

BAIL IN NORTH CAROLINA

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My work at the University of North Carolina (“UNC”) School of Government Criminal Justice Innovation Lab includes supporting North Carolina leaders and justice-system stakeholders as they examine and address state and local bail systems. Based on that experience, I share here some of the key factors motivating new attention to bail systems, the nature of that interest, and key challenges and opportunities for stakeholders as they seek to promote fair and effective pretrial justice systems.

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I. KEY FACTORS DRIVING RECENT ATTENTION

In North Carolina, as in other states, criminal justice stakeholders are taking a closer look at state and local bail systems.¹ Four primary issues are motivating this interest. The first is public safety. North Carolina’s bail system is largely a money-based one, in which a majority of defendants, even those charged with misdemeanors, receive a secured bond as a condition of pretrial release.² A secured bond requires money up front to secure release

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1. Unless otherwise noted in this Article, statements are based on the author’s personal experiences and conversations with stakeholders in her work at the UNC School of Government.

2. JESSICA SMITH, UNC SCH. OF GOV’T, HOW BIG A ROLE DOES MONEY PLAY IN NORTH CAROLINA’S BAIL SYSTEM? 1 (2019), <https://cjil.sog.unc.edu/files/2019/07/How-Big-a-Role-Does-Money-Play-in-North-Carolina.pdf>.

from jail.³ Defendants can put the money down themselves or pay a fee to a professional or surety bondsman to secure the bond.⁴ One aspect of the public safety issue is this: when money serves as the key to get out of jail, wealthy but dangerous individuals can buy their way out of detention. Consider Sam, who is charged with drug trafficking in opioids. Sam has been charged with this offense before but thwarted the prosecution by intimidating witnesses. The judge has set a \$2 million secured bond in Sam's case. If Sam has money—and as a drug trafficker he may—he can get out of jail, free to carry on his preferred activities. Sam's bond is not forfeited if he engages in further drug crimes or intimidates witnesses again to avoid prosecution. Stakeholders have come to understand that in cases like Sam's, the bond fails to protect the public—it results in the undersupervision of dangerous defendants and thus undermines public safety.⁵

There is another component to the public safety issue. Many people—including low-risk defendants—remain in jail for some period of time because they cannot pay the secured bonds imposed in their cases.⁶ Studies show that low-risk individuals who are detained pretrial are more likely to commit new crimes following release. A recent study of almost 400,000 misdemeanor cases in Harris County, Texas (the third largest county in the nation), found that “although detention reduced criminal activity in the short-term through incapacitation, by [18] months post-hearing, detention is associated with a 30% increase in new felony charges and a 20% increase in new misdemeanor charges.”⁷ These differences persisted “even after controlling for the initial bail amount, offense, demographic information, and criminal history characteristics.”⁸

The study did not address why misdemeanor defendants who are incarcerated pretrial have a greater likelihood of committing crime, but many criminal justice stakeholders I work with opine the same answer: pretrial incarceration results in job loss, loss of housing and transportation, disruptions to the family unit, and other consequences that make a person more likely to recidivate. For those who have assumed that locking people up pretrial always makes us

3. *Id.*

4. Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 721 (2017).

5. See Michael Gordon & Ames Alexander, *From Murders to Gun Violence, DA Announces New Crackdown on Charlotte's Violent Crime*, CHARLOTTE OBSERVER (Jan. 30, 2020, 2:48 PM), <https://www.charlotteobserver.com/news/local/crime/article239752448.html> (reporting that Charlotte-Mecklenburg District Attorney Spencer Merriweather called for a new state law allowing for preventative detention for dangerous defendants on the premise that the current system of cash bond gambles with public safety).

6. Heaton et al., *supra* note 4, at 732.

7. *Id.* at 718.

8. *Id.* at 711, 761–68.

safer, research is calling those assumptions into question and amplifying concerns about the negative public safety impacts of unnecessary pretrial detentions.

Another reason driving interest in bail is cost. One aspect of cost is providing jail beds for defendants detained pretrial. On any given day, the United States detains an estimated 500,000 people pretrial at a cost of about \$14 billion a year.⁹ If these costs were necessary for public safety—for example, if the evidence showed that jails were filled with the highest risk defendants who could not safely be released into the community—few would object to them. The evidence, however, shows that we are detaining high numbers of defendants charged with low-level crimes. The Texas study mentioned above found that more than half of all misdemeanor defendants are detained pretrial.¹⁰ Researchers report similar numbers in other jurisdictions.¹¹ This has led some to assert that we are spending enormous sums of money detaining people who pose little risk to public safety.

One alternative to pretrial detention is release or release with supervision. Even when the cost of pretrial supervision is considered, significant savings can be achieved by reducing incarceration of low-level defendants.¹² Additionally, as noted, research shows that pretrial detention of low-risk defendants causes crime.¹³ That crime has costs too, for victims, law enforcement, and the justice system. Finally, successful reform efforts in North Carolina show that jurisdictions have achieved significant savings in daily jail costs and averted projected capital costs for new jail facilities. For example, before Mecklenburg County embarked on bail reform, its average pretrial daily jail population was 1,953; it projected needing 5,111 jail beds in 12 years; and it was faced with spending \$360 million to build a new jail to house that expanded population.¹⁴ Fast forward 12 years, and after implementation of bail reform, Mecklenburg avoided the need to build the new jail facility, consolidated its adult jail

9. PRETRIAL JUST. INST., PRETRIAL JUSTICE: HOW MUCH DOES IT COST? 2 (2017), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c2f50513-2f9d-2719-c990-a1e991a57303&forceDialog=0>.

10. Heaton et al., *supra* note 4, at 716.

11. *Id.* at 716 n.19.

12. N.C. ATT'Y GEN., N.C. DEP'T OF JUST., PRETRIAL RELEASE AND ACCOUNTABILITY ROUNDTABLE (Jan. 18, 2019) (on file with author) (containing a table of daily cost to detain a defendant in jail pretrial and to supervise a person on pretrial release; for example, in Wake County, the daily jail cost is \$70 while the daily pretrial supervision cost is \$2.20).

13. Heaton et al., *supra* note 4, at 718.

14. Kelli Braunbach & Jordan Smith, *Nuts and Bolts of Starting and Funding Pretrial Release Initiatives*, in N.C. ATT'Y GEN., N.C. DEP'T OF JUST., PRETRIAL RELEASE AND ACCOUNTABILITY ROUNDTABLE (Oct. 25, 2019) (PowerPoint presentation on file with author).

population, and recently reported a pretrial average daily jail population of 917.¹⁵ That county thus lowered its daily jail costs and avoided an enormous capital outlay.

Another reason driving interest in pretrial systems is fairness. For decades, research has confirmed the prominent role of wealth in pretrial systems, specifically, that whether a person is detained pretrial depends largely on whether he or she can afford to pay the bond imposed.¹⁶ This appears to be true even when relatively low amounts are required to secure release. For example, one study found that in Philadelphia, almost half of defendants who only needed to post a \$500 deposit to obtain release failed to do so within three days of the bail hearing.¹⁷ That study noted that while “a percentage may prefer to stay in jail, it is reasonable to infer that many would post bail if they could afford it.”¹⁸ Additionally, the Texas study noted above found that “only about 30% of defendants from the wealthiest ZIP codes [were] detained pretrial versus 60–70% of defendants from the poorest” ones.¹⁹ As the United States Court of Appeals for the Fifth Circuit stated in declaring the bail system in Harris County, Texas, unconstitutional, the system causes “[a] basic injustice: poor arrestees . . . are incarcerated where similarly situated wealthy arrestees are not, solely because the indigent cannot afford to pay a secured bond.”²⁰ That court recognized an inherent unfairness in poverty-based incarcerations.

Many see that unfairness as being compounded by research finding that pretrial detention increases the likelihood of adverse case consequences. For example, the Texas study found that compared to similarly situated defendants who are released, misdemeanor defendants who are detained are 25 percent more likely to be convicted; 43 percent more likely to be sentenced to jail; and on average their sentences are nine days longer, more than double that of similar defendants who were released pretrial.²¹ Similarly, a Philadelphia study found that pretrial detention leads to a 13 percent increase in the likelihood of being convicted and a 42 percent increase in the length of the sentence.²² These studies are consistent with other research finding correlations between pretrial detention and negative case outcomes.²³ Further amplifying these concerns is the issue of coerced pleas. Research as early as 1964 shows that pretrial

15. *Id.*

16. Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 511, 512 (2018).

17. *Id.* at 523.

18. *Id.*

19. Heaton et al., *supra* note 4, at 737.

20. O'Donnell v. Harris County, 892 F.3d 147, 162 (5th Cir. 2018).

21. Heaton et al., *supra* note 4, at 717.

22. Stevenson, *supra* note 16, at 512–13.

23. See Heaton et al., *supra* note 4, at 746.

detention increases the likelihood that a defendant will plead guilty.²⁴ The Texas study found that “[pretrial] detention increases the likelihood of pleading guilty by 25 percent for no reason relevant to guilt.”²⁵

Another reason animating interest in bail systems is racial and ethnic disparities. The national jail population consists largely of pretrial detainees.²⁶ Black defendants make up 33 percent of that population,²⁷ despite constituting only 13 percent of the US population.²⁸ Racial and ethnic disparities in pretrial outcomes have been well-documented and are a key issue with respect to bail systems²⁹ and, more generally, criminal justice reform both nationally and in North Carolina.³⁰

A final reason for the interest in bail systems is litigation risk. Opponents of money-based bail systems have been successful in litigation. For example, in 2018, the United States Court of Appeals for the Fifth Circuit held the bail system in Harris County, Texas, unconstitutional, finding that it violated indigent arrestees’ right to equal protection.³¹ It explained:

[T]he essence of the district court’s equal protection analysis can be boiled down to the following: take two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. Applying the County’s current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is

24. *Id.* at 721 n.41 (citing Patricia Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U. L. REV. 631, 632 (1964)).

25. Heaton et al., *supra* note 4, at 771.

26. ZHEN ZENG, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., JAIL INMATES IN 2018 (2020), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6826>. The percentages displayed in the text have been rounded to the nearest whole percentage point. Percentages were derived from data tables accompanying this Bureau of Justice Statistics (“BJS”) report, which indicates that approximately 66 percent of the national jail population is “unconvicted.”

27. *Id.*

28. U.S. CENSUS BUREAU, QUICK FACTS: UNITED STATES (2019).

29. *See, e.g., Issues*, N.C. COMM’N ON RACIAL & ETHNIC DISPARITIES IN THE CRIM. JUST. SYS., <http://ncracialjustice.org/issues/> (last visited Nov. 27, 2020); *Mecklenburg County, NC*, SAFETY + JUSTICE CHALLENGE, <http://www.safetyandjusticechallenge.org/challenge-site/mecklenburg-county/> (“Despite making up approximately 46 percent of the local population, African Americans and Hispanics make up 78 percent of the jail population (as of January-November 2019).”).

30. N.C. Exec. Order No. 145 (June 9, 2020), <https://files.nc.gov/governor/documents/files/EO145-Criminal-Justice-Reform.pdf> (creating the new North Carolina Task Force for Racial Equity in Criminal Justice).

31. *O’Donnell v. Harris County*, 892 F.3d 147, 163 (5th Cir. 2018).

less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.³²

This case and others like it have amplified concerns about money-based bail systems. In North Carolina, those concerns were heightened in November 2019 when a federal class action complaint was filed in the Middle District of North Carolina challenging Alamance County's bail system.³³ That complaint alleges that Alamance County's policies and practices violate defendants' federal constitutional rights to equal protection, substantive due process, procedural due process, and counsel.³⁴ In May 2020, a consent order was entered in that case,³⁵ and it has been a powerful motivator for stakeholders to reexamine their bail systems.³⁶

II. BROAD INTEREST IN BAIL REFORM

At the state level, numerous committees and commissions have examined or are examining North Carolina's state and local bail systems. In 2016, former Chief Justice Mark Martin's "Blue Ribbon" North Carolina Commission on the Administration of Law and Justice ("NCCALJ") released its final report, recommending, among other things, that North Carolina embark on bail reform pilot projects.³⁷ The issue has been considered by multiple state-level bodies, including the North Carolina Courts Commission,³⁸ the North Carolina State Judicial Council,³⁹ the Governor's Crime

32. *Id.*

33. Class Action Complaint at 4–5, *Allison v. Allen*, No. 1:19-cv-01126 (M.D.N.C. Nov. 12, 2019).

34. *Id.* at 3; *see also* Jessica Smith, *Federal Lawsuit Challenges Alamance County NC's Bail System*, UNC SCH. OF GOV'T (Mar. 17, 2020), <https://nccriminal.law.sog.unc.edu/federal-lawsuit-challenges-alamance-county-ncs-bail-system/>.

35. Consent Order for Preliminary Injunction, *Allison v. Allen*, No. 19-cv-1126 (M.D.N.C. May 8, 2020).

36. Jessica Smith, *Lessons from the Alamance County Bail Litigation*, UNC SCH. OF GOV'T (Sept. 23, 2020, 1:07 PM), <https://nccriminallaw.sog.unc.edu/lessons-from-the-alamance-county-bail-litigation/>.

37. N.C. COMM'N ON THE ADMIN. OF L. & JUST., FINAL REPORT MARCH 2017: RECOMMENDATIONS FOR STRENGTHENING THE UNIFIED COURT SYSTEM OF NORTH CAROLINA app. C at 1 (2017), https://www.nccourts.gov/assets/documents/publications/nccalj_final_report.pdf?xahbJ_Q8O_XYD2w.IGCrOOoBeMSeDv2i.

38. *See, e.g.*, N.C. CTS. COMM'N, AGENDA (2018), <https://www.ncleg.gov/documents/sites/committees/BCCI-98/Meetings/2018-09-07/Courts%20Commission%20Agenda%2009-07-18.pdf>.

39. *See, e.g.*, N.C. CTS. STATE JUD. COUNCIL, AGENDA FOR THE DECEMBER 5, 2019 MEETING OF THE NORTH CAROLINA STATE JUDICIAL COUNCIL, https://www.nccourts.gov/assets/inline-files/Meeting%20Agenda%2012-5-2019.pdf?VgLOtWIhbQH_6qXdKegqjN5wkZxZRY.

Commission,⁴⁰ the North Carolina Commission on Racial and Ethnic Disparities,⁴¹ and the Governor's Task Force of Racial Equity in the Criminal Justice System.⁴² Criminal justice stakeholder groups have included sessions on bail at their statewide continuing education events,⁴³ and examining state bail systems has become a priority for North Carolina's Attorney General Josh Stein, who hosted a series of regional roundtables on the topic in 2019 and 2020.⁴⁴ These roundtables served stakeholder teams from across North Carolina.⁴⁵ Cheri Beasley, Chief Justice of the Supreme Court of North Carolina, supports efforts to improve bail systems,⁴⁶ as does her opponent in the November 2020 general election, Justice Paul Newby.⁴⁷

In addition to state-level attention, local stakeholders are examining their bail systems and embarking on reform. North Carolina's largest county, Mecklenburg County, has been on the forefront of bail reform in the state and has adopted a number of reforms.⁴⁸ Mecklenburg and other jurisdictions—including Buncombe, Catawba, and Forsyth Counties and Judicial Districts 30B (Haywood and Jackson Counties) and 2 (Washington, Martin, Beaufort, Hyde, and Terrell Counties)—have received grants and

40. See, e.g., *MEDIA ADVISORY: Governor's Crime Commission Meets Thursday in Raleigh*, N.C. DEP'T OF PUB. SAFETY (Mar. 5, 2019), <https://www.ncdps.gov/news/press-releases/2019/03/05/media-advisory-governor%E2%80%99s-crime-commission-meets-thursday-raleigh>.

41. See, e.g., *Events: Jessica Smith, Pretrial Justice Reform, NC Commission on Racial & Ethnic Disparities in the Criminal Justice System, May 2018*, UNC SCH. OF GOV'T (Aug. 15, 2019), <https://cjil.sog.unc.edu/event/page/3/>.

42. N.C. Attorney General's Office, *Working Group #3 – Meeting #4*, YOUTUBE (Sept. 16, 2020), <https://www.youtube.com/watch?v=gNaE4VG7tIE&feature=youtu.be>; see generally *Task Force for Racial Equity in Criminal Justice (TREC)*, N.C. DEP'T OF JUST., <https://ncdoj.gov/trec/>.

43. See, e.g., *NC Magistrates' 2019 Fall Conference*, UNC SCH. OF GOV'T (Oct. 7–10, 2019) (on file with author); *Superior Court Judges' Summer Conference*, UNC SCH. OF GOV'T, https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/Agenda%202019%20SCJ%20Summer%20Conf%206.6.19-FINAL_0.pdf (last visited Nov. 27, 2020).

44. *Attorney General Josh Stein Holds 18-County Pretrial Release and Accountability Roundtable*, N.C. DEP'T OF JUST. (Jan. 18, 2019), <https://ncdoj.gov/release-attorney-general-josh-stein-holds-18-count-d1/>. We were on track to speak to stakeholders from all 100 counties before COVID-19 forced cancellation of the last roundtable in Western North Carolina.

45. N.C. Attorney General's Office, *supra* note 42, at 25:24 (remarks from Jasmine McGee, N.C. Attorney General's Office).

46. See, e.g., *AGENDA: CENTRAL PRETRIAL RELEASE & ACCOUNTABILITY ROUNDTABLE*, N.C. DEP'T OF JUST., ATT'Y GEN. (2020) (on file with author) (including a video presentation from Chief Justice Beasley).

47. Corey Vaillancourt, *Republican Seeks N.C. Chief Justice Seat*, SMOKEY MOUNTAIN NEWS (Nov. 6, 2019), <https://www.smokymountainnews.com/archives/item/27940-republican-seeks-n-c-chief-justice-seat>.

48. *JESSICA SMITH, UNC SCH. OF GOV'T, STUDY: MECKLENBURG COUNTY'S BAIL REFORMS LEAD TO INCREASED RELEASE RATES BUT NO SIGNIFICANT INCREASE IN FTAS OR NEW CRIMINAL ACTIVITY 1* (2019), <https://cjil.sog.unc.edu/files/2019/05/Bail-Reform-in-North-Carolina-Meck-County-Cite-Checked-JS.pdf>.

other support to pursue bail reform efforts.⁴⁹ Numerous other jurisdictions are working on the issue, including Durham⁵⁰ and Orange Counties.⁵¹ Durham County's efforts made the news, in part, because they are spearheaded by the prosecutor's office. In my work, I have seen broad support for these efforts, including from prosecutors' offices and law enforcement leaders.⁵²

Interest in North Carolina's bail systems is not limited to those working directly in the criminal justice system. It has become a topic of interest for civic groups⁵³ and faith-based communities.⁵⁴ And in at least one instance, a county commissioner candidate made bail reform a key election issue.⁵⁵

As I work to support stakeholders throughout North Carolina, I see broad-based support for a simple reason: Everyone wants the same thing—a fair and effective system, improved public safety, and wise use of taxpayer money.

49. JESSICA SMITH, UNC SCH. OF GOV'T, NC JUDICIAL DISTRICT 2 BAIL REFORM PROJECT 1 (2019), <https://cjil.sog.unc.edu/files/2020/01/Project-Report-JD2.pdf>; JESSICA SMITH, UNC SCH. OF GOV'T, NC JUDICIAL DISTRICT 21 BAIL REFORM PROJECT 1 (2019), <https://cjil.sog.unc.edu/files/2020/01/Project-Report-JD-21.pdf>; JESSICA SMITH, UNC SCH. OF GOV'T, JUDICIAL DISTRICT 30B PRETRIAL JUSTICE PILOT PROJECT 3 (2018), <https://cjil.sog.unc.edu/files/2019/02/Judicial-District-30B-Report.pdf>; Jennifer Bowman, *Buncombe Wins \$1.75M MacArthur Foundation Grant, Aims to Reduce Jail Population*, CITIZEN TIMES (Oct. 24, 2018), <https://www.citizen-times.com/story/news/local/2018/10/24/buncombe-county-macarthur-foundation-grant-aims-reduce-jail-inmate-population-numbers/1748975002/>; *Catawba County Selected to Participate in Research-Action Site Grant*, CATAWBA CNTY. GOV'T (Aug. 28, 2019), <https://www.catawba-countync.gov/news/catawba-county-selected-to-participate-in-research-action-site-grant/>.

50. Thomas C. Martin, *Durham Prosecutors will Stop Seeking Cash Bail in Most Cases*, INDY WEEK (May 28, 2019, 7:51 PM), <https://indyweek.com/news/durham/durham-prosecutors-will-stop-seeking-cash-bail-in-most-cases/>.

51. Kayleigh Carpenter, *Report Shows Orange County Bail and Bond System Unjustly Penalizes Low-Income Citizens*, THE DAILY TAR HEEL (Feb. 14, 2020, 1:07 PM), <https://www.dailytarheel.com/article/2020/02/oc-bail-bond-report-0214> (noting that the criminal justice resource director for Orange County said that the County has already instituted several policy reforms).

52. *See, e.g.*, NC JUDICIAL DISTRICT 2 BAIL REFORM PROJECT, *supra* note 49, at 1–2; NC JUDICIAL DISTRICT 21 BAIL REFORM PROJECT, *supra* note 49, at 1–2.

53. *Community Calendar, Sept. 9*, NEWS & REC. (Sept. 9, 2019), https://greensboro.com/life/community-calendar-sept-9/article_2a2eab3a-e62a-51e2-91f5-3288399d653f.html (noting that on September 17, 2019, the League of Women Voters' monthly "Lunch with the League" meeting agenda focused on bail reform).

54. *See, e.g.*, ORANGE CNTY. BAIL/BOND JUST. PROJECT, COURT OBSERVATION PROGRAM: FINDINGS AND RECOMMENDATIONS 2, 9 (2020), https://ocbailbondjustice.org/wp-content/uploads/2020/02/OCBBJ_CourtObservationFindingsAndRecommendationsReport.pdf.

55. Kieran Ungemach, *The Push for Bail Reform in Alamance County: Drama Caldwell Uses Bail Reform to Drive County Commissioner Candidacy*, ELON NEWS NETWORK (Feb. 16, 2020, 2:55 PM), <https://www.elonnewsnetwork.com/article/2020/02/alamance-county-bail-reform>.

III. CHALLENGES

While there is significant support for examining state and local bail systems, challenges exist. First is the data challenge. Notwithstanding the tremendous resources spent on the criminal justice system, it is incredibly difficult to get good data about pretrial systems, and efforts to promote data transparency recently met opposition in the state legislature. In fact, until the UNC School of Government Criminal Justice Innovation Lab (“the Lab”) produced its recent jail occupancy rate reports,⁵⁶ there was no easily accessible information about local jail population data. The Lab’s reports provide statewide and county-level jail occupancy rates.⁵⁷ However, because of limited information, we were unable to report on, among other things, how many people were detained in jail pretrial versus those serving a sentence or being held for some other reason.⁵⁸ Similarly, there is no public reporting on core pretrial metrics like nonappearance rates, new criminal activity rates, daily jail costs, or the number of days defendants spend in jail pretrial in North Carolina. Lack of easily accessible data makes it hard for stakeholders—including the public—to understand how their pretrial systems are functioning. It also complicates empirical evaluations of implemented reforms, which are essential to an evidence-based approach to criminal justice.

Another challenge is that North Carolina is a diverse state, and this diversity cuts across many different lines. For example, consider the diversity across North Carolina with respect to population and number of criminal charges. Hyde County, population 5,230, had a total of 619 criminal charges in 2019.⁵⁹ Mecklenburg County, by contrast, has a population of 1,093,901 and had 154,619 charges in that same period.⁶⁰ There is also considerable variability as to how

56. JESSICA SMITH & ROSS HATTON, UNC SCH. OF GOV’T, CHANGE IN NORTH CAROLINA JAIL POPULATIONS DURING THE COVID-19 PANDEMIC (2020), <https://cjil.sog.unc.edu/files/2020/07/7.10.20-2020-Jail-Occupancy-Rates-FINAL.pdf>; JESSICA SMITH & ROSS HATTON, UNC SCH. OF GOV’T, 2019 NORTH CAROLINA JAIL OCCUPANCY RATES 2–5 (2020), <https://cjil.sog.unc.edu/files/2020/04/2019-North-Carolina-Jail-Occupancy-Rates.pdf>; JESSICA SMITH & ROSS HATTON, UNC SCH. OF GOV’T, 2018 NORTH CAROLINA JAIL OCCUPANCY RATES 2–4 (2020), <https://cjil.sog.unc.edu/files/2020/01/2018-North-Carolina-Jail-Occupancy-Rates-hyperlink.pdf>.

57. CHANGE IN NORTH CAROLINA JAIL POPULATIONS DURING THE COVID-19 PANDEMIC, *supra* note 56; 2019 NORTH CAROLINA JAIL OCCUPANCY RATES, *supra* note 56, at 1–5; 2018 NORTH CAROLINA JAIL OCCUPANCY RATES, *supra* note 56, at 1–4.

58. CHANGE IN NORTH CAROLINA JAIL POPULATIONS DURING THE COVID-19 PANDEMIC, *supra* note 56; 2019 NORTH CAROLINA JAIL OCCUPANCY RATES, *supra* note 56, at 1; 2018 NORTH CAROLINA JAIL OCCUPANCY RATES, *supra* note 56, at 1.

59. JESSICA SMITH & ROSS HATTON, UNC SCH. OF GOV’T, NORTH CAROLINA COUNTY-LEVEL CRIMINAL CHARGING DATA 1–2 (2020), <https://cjil.sog.unc.edu/files/2020/03/Tally-Report.pdf>.

60. *Id.*

court systems function, including, for example, whether the jurisdiction is served by a public defender, the availability of local lawyers to serve as court-appointed counsel, and how many judges serve in the jurisdiction.⁶¹ In Mecklenburg County, district court is held daily, but in Hyde County, it is held once a week.⁶² These variations have a direct impact on the functioning of local bail systems and capacity to implement reforms.

Of course, North Carolina's counties differ in many other ways including urbanicity, demographics, geographic size, politics, crime rates, education rates, poverty rates, unemployment rates, and jail capacity, just to name a few.⁶³ All of these differences may mean that tools that work in wealthier, urban jurisdictions may not be feasible or effective in poorer, rural ones and vice versa. The fact that a one-size-fits-all model may not work across the board in North Carolina complicates reform efforts.

A related issue is the challenge of local resourcing. For example, many jurisdictions across the country use pretrial services programs as an alternative to pretrial incarceration for defendants who can be safely released into the community pretrial with appropriate supervision and support.⁶⁴ In North Carolina, pretrial services are funded at the local, not state, level.⁶⁵ As a result, pretrial services programs exist in only a minority of counties and are rarely offered in North Carolina's lower-wealth communities.⁶⁶ And as noted above, other resourcing issues impact local jurisdictions' ability to effect and sustain change, including that many lower-wealth communities are not served by a public defender and may have a limited number of judges and infrequent court calendars.

A final challenge is the political influence of the for-profit bail industry. That industry has opposed changes in other states,⁶⁷ and

61. See, e.g., *North Carolina District Court Districts*, N.C. GEN. ASSEMBLY (June 15, 2018), https://www.nccourts.gov/assets/documents/publications/District-Court-Districts-Map-20190101_0.pdf?UOFTutPx_lbpdzdkaWvCbchTMF59u4n_.

62. *Compare Criminal Calendars for Hyde County*, N.C. JUD. BRANCH (Aug. 5, 2020, 6:30 AM), <http://www1.aoc.state.nc.us/www/calendars/Criminal.jsp?county=HYDE> (listing the criminal district court dates available for Hyde County), with *Criminal Calendars for Mecklenburg County*, N.C. JUD. BRANCH (Aug. 5, 2020, 8:50 AM), <http://www1.aoc.state.nc.us/www/calendars/Criminal.jsp?county=MECKLENBURG> (listing the criminal district court dates available for Mecklenburg County).

63. *County Map Book 2020*, N.C. ASS'N OF CNTY. COMM'RS 8–35, <https://indd.adobe.com/view/331bafcc-d742-43e3-9423-2e14aa131f97>.

64. See BARRY MAHONEY ET AL., U.S. DEP'T JUST., PRETRIAL SERVICES PROGRAMS: RESPONSIBILITIES AND POTENTIAL 3–4 (2001), <https://www.ncjrs.gov/pdffiles1/nij/181939.pdf>.

65. Melinda Tanner et al., *Evaluating Pretrial Services Programs in North Carolina*, FED. PROB. (June 2008), <https://www.uscourts.gov/file/22928/download>.

66. *Id.*

67. See, e.g., Collette Richards & Drew Griffin, *States Are Trying to Change a System that Keeps Poor People in Jail. The Bail Industry Is Blocking Them*,

the influence of the industry has come up in many of the meetings that I have attended.

IV. OPPORTUNITIES

At both the state and national level, there is new, broad, bipartisan support for criminal justice reform. At the federal level, legislation such as the First Step Act enjoyed bipartisan support.⁶⁸ And at the state level, North Carolina's historic legislation raising its juvenile age enjoyed tremendous success across the aisle,⁶⁹ and in June 2020, the Second Chance Act passed the state legislature by unanimous vote in the House and Senate.⁷⁰ This new environment of bipartisan support for evidence-based criminal justice reform presents an opportunity to examine bail systems.

Even in the absence of state legislation, there is tremendous opportunity for local stakeholders to implement change in their pretrial systems at every stage of the process, as shown below in Figure 1. I turn now to a discussion of some of those opportunities, highlighting efforts underway in North Carolina.

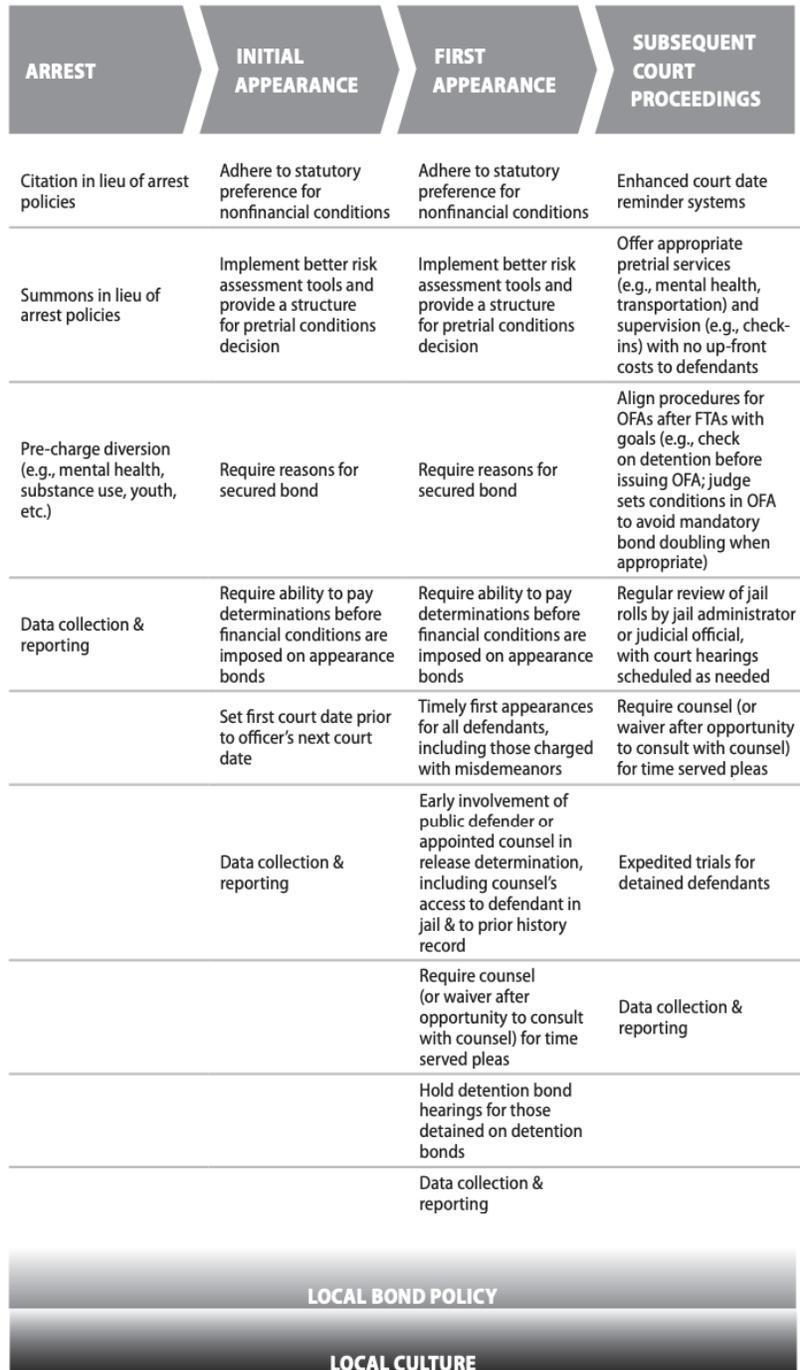
CNN (Aug. 30, 2019), <https://www.cnn.com/2019/08/30/us/bail-reform-bonds-lobbying-invs/index.html>.

68. Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html>.

69. LaToya Powell, *"Raise the Age" is Now the Law in North Carolina*, UNC SCH. OF GOV'T (Aug. 31, 2017), <https://nccriminallaw.sog.unc.edu/raise-age-now-law-north-carolina/> (noting the bipartisan support for reform).

70. Second Chance Act, 2020 N.C. Sess. Laws 35. Votes are recorded at: S. B. 562, 2020 Sess. (N.C. 2020) (enacted).

FIGURE 1. BAIL REFORM OPTIONS FOR NORTH CAROLINA JURISDICTIONS



A. *Arrest Stage Options for Reform*

An arrest is typically a person's first entry into the criminal justice system. There are opportunities for jurisdictions to impact bail outcomes by changing policies and practices at the arrest stage of the criminal process. In North Carolina, conditions of pretrial release are only set initially for those who are arrested.⁷¹ Once an arrest is made, the person is brought before a magistrate for an initial appearance;⁷² at this proceeding, the magistrate sets conditions of pretrial release.⁷³ The most common condition of pretrial release imposed in North Carolina is a money bond.⁷⁴ Stakeholders are increasingly reexamining policies and practices around who gets arrested in the first instance as a way to address unnecessary wealth-based detentions.⁷⁵ Some strategies focus on precharge diversion, particularly with respect to youthful offenders and those with behavioral health issues, including substance use.⁷⁶ Others involve local programs to address issues of poverty and homelessness that can result in criminal charges, such as begging, littering, or sleeping in public parks.⁷⁷ These programs are being implemented and supported in a number of ways, including through the Stepping Up campaign,⁷⁸ Law Enforcement Assisted Diversion ("LEAD"),⁷⁹ and other programs.⁸⁰

71. However, even those initially charged by a citation or criminal summons may later receive conditions of release if, for example, they are arrested on an order for arrest after a failure to appear in court as required. See N.C. GEN. STAT. §§ 15A-501(2), 15A-533(b)–(c).

72. *Id.* § 15A-501(2).

73. *Id.* § 15A-511.

74. JESSICA SMITH & ROSS HATTON, UNC SCH. OF GOV'T, 2019 NORTH CAROLINA CONDITIONS OF RELEASE REPORT 1 (2020), <https://cjil.sog.unc.edu/files/2020/02/2019-Conditions-of-Release-Report.pdf>.

75. See, e.g., *The Citation Project: A Collaborative Project to Inform Policing Policy*, UNC SCH. OF GOV'T (May 2020), <https://cjil.sog.unc.edu/files/2020/06/The-Citation-Project-One-Pager-5.11.2020.pdf>.

76. See, e.g., *Adult Pre-Arrest Diversion (OC-PAD)*, ORANGE CNTY., N.C., <https://www.orangecountync.gov/2122/Adult-Pre-Arrest-Diversion-OC-PAD>.

77. See, e.g., Jessica Smith, *Overcriminalization & Ordinance Violations as Crimes*, UNC SCH. OF GOV'T (Mar. 21, 2019), <https://nccriminallaw.sog.unc.edu/overcriminalization-ordinance-violations-as-crimes/> (reporting that in 2018, North Carolina had at least 1,690 criminal charges for begging).

78. See, e.g., *The Stepping Up Initiative*, ALAMANCE CNTY. GOV'T, <https://www.alamance-nc.com/steppingup/> (last visited Nov. 27, 2020) (noting that the mission of the county's Stepping Up task force is to reduce the number of persons with mental illness or co-occurring substance use who are involved with the criminal justice system).

79. See generally *Law Enforcement Assisted Diversion*, N.C. HARM REDUCTION COAL., <http://www.nchrc.org/lead/law-enforcement-assisted-diversion/> (last visited Nov. 27, 2020) (indicating that LEAD programs are in effect in Fayetteville, Wilmington, Waynesville, Statesville, and Mooresville, North Carolina).

80. Although I focus my comments here on pre-charge diversion, efforts are also underway to implement post-charge diversion, especially for individuals

Other strategies to address arrest stage decisions include citation in lieu of arrest and summons in lieu of arrest practices. North Carolina's law enforcement officers already use citations to charge the vast majority of misdemeanor offenses. In 2018, officers across North Carolina opted for a citation over an arrest in 945,663 misdemeanor cases, 87.8 percent of those cases.⁸¹ Given the large number of cases at issue, even a small percentage change in the use of citations could have a significant impact on the number of individuals detained pretrial. Additionally, the statewide rate disguises a significant disparity in citation use in North Carolina. The county that uses citations the most does so in 97.4 percent of misdemeanor cases; the county that uses them the least does so in only 70.9 percent of cases.⁸² These variations may make sense depending upon the nature of the misdemeanor charges at issue, but the variation in the rates at which jurisdictions use citations may present opportunities to examine this issue. At the Lab, we are supporting stakeholders' efforts to inform best practices in this area. Working with the North Carolina Association of Chiefs of Police, we have developed a model citation in lieu of arrest policy which will be piloted by police departments beginning in December 2020.⁸³ We will track pilot units to assess the policy's impact on key criminal justice metrics, producing results to improve policing practices.⁸⁴

A related practice is summons in lieu of arrest. When an officer or individual goes to the magistrate and swears to facts establishing probable cause that a crime has been committed by the accused, the magistrate has a choice: issue a summons or issue a warrant for arrest.⁸⁵ A summons, like a citation, notifies the person to appear in court and answer the charges.⁸⁶ A warrant for arrest, however, results in the person being taken into custody⁸⁷ and brought before the magistrate for an initial appearance and conditions of pretrial release.⁸⁸ And as discussed above, secured bonds are the most commonly imposed conditions of pretrial release in North Carolina.⁸⁹

with behavioral health issues. *See, e.g.*, KIM MORETZ, BUNCOMBE CNTY. PRETRIAL SERVS., BEHAVIORAL HEALTH JAIL DIVERSION THRU PRETRIAL SERVICES 195–98 (2019) (PowerPoint presentation on file with author).

81. JESSICA SMITH & ROSS HATTON, UNC SCH. OF GOV'T, CITATION VERSUS ARREST BY NORTH CAROLINA LAW ENFORCEMENT OFFICERS: A COUNTY-LEVEL ANALYSIS 1 (2019), <https://cjil.sog.unc.edu/files/2019/09/Prevalence-of-Citation-Use-in-North-Carolina-2.pdf>.

82. *Id.*

83. *The Citation Project: A Collaborative Project to Inform Policing Policy*, *supra* note 75.

84. *Id.*

85. N.C. GEN. STAT. §§ 15A-303(a), (c), 15A-304(d).

86. *Id.* § 15A-303(d).

87. *Id.* § 15A-304(a).

88. *Id.* § 15A-501(2).

89. *See* SMITH & HATTON, *supra* note 74 and accompanying text.

In North Carolina, a summons may be used to charge any crime.⁹⁰ State law expresses a preference for a summons in citizen-initiated cases⁹¹ and provides that a warrant is appropriate when the person needs to be taken into custody for reasons such as prior failures to appear, danger of escape, or injury to property or person.⁹² Notwithstanding this, summonses are not widely used. Our research shows that summonses were used in only 32.9 percent of misdemeanor cases in 2018,⁹³ and there is considerable variability among jurisdictions. At the high-end, one county used summonses in 60.9 percent of misdemeanor cases; at the low end, another county issued them in only 8.7 percent of criminal cases.⁹⁴ Expanded use of summonses in appropriate cases is thus another bail strategy, and policies implementing that practice have been adopted recently in at least two North Carolina judicial districts.⁹⁵

B. *Initial & First Appearance Stage Options for Reform*

After arrest, the next step in the pretrial process is the initial appearance before a magistrate where conditions of release are set.⁹⁶ For some defendants, the initial appearance is followed by a proceeding called a first appearance.⁹⁷ The first appearance typically is held before a district court judge and includes a review of pretrial conditions.⁹⁸ Jurisdictions are examining and implementing several bail reform strategies with respect to initial and first appearance proceedings.

One such strategy is changing local policy and practice to require adherence to the existing statutory preference for conditions other than secured bonds.⁹⁹ North Carolina General Statute section 15A-534(b) provides that a written promise to appear, custody release, or unsecured bond must be imposed unless the judicial official determines that release on those conditions “will not reasonably assure the appearance of the defendant as required; will pose a

90. § 15A-303(a)–(b).

91. *Id.* § 15A-304(b)(3).

92. *Id.* § 15A-304(b)(1).

93. JESSICA SMITH & ROSS HATTON, UNC SCH. OF GOV'T, USE OF SUMMONS V. ARREST IN NORTH CAROLINA MISDEMEANOR CASES: A COUNTY-LEVEL ANALYSIS 1 (2019), <https://cjl.sog.unc.edu/files/2019/09/Summons-v.-Arrest-for-North-Carolina-Misd.-Cases-9.13.2019.pdf>.

94. *Id.* at 2.

95. *See* STATE OF N.C. JUD. DIST. 2: BEAUFORT, MARTIN, HYDE, TYRRELL & WASHINGTON CNTYS., ORDER: BAIL AND PRETRIAL RELEASE POLICY (Dec. 13, 2019) (on file with author); STATE OF N.C. JUD. DIST. 30B: HAYWOOD & JACKSON CNTYS., ORDER: 18R425 (Dec. 28, 2018) (on file with author) (enacting “local rules relating to bail and pretrial release”).

96. N.C. GEN. STAT. § 15A-511(a)(1), (b)(3), (e).

97. *See id.* § 15A-601(a)–(e).

98. *Id.* § 15A-605(3).

99. *See, e.g.*, NC JUDICIAL DISTRICT 21 BAIL REFORM PROJECT, *supra* note 49, at 5, 8–9.

danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses.”¹⁰⁰ Notwithstanding this statutory mandate, stakeholders across North Carolina report that secured bonds are routinely imposed without the required statutory determination being made and in cases where the facts do not support such a determination.

One way to address this issue is to include the statutory mandate in written local bail policy. Under state law, the senior resident superior court judge is required to issue a written local pretrial release policy.¹⁰¹ I recently reviewed every local pretrial release policy in North Carolina and found that a number failed to include this key statutory requirement. Including the statutory mandate in local policy and adopting appropriate procedures to ensure adherence to it is one bail change being implemented in North Carolina.¹⁰²

A related strategy is modifying local pretrial release policy to require that judicial officials record reasons for imposing secured bonds. The North Carolina General Statutes only require judicial officials to record reasons for imposing a secured bond in writing if required by the local bail policy.¹⁰³ Not all local bail policies require written reasons for this decision.¹⁰⁴ In some jurisdictions this is changing, in part to slow down the decision-making process and ensure adherence to the statutory mandate about imposition of conditions other than secured bonds.¹⁰⁵

Most local bail policies require that when setting conditions of release, decisionmakers consider a set of statutory factors that include things like the nature and circumstances of the charged offense; the weight of the evidence against the defendant; and the defendant’s family ties, employment and financial resources, character, and mental condition.¹⁰⁶ Most policies also include a bond table, recommending secured bond amounts based on the offense level of the charged crime. Since local policies rarely prescribe a process for evaluating the laundry list of statutory factors, stakeholders regularly report that bond tables drive pretrial decision-making, pushing decisionmakers towards a secured bond. Moreover, using bond tables as the key decision-making tool seems inconsistent with

100. § 15A-534(b).

101. § 15A-535(a).

102. Smith, *supra* note 36.

103. *Id.* § 15A-534(b).

104. John Clark et. al, *Upgrading North Carolina’s Bail System: A Balanced Approach to Pretrial Justice Using Legal and Evidence-Based Practices*, in CRIMINAL INVESTIGATION & ADJUDICATION COMMITTEE REPORT 36–37 (Aug. 15, 2016), https://www.nccourts.gov/assets/documents/publications/nccalj_criminal_investigation_and_adjudication_committee_report.pdf?FzwNepbOildnLygNhgfi7PqYjj8GD09e.

105. *See, e.g.*, JUDICIAL DISTRICT 30B PRETRIAL JUSTICE PILOT PROJECT, *supra* note 49, at 1–2, 5.

106. § 15A-534(c).

the statutory mandate to consider the range of factors noted above and the statutory requirement that a written promise to appear, custody release, or unsecured bond must be imposed unless these conditions will not assure the defendant's appearance, the safety of the community, or the integrity of the criminal proceeding. To address this issue, North Carolina jurisdictions are providing judicial officials with tools to better inform decision-making and conform it to statutory and constitutional requirements.

One type of tool that has been adopted is a structured decision-making rubric to better evaluate the case consistent with controlling constitutional and statutory requirements. After the NCCALJ Report recommended that North Carolina engage in a pilot project on bail reform,¹⁰⁷ North Carolina's Judicial District 30B was selected to carry out that effort.¹⁰⁸ Among the reforms adopted was a structured decision-making tool, in the form of a flowchart, that guides decisionmakers through a series of inquiries and determinations.¹⁰⁹ Reforms were implemented in Judicial District 30B in January 2019, and an empirical evaluation was executed to measure their impact.¹¹⁰ Preliminary reports to stakeholders showed substantial decreases in the use of secured bonds without significant increases in rates of nonappearance or new criminal activity.¹¹¹ These results generated interest around North Carolina, and in January 2020, two additional judicial districts (six counties total) implemented their own versions of a structured decision-making tool.¹¹² No additional local resources were required to develop and implement these tools—a significant advantage in light of funding issues that pervade all levels of the court system.

A supplemental, or sometimes alternative, approach to providing decisionmakers with tools to better inform pretrial decisions is employment of an empirical risk assessment tool. These tools use algorithms to calculate the likelihood of a defendant's failure to appear in court or to commit a new crime during the pretrial period

107. N.C. COMM'N ON THE ADMIN. OF L. & JUST., *supra* note 37, at 18–19, 45–46.

108. *See* JUDICIAL DISTRICT 30B PRETRIAL JUSTICE PILOT PROJECT, *supra* note 49, at 1.

109. *Id.* at 2, 4–5.

110. JAMIE VASKE & JESSICA SMITH, UNC SCH. OF GOV'T, JUDICIAL DISTRICT 30B PRETRIAL JUSTICE PILOT PROJECT: THIRD QUARTER 2019 REPORT 2 (2019), <https://cjl.sog.unc.edu/files/2019/11/Third-quarter-implementation-results.pdf>.

111. *See, e.g., id.* at 9–12. The project's final report confirmed those results. *See* JAMIE VASKE, NORTH CAROLINA JUDICIAL DISTRICT 30B PRETRIAL PILOT PROJECT FINAL REPORT, PART II: EVALUATION REPORT (2020), <https://cjl.sog.unc.edu/files/2020/04/March-2020-Final-Report-30B-Project-Part-2.pdf>.

112. NC JUDICIAL DISTRICT 2 BAIL REFORM PROJECT, *supra* note 49, at 1; NC JUDICIAL DISTRICT 21 BAIL REFORM PROJECT, *supra* note 49, at 1–3. Our Lab applied for and received grant funding to conduct an empirical evaluation of these reforms; that evaluation currently is ongoing.

based on risk factors that have been tested for predictability.¹¹³ The Public Safety Assessment (“PSA”) is one such tool, used nationally and in North Carolina.¹¹⁴ Mecklenburg County has been using the PSA for some time,¹¹⁵ Buncombe County will begin doing so in 2020,¹¹⁶ and Catawba County is exploring adopting it.¹¹⁷ Another empirical risk assessment tool used in North Carolina is the Virginia Pretrial Risk Assessment Instrument-Revised.¹¹⁸

In addition to questions about the predictive validity of empirical risk assessment tools,¹¹⁹ these tools also require considerable resources to implement and conduct the necessary validation of their predictability.¹²⁰ Additionally, their use is controversial. In 2018, a group of more than 120 civil rights organizations announced opposition to pretrial risk assessment instruments, arguing that jurisdictions should instead “move to end secured money bail and decarcerate most accused people pretrial.”¹²¹ Among other things, the group noted that use of the tools “has not curtailed the continued over-

113. See generally SARAH L. DESMARAIS & EVAN M. LOWDER, PRETRIAL RISK ASSESSMENT TOOLS: A PRIMER FOR JUDGES, PROSECUTORS, AND DEFENSE ATTORNEYS 4–5 (2019), <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/02/Pretrial-Risk-Assessment-Primer-February-2019.pdf> (discussing the factors used to estimate likelihood of failure to appear and rearrests).

114. Jessica Smith, *What Risk Assessment Validation Tells Us About Pretrial Failures: They’re Lower than We Think*, UNC SCH. OF GOV’T (Sept. 9, 2019), <https://nccriminallaw.sog.unc.edu/what-risk-assessment-validation-tells-us-about-pretrial-failures-theyre-lower-than-we-think/>.

115. Jessica Smith, *Study: Mecklenburg County’s Bail Reforms Lead to Increased Release Rates but No Significant Increase in FTAs or New Criminal Activity*, UNC SCH. OF GOV’T (June 20, 2019), <https://nccriminallaw.sog.unc.edu/study-mecklenburg-countys-bail-reforms-lead-to-increased-release-rates-but-no-significant-increase-in-ftas-or-new-criminal-activity/>.

116. BUNCOMBE CNTY. JUS. RES. ADVISORY COUNCIL, SAFETY AND JUSTICE CHALLENGE (2019).

117. *Catawba County Selected to Participate in Research-Action Site Grant*, *supra* note 49.

118. Jessica Smith, *Bail Reform in North Carolina: Orange County Reforms*, UNC SCH. OF GOV’T (May 8, 2019), <https://nccriminallaw.sog.unc.edu/bail-reform-in-north-carolina-orange-county-reforms/>.

119. DESMARAIS & LOWDER, *supra* note 113, at 6–7 (noting that studies focusing on the predictive validity of risk assessment tools have produced promising results but that “the research methods and statistics used in [those] studies often fail to meet the standards of practice in the field of risk assessment and the standards for educational and psychological testing more generally”; noting further that “there has been no independent evaluation or synthesis of this research, limiting more definitive conclusions regarding the predictive validity of pretrial risk assessment tools overall and with respect to specific tools and pretrial outcomes”).

120. *Id.* at 9.

121. AFR. AM. MINISTERS IN ACTION ET AL., THE USE OF PRETRIAL “RISK ASSESSMENT” INSTRUMENTS: A SHARED STATEMENT OF CIVIL RIGHTS CONCERNS 1 (2018), <http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf>.

incarceration of people of color pretrial.”¹²² After recommending the use of an empirical risk assessment tool for North Carolina,¹²³ the national Pretrial Justice Institute released an updated position paper disavowing use of these tools.¹²⁴ Notwithstanding these issues, empirical risk assessment tools are being used in North Carolina. A recent study found that use of pretrial risk assessments and other reforms in Mecklenburg County resulted in more defendants being released pretrial without significant increases in failures to appear or new criminal charges during the pretrial period.¹²⁵

Improving procedures for determining an individual’s ability to pay a money bond is another opportunity for reform. In many jurisdictions, secured bonds are imposed without any meaningful assessment of the defendant’s ability to pay.¹²⁶ Failure to consider ability to pay has been challenged as unconstitutional,¹²⁷ and it can inadvertently result in wealth-based pretrial detention and the negative consequences for defendants and communities that such detentions cause.¹²⁸ Not surprisingly, jurisdictions are exploring ways to implement meaningful ability to pay determinations. Doing so is particularly challenging at the magistrate level where the relevant proceeding occurs shortly after arrest, neither the prosecutor nor defense counsel is present, and little information may be known about the defendant and his or her circumstances.¹²⁹ Further complicating the issue is the lack of standard tools for making ability to pay determinations. Although North Carolina uses an Affidavit of Indigency for determining whether a person is entitled to counsel provided by the state, the affidavit itself does not contain formulas or guidance regarding ability to pay.¹³⁰ And for years, stakeholders have complained that in practice the affidavit provides little information to

122. *Id.*

123. Clark et. al, *supra* note 104, at 22.

124. PRETRIAL JUST. INST., UPDATED POSITION ON PRETRIAL RISK ASSESSMENT TOOLS 1–2 (2020), <https://www.pretrial.org/wp-content/uploads/Risk-Statement-PJI-2020.pdf>.

125. Jessica Smith, *Study: Mecklenburg County’s Bail Reforms Lead to Increased Release Rates but no Significant Increase in FTAs or New Criminal Activity*, UNC SCH. OF GOV’T 4 (2019), <https://cjil.sog.unc.edu/files/2019/05/Bail-Reform-in-North-Carolina-Meck-County-Cite-Checked-JS.pdf>.

126. Smith, *supra* note 34.

127. *Id.*

128. *See supra* Part I.

129. Clark et. al, *supra* note 104, at 16, 25–26.

130. *See* ADMIN. OFF. OF THE CTS., AOC-CR-226, AFFIDAVIT OF INDIGENCY (2013), <https://www.nccourts.gov/assets/documents/forms/cr226-en.pdf?e1Vg5Go11xRI3OAVkbvPBdXUyDuK.yrV>.

the judge.¹³¹ Nevertheless, creating an easy to implement ability to pay tool is a significant opportunity.¹³²

One procedural reform that has widespread support is providing timely first appearances for all in-custody defendants, though practical issues can create roadblocks to implementation. Under state law, first appearances are only required for in-custody felony defendants.¹³³ Because first appearances are not required for in-custody misdemeanor defendants, defendants charged with misdemeanors and held on secured bonds may be detained in jail for days, weeks, or longer before a judge first reviews their conditions of pretrial release.¹³⁴ Some jurisdictions provide first appearances for misdemeanor defendants, but the practice is not uniform statewide.¹³⁵ Bail reform has renewed attention to this issue, and jurisdictions have moved to provide timely first appearances for all in-custody defendants and to shorten the time for first appearances for felony defendants.¹³⁶ But this reform can present challenges. After all, how can a jurisdiction provide a timely first appearance when district court is not held daily?

Early involvement of counsel is another opportunity for reform. As noted, counsel is not present at the initial appearance before the magistrate.¹³⁷ And in the vast majority of jurisdictions, counsel is not meaningfully involved in the first appearance before the district court judge. In most communities, both those served by a public defender's office and by private assigned counsel, a lawyer is not appointed *until*

131. See, e.g., N.C. ADMIN. OFF. OF THE CTS., 2018 REPORT ON INDIGENCY STANDARDS 6 (2018), https://www.ncleg.gov/documentsites/committees/JLOCJPS/2017-18%20Interim/6-March%2015,%202018_NIC_AOC_IDS/06a_AOC_Indigency_Standards_rev1-2018_02_01.pdf.

132. The Vera Institute of Justice recently released an Ability to Pay Calculator for use in New York; the calculator can be used online or downloaded to Android and iPhone devices. *Vera's Bail Assessment Pilot Launches "Ability To Pay" Calculator*, VERA INST. OF JUST. (Dec. 17, 2019), <https://www.vera.org/newsroom/veras-bail-assessment-pilot-launches-ability-to-pay-calculator>.

133. N.C. GEN. STAT. § 15A-601(a) (noting that first appearances are only required for crimes within the original jurisdiction of the superior court).

134. JESSICA SMITH, UNC SCH. OF GOV'T, NORTH CAROLINA JUDICIAL DISTRICT 30B PRETRIAL JUSTICE PILOT PROJECT FINAL REPORT, PART I: BACKGROUND, PROCESS & IMPLEMENTED REFORMS 5 (2020), <https://ejil.sog.unc.edu/files/2020/04/March-2020-Final-Report-30B-Project-Part-1.pdf>.

135. See Clark et. al, *supra* note 104, at 26 (noting that misdemeanor defendants are often not provided with a first appearance in North Carolina; VASKE, *supra* note 111, at 16 (noting two North Carolina counties that provide first appearances for misdemeanor defendants).

136. See, e.g., NC JUDICIAL DISTRICT 2 BAIL REFORM PROJECT, *supra* note 49, at 3–4 (reporting that the district adopted a reform to provide new first appearance proceedings for in-custody misdemeanor defendants); SMITH, *supra* note 134, at 5–6 (same).

137. Clark et. al, *supra* note 104, at 26.

the first appearance.¹³⁸ Thus, prior to the first appearance, counsel has had no opportunity to meet with the defendant, obtain the defendant's criminal history record, or gather information that can be used to advocate for modified conditions.¹³⁹ Jurisdictions have taken steps to promote the early involvement of counsel. In North Carolina's Judicial District 30B, for example, this was done in 2019 with the support of North Carolina Indigent Defense Services, which contracted with private counsel to represent defendants at first appearances.¹⁴⁰ In that jurisdiction, representation included meeting with defendants and obtaining and reviewing their criminal history records before the first appearance.¹⁴¹ Defendants who had counsel were more likely to have their bonds unsecured or to have secured bond amounts reduced than those who did not have the assistance of a lawyer.¹⁴²

Jurisdictions are also reexamining procedures that allow or encourage defendants who appear without counsel at the first appearance to waive their right to counsel and enter a time-served plea. Stakeholders have come to understand the coercive effect of pretrial detention¹⁴³ and the need for defendants to consult with a lawyer about the consequences of the plea and resulting conviction on, for example, immigration, employment, professional licensing, and other matters.¹⁴⁴ Thus, some stakeholders are exploring procedures that require a consultation with counsel prior to a waiver of the right to counsel for time-served pleas entered at the first appearance.

Unlike many other jurisdictions around the country, North Carolina does not have a statutory preventative detention statute.¹⁴⁵ Notwithstanding this, North Carolina decisionmakers routinely impose secured bonds for the purpose of detaining defendants determined to be too dangerous or too great a flight risk to be released

138. Nial Raaen et al., NAT'L CTR. FOR STATE CTS., *Implementation of a Criminal Caseflow Management Plan*, in N.C. COMM'N ON THE ADMIN. OF L. & JUST., *supra* note 37, at 13.

139. See NCCALJ COMM. ON CRIMINAL INVESTIGATION & ADJUDICATION REPORT, *Improving Indigent Defense in North Carolina*, in N.C. COMM'N ON THE ADMIN. OF L. & JUST., *supra* note 37, at 3–4.

140. JUDICIAL DISTRICT 30B PRETRIAL JUSTICE PILOT PROJECT, *supra* note 49, at 6.

141. *Id.*

142. VASKE, *supra* note 111, at 18; see also Jamie C. Vaske, *North Carolina Judicial District 30B Pretrial Justice Pilot Project*, UNC SCH. OF GOV'T, <https://cjil.sog.unc.edu/files/2020/04/Fact-Sheet.pdf>.

143. See, e.g., Heaton et al., *supra* note 4, at 715–16.

144. See generally *Collateral Consequences Assessment Tool*, UNC SCH. OF GOV'T (July 2020), <https://ccat.sog.unc.edu/> (collecting the collateral consequences of a criminal conviction).

145. JESSICA SMITH, UNC SCH. OF GOV'T, PRETRIAL PREVENTATIVE DETENTION IN NORTH CAROLINA 2 (2019), <https://cjil.sog.unc.edu/files/2019/03/Preventative-Detention-3.21.2019.pdf>.

pretrial.¹⁴⁶ Regardless of whether this procedure is permissible under North Carolina law, the United States Supreme Court has held that preventative pretrial detention passes constitutional muster when accompanied by certain procedural protections.¹⁴⁷ To better align their procedures with this law, stakeholders are seeking to implement detention bond hearings for those defendants intentionally detained pretrial and afford defendants procedural protections, including the right to counsel and the right to present evidence.¹⁴⁸

Some research suggests that court date reminder systems can be a cost-effective way to reduce court nonappearance rates.¹⁴⁹ In 2018, the North Carolina Administrative Office of the Courts implemented a statewide court date reminder system.¹⁵⁰ All court employees have the ability to initiate the sign up process for defendants, though the sign up is not final until defendants themselves complete the process.¹⁵¹ However, use of the system has been limited, enrollment can be cumbersome, reminders do not include required appointments with pretrial supervision officers, and some research suggests that the content of the messages produced could be improved.¹⁵² Jurisdictions are thus looking at ways to enroll more people in the free, existing system and at investing in alternative systems.

C. *Subsequent Court Proceedings & Options for Reform*

Previously discussed reforms, such as enhanced court date reminder systems and requiring counsel or an opportunity to consult with counsel for time-served pleas, can be applied throughout the pretrial period, including during subsequent court proceedings. Other reform options can also be applied during subsequent court proceedings. One option is creating or enhancing the availability of local pretrial supervision and support through pretrial services programs. When used as an alternative to detention, release to a pretrial services program can result in substantial cost savings. For

146. *Id.*

147. *Id.* at 5.

148. *Id.* at 5–6.

149. *See, e.g.*, NAT'L CTR. FOR STATE CTS.' PRETRIAL JUST. CTR. FOR CTS., USE OF COURT DATE REMINDER NOTICES TO IMPROVE COURT APPEARANCE RATES 1 (2017), https://www.ncsc.org/__data/assets/pdf_file/0015/1635/pjcc-brief-10-sept-2017-court-date-notification-systems.ashx.pdf; *see also* LISA PILNIK, NAT'L INST. OF CORR., A FRAMEWORK FOR PRETRIAL JUSTICE: ESSENTIAL ELEMENTS OF AN EFFECTIVE PRETRIAL SYSTEM AND AGENCY 47 (Barbara Hankey et al. eds., 2017), <https://s3.amazonaws.com/static.nicic.gov/Library/032831.pdf>.

150. *Court Date Notifications and Reminders for Criminal Cases Now Available via Text and Email*, N.C. JUD. BRANCH (Oct. 19, 2018), <https://www.nccourts.gov/news/tag/press-release/court-date-notifications-and-reminders-for-criminal-cases-now-available-via-text-and-email>.

151. *Id.*

152. Jessica Smith, *Improving North Carolina's Criminal Court Date Notification System*, UNC SCH. OF GOV'T (May 29, 2019), <https://nccriminallaw.sog.unc.edu/improving-north-carolinas-criminal-court-date-notification-system/>.

example, Wake County reports that its pretrial services program costs \$2.18 per day and resulted in an average daily jail population reduction of 661 beds in 2019.¹⁵³ Likewise, Durham County reports that its pretrial services program has resulted in jail bed reductions and avoidance of substantial costs associated with jail expansions and construction.¹⁵⁴

As noted above, pretrial services programs are county funded and do not exist in much of North Carolina.¹⁵⁵ Where such programs do exist, there is considerable variability with respect to capacity and services offered. In Forsyth County, for example, the pretrial services program is housed within the sheriff's department and consists almost exclusively of electronic monitoring. Mecklenburg County's pretrial services program, by contrast, offers an array of supervision and support services, such as weekly office visits, substance abuse screening, case planning to address barriers to successful supervision, and referral to community resources.¹⁵⁶ Although pretrial services programs are sometimes associated with supervision services, these programs can also provide important support services, such as enhanced court date reminders, assistance with transportation to and from court, referrals to behavioral health services, and other social services, such as shelter housing.¹⁵⁷

A related issue that is attracting new attention is: Who pays for these services? In some jurisdictions, individuals are charged for pretrial program services. For example, in Wake County, North Carolina, individuals who are not indigent are charged a fee for pretrial electronic monitoring.¹⁵⁸ Some object to the practice of imposing fees for pretrial services monitoring, asserting that it leads to the same unfair and inequitable results as financial bail.¹⁵⁹

Another consideration with respect to pretrial programs is ensuring that the services offered are appropriately matched to the individual's pretrial risk. It is commonly asserted that pretrial services should follow the risk principle whereby individuals are provided with supervision and services appropriate to their pretrial

153. Braunbach & Smith, *supra* note 14.

154. Gudrun Parmer, *Data Collection to Track Outcomes, in PRETRIAL RELEASE AND ACCOUNTABILITY ROUNDTABLE* (2019) (PowerPoint presentation on file with author).

155. See Tanner et al., *supra* note 65.

156. See, e.g., *Pretrial Services*, MECKLENBURG CNTY. GOV'T, <https://www.mecknc.gov/CriminalJusticeServices/Pages/Pretrial%20Services.aspx> (last visited Nov. 27, 2020); see also Sonya Harper & Caitlin Fenhagen, *A More Predictive, Faster Way to Assess Whether a Defendant is a Danger to the Public or Will Fail to Appear in Court*, in *PRETRIAL RELEASE AND ACCOUNTABILITY ROUNDTABLE* (2019) (PowerPoint presentation on file with author).

157. See, e.g., *Court Date Notifications and Reminders for Criminal Cases Now Available via Text and Email*, *supra* note 150.

158. Braunbach & Smith, *supra* note 153.

159. NAT'L ASS'N OF PRETRIAL SERVS. AGENCIES, *STANDARDS ON PRETRIAL RELEASE* 12 (2020).

risk level.¹⁶⁰ Although research is limited in this area, some research supports this notion.¹⁶¹ Unfortunately, there is little evidence about the most effective pretrial supervision and support options, and practices do not always align with the research. For example, notwithstanding the fact that many local jurisdictions are turning to pretrial electronic monitoring as an alternative to pretrial detention, our Lab reviewed the research and found a very mixed picture about the effectiveness of this tool.¹⁶² And we found even less evidence supporting the effectiveness of pretrial drug testing, another popular pretrial supervision technique.¹⁶³

Stakeholders are also exploring opportunities to align procedures for addressing failures to appear in court with bail system objectives. Consider, for example, the case of John, a homeless, disabled veteran with mental health issues charged by citation with begging. When John fails to appear in court on the Class 3 misdemeanor begging charge, the district court judge can, under the law, issue an order for John's arrest. If the judge does not specify pretrial conditions in that order, the magistrate is required by statute to impose a minimum \$1,000 secured bond.¹⁶⁴ John also has multiple begging charges, all on different court calendars, requiring different appearance dates. Consider a second case involving Mary, a single mother of two children with no criminal record who is living paycheck to paycheck. Mary is charged by citation with larceny of motor fuel, after filling her tank with \$10 worth of gas and driving away without paying. If Mary cannot get off from work or has no childcare to attend court as required, a nonappearance can result in issuance of an order for arrest and imposition of a mandatory secured bond.¹⁶⁵ In both cases, the defendants' limited financial resources likely mean that imposition of a secured bond will result in pretrial detention.

Jurisdictions are implementing more nuanced ways to handle these types of cases, including adopting policies about the issuance of orders for arrest and establishing alternate procedures to avoid mandatory secured bonds in all cases. In cases like Mary's, for instance, at least one jurisdiction affords the individual the

160. See, e.g., *Pretrial Services & Supervision*, PRETRIAL JUST. CTR. FOR CTS., <https://www.ncsc.org/pjcc/topics/pretrial-services> (last visited Oct. 10, 2020).

161. See, e.g., Christopher T. Lowenkamp & Kristin Bechtel, *Meeting Pretrial Objectives: A Validation of the Summit County Pretrial Risk Assessment Instrument (SCPRAI)*, RESEARCHGATE 1, 5, 27 (2009), https://www.researchgate.net/publication/228461908_Meeting_pretrial_objectives_A_validation_of_the_Summit_County_pretrial_risk_assessment_instrument_SCPRAI.

162. ROSS HATTON, RESEARCH ON THE EFFECTIVENESS OF PRETRIAL ELECTRONIC MONITORING 2–3 (2019), <https://cjl.sog.unc.edu/files/2019/09/EM-Briefing-Paper-9.26.2019.pdf>.

163. ROSS HATTON, RESEARCH ON THE EFFECTIVENESS OF PRETRIAL DRUG TESTING 1, 4 (2019), <https://cjl.sog.unc.edu/files/2019/11/Research-on-Effectiveness-of-Drug-Testingdocx.pdf>.

164. N.C. GEN. STAT. § 15A-534(d1).

165. *Id.*

opportunity to appear before the clerk of court to have the matter rescheduled and thus avoid issuance of an order for arrest.¹⁶⁶ For cases like John's, alternatives include consolidating charges and referring individuals whose offenses result from poverty, homelessness, or mental health issues to specialized courts whose primary goal is addressing root causes to reduce recidivism.¹⁶⁷ Other jurisdictions take simpler approaches, such as holding orders for arrest until the end of the day or session and ensuring that the clerk or lawyer contacts the defendant, informing him or her that immediate appearance in court is required to avoid the order for arrest.¹⁶⁸

Jurisdictions are also creating the capacity and procedures to conduct regular reviews of jail rolls. Buncombe County, for example, created a dashboard that allows judicial officials to see, at a glance, who is in jail, for what, and for how long—facilitating review of appropriate cases.¹⁶⁹ Wake County reports that it is creating a similar dashboard, modeled on the one used in Buncombe County.¹⁷⁰ Another jurisdiction addresses the issue by instituting a “custody court,” where detained defendants are brought before a judge for a regular review of their cases. Still, others are addressing the issue with a “Jail Navigator” who is tasked with a daily review of local jail populations to efficiently manage cases and ensure that risk-based considerations warrant pretrial detention.

I have summarized many of the key opportunities that local jurisdictions are examining, but my list is not exhaustive. Additional avenues for reform include expedited trials for detained defendants, improved case processing to shorten disposition times, and education and training for prosecutors, defenders, and judges on the bail system and its impact.

V. CONCLUSION

I write this Article sequestered at home because of COVID-19. While the pandemic is devastating communities around the world, it has caused a sharp, sudden interest in addressing jail populations in

166. *Pretrial Release*, CRIM. JUST. RES. DEP'T, ORANGE CNTY. N.C., <https://www.orangecountync.gov/439/Pretrial-Release> (last visited Nov. 27, 2020).

167. *See, e.g.*, Rose Hoban, *Mental Health Court Offers an Alternate Path*, N.C. HEALTH NEWS (Dec. 6, 2012), <https://www.northcarolinahealthnews.org/2012/12/06/mental-health-court-offers-an-alternate-path/>.

168. Marty McGee, *One N.C. County Significantly Cut its Failure-to-Appear Rate. Here's How.*, N.C. LAWS. WKLY. (Aug. 17, 2020), <https://nclawyersweekly.com/2020/08/17/one-n-c-county-significantly-cut-its-failure-to-appear-rate-heres-how/>.

169. *Sheriff's Office Launches Innovative Data Dashboards*, BUNCOMBE CNTY., N.C., https://www.buncombecounty.org/governing/depts/sheriff/news_detail.aspx?newsid=18005 (last updated Mar. 20, 2020).

170. Braunbach & Smith, *supra* note 153.

anticipation of the potentially catastrophic consequences of the virus's spread in detention facilities. Major news outlets have already reported that the virus is spreading within New York's Rikers Island¹⁷¹ and other jail facilities. I fielded more inquiries in the early months of the COVID-19 pandemic than in the entire prior year about best practices for citation and summons in lieu of arrest, managing pretrial jail populations, and other strategies to swiftly and safely reduce jail populations. It is, of course, unknown what impacts the speedy implementation of new criminal justice practices will have on individuals and communities. But when we emerge, there may be a new appreciation for the impact of our state and local bail systems on public safety, the economic well-being of our communities, and the fairness of our criminal justice systems.

171. Katie Shepherd, *Trapped on Rikers: Jails and Prisons Face Coronavirus Catastrophe as Officials Slowly Authorize Releases*, WASH. POST (Mar. 23, 2020), <https://www.washingtonpost.com/nation/2020/03/23/coronavirus-rikers-island-releases/>.