Feb. 24, 2017, 9:25 PM), https://www.cleveland.com/metro/2017/02/new_jersey_gov_chris_christie.html [https://perma.cc/24EY-KCVA].

[421] *See e.g.*, N.Y. STATE BAR ASS'N, *supra* note 10, at 1–3*;* N.Y. State Unified Ct. Sys., *supra* note 65; LIPPMAN, *supra* note 65, at 4–6.

[422] Ostrom & Hanson, *supra* note 39, at 55; Roth, *supra* note 41 at 225.

[423] Roth, *supra* note 41, at 229 ("[L]eadership can use the data collected to communicate to internal and external actors the merits of recent adjustments to its practices in helping the organization meet its stated goals—which can be critical to winning over those constituencies (if they were not already convinced) and securing the longevity of the reform.").

[424] *Id.*

reforms, or the positive incentives to support the reforms must be shored up. The legislators should be prepared to address the unforeseen issues with implementation that do not arise until the lowest level administrators are actually tasked with giving force to the reforms.[425]

Sheltering judges from political pressures does not necessarily require reshaping the political appointment or election process. It could be as simple as clear messaging from the governor that they support the reforms, or at least that a judge's efforts to implement democratically enacted reforms will not be considered against them in reappointment. New Jersey's reforms were moderately more successfully implemented.[426] And New Jersey's judges are appointed by the governor.[427] While this does not prevent political pressure, it does potentially inoculate judicial decision-makers, assuming the governor continues to be supportive of the reforms, as the governors in New Jersey have been.[428] While there are a myriad of reasons to hold values about the criminal legal system, it would be foolish to ignore the motivational power of job security.

Shaping the incentives to follow reforms could likewise be accomplished through modest methods, mainly increased reporting and oversight on judicial decision-making.[429] The example of Lorin Duckman or the judge who warned the author's colleague of their own concerns[430] both make clear that it is not harshness that leads to reelection or reappointment, but the occasional act of lenience that causes a judge to be targeted.[431] When left to the media to spotlight issues, the judges that opposed the reforms, that set monetary bail when individuals were ineligible, do not face the same career consequences.

While a large-scale change in judicial appointments and media culture could reverse this issue in New York, there are also smaller structural changes that could help. Judges that do not follow the law should be scrutinized through formal reports and examined by oversight bodies,

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[425] "[P]rinciples [must] be examined only in relation to concrete settings" and change should be made tentatively to allow for incremental reform. Roth, *supra* note 41, at 228 (quoting FEELEY, *supra* note 23, at 194–95).

[426] *See* discussion *supra* Sections I.C, II.B.

[427] N.J. CTS., THE N.J. CTS.: A GUIDE TO THE JUDICIAL PROCESS 9 (2019), https://www.njcourts.gov/sites/default/files/forms/12246_guide_judicial_process.pdf [https://perma.cc/EA2Z-4M7L].

[428] Dorn, *supra* note 420.

[429] *Id*.

[430] *See* anecdote cited *supra* note 115 ("No judge has ever lost their job for setting bail on someone.").

[431] Covert, *supra* note 98 (discussing the lopsided reporting on bail that resulted in pressure on judges not to release individuals for fear of being reported on).

whether legislative, executive, or independent.[432] The judge who releases someone has the discretion to do so, though it may be unwise. But the judge in *Johnston* who set bail on a suspended license case and the judge in *Burnette* who set bail on the vandalism suspect did not have legal authority, yet did so anyway.[433] Despite this egregiousness, the media did not write about those bail-setting judges the way they write about acts of lenience. Judge Nock, who set bail in the vandalism case, was applauded for refusing to follow the bail law.[434] Furthermore media reporting is slanted because confidentiality issues, accused individual's concern of speaking with an open case, and defense lawyer gatekeeping prevent bail success stories from being published as frequently as negative stories are.[435] There must be oversight beyond media scrutiny.

There was overwhelming popular support for the reforms, even if the political process did not continue to reflect this.[436] The public was able to implement the reforms through mass movements.[437] It was the protests, grassroots organizing, and general popular will that drove the recent criminal legal reforms in New York.[438] As the reforms themselves were led by movements that overcame decades of political recalcitrance and sensationalist media opposition, perhaps the answer to the implementation problem is also movement-driven.[439]

This intersects with the power of symbolism that Feeley and Roth both discuss. Feeley finds that in some cases, reforms work over time, even when the mechanics of an actual reform fail, because a reform changes perceptions

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[432] Effective management requires that if "some internal actors persist in behaviors that are inconsistent with the desired reform, then either the reform plan must be adjusted or eventually those actors must be dismissed." Roth, *supra* note 41, at 229.

[433] People v. Johnston, 121 N.Y.S.3d 836, 845, (N.Y. City Ct. 2020); Transcript of Arraignment, People v. Burnette, No. CR-006370-21BX (May 2, 2021).

[434] Marsh, Fenton & Golding, *supra* note 190.

[435] *See* Covert, *supra* note 98 (detailing the "coverage imbalance" that gives disproportionate attention to rare instances of re-arrest because of the difficulty in getting bail reform beneficiaries to speak out).

[436] At the time of its passage, some polls showed 71% of New Yorkers supported limited pretrial detention by prohibiting it for misdemeanors and non-violent felonies, as the 2020 reforms did. *See New Yorkers Show Broad Support for Bold Pretrial Reforms*, FWD.US, https://www.fwd.us/nycjr-public-opinion-poll [https://perma.cc/5PDR-6P8N].

[437] Tharpe, *supra* note 60.

[438] *Id.*; *Remembering Kalief Browder*, *supra* note 60.

[439] *End to Pretrial Detention and Money Bail*, M4BL: POLICY PLATFORM: END THE WAR ON BLACK PEOPLE, https://m4bl.org/policy-platforms/end-pretrial-and-money-bail [https://perma.cc/3F7N-Y7MR].

about rights and becomes a powerful symbol that can be built upon.[440] Roth believes this allows successive changes to be more effective since "[s]ymbols can be a powerful tool in pursuing such incremental reform."[441]

The 2020 reforms were born out of popular will and symbolism,[442] and the solution may be as straightforward as the public maintaining the same scrutiny on the implementation of the reforms as they did on the passage of the laws in the first instance. The public should harness the same mass movement tactics to ensure judges continue to follow the reforms as implemented.

CONCLUSION

New York's 2020 criminal legal reforms were a large-scale disruption of bail and discovery statutes aimed to reduce pretrial detention, improve the accused's access to discovery, and provide speedy trial consequences for prosecution delay in providing discovery. However, in certain areas, the effects were muted. A substantial reason for this is the judiciary's successful avoidance of some of the reforms' effects. This may be due to the nature of the reforms in curtailing judicial discretion, the reactionary nature of judicial culture, and the sensitivity of judges to shifting political and popular will. Those who have studied court reforms have generally found that the judiciary should have greater involvement in the initial drafting and enactment of legislation in order to avoid the undoing of the reforms through the judiciary's implementation. While true, and somewhat reinforced in New York's 2020 reforms, it also seems that the root problem is not the lack of a dialogue with the judiciary, but the incentives imposed on the judiciary based on structural constraints, court culture, and media narratives.

This suggests that for states such as New York, where political will affects judicial decision-making very directly, greater safeguards must be implemented to monitor, review, and ensure compliance with any reforms. Otherwise, the same movements and processes that enabled the reforms in the first instance must continue to scrutinize the implementation by the judiciary, if these sorts of reforms are to have any chance of success.

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[440] Symbolic, rather than substantive, change can be "potent instruments in fostering the political ends of quiescence and change," and can lead to further "political mobilization, flags around which to rally." FEELEY, *supra* note 23, at 222.

[441] Roth, *supra* note 41, at 228.

[442] Gonnerman, *supra* note 392.