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DECARCERATING NEW YORK CITY: LESSONS FROM A PANDEMIC

Nicole Smith Futrell*

“A storm is coming and I know what I’ll be doing when it claims my first patient. What will you be doing? What will you have done? We have told you who is at risk. Please let as many out as you possibly can. end.”¹

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1. Ross MacDonald (@RossMacDonaldMD), TWITTER (Mar. 18, 2020), https://twitter.com/RossMacDonaldMD/status/1240455801397018624?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1240455802193883137%7Ctwgr%5Eshare_3&ref_url=https%3A%2F%2Fwww.nytimes.com%2F2020%2F03%2F20%2Fnyregion%2Fnycoronavirus-rikers-island.html [https://perma.cc/H7P6-KMQK]. Dr. Ross MacDonald is the Chief Medical Officer at Rikers Island. *See id.*

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INTRODUCTION

Over the last decade, long before the sweeping impact of COVID-19, the criminal legal system in New York City has been on a halting path toward decarceration. Set against the national backdrop of declining crime rates and a reckoning with the economic, social, and racial costs of mass criminalization and incarceration, elected officials in New York City and State have acknowledged that a shift toward reducing the number of people held in New York City jails is long overdue.² Particular attention has been focused on Rikers Island, the notoriously violent, sprawling jail complex, which has been regarded as one of the most visibly troubling aspects of the administration of criminal “justice” in New York City. With its reputation for corruption, violence, and human rights abuses, Rikers has become the final resting place for New York City’s failed social welfare and criminal legal systems.³ Former New York State Court of Appeals Chief Justice Jonathan Lippman has called Rikers Island “a stain on the soul of New York City.”⁴

2. In an official statement touting his change of policy on closing Rikers Island, Mayor Bill de Blasio proclaimed:

Mass incarceration did not begin in New York City, but it will end here With the lowest rate of incarceration of any major city, we are proving you don’t need to arrest your way to safety. New York is a telling a different story, one where we can keep fathers at home and kids in schools and still be the safest big city in America.

Press Release, City of N.Y., Projected City Jail Population Falls to 3,300 by 2026 (Oct. 15, 2019) [hereinafter Projected City Jail Population], <https://www1.nyc.gov/office-of-the-mayor/news/484-19/projected-city-jail-population-falls-3-300-2026> [https://perma.cc/4S7C-RY2U].

3. See Michael Jacobson et al., *Beyond the Island: Changing the Culture of New York City Jails*, 45 FORDHAM URB. L.J. 373, 376 (2018). See generally *This Is Rikers*, MARSHALL PROJECT (June 28, 2015), <https://www.themarshallproject.org/2015/06/28/this-is-rikers> [https://perma.cc/L3A5-4L4P].

4. *Closing Rikers Island: A Catalyst for Criminal Justice Reform*, CITY LAND (Apr. 16, 2019),

As the primary jail complex for New York City, Rikers Island currently has eight facilities that house people who are held in pretrial detention, sentenced to less than one year in jail, or accused of violating the conditions of their New York State parole.⁵ New York City's jail system has historically been among the largest in the world and manages a significant number of detainees, predominately Black and Latinx, who deal with homelessness as well as substance and mental health concerns.⁶ At its peak in 1991, City jails held over 21,000 people.⁷ In the past two decades as crime has fallen, the population of people held in detention in New York City jails has also dropped.⁸

Within recent years, criminal legal reform organizers and advocates have seized the downward trends in crime and broader rejection of mass incarceration policies to galvanize the support of backers in New York City and State government and push for the closure of Rikers Island.⁹ In October 2019, the New York City Council voted in favor of a plan to close Rikers Island by 2026 and replace it with four smaller borough-based jails, drastically reducing the space available for incarceration in New York City.¹⁰ This vote came over the objection of more abolitionist-oriented advocates, who want to see Rikers Island closed, but oppose investing public funds in the construction of new jails.¹¹ Nonetheless, the announcement was heralded

<https://www.citylandnyc.org/closing-rikers-island-a-catalyst-for-criminal-justice-reform/> [https://perma.cc/88DE-LRT9].

5. There are also two other jails runs by New York City Department of Correction in Manhattan and Brooklyn. See *Facilities Overview*, N.Y.C. DEP'T CORRECTION, <https://www1.nyc.gov/site/doc/about/facilities.page> [https://perma.cc/6W8T-H98H] (last visited Oct. 13, 2020).

6. See Ross MacDonald et al., *The Rikers Island Hot Spotters: Defining the Needs of the Most Frequently Incarcerated*, 105 AM. J. PUB. HEALTH 2262, 2262 (2015).

7. See Judith A. Greene & Vincent Schiraldi, *Better by Half: The New York City Story of Winning Large-Scale Decarceration While Improving Public Safety*, 29 FED. SENT'G REP. 22, 22 (2016).

8. See *id.*

9. See *id.* at 36. ("New York's unprecedented reduction in reliance on incarceration has been a bottom-up, advocacy-driven, community-focused strategy, as opposed to their topdown, technocratic, elite-consensus approach. In New York, public officials and policy makers have been relentlessly pressured by vigorous demands from advocates, organizers, and activists, who have also worked tirelessly to educate the public about the need for a more humane and effective criminal justice system.")

10. See Matthew Haag, *N.Y.C. Votes to Close Rikers. Now Comes the Hard Part*, N.Y. TIMES (Oct. 17, 2009), <https://www.nytimes.com/2019/10/17/nyregion/rikers-island-closing-vote.html> [https://perma.cc/6UMD-SHWB].

11. Advocates with an abolitionist vision did not support the plan to spend billions in public funds to replace Rikers Island with newly constructed, smaller borough-based jails. See Gabriel Sayegh, *Making Sense of the Fight over NYC Jails*, KATAL CTR. FOR EQUITY HEALTH & JUST. (Oct. 10, 2019), <https://www.katalcenter.org/makingsenseriakers> [https://perma.cc/GM9B-P7EU].

by those in city government as New York City's "historic decarceration" plan.¹² Yet, for the City's closure plan to be possible, the Mayor estimated that it would take a period of years well beyond his tenure to drastically reduce the jail population to fewer than 6,000 people.¹³

Even before the City Council's vote, stakeholders were beginning to closely examine what reforms would be necessary at earlier stages of the criminal legal process to shrink New York City's jail population.¹⁴ They explored administrative changes such as increased use of diversion, supervised release, and policy modifications within the New York Police Department (NYPD) and local district attorneys' offices.¹⁵ In April 2019, in a major legislative boost to the efforts to close Rikers, New York State passed wide-reaching criminal justice reform legislation that eliminated money bail and pretrial detention for virtually all misdemeanor and non-violent felony offenses, provided for early disclosure of prosecutorial evidence, and strengthened speedy trial rights.¹⁶ These changes, while not a panacea for the ills of the criminal legal system, did represent a significant step forward in efforts to shift the City's overreliance on incarceration and excessively punitive approaches.

In January 2020, just before the COVID-19 outbreak, the population of New York City jails was as at a low of 5,721,¹⁷ and New York State's legislative changes had just gone into effect.¹⁸ With the emergence of COVID-19 in New York City in March, advocates and public defenders began to publicly warn about the impending public health crisis of COVID-19 and the need for the rapid reduction of the census on Rikers

12. See Projected City Jail Population, *supra* note 2.

13. See JB Nicholas, *Close Rikers in Under 10 Years? It Can Be Done*, VILL. VOICE (May 23, 2017), <https://www.villagevoice.com/2017/05/23/close-rikers-in-under-10-years-it-can-be-done> [https://perma.cc/C3GW-B33B].

14. See generally INDEP. COMM'N ON N.Y.C. CRIM. JUST. & INCARCERATION REFORM, A MORE JUST NEW YORK CITY (2017) [hereinafter A MORE JUST NEW YORK CITY], <https://static1.squarespace.com/static/5b6de4731aef1de914f43628/t/5b96c6f81ae6cf5e9c5f186d/1536607993842/Lippman%2BCommission%2BReport%2BFINAL%2BSingles.pdf> [https://perma.cc/G7W7-MK8S].

15. See *id.*

16. See *Making Sense of Bail Reform in NYS, Part 2*, KATAL CTR. FOR EQUITY HEALTH & JUST. (May 17, 2019), https://www.katalcenter.org/bailreform_nys2 [https://perma.cc/Q8MJ-WT67].

17. N.Y.C. MAYOR'S OFF. OF CRIM. JUST., NEW YORK CITY JAIL POPULATION REDUCTION IN THE TIME OF COVID-19 (2020) [hereinafter MOCJ FACTSHEET May 25, 2020], <https://criminaljustice.cityofnewyork.us/wp-content/uploads/2020/05/COVID-factsheet-MAY-25-2020.pdf> [https://perma.cc/367N-RU7Z].

18. See *Making Sense of Bail Reform in NYS, Part 2, supra* note 16.

Island and in other City jail facilities.¹⁹ Public health officials, the Board of Correction, and other oversight groups recommended actions to minimize the impact of COVID-19, such as decreasing the jail population and admissions, as well as drastically reducing face-to-face contact in precincts, courts, and sites of community supervision.²⁰ Notably, these actions fit within the rationale of effective strategies for decarceration more generally.²¹

This Article examines how the City's broader decarceration agenda can be informed by the lessons learned from efforts to rapidly depopulate Rikers Island during the height of the COVID-19 outbreak. It argues that long term decarceration in New York City will not be realized without meaningful investments in necessary social supports and a willingness to shift away from outmoded conceptions of public safety. The economic instability brought about by COVID-19 undoubtedly make these financial and ideological changes all the more necessary and complex. Part I provides a brief overview of the pre-COVID-19 approach to decarceration in New York City. Part II details how various institutional actors responded to the need to accelerate the release of people detained at Rikers Island during the height of the pandemic. It highlights the often-regressive character of decision-making by police, prosecutors, courts, and government agencies during the pandemic. Part III argues that critical insights gained during the systemic response to the initial COVID-19 outbreak should inform ongoing decarceration efforts in New York City. It contends that the City's COVID-19 response shows that many institutional actors across the City are only willing to do the bare minimum in achieving decarceration, even when the lives of detained people and City employees are at stake. This Article proposes movement away from deeply entrenched, punitive practices and policies and more expansive investment in non-carceral services and institutions for a meaningful, long-term decarceral agenda.

19. See Jan Ransom & Alan Feuer, *'A Storm Is Coming': Fears of an Inmate Epidemic as the Virus Spreads in the Jails*, N.Y. TIMES (Mar. 20, 2020), <https://www.nytimes.com/2020/03/20/nyregion/nyc-coronavirus-rikers-island.html> [<https://perma.cc/X35M-N43L>].

20. See *id.* See generally Jonathan Lippman & Tyler Nims, *Let More People out of Rikers: The Coronavirus Demands Bolder Action to Decarcerate*, N.Y. DAILY NEWS (Apr. 18, 2020), <https://www.nydailynews.com/opinion/ny-oped-let-more-people-out-of-rikers-20200418-caf-itdk7sjamljylgskfts73se-story.html> [<https://perma.cc/A383-4V84>]; Peter Wagner & Emily Widra, *Five Ways the Criminal Justice System Could Slow the Pandemic*, PRISON POL'Y INITIATIVE (Mar. 27, 2020), <https://www.prisonpolicy.org/blog/2020/03/27/slowpandemic/> [<https://perma.cc/NV72-LS9U>].

21. See DENNIS SCHRANTZ, STEPHEN DEBOR & MARC MAUER, SENT'G PROJECT, DECARCERATION STRATEGIES: HOW 5 STATES ACHIEVED SUBSTANTIAL PRISON POPULATION REDUCTIONS 6-7 (2018), <https://www.sentencingproject.org/publications/decarceration-strategies-5-states-achieved-substantial-prison-population-reductions/> [<https://perma.cc/SM6G-B6GH>].

I. DECARCERATION BEFORE COVID-19

The movement toward decarceral policies in New York City is largely the result of efforts to close Rikers Island. Over the past several decades, Rikers Island has served as an inhumane warehouse for people at the margins of life in New York City due to poverty, structural racism, and mental and substance abuse issues.²² The majority of people held at Rikers are pretrial detainees, people who are presumed innocent but remain behind bars because they have been denied bail or because they do not have the financial resources to pay the bail amount set.²³ Rikers Island, with its well-documented reputation for violence, racial inequities, and punitiveness, represents many of the larger criminal legal system's ills.²⁴

While local officials have been aware of the problems at Rikers Island for quite some time, a reduction in arrest and crime rates and concerns about the impact of mass incarceration made it politically feasible to explore the political and legal strategies necessary to close Rikers and shrink the overall jail capacity in New York City.²⁵ This Part gives a brief overview of recent decarceration efforts in New York City. It highlights the history of violence and abuse at Rikers and outlines the various pre-COVID-19 measures taken to reduce the detained population and move toward diminished reliance on jails.

A. The Case for Closing Rikers Island

In October 2019, the New York City Council approved a plan to close Rikers Island and replace it with a number of smaller borough-based jails by 2026.²⁶ The vote marked a significant milestone after years of grassroots advocacy and political maneuvering and promised, at least in word, to put New York City “at the forefront of a national movement to reverse decades of mass incarceration that disproportionately affected black and Hispanic people.”²⁷ The vote was indeed historic. For over eight decades, Rikers Island has served as the primary criminal detention facility for New York

22. See generally A MORE JUST NEW YORK CITY, *supra* note 14.

23. See Janos Marton, #CLOSERikers: The Campaign to Transform New York City's Criminal Justice System, 45 FORDHAM URB. L.J. 499, 526 (2018).

24. See Darren Walker, *Lessons from Rikers Island*, ATLANTIC (May 9, 2017), <https://www.theatlantic.com/politics/archive/2017/05/rikers-island/525858/> [https://perma.cc/2TPN-SDEE].

25. See Jarrett Murphy, *It Will Take Tenacity and Guts to Shutter One of the Country's Most Notorious Jails*, NATION (July 25, 2017), <https://www.thenation.com/article/archive/it-will-take-tenacity-and-guts-to-shutter-one-of-the-countrys-most-notorious-jails/> [https://perma.cc/MR2X-GXYX].

26. See Haag, *supra* note 10.

27. *Id.*

City.²⁸ As the number of facilities and people held on Rikers Island grew over the years, so did its reputation for violence, corruption, and mismanagement.²⁹ Despite many efforts to reform and even close down Rikers in the past, the political, fiscal, and social conditions never quite converged until this moment.³⁰

Rikers Island was built to replace its predecessor, Blackwell's Island penitentiary, which was marked by overcrowding and corruption.³¹ Before its opening in 1935, Rikers Island was touted as a space that would allow detainees to reenter society with better "mental and moral health" and with valuable vocational training.³² However, mismanagement and overcrowding marked Rikers Island from the beginning.³³ Yet it was not until the 1960s and 1970s that the foundation for modern-day problems with the facility developed.³⁴ During this time frame, the social, economic, and racial upheaval happening in New York City contributed to the steady population increases and racial disparities that have become hallmarks of the institution.³⁵ The demographic composition of Rikers Island "evolved from a jail population that was 85% white in 1930 to 35% white by 1970 to 92.5% people of color in 2015."³⁶ The New York City fiscal crisis of the mid-1970s also took funds away from City jails, depriving the facility of resources and deepening substandard conditions of confinement.³⁷

The first major government-driven attempt to close Rikers Island occurred during Ed Koch's mayoral administration.³⁸ After a number of litigation efforts against the City and failed reform attempts, Koch appointed Herb Sturz, known for his work on bail reform and as a founding director of the Manhattan Project (later known as the Vera Institute), as deputy mayor for criminal justice.³⁹ Sturz evaluated the severely deficient conditions at Rikers

28. See Marton, *supra* note 23, at 500.

29. See *id.* at 503–04.

30. See *id.* at 516–18.

31. See *id.* at 507.

32. See *id.*

33. See *This Is Rikers*, *supra* note 3.

34. See Jacobson et al., *supra* note 3, at 384–86.

35. See Marton, *supra* note 23, at 508–10.

36. *Id.* at 509.

37. See *id.*

38. See *id.* at 508–10.

39. See JB Nicholas, *A History Of Hell: How Rikers Island Became a Modern Municipal Abomination*, VILL. VOICE (Apr. 11, 2017), <https://www.villagevoice.com/2017/04/11/a-history-of-hell-how-rikers-island-became-a-modern-municipal-abomination/> [<https://perma.cc/MM5W-EPWB>] ("In 1975, prisoners held in New York City's jails filed seven separate class-action lawsuits in federal court that challenged thirty discrete areas of prison administration and, collectively, alleged that the conditions they were confined under were inhumane and unlawful under the Constitution. But

and its remote and inaccessible location and recommended that the City sell the property to the state and use the proceeds to create smaller jail facilities within reach of criminal courts in each borough.⁴⁰ Sturz's proposals were never adopted, in part because of the rising crime rate and the rapid expansion of the jail population.⁴¹

The 1990s marked the notable emergence of hyper-aggressive policing strategies, gang influence, and significant overcrowding at Rikers Island, with the daily population reaching close to 22,000.⁴² The number of corrections officers working within Rikers facilities also increased, bringing along more powerful gear such as “pepper spray, mace, and electrified stun shields.”⁴³ All of these conditions helped encourage a culture of brutal violence.⁴⁴ By the 2000s, as the City's crime rate began to fall, the number of homicides dropped from 2,245 in 1990 to 334 in 2016.⁴⁵ Yet, even as the number of people held at Rikers gradually decreased, the culture of violence and brutality persisted.⁴⁶

A few particularly significant, high-profile examples of the problems at Rikers Island helped to bring the ills of New York City's infamous jail complex into popular consciousness. In October 2008, while being held in an adolescent facility on Rikers Island, 18-year-old Christopher Robinson was viciously beaten and killed by other detained teens.⁴⁷ The Department of Correction Intelligence Unit and the Bronx District Attorney's Office launched investigations into Christopher Robinson's killing, which confirmed the existence of an enterprise known as “the Program,” an elaborate scheme in which corrections officers “either look the other way, or

the administration of Mayor Abraham Beame was consumed by the city's existential financial crisis, and it paid little attention to the lawsuits.”).

40. See Marton, *supra* note 23, at 511.

41. Martin Horn, who served as DOC Commissioner from 2002–2010, was also convinced that City jails needed to be decentralized. However, community opposition to building new facilities in the Bronx thwarted his plans. See *id.* at 516–17.

42. See *id.* at 513.

43. See *id.*

44. See *id.* at 513–14.

45. See A MORE JUST NEW YORK CITY, *supra* note 14, at 22.

46. See Marton, *supra* note 23, at 519. The problem of violence at Rikers Island has continued up until recently. According to a federal monitor's report, from 2016 to 2019, use of force by guards at Rikers Island increased by 54% despite a falling jail population. See Benjamin Weiser, *Violence at Rikers at an 'All-Time High' Despite City's Promise to Curb It*, N.Y. TIMES (Aug. 6, 2020), <https://www.nytimes.com/2020/08/06/nyregion/rikers-island-violence-guards.html> [perma.cc/VB6L-47XA].

47. See Russ Buettner, *Rikers Extortions Noted Before Death*, N.Y. TIMES (Mar. 15, 2009), <https://www.nytimes.com/2009/03/16/nyregion/16rikers.html> [https://perma.cc/D2PS-2BXQ]; Geoffrey Gray, *The Lords of Rikers*, N.Y. MAG. (Jan. 28, 2011), <https://nymag.com/news/features/70978> [https://perma.cc/9G83-648M].

actively enable, tougher inmates to beat up on weaker ones in order to control them and extort their privileges.”⁴⁸ The Bronx District Attorney charged at least three corrections officers and a number of incarcerated young people with recruiting and serving as “managers, foot soldiers and enforcers” within the jail facilities and “deciding where and when attacks would occur.”⁴⁹ The extensive scale of “the Program” provided a window into a deep-seated and extreme culture of violence and corruption at Rikers Island.⁵⁰

In August 2014, the United States Attorney’s Office for the Southern District of New York, then led by Preet Bharara, issued a 79-page report describing in detail the complicity and “powerful code of silence” that allowed for brutal violence to continue unabated at the hands of staff and detainees on Rikers Island.⁵¹ The report detailed officer-created punishments that included assaults to the head, beatings, and removals of detainees to isolated areas outside of video view.⁵² The report also documented officers’ extended and excessive use of solitary confinement against detainees.⁵³

In September 2014, *The New Yorker* first reported the tragic case of Kalief Browder.⁵⁴ Mr. Browder was 16-years-old when he was arrested for stealing

48. Sadhbh Walshe, *Is Rikers Island Jail with ‘The Program’?*, *GUARDIAN* (May 16, 2012), <https://www.theguardian.com/commentisfree/cifamerica/2012/may/16/is-rikers-island-jail-with-the-program> [https://perma.cc/8XMB-8R55]; see also Gray, *supra* note 47.

49. Benjamin Weiser, *Lawsuits Suggest Pattern of Rikers Guards Looking Other Way*, *N.Y. TIMES* (Feb. 3, 2009), <https://www.nytimes.com/2009/02/04/nyregion/04rikers.html> [https://perma.cc/4G6A-DVSE].

50. See Gray, *supra* note 47.

51. See Benjamin Weiser & Michael Schwartz, *U.S. Finds a ‘Culture of Violence’ Against Teenage Inmates at Rikers Island*, *N.Y. TIMES* (Aug. 5, 2014), <https://www.nytimes.com/2014/08/05/nyregion/us-attorneys-office-reveals-civil-rights-investigation-at-rikers-island.html> [https://perma.cc/ZXA5-4JTX].

52. See *id.*

53. See *id.* It is well documented that people subjected to solitary confinement experience extreme psychological and physical harm. Many psychologists and human rights organizations regard solitary confinement as a form of torture. See Juan E. Méndez (Special Rapporteur), Hum. Rts. Council on Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/66/268 (Aug. 5, 2011), <http://www.solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf> [https://perma.cc/22QT-8TXG]; Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 *WASH. U. J.L. & POL’Y* 325, 327 (2006) (detailing the extreme psychiatric harm of solitary confinement); Atul Gawande, *Hellhole*, *NEW YORKER* (Mar. 23, 2009), <https://www.newyorker.com/magazine/2009/03/30/hellhole#ixzz0gGPlkqY7> [https://perma.cc/TU2M-GYUA].

54. See Jennifer Gonnerman, *Before the Law*, *NEW YORKER* (Sept. 29, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law> [https://perma.cc/9DZJ-JWJT].

a backpack and held at Rikers, in both solitary confinement and general population, for more than three years before the charges against him were finally dismissed.⁵⁵ The article was particularly compelling because it highlighted for the general public not only the inhumane abuses of Rikers, but also the way the entire legal process — from bail to discovery to speedy trial — and all the court actors — from prosecutor to defense attorney to judge — were responsible for Mr. Browder’s tragic circumstances.⁵⁶ Mr. Browder’s subsequent death by suicide after his release from jail deepened the heartbreaking nature of his story and has been used by many as a call to action to close Rikers and bring about meaningful policy and legislative reform.⁵⁷

B. New York City’s Road to Decarceration

New York City would have been unlikely to adopt a movement toward decarceration and the closure of Rikers Island without the mobilization efforts of grassroots activists, advocates, and community members. Organizing groups intensified the pressure on local and state politicians, which in turn brought about new policy directives and legislative reforms aimed at shrinking the population at Rikers. This Section highlights how organizing, policy, and legislation have provided the foundation for decarceration efforts in New York City before the emergence of COVID-19.

i. Community Organizing

The atrocities of Rikers Island that gained widespread media attention were already fueling an agenda for grassroots change in New York City. Conditions at Rikers Island, as well as the NYPD’s aggressive use of stop and frisk and culture of violence as demonstrated in the chokehold killing of Eric Garner, served as flash points for organized protests and uprisings across the City.⁵⁸ Thus, it should come as no surprise that grassroots organizing played a vitally important role in advancing decarceral policies

55. *See id.*

56. *See id.*

57. *See* Michael Schwirtz & Michael Winerip, *Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide*, N.Y. TIMES (June 8, 2015), <https://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html> [<https://perma.cc/2Z7G-YFRS>].

58. *See* John Leland & Colin Moynihan, *Thousands March Silently to Protest Stop-and-Frisk Policies*, N.Y. TIMES (June 17, 2012), <https://www.nytimes.com/2012/06/18/nyregion/thousands-march-silently-to-protest-stop-and-frisk-policies.html> [<https://perma.cc/G72E-PFDJ>]; Megan Specia & Colin Dalieda, *How Twitter and Facebook Helped Shut Down Lower Manhattan for Eric Garner*, MASHABLE (Dec. 5, 2014), <https://mashable.com/2014/12/05/protests-eric-garner-grassroots/> [<https://perma.cc/M94E-LFYF>].

across New York City's criminal legal system and in advocating for the closure of Rikers Island.⁵⁹

Groups such as the Campaign to Shut Down Rikers, Millions March NYC, and Jails Action Coalition used the mobilization power of incarcerated and formerly incarcerated people and their allies to push not only for the closure of Rikers Island but, importantly, the City's broader divestment from carceral structures such as policing and prisons.⁶⁰ These alliances insisted that Rikers Island be closed and that government funds be used for necessary services that would help keep people out of the system, such as education, healthcare, and housing.⁶¹ One coalition, No New Jails, which advocates for the closure of Rikers and prison abolition through opposing the construction of new jails, has drawn public attention to the amount of money the City currently spends on carceral systems instead of communities.⁶² In particular, they highlight the \$8.7 billion needed for building new jails and the continued increase in the Department of Correction budget despite the decline in incarceration.⁶³ They point out that in Fiscal Year 2018, the average annual cost to incarcerate a person in New York City jails surpassed \$300,000, which is money that could be spent on affordable housing,

59. There are a number of campaigns across the City and State working for decarceration of jails and prisons. *See, e.g.*, FREE THEM ALL FOR PUB. HEALTH, <https://freethemall4publichealth.org/> [<https://perma.cc/3523-C6RH>] (last visited Oct. 14, 2020); RELEASE AGING PEOPLE PRISON, <http://rappcampaign.com/> [<https://perma.cc/XPW9-UTLK>] (last visited Oct. 14, 2020). For information on the campaign to close Rikers Island, see #CLOSERikers, JUSTLEADERSHIPUSA, <http://jlusa.org/campaign/closerikers/#:~:text=In%20April%202016%2C%20JustLeadership%20USA%20launched,policy%20of%20New%20York%20City> [<https://perma.cc/5D6M-AVG4>] (last visited Oct. 14, 2020).

60. *See* Raven Rakia & Ashoka Jegroo, *How the Push to Close Rikers Went from No Jails to New Jails*, APPEAL (May 29, 2018), <https://theappeal.org/how-the-push-to-close-rikers-went-from-no-jails-to-new-jails/> [<https://perma.cc/M5ZJ-JQGS>].

61. *See id.*

62. *See* Press Release, N.Y.C. Comptroller Scott M. Stringer, Comptroller Stringer: Despite a Decline in Incarceration, Correction Spending, Violence, and Use of Force Continued to Rise in FY 2018 (Jan. 22, 2019) [hereinafter *Despite a Decline in Incarceration*], <https://comptroller.nyc.gov/newsroom/comptroller-stringer-despite-a-decline-in-incarceration-correction-spending-violence-and-use-of-force-continued-to-rise-in-fy-2018/> [<https://perma.cc/V7MQ-DRXJ>]; NO NEW JAILS NYC, CLOSE RIKERS NOW, WE KEEP US SAFE: A NEW YORKER'S GUIDE TO BUILDING COMMUNITY CARE AND SAFETY BY CLOSING RIKERS WITH NO NEW JAILS (VERSION 2.0) (2019), https://drive.google.com/file/d/1NPW9cNv6AsbKYF_se4d8IIHQ5cyHOvOx/view [<https://perma.cc/8L9H-RX7B>]; Emily Nonko, *What Would 'No New Jails' Actually Look Like?*, GOTHAMIST (July 16, 2019, 3:05 PM), <https://gothamist.com/news/what-would-no-new-jails-actually-look-like> [<https://perma.cc/QW2H-LUDM>].

63. *See* Nonko, *supra* note 62; *Despite a Decline in Incarceration*, *supra* note 62.

improving mental healthcare and schools, or in investments in community-based programs like violence interruption.⁶⁴

Another organizing group that played a critical role in the effort to close Rikers Island was the #CLOSErikers campaign led by JustLeadershipUSA.⁶⁵ The #CLOSErikers campaign was composed of directly impacted individuals and over 100 non-profits and partner organizations across the City.⁶⁶ The group used three strategic approaches in its advocacy by (1) seeking to influence the public narrative about Rikers Island and its detainees through public actions and digital outreach, (2) putting pressure on elected officials who would support a closure plan, and (3) aligning the coalition with decarceral policy changes that would lead to the closure of Rikers.⁶⁷ Specifically, #CLOSErikers advocated for decarceral policies such as modifying pretrial detention, “eliminating city sentences of one year or less and replacing them with alternatives like community service; revamping the parole supervision system; and decriminalizing low-level, non-violent crimes like turnstile jumping.”⁶⁸

One important difference between grassroots groups pushing for the closure of Rikers, like Shut Down Rikers and No New Jails, and the #CLOSErikers campaign centered on the issue of constructing new borough-based jails. The leadership of the #CLOSErikers campaign ultimately took a position that supporting the closure of Rikers Island and the construction of smaller borough-based jails is a tangible step toward decreasing the current levels of incarceration in the City.⁶⁹ However, even Rikers was designed to be a better, more modern jail when it was built. Therefore many abolitionist organizers are convinced that building new jails will allow government actors to continue to focus on incarceration rather than social investment.⁷⁰ They are instead eager to see attention paid to the underlying social and institutional dysfunction that has allowed incarceration to proliferate.

ii. The Lippman Commission Report and the Mayor’s Smaller Safer Fairer Roadmap

In February 2016, New York City Council Speaker Melissa Mark-Viverito spearheaded a privately funded independent commission to

64. See Nonko, *supra* note 62; Despite a Decline in Incarceration, *supra* note 62.

65. See Rakia & Jegroo, *supra* note 60.

66. See *id.*

67. See Marton, *supra* note 23, at 535.

68. Nonko, *supra* note 62.

69. See *id.*

70. See Rakia & Jegroo, *supra* note 60.

study the criminal legal system and Rikers Island and to make recommendations on fundamental reforms.⁷¹ Former New York State Chief Judge Jonathan Lippman chaired the commission and worked with leaders from across the private and public sectors to examine the issues connected to Rikers Island and author a comprehensive report. In 2017, The Independent Commission on New York City Criminal Justice and Incarceration Reform issued what has come to be known as the *Lippman Commission Report*, which provided a powerful rebuke of the jail facility: “Closing Rikers Island is a moral imperative. The Island is a powerful symbol of a discredited approach to criminal justice — a penal colony that subjects all within its walls to inhumane conditions.”⁷² The report highlighted the policies that needed to be implemented in order to reduce the City’s reliance on detention and asserted that the jail population, which hovered around 9,700 at that point, would need to be reduced to 5,000 for Rikers Island to close and be replaced with smaller borough-based jails.⁷³ It also explored measures to transform pretrial detention into a rehabilitative rather than punitive process and contemplated other uses for the space that the Rikers facilities currently occupy, emphasizing housing and employment reinvestment for the communities most impacted by mass incarceration.⁷⁴

Following the release of the *Lippman Commission Report*, and trying to seize on the political moment, Mayor de Blasio’s office released *Smaller Safer Fairer: A Roadmap to Closing Rikers*,⁷⁵ which presented reforms that, in large part, overlapped with the *Lippman Commission Report*’s recommendations.⁷⁶ After previously characterizing efforts to close Rikers as “a noble concept” that was unpractical,⁷⁷ Mayor de Blasio joined the calls

71. See J. David Goodman, *Melissa Mark-Viverito, Council Speaker, Vows to Pursue Criminal Justice Reforms*, N.Y. TIMES (Feb. 11, 2016), <https://www.nytimes.com/2016/02/12/nyregion/melissa-mark-viverito-council-speaker-vow-s-to-pursue-new-criminal-justice-reforms.html> [<https://perma.cc/3GXE-ZK4L>].

72. A MORE JUST NEW YORK CITY, *supra* note 14, at 19.

73. See *id.* at 71–75, 88 (noting the utility of borough-based jails and discussing the necessity of a jail population reduction to 5,000).

74. See *id.* at 61–62, 105 (discussing sentencing reforms that favor rehabilitation and referencing employment and housing opportunities that come from closing Rikers Island).

75. See *Mayor de Blasio Announces “Smaller, Safer, Fairer: A Roadmap to Closing Rikers Island,”* OFF. MAYOR, CITY N.Y. (June 22, 2017), <https://www1.nyc.gov/office-of-the-mayor/news/427-17/mayor-de-blasio-smaller-safer-fairer-roadmap-closing-rikers-island-> [<https://perma.cc/ZZ43-HR9A>]. See generally OFF. OF THE MAYOR, CITY OF N.Y., *SMALLER SAFER FAIRER: A ROADMAP TO CLOSING RIKERS ISLAND* (2017) [hereinafter *SMALLER SAFER FAIRER*], <https://rikers.cityofnewyork.us/wp-content/uploads/Smaller-Safer-Fairer-1.pdf> [<https://perma.cc/Q95S-G24L>].

76. See *id.* at 26.

77. See J. David Goodman, *De Blasio Says Idea of Closing Rikers Jail Complex Is Unrealistic*, N.Y. TIMES (Feb. 16, 2016),

for Rikers Island's closure and announced the appointment of a Task Force charged with implementing the recommendations outlined in his office's *Smaller Safer Fairer* roadmap.⁷⁸ The roadmap identifies changes in the City's criminal legal process to reduce the City's jail population, such as facilitating the payment of bail, supplanting short-term jail sentences with programs, utilizing supervised release, processing cases through the courts more quickly, and reducing the reliance on jails for cases involving mental health or substance abuse concerns.⁷⁹ The roadmap details a vision of jails that are "safe and humane," with an emphasis on greater mental health treatment, rehabilitative programming, and less use of punitive segregation.⁸⁰ The Mayor's plan proposes a significantly reduced City jail population, primarily composed of people who are considered "violent" or "chronic."⁸¹ The roadmap also continues to invest in the carceral system by proposing the allocation of \$100 million to training new corrections officers.⁸²

While the City's plan highlights specific steps aimed at altering the current methods of criminal "justice" in New York City, the reforms focus primarily on speeding up the process and improving the experience of the system, rather than on addressing the issues that cause people to come into contact with the system in the first place. Notably, funds are directed toward constructing newer and more modern decentralized jails and training corrections staff.⁸³ The extent to which funds might support improvements in access to education, health, mental health, and substance abuse treatment outside of the carceral system is largely unaddressed. Relatedly, the roadmap proposes very limited interventions for other key actors in the system: district attorneys are tasked with improving case processing times,⁸⁴ refining risk assessments,⁸⁵ and expanding the use of supervised release and diversion.⁸⁶ Prosecutors and police officers are not urged to explore how changes in their discretionary policies might lead to fewer arrests and prosecutions.

<https://www.nytimes.com/2016/02/17/nyregion/de-blasio-says-idea-of-closing-rikers-jail-complex-is-unrealistic.html> [<https://perma.cc/C8PF-SGB5>]. See generally SMALLER SAFER FAIRER, *supra* note 75.

78. See generally SMALLER SAFER FAIRER, *supra* note 75.

79. See *id.* at 8.

80. See *id.*

81. See *id.* at 11–18.

82. See *id.* at 36.

83. See *id.* at 9, 36.

84. See *id.* at 26–27.

85. See *id.* at 19.

86. See *id.* at 21.

The strategies proposed by the Mayor’s office address the low-hanging fruit of decarceration but fail to take on more challenging issues such as re-thinking our approach to detaining so-called violent offenders in pretrial detention.⁸⁷ By investing billions in new borough-based jails to incarcerate “violent” and “chronic” people, many of the most intractable problems of the criminal punishment system remain unaddressed. The construction of four local jail facilities is likely to carry Rikers Island’s same culture of violence and deprivation to new locations. Additionally, given that implementation of these strategies would extend beyond the term of Bill de Blasio and the current City Council, many rightly question whether a plan that relies on the support of future elected officials, continued decline in crime rates, and constantly evolving dynamics will ever actually come to fruition.⁸⁸ The reverberations of the social and fiscal crisis brought on by COVID-19 only serve to deepen these concerns.

iii. New York State Criminal Legislative Reforms

In 2019, New York State passed a historic set of criminal legislative reforms that would significantly impact New York City’s criminal legal process and decarceral efforts.⁸⁹ The legislation focused on bail reform, speedy trial, and discovery — areas that most impact the length of detention and the duration of a criminal case.

Of all the changes to the statutory scheme, the reform of the cash bail system presents the most immediate impact on reducing the population of pretrial detainees. In New York State, judges historically had a set of factors to consider when determining whether and how much money bail was required to ensure an accused person’s appearance for subsequent court dates.⁹⁰ Considering a person’s dangerousness to the community, or so-called preventative detention, has never been an explicit factor permitted by statute. Nonetheless, judges frequently exercised their discretion to set

87. See discussion *infra* Part III.

88. See Matthew Haag, *N.Y.C. Votes to Close Rikers. Now Comes the Hard Part*, N.Y. TIMES (Oct. 17, 2019, 1:45 PM), <https://www.nytimes.com/2019/10/17/nyregion/rikers-island-closing-vote.html> [https://perma.cc/6G77-T77M]; Rachel Holliday Smith, *Manhattan Jail Design Forges Ahead Even as Plan to Replace Rikers Is Delayed to 2027*, CITY (Oct. 19, 2020, 8:02 PM), <https://www.thecity.nyc/2020/10/19/21524219/manhattan-jail-tombs-replace-rikers-delayed-nyc> [https://perma.cc/L52S-AS2T].

89. The reforms largely relate to speedy trial, discovery, and bail. See N.Y. CRIM. PROC. LAW §§ 30.30, 245.10, 500.10 (McKinney 2020).

90. Prior to 2020, the applicable bail statute provided that, “[w]ith respect to any principal, the court must consider the kind and degree of control or restriction that is necessary to secure his court attendance when required.” *Id.* § 510.30(2)(a) (McKinney 2019).

high amounts of cash bail in cases where a person's appearance in court could be assured through other means.⁹¹ In New York, as in cities across the country, pretrial detention is disproportionately experienced by Black and Latinx people.⁹²

The changes to New York's bail statute did not do away with cash bail completely, but instead require pretrial release without money bail for most types of misdemeanor and non-violent felony offenses.⁹³ In cases where bail would still be set, the law mandated that judges issue an easier-to-pay form of bail.⁹⁴ Notably, the reforms also required a waiting period and notice to the accused before the issuance of a bench warrant after a missed court date and mandated the issuance of appearance tickets for a number of previously arrestable offenses, which would allow a charged person to return to court at a later date for arraignment as opposed to being held for 24 hours or more before arraignment.⁹⁵ These changes have tremendous potential to reduce the number of people who are detained pre-trial.

91. See INSHA RAHMAN, VERA INST. OF JUST., *AGAINST THE ODDS: AN EXPERIMENT TO PROMOTE ALTERNATIVE FORMS OF BAIL IN NEW YORK CITY'S CRIMINAL COURTS* 4 (2017), https://www.vera.org/downloads/publications/Against_the_Odds_Bail_report_FINAL3.pdf [<https://perma.cc/Q3B6-CY6J>].

92. See HUM. RTS. WATCH, *THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY* 47 (2010), https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf [<https://perma.cc/SNM2-MSKK>]. Racial disparities have been found to exist at every stage of the criminal legal process where discretionary decisions are made, but they are particularly prevalent in bail determinations. Racial bias by prosecutors and judges results in Black and Latinx defendants having cash bail set with more frequency and in greater amounts than similarly situated white defendants. See Ellen A. Donnelly & John M. MacDonald, *The Downstream Effects of Bail and Pretrial Detention on Racial Disparities in Incarceration*, 108 J. CRIM. L. & CRIMINOLOGY 775, 775 (2018); Cynthia E. Jones, "Give Us Free": *Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919 (2013). Some jurisdictions have moved to the use of risk assessments to alleviate some of the bias inherent in discretionary bail decisions. However, empirical studies show that reforms using risk assessments in bail determinations have reduced the pretrial population but have little or no impact on eliminating racial disparities. See Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 304–05 (2018).

93. See N.Y. CRIM. PROC. LAW § 510.10(4); see also INSHA RAHMAN, VERA INST. OF J., *NEW YORK, NEW YORK: HIGHLIGHTS OF THE 2019 BAIL REFORM LAW* 9 (2019), <https://www.vera.org/downloads/publications/new-york-new-york-2019-bail-reform-law-highlights.pdf> [<https://perma.cc/9ANW-S9JS>].

94. See N.Y. CRIM. PROC. LAW § 520.10; see also Michael Rempel & Krystal Rodriguez, *Bail Reform in New York: Legislative Provisions and Implications for New York City*, CTR. FOR CT. INNOVATION 4 (Apr. 2019), https://www.courtinnovation.org/sites/default/files/media/document/2019/Bail_Reform_NY_full_0.pdf [<https://perma.cc/94HJ-MNMA>]. The court must consider the accused's ability to pay bail and post a secured, partially secured, or unsecured bond. See N.Y. CRIM. PROC. LAW § 510.30(1)(f).

95. See Rempel & Rodriguez, *supra* note 94, at 7; see also N.Y. CRIM. PROC. LAW § 150.20(1)(a) (mandating desk appearance tickets for certain offenses); N.Y. CRIM. PROC. LAW

In terms of discovery, New York's previous law allowed prosecutors to withhold witness names and police reports until right before the start of trial.⁹⁶ This practice kept vital information needed to prepare a defense from the accused until just before the start of trial and often had the effect of encouraging people to plead guilty earlier in the life of the case without full knowledge of the weight of the prosecution's case.⁹⁷ The change in law recognizes that the vast majority of cases are resolved by plea rather than trial. Under the new law, prosecutors would have 20 days from arraignment to provide the defense with evidence such as witness names, police documents, and photos.⁹⁸ They would be permitted an extension under exceptional circumstances and also be entitled to reciprocal discovery from defense counsel after their disclosures.⁹⁹ Many local prosecutors and law enforcement groups argued that earlier disclosure to the accused would encourage witness intimidation, particularly when allegations of sexual assault or gang activity were involved.¹⁰⁰ The reforms also addressed the "speedy trial clock," which governs the amount of time after arraignment

§ 510.50(2) (providing a grace period for return after a missed court date before a warrant is issued); Martha Rayner & Alex Garber, *How an Unheralded Change to Criminal Procedure Law §150.20 Will Overhaul Arrest Procedures in New York*, N.Y.L.J. (Feb. 21, 2020, 11:00 AM),

<https://www.law.com/newyorklawjournal/2020/02/21/how-an-unheralded-change-to-criminal-procedure-law-150-20-will-overhaul-arrest-procedures-in-new-york/> [<https://perma.cc/NP75-S5TF>] (discussing changes to N.Y. CRIM. PROC. LAW § 150.20 as a "paradigm-shifting development in arrest and ticketing procedures").

96. See Donna Lieberman & Isabelle Kirshner, *Take off the Blindfold: Reform NY Discovery Law*, N.Y.C.L. UNION (Mar. 11, 2019), <https://www.nyclu.org/en/publications/take-blindfold-reform-ny-discovery-law-commentary> [<https://perma.cc/DT39-7SSC>]; see also 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/XV6H-27XN>].

97. See Lieberman & Kirshner, *supra* note 96; see also Dan Svirsky, *The Cost of Strict Discovery: A Comparison of Manhattan and Brooklyn Criminal Cases*, 38 N.Y.U. REV. L. & SOC. CHANGE 523, 538 (2014) (discussing how New York's previous discovery statute, one of the strictest in the nation, was implemented in New York City courts); Krystal Rodriguez, *Discovery Reform in New York: Major Legislative Provisions*, CTR. FOR CT. INNOVATION 2–3 (May 2019), https://www.courtinnovation.org/sites/default/files/media/document/2019/Discovery-NYS_Full.pdf [<https://perma.cc/87DB-HX52>].

98. See N.Y. CRIM. PROC. LAW §§ 245.10, 245.20.

99. See *id.* § 245.10(1)(iv)(B) (permitting extensions); *id.* § 245.20(4) (discussing reciprocal discovery).

100. See Ashley Southall & Jan Ransom, *Once as Pro-Prosecution as Any Red State, New York Makes a Big Shift on Trials*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/nyregion/prosecutors-evidence-turned-over.html> [<https://perma.cc/9K8P-CYG6>]; see also N.Y. CRIM. PROC. LAW § 245.70 (allowing judges to consider at their discretion a prosecutor's request for a protective order that would protect witnesses' names and information until trial).

that the prosecution has to bring the case to trial. Historically, this time period has been measured in ways that allow for long case delays.¹⁰¹ The new laws limit the prosecution's ability to cause unnecessary delay.¹⁰² These changes in discovery and speedy trial practices promise more fairness to the accused through earlier access to information and an expedited adjudication process, which by extension contribute to shorter stays in pre-trial detention.

Prosecutors and law enforcement groups across the state met the 2019 legislative reforms with significant resistance.¹⁰³ Among their grievances with the new laws were concerns about the safety of witnesses whose information would be turned over to the defense at an earlier stage, and the excessive amount of work required of district attorneys in complying with discovery obligations.¹⁰⁴ Early on, reporting uncovered that district attorneys' offices were training junior prosecutors on how to work with the police to undermine the spirit of the new law.¹⁰⁵

Following the passage of the NYC plan to close Rikers Island, but before the COVID-19 outbreak, top NYPD officials were already on a media campaign to stoke fears about the State and City's move toward decarceration. In October of 2019, former NYPD Commissioner James O'Neill warned that reforms intended to change the City's bail system could endanger the safety of New Yorkers:

Come January 1, there are going to be very few people that are bail eligible, so you're going to see people that have significant criminal histories, significant firearms histories, and they're not going to be held in . . .

101. See Daniel Hamburg, *A Broken Clock: Fixing New York's Speedy Trial Statute*, 48 COLUM. J.L. & SOC. PROBS. 223 (2015); see also Rory I. Lancman, *We Need Speedy Trial Reform in City's Criminal Courts*, N.Y.L.J. (Feb. 24, 2016, 12:00 AM), <https://www.law.com/newyorklawjournal/almID/1202750433895/We-Need-Speedy-Trial-Reform-in-Citys-Criminal-Courts/?mcode=1380566249891&curindex=39> [<https://perma.cc/6Q8T-2HE5>].

102. See N.Y. CRIM. PROC. LAW § 30.30.

103. See Beth Fertig, *What the New Rollbacks to Bail Reform Mean in New York*, GOTHAMIST (July 2, 2020, 8:07 PM), <https://gothamist.com/news/what-new-rollbacks-bail-reform-mean-new-york> [<https://perma.cc/9QKQ-3AX9>]; see also Southall & Ransom, *supra* note 100.

104. See Southall & Ransom, *supra* note 100; see also Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases*, 73 WASH. & LEE L. REV. 285 (2016) (using an empirical study to compare early full discovery in Virginia and North Carolina and finding no increased danger to witnesses).

105. See Denis Slattery, *Advocates Call on Cuomo to Keep an Eye on Prosecutors Out to Undermine Criminal Justice Reforms*, N.Y. DAILY NEWS (Nov. 7, 2019, 4:00 AM), <https://www.nydailynews.com/news/politics/ny-advocates-cuomo-state-lawmakers-prosecutors-criminal-justice-reform-20191107-wejixrv7cbhuppdjfwgf7dh4a4-story.html> [<https://perma.cc/6WHX-5UF4>].

That's going to put people at risk, put New Yorkers at risk, put victims at risk, and put witnesses at risk.¹⁰⁶

Perhaps unsurprisingly, statements such as these make clear that the legislative measures aimed at shrinking the City's reliance on pretrial detention have not been embraced by the City's law enforcement arms, which remain wedded to more traditional, pro-carceral approaches.

II. HOW THE CRIMINAL LEGAL SYSTEM RESPONDED TO COVID-19 IN NEW YORK CITY

Given the context of the City's steps toward decarceration, the COVID-19 pandemic introduced a new degree of urgency to the entire system. In order to adequately respond to the COVID-19 public health crisis, all parts of the criminal legal system had to alter their usual course of operations drastically. Decarceration requires reducing the stream of people into jails and hastening the movement of people out of jails by "reducing arrests and increasing early release."¹⁰⁷ To ensure an aggressive public health response, the system, through each of its parts, had to eliminate unnecessary face-to-face contact and reduce the number of people entering and held in City jails. This Part will detail the efforts of institutional actors in achieving these two goals.

A. Eliminating Unnecessary In-Person Contact Through Policing

Enforcement of social distancing rules did little to minimize in-person contact through policing during the height of the COVID-19 outbreak in New York City. In March, as COVID-19 emerged as a public health crisis in the City, the NYPD refused to heed calls from advocates and local elected officials asking for the suspension of enforcement of low-level "broken windows" policing until the end of the pandemic.¹⁰⁸ Despite the risks to the

106. Jeffrey Cawood, *NYPD Commish Warns City's 'Decarceration Plan' Could Put New Yorkers in Danger*, DAILY WIRE (Oct. 29, 2019), <https://www.dailywire.com/news/nypd-commish-warns-citys-decarceration-plan-could-put-new-yorkers-in-danger> [<https://perma.cc/M7RF-HBG8>].

107. Brandy F. Henry, *Social Distancing and Incarceration: Policy and Management Strategies to Reduce COVID-19 Transmission and Promote Health Equity Through Decarceration*, 47 HEALTH EDUC. & BEHAV. 536, 537 (2020).

108. As Councilmember Brad Lander noted, the "crisis has put the stark differences in how our society cares for and values people into sharp relief[;] . . . New York City and New York State have a responsibility to shrink the jail population by halting arrests for low-level offenses." Thomas Tracy, *NYPD Commissioner Says 'No Intention' of Reducing Arrests Amid Coronavirus Crisis*, N.Y. DAILY NEWS (Mar. 21, 2020, 4:41 PM), <https://www.nydailynews.com/coronavirus/ny-nypd-wont-reduce-arrests-coronavirus-crisis-20200321-ae6ltasujjelbdpkgefkbpuuu-story.html> [<https://perma.cc/93E4-8KUB>]. Public Advocate Jumaane Williams has also joined calls to end all arrests for minor offenses, stating that "[i]f we continue to knowingly expose the most vulnerable New Yorkers to this disease through over policing of broken-windows offenses, those values are laid bare." *Id.*

members of the NYPD and to residents of New York City, NYPD Police Commissioner Dermot Shea publicly responded that he “ha[d] no intention of strategically cutting enforcement specifically related to th[e] coronavirus.”¹⁰⁹ Despite Shea’s statement, the circumstances of the pandemic resulted in a decrease in arrests — by “March, the New York City Police Department made about 13,000 arrests, a 30-percent drop from the same month a year before.”¹¹⁰ Although arrest numbers decreased overall, concerns about how police officers exercised their discretion persist.

As the NYPD attempted to shift to a public health enforcement role, news reports supported by data and video footage raised concerns about the aggressive and disparate way that the NYPD engaged with New Yorkers while enforcing government social distancing orders. In May, reports of violent arrests resulting in people being assaulted while being ticketed or arrested surfaced.¹¹¹ The aggressive enforcement of social distancing violations in predominately Black and Latinx neighborhoods was juxtaposed to images of police officers handing out masks to mostly white visitors in the City’s neighborhood parks.¹¹² Numbers released by the Brooklyn District Attorney’s Office showed that from March 17 through May 4, the NYPD arrested 40 people for social distancing-related violations.¹¹³ “Of those arrested, 35 people were black, four were Hispanic and one was white. More

109. *Id.*; see also Will Feuer, *More Than 1,000 New York City Police Officers Have the Coronavirus as 911 Calls Hit Records*, CNBC (Apr. 1, 2020, 2:07 PM), <https://www.cnn.com/2020/04/01/more-than-1000-new-york-city-police-officers-are-infected-with-coronavirus.html> [<https://perma.cc/32AQ-HXUB>] (noting that as of April 1, 2020, over 1,400 of the NYPD’s more than 36,000 employees had tested positive for COVID-19 and 17% of the force had called out sick on one specific day).

110. Weihua Li, *Police Arrested Fewer People During Coronavirus Shutdowns — Even Fewer Were White*, MARSHALL PROJECT (June 6, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/06/02/police-arrested-fewer-people-during-coronavirus-shutdowns-even-fewer-were-white> [<https://perma.cc/T6TK-PGLX>]. A search of NYC OpenData indicates 19,672 arrests in March of 2019. See *NYPD Arrests Data (Historic)*, NYC OPENDATA, <https://data.cityofnewyork.us/Public-Safety/NYPD-Arrests-Data-Historic-/8h9b-rp9u> [<https://perma.cc/EHY8-G2AD>] (last visited Oct. 14, 2020) (follow “create visualization” hyperlink; then “filters” hyperlink; then “add filter” hyperlink; then “ARREST_DATE” hyperlink; set range “03/01/2019 to 03/31/2019”; then “Apply” hyperlink).

111. See Josiah Bates, *‘We Cannot Police Our Way out of a Pandemic.’ Experts, Police Union Say NYPD Should Not Be Enforcing Social Distance Rules Amid COVID-19*, TIME (May 7, 2020, 5:03 PM), <https://time.com/5832403/nypd-pandemic-police-social-distancing-arrests/> [<https://perma.cc/8VWH-QLTT>].

112. See Ashley Southall, *Scrutiny of Social-Distance Policing as 35 of 40 Arrested Are Black*, N.Y. TIMES (May 29, 2020, 3:48 PM), <https://www.nytimes.com/2020/05/07/nyregion/nypd-social-distancing-race-coronavirus.html> [<https://perma.cc/3A5E-S67F>].

113. See *id.*

than a third of the arrests were made in the predominantly black neighborhood of Brownsville. No arrests were made in the more white Brooklyn neighborhood of Park Slope.”¹¹⁴ Even the NYPD’s own figures showed that citywide, from March 16 through May 10, 93% of COVID-19-related arrests were of Black and Latinx New Yorkers.¹¹⁵ The data sparked comparisons to the City’s long, troubled history of racist police stops in the practice of stop-and-frisk policing.¹¹⁶

In late May 2020, anger over systemic racism in the criminal legal system and the police killing of George Floyd in Minneapolis prompted protests and civil unrest in the streets of New York City and in cities across the country. In New York City streets, interactions with law enforcement depicted on video showed officers using violent displays of force and aggressive tactics.¹¹⁷ Video captured a young protestor violently hurled to the ground, someone in a quick-moving NYPD vehicle opening a car door to hit a protestor, and demonstrators being corralled and charged with batons and pepper spray.¹¹⁸ Since the protests erupted in New York City, over 200 incidents of police misconduct have been reported to the City’s Civilian Complaint Review Board.¹¹⁹

All told, more than 2,000 people were arrested during the summer protests, while the COVID-19 pandemic continued. Many of the people arrested reported waiting for long hours in cramped holding cells.¹²⁰ Both before and during the protests, videos that went viral on social media also showed officers not maintaining social distancing regulations or incorrectly

114. *Id.*

115. See Kevin Duggan, *NYPD Stats Find That 93% of COVID-19-Related Arrests Are Made Up of People of Color*, AMNEWYORK (May 12, 2020), <https://www.amny.com/police-fire/nypd-stats-find-that-93-of-covid-19-related-arrests-are-made-up-of-people-of-color> [https://perma.cc/273X-7K49].

116. See Southall, *supra* note 112. These numbers parallel the racial disparities in NYPD policing practices generally, where Black and Latinx people are disproportionately stopped and frisked, arrested for marijuana offenses, targeted for buy-and-bust operations, or given summonses for non-criminal conduct. These persistent disparities suggest that racist policing practices are so deeply entrenched in NYPD’s culture that even a public health crisis caused by a novel viral pathogen cannot disrupt them.

117. See Ali Watkins, *They Were Arrested During the Protests. Here’s What Happened Next*, N.Y. TIMES (Aug. 7, 2020), <https://www.nytimes.com/2020/08/07/nyregion/ny-protest-arrests.html> [https://perma.cc/4GEN-MUKW].

118. See Ethan Geringer-Sameth, *A Month After Historic Curfew, Many Unanswered Questions About How City Policed Protests, Looting*, GOTHAM GAZETTE (July 8, 2020), <https://www.gothamgazette.com/city/9575-new-york-city-curfew-unanswered-questions-ny-pd-de-blasio-protests-looting> [https://perma.cc/6NR3-DKP4].

119. *See id.*

120. *See* Watkins, *supra* note 117.

using masks and other personal protective equipment while interacting with New York residents.¹²¹

As such, the NYPD's aggressive social distancing enforcement and policing of protestors did little to diminish face to face contact and exposure related to the COVID-19 outbreak.

B. Reducing the Population in City Jails

As the COVID-19 outbreak spread throughout New York City, many advocates and public health experts expressed grave concerns about how conditions in City jails would hasten the spread of the virus and have a deadly impact on detainees, employees, and their families.¹²² When the outbreak began in March, there were approximately 5,300 people in City jails, over 900 of them over the age of 50.¹²³ As fears about the virus developed, people who worked and were held within City facilities reported a lack of basic interventions to aid in preventing the spread of COVID-19.¹²⁴ There was limited access to soap, hand sanitizer, cleaning supplies, masks, or other personal protective equipment; people were housed together in small, shared spaces that lack adequate ventilation.¹²⁵ As one detained person described, “[i]n my dorm we’d started sleeping head-to-toe. Imagine a big open room with 60 single beds less than 2 feet apart. There were only 51 or 52 men in

121. See Bates, *supra* note 111; see also Melissa Gira Grant, *The Pandemic Surveillance State*, NEW REPUBLIC (May 8, 2020), <https://newrepublic.com/article/157639/pandemic-surveillance-state> [<https://perma.cc/6Y9F-YBQZ>].

122. See Lippman & Nims, *supra* note 20.

123. See *New York City Must Act Now on COVID-19 at Rikers Island*, VERA INST. JUST. (Mar. 25, 2020), <https://www.vera.org/downloads/publications/coronavirus-guidance-rikers-island.pdf> [<https://perma.cc/LM7T-7E5W>]; see also *NYC Officials Call for Release of ‘Most at Risk’ on Rikers Island as More Test Positive for Virus*, NBC N.Y. (Mar. 18, 2020, 6:22 PM), <https://www.nbcnewyork.com/news/local/nyc-officials-call-for-release-of-most-at-risk-on-rikers-prison-as-more-test-positive-for-virus/2333348/> [<https://perma.cc/EJA2-7QML>].

124. See Reuven Blau & Rosa Goldensohn, *Little Relief for Jails’ Most Vulnerable as Pandemic Grows*, CITY (Mar. 19, 2020, 8:59 PM), <https://www.thecity.nyc/coronavirus/2020/3/19/21210419/little-relief-for-jails-most-vulnerable-as-pandemic-grows> [<https://perma.cc/78H9-QDJP>]; Christina Carrega, *Shampoo, Watery Soap to Disinfect: Conditions on Rikers Island During COVID-19 Unsafe, Some Inmates Say*, ABC NEWS (Mar. 29, 2020, 2:51 PM), <https://abcnews.go.com/Health/shampoo-watery-soap-disinfect-conditions-rikers-island-covid/story?id=69767859> [<https://perma.cc/7LLT-L25Q>].

125. See Courtney Gross, *NYC Correction Investigator Dies of Coronavirus*, SPECTRUM NEWS (Mar. 16, 2020, 2:00 PM), <https://www.ny1.com/nyc/all-boroughs/coronavirus-blog/2020/03/16/nyc-correction-employee-dies-of-coronavirus> [<https://perma.cc/X8X6-5LXG>].

the dorm on any given day, but everyone is still close together.”¹²⁶ Public defenders in New York City issued a joint statement raising these concerns and calling for courts, corrections, and elected officials to take drastic measures to reduce the population of people held in detention.¹²⁷

Over three days in mid-March, a civilian corrections investigator passed away from the virus, and both a security corrections officer and a detained person in Rikers Island tested positive.¹²⁸ These cases sparked public responses to concerns that the virus had begun spreading within City jails.¹²⁹ Medical professionals working within City jail facilities recognized that sounding alarms behind the scenes was no longer sufficient to address the urgent moral crisis unfolding and took the rare step of speaking publicly about their observations.¹³⁰ In a rare public statement, Ross MacDonald, the Chief Medical Officer for Health Services at Rikers, expressed his grave concerns through a public thread on social media. He wrote:

A message from the Chief Physician of Rikers Island for the judges and prosecutors of New York: We who care for those you detain noticed how swiftly you closed your courts in response to #COVID19 This was fundamentally an act of social distancing, a sound strategy in public health. But the luxury that allows you to protect yourselves, carries with it an obligation to those you detain. . . . You must not leave them in harm’s way.¹³¹

126. Donald Kagan, *I Was at Rikers While Coronavirus Spread. Getting out Was Just as Surreal*, MARSHALL PROJECT (Apr. 8, 2020, 4:00 PM), <https://www.themarshallproject.org/2020/04/08/i-was-at-rikers-while-coronavirus-spread-getting-out-was-just-as-surreal> [https://perma.cc/442A-EHCE] (Donald Kagan’s words as told to Nicole Lewis).

127. See Press Release, Legal Aid Soc’y et al., Joint Defender Statement Calling for Immediate Release of Vulnerable Incarcerated New Yorkers in Response to Coronavirus (Mar. 12, 2020), <https://legalaidnyc.org/wp-content/uploads/2020/03/03-12-20-Joint-Defender-Statement-Calling-for-Immediate-Release-of-Vulnerable-Incarcerated-New-Yorkers-in-Response-to-Coronavirus.pdf> [https://perma.cc/EN6L-H8U8].

128. See Gross, *supra* note 125; see also Jennifer Gonnerman, *A Rikers Island Doctor Speaks Out to Save Her Elderly Patients from the Coronavirus*, NEW YORKER (Mar. 20, 2020), <https://www.newyorker.com/news/news-desk/a-rikers-island-doctor-speaks-out-to-save-her-elderly-patients-from-the-coronavirus> [https://perma.cc/7JDB-EMP4].

129. See Josiah Bates, *‘We Feel Like All of Us Are Gonna Get Corona.’ Anticipating COVID-19 Outbreaks, Rikers Island Offers Warning for U.S. Jails, Prisons*, TIME (Mar. 24, 2020, 1:53 PM), <https://time.com/5808020/rikers-island-coronavirus/> [https://perma.cc/ZVD9-CBQS].

130. See Gonnerman, *supra* note 128.

131. Ross MacDonald (@RossMacDonaldMD), TWITTER (Mar. 18, 2020, 9:51 PM), <https://twitter.com/RossMacDonaldMD/status/1240455796946800641> [https://perma.cc/C6J7-3SMZ].

Medical professionals also made it clear that a large-scale move to depopulate City jails was necessary for a meaningful impact on the people released and the detainees and employees who would remain.¹³²

As an initial response to the need to depopulate City jails, Mayor de Blasio announced that the NYPD and the Mayor's Office of Criminal Justice (MOCJ) had identified a mere 40 people for release, pending the local district attorneys' offices' and the courts' agreement.¹³³ According to the Mayor, this initial release was based on pre-existing health conditions or the minor nature of the charges of the people being held.¹³⁴ The Board of Correction, New York City's independent correctional oversight board, echoed the appeals of health professionals and advocates and called on the leaders of courts, corrections departments, and district attorneys' offices in the City to consider jail depopulation more comprehensively.¹³⁵ Specifically, the agency requested "the release of people over 50 years old, those with underlying health conditions, those detained for administrative reasons such as technical violations of parole, and those serving short sentences."¹³⁶ These categories of individuals would account for a roughly one-third reduction of the City's jail population.¹³⁷

MOCJ official data indicate that as a result of working in conjunction with judges, district attorneys, defense attorneys, and corrections departments on the city and state levels, City jails saw a significant reduction in the number of people entering and released from custody.¹³⁸ Between March and May 2020, the number of people entering jails numbered close to 2,000 people, compared to more than 7,300 over the same time period in 2019.¹³⁹ During

132. See Gonnerman, *supra* note 128.

133. See Blau & Goldensohn, *supra* note 124.

134. See Julia Marsh & Ben Feuerherd, *NYC to Begin Releasing Inmates Amid Coronavirus Outbreak*, N.Y. POST (Mar. 18, 2020, 7:04 PM), <https://nypost.com/2020/03/18/nyc-to-begin-releasing-inmates-amid-coronavirus-outbreak/> [<https://perma.cc/8L44-MALW>].

135. See Letter from Jacqueline Sherman, Interim Chair, N.Y.C. Bd. of Corr., to New York City's Criminal Justice Leaders (Mar. 21, 2020), https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Letter-from-BOC-re-NYC-Jails-and-COVID-19-2020-03-21.pdf?mc_cid=e78283efad&mc_eid=eee073305c [<https://perma.cc/LJ9E-L2W8>].

136. *New York City Must Act Now on COVID-19 at Rikers Island*, *supra* note 123.

137. See *id.*

138. See N.Y.C. MAYOR'S OFF. OF CRIM. JUST., NEW YORK CITY JAIL POPULATION REDUCTION IN THE TIME OF COVID-19 (2020) [hereinafter MOCJ FACTSHEET APRIL 2020], <http://criminaljustice.cityofnewyork.us/wp-content/uploads/2020/04/MOCJ-COVID-19-Jail-Reduction.pdf> [<https://perma.cc/H7VL-YM4H>].

139. See MOCJ FACTSHEET May 25, 2020, *supra* note 17, at 1.

the same time frame, nearly 3,400 people left custody, resulting in a daily population decline of 1,480 people.¹⁴⁰

The process of working to rapidly depopulate New York City jails helped to reveal the complex patchwork of systems, actors, and laws involved in release decisions. People held in City jails can be there for a host of reasons, each requiring a different set of actions and approval by various parts of the system for release.¹⁴¹ There are four main categories of people who are held in detention at Rikers Island: (1) people charged, but not yet convicted of a crime who are being held pretrial on felony or misdemeanor charges;¹⁴² (2) people who have been convicted of a misdemeanor or felony offense and are serving a jail sentence of less than one year; (3) people who were on parole after serving time in state prison for a felony offense and have violated one of the many requirements of their parole supervision; and (4) people held for other reasons, such as awaiting transfer to state prison to serve a sentence of over a year or transfer to another jurisdiction or agency due to active warrant.¹⁴³

Pretrial detainees are usually held when a judge orders bail or remand, which a defense attorney or district attorney can seek to change upon request. People who have been sent to City custody as a result of a parole violation may be there because of a technical violation¹⁴⁴ or because they committed a new criminal offense while on parole. For technical violations, the New York State Department of Corrections and Community Supervision (DOCCS) must lift the parole hold, or the state parole board must conduct a hearing process to adjudicate the violation and determine whether to restore the person to parole supervision in the community or order them to serve an

140. *See id.*

141. *See id.* at 2.

142. Under the new bail statutes, certain categories of misdemeanor and felony offenses and certain categories of defendants are deemed eligible for bail or remand, which can lead to pretrial detention. These include “virtually all violent felony offenses; felony witness tampering; felony witness intimidation; Class A felonies (except *most* Class A drug charges); sex offenses; criminal contempt *when involving a crime of domestic violence*; conspiracy to commit murder; most terrorism charges; and offenses involving pornography and children.” Rempel & Rodriguez, *supra* note 94, at 2. Categories of defendants include those on community supervision, listed as a Persistent Felony Offender, accused of harm to a person or property, and who pled guilty or were convicted at trial and are awaiting sentence. For more extensive detail of bail-eligible offenses, see generally *id.*

143. *See* MOCJ FACTSHEET April 2020, *supra* note 138, at 2.

144. Technical parole violations are usually for allegations of failure to comply with the conditions of release, such as drug testing or attending a check-in meeting. Statewide, technical parole violations accounted for more than 1 in 12 people, or 8.6%, in New York jails in 2019. *See* Wendy Sawyer, Alexi Jones & Maddy Troilo, *Technical Violations, Immigration Detainers, and Other Bad Reasons to Keep People in Jail*, PRISON POL’Y INITIATIVE (Mar. 18, 2020), <https://www.prisonpolicy.org/blog/2020/03/18/detainers/> [<https://perma.cc/7RYR-9YF4>].

additional period of time on their original prison sentence. If the parole detention stems from a new criminal charge, DOCCS must remove the parole warrant keeping the person in city custody, and if bail or remand was set in the new case, the judge, with input from the defense attorney and district attorney, must order release. For people held in City jails on a sentence of less than one year, New York state law authorizes release when “some compelling reason consistent with the public interest” is demonstrated.¹⁴⁵ The Commissioner of the City Department of Correction has authority to allow people sentenced to less than a year to serve the remainder of their sentence at home.¹⁴⁶ Finally, for people who are awaiting transfer to state prison or are held on other warrants, a judge or the responsible jurisdiction can order release.

Effectuating the mass release of people from City jails required a high level of communication between these various institutional actors. Lack of clarity around who could authorize release, public safety fears, and concerns over the adequacy of reentry plans slowed depopulation efforts.¹⁴⁷ Additionally, release for any particular individual required a willingness on the part of the appropriate institutional actor to exercise the discretion provided for by statutory or regulatory authority. Public defenders and other advocates urged broad exercise of judicial authority for detained people and petitioned for clients’ release on both an individual and a collective basis. Some instances of release were through individual negotiations with assigned district attorneys, and others were through the filing of writs of habeas corpus.¹⁴⁸ The Legal Aid Society reported the release of “over 130 people through mass writ filings and many more via individual motions.”¹⁴⁹

145. See MOCJ FACTSHEET April 2020, *supra* note 138, at 2.

146. See *id.* at 2; see also N.Y. CORRECT. LAW §§ 141, 633, 855 (McKinney 2020).

All jail and prison administrators in New York State already have the authority under New York law to release people on furlough — essentially a temporary release — under Correction Law § 633 and § 855. Using emergency powers, these furloughs can be extended for as long as this crisis persists. At the local level, Correction Law § 141 allows the commissioner of correction to remove people from jail when there is an outbreak of a contagious disease within the facility or in the vicinity.

New York City Must Act Now on COVID-19 at Rikers Island, *supra* note 123, at 1–2.

147. See Ransom & Feuer, *supra* note 19.

148. See *LAS Files Fourth Lawsuit to Free 100 Clients from Parole Violation Holds at Rikers Island*, LEGAL AID SOC’Y (Apr. 3, 2020) [hereinafter *LAS Files Fourth Lawsuit*], <https://www.legalaidnyc.org/news/legal-aid-files-fourth-lawsuit-to-free-100-clients-from-parole-violation-holds-at-rikers-island/> [https://perma.cc/ZL63-SJLG].

149. *Id.*

When one actor in the system failed to exercise its authority, advocates would often seek relief through another. In the parole violation context, DOCCS was notably slow in acting to release people detained at Rikers on violations of parole.¹⁵⁰ The Rikers Island office where parole revocation hearings are held was closed after an officer tested positive in March, significantly limiting the capacity for hearings.¹⁵¹ When DOCCS failed to act, public defenders filed mass writs on behalf of clients held on parole warrants arguing that continuing to hold vulnerable people on parole warrants “constitutes deliberate indifference to the risk of serious medical harm in violation of the Fourteenth Amendment and the New York State constitutional right to due process.”¹⁵²

One issue of persistent concern between different actors in the system was whether individuals at high risk for complications from the virus who were charged with violent offenses should be released.¹⁵³ The Mayor and the DOC stated that they would prioritize for release “those over 50 years of age, and those with the underlying health conditions that put people at highest risk from COVID-19, including auto-immune, heart and lung diseases, diabetes, and cancer.”¹⁵⁴ Mayor de Blasio went on record to say that “[t]here

150. One tragic case detailed in the news is that of Raymond Rivera, who was detained on a parole violation in August 2019, and languished in Rikers Island for over six weeks after an administrative judge ordered his release. See Jan Ransom, *Jailed on a Minor Parole Violation, He Caught the Virus and Died*, N.Y. TIMES (Apr. 9, 2020, 4:15 PM), <https://www.nytimes.com/2020/04/09/nyregion/rikers-coronavirus-deaths-parolees.html> [https://perma.cc/W3DQ-4WCR]. Mr. Rivera became ill with COVID-19 while detained past his designated release date and died of the virus on April 4, 2020. See *id.* Another example is the case of Michael Tyson. Mr. Tyson, 53, died of COVID-19 on Sunday, April 5, 2020, in New York after being “in custody at Rikers Island for nearly three weeks on a technical parole violation. The New York Legal Aid Society and the New York Civil Liberties Union had filed a writ requesting his release the week prior to his death.” Malia Brink, *Hero Public Defenders Respond to COVID-19*, 35 CRIM. JUST. 39, 40 (2020).

151. See Ransom, *supra* note 150.

152. *LAS Files Fourth Lawsuit*, *supra* note 148.

In New York, as both detained individuals and staff members began to test positive in Rikers, the New York Legal Aid Society sprang into action, filing mass writs on behalf of those detained for technical parole and probation violations and those detained pretrial whose age or medical condition made them particularly vulnerable to COVID-19. The initial writ, covering 116 individuals, was filed on March 20, 2020. It was followed by several subsequent mass writs, as well as numerous individual motions filed by Legal Aid and other public defense providers in New York. By the end of March, the New York City jail at Rikers Island had thinned dramatically from over 5,200 to around 4,300.

Brink, *supra* note 150, at 40.

153. See *supra* Section I.B.ii (discussing the need for a more nuanced distinction between offenses designated as violent or non-violent).

154. See MOCJ FACTSHEET May 25, 2020, *supra* note 17, at 2.

are some who have domestic violence charges or sexual offenses charges who I have determined we are not prepared to release at this time.”¹⁵⁵

During the first wave of the pandemic in spring 2020, roughly 3,400 people were released from New York City jails.¹⁵⁶ People left City custody for a host of reasons: some paid bail, some completed their sentences, others were ordered to be released by the court, and others were released based on writs filed by defense counsel.¹⁵⁷ During that time frame, the population of violent felony offenders saw the smallest decrease. According to DOC data, of those remaining in custody, 67% were charged with violent felonies, 12% were charged with non-violent felonies, 4% with misdemeanors, 3% were serving city sentences, 10% had another warrant or hold on them, 5% were held on state technical parole violations, and 9% were held for other reasons.¹⁵⁸ As such, the various stakeholders of New York City’s criminal legal system made drawn-out but modest progress in decreasing the population at Rikers Island.

III. LESSONS FOR DECARCERATING NEW YORK CITY

The full impact of COVID-19 on New York City’s larger efforts to close Rikers and implement decarceral policies still remains to be seen. However, at this stage, the initial responses from various parts of the system at the height of the initial outbreak in the City provide valuable insight into the future of the City’s larger decarceral agenda. This Part offers recommendations for furthering a decarceral agenda in the wake of the pandemic. First, the City must adopt a public health-informed agenda. Second, it must reckon with the cultural institutional norms that continue to impede a commitment to decarceration. Third, it must confront the hard cases involving violence, and fourth, the City must resist the tendency toward regression brought about in the economic aftermath of COVID-19.

A. Decarceration Requires a Public Health Is Public Safety Perspective

When crisis strikes, the high costs and heavy obligations of maintaining the current criminal legal system are laid bare. The pandemic has revealed that the City’s reliance on jail and criminalization has been based more on convenience, politics, capitalism, and racism than on necessity or

155. *Transcript: Mayor de Blasio Holds Media Availability on COVID-19*, OFF. MAYOR, CITY N.Y. (Mar. 24, 2020), <https://www1.nyc.gov/office-of-the-mayor/news/188-20/transcript-mayor-de-blasio-holds-media-availability-covid-19> [<https://perma.cc/K4QZ-XQSU>].

156. *See* MOCJ FACTSHEET May 25, 2020, *supra* note 17, at 1.

157. *See id.* at 2.

158. *Id.* at 3.

effectiveness. In normal times, the civil, psychological, or physical harm caused to a specific detainee, officer, or discrete group of detainees or officers is typically experienced in very individualized ways, such as a specific complaint, a death, or a class action lawsuit. Yet the outbreak of this deadly virus has shown, in a very visceral way, what those with loved ones ensnared in the criminal legal system have always known: the criminal legal process causes and exacerbates harm, not only to the individual person held but to all the people around them as well.

Law enforcement, the judicial process, and City jails interact with each other in ways that will impact justice-involved people (whether they have been deemed guilty or not), employees who work within these spaces, the families of justice-involved people and employees, and the larger public. The existence of a deadly virus within the criminal system serves as a very palpable marker of this interconnectedness. The virus has many opportunities for transmission from the moment someone is arrested. A person and a police officer are in close contact, where one may transmit the virus to the other; an arrested person interacts with other detained people in the precinct, during transport between facilities, while in court for an appearance, and in jail. In jail, the virus can be passed between people who are exposed to unsanitary, crowded conditions and meager healthcare access. Finally, corrections officers and detainees who are released could then bring the virus into their homes and communities.¹⁵⁹ This interconnectedness also impacts the community's ability to manage the pandemic when at crisis levels: "Prisoners with serious symptoms wind up in the local hospitals, worsening shortages of doctors, nurses, masks, ICU beds, and ventilators. People who have never seen a city jail could die because too many others were kept in one."¹⁶⁰ Each part of the criminal legal system is deeply interrelated and reliant on the other parts and what happens within this process spills over to the larger community.

The many people who pass through New York City's precincts, courts, and jails experience high rates of chronic illnesses, as well as mental health and substance abuse concerns. The well-documented conditions of detention, which include "overcrowding, violence, sexual victimization, use of solitary confinement, and lower standards of medical care," are damaging

159. See Leah Pope & Aaron Stagoff-Belfort, *Public Health and Public Safety: The Critical Role of Police During the COVID-19 Crisis*, VERA INST. JUST.: THINK JUST. BLOG (Apr. 30, 2020), <https://www.vera.org/blog/covid-19-1/public-health-and-public-safety-the-critical-role-of-police-during-the-covid-19-crisis> [<https://perma.cc/JCK7-ECLF>].

160. Conor Friedersdorf, *Let People out of Jail*, ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/public-safety-case-more-jail-releases/609166/> [<https://perma.cc/9DVG-6Z4S>].

not only to the physical and mental health of incarcerated individuals but also to their families and communities.¹⁶¹ Many of these realities are the product of choices about where government and social structures invest resources. The impact is pernicious and intergenerational:

According to a widely-accepted public health model called the social determinants of health (SDH), human health is profoundly influenced by a range of social, economic, and political forces beyond the control of the individual. Forty years of mass incarceration has had crippling, intergenerational effects on SDH including: Altering the demographic composition of communities in ways that fracture family structures and trap young children in poverty; Diminishing the educational opportunities of youth; Stagnating economic mobility and widening income inequality; Exacerbating homelessness; Restricting access to essential social benefits . . .¹⁶²

The COVID-19 outbreak illustrates, on a very practical level, this larger connection between socio-political choices, health, and safety. Lasting decarceration requires that institutional actors operate from an understanding that public health is vital to ensuring public safety.

Detention perpetuates the violence, trauma, and deprecation of human life that is endemic to jails and the criminal legal process writ large. Those who work or are held within jails often experience trauma due to the physical and psychological violence they are exposed to.¹⁶³ What often results from the violence of jails is post-traumatic stress, which can manifest as mental health and anger management issues.¹⁶⁴ The effects directly impact the family members and communities of those involved in the criminal legal system.

This concrete demonstration of how public health interacts with the criminal legal process should be applied to a larger understanding of justice and safety in the movement toward decarceration. Despite some actors' professed commitment to decarceration in New York City, many of the public responses that came from the local district attorneys' offices and the Mayor's office during the pandemic demonstrated a commitment to a more

161. See DAVID CLOUD, VERA INST. OF JUST., ON LIFE SUPPORT: PUBLIC HEALTH IN THE AGE OF MASS INCARCERATION 5 (2014), https://www.vera.org/downloads/Publications/on-life-support-public-health-in-the-age-of-mass-incarceration/legacy_downloads/on-life-support-public-health-mass-incarceration-report.pdf [<https://perma.cc/NWT8-3ZPZ>].

162. *Id.* at 15 (internal citation omitted).

163. See Paul Boxer et al., *Exposure to Violent Crime During Incarceration: Effects on Psychological Adjustment Following Release*, 36 CRIM. JUST. & BEHAV. 793 (2009); Lisa A. Jaegers et al., *Posttraumatic Stress Disorder and Job Burnout Among Jail Officers*, 61 J. OCCUPATIONAL & ENV'T'L MED. 505 (2019).

164. See Boxer et al, *supra* note 163; Jaegers et al., *supra* note 163.

traditional and punitive interpretation of public safety.¹⁶⁵ The pandemic has tested the limits of each institutional actor's tolerance for enabling wide-reaching and immediate systemic harm. The default response of institutional actors in the City — judges, government officials, and district attorneys — has been to think of public safety primarily in terms of personal victimization: when someone causes harm to the physical or property interests of another, it in turn harms broader societal norms. However, “the community interest in safety is often not separate from the defendant's, but entwined with it.”¹⁶⁶ Investing in the health, safety, and well-being of the criminally accused and most marginalized people in our communities will be more responsive to the “complex dynamics” that make up public safety.¹⁶⁷

The institutional parts of the City's criminal legal system each have a responsibility to care for and promote the well-being of people within the system whether they are the accused, the detained, someone who has experienced harm, or someone who works to maintain the system's functioning. A public health emergency like this shows that the system has been criminalizing and jailing people in ways that cannot responsibly be sustained. A more informed interpretation of public safety, which considers the role of public health, would require an equal or perhaps even greater focus on caring for people collectively in ways that are proactive and not merely reactive. This would reflect a recognition that centering our interconnectedness will help us all to thrive and be kept safer. Such an orientation emphasizes how front-end investments in preventative healthcare, education, and employment will protect the personal interests of more individuals in the long-term. Much of what can be learned from COVID-19 in terms of decarceration efforts supports what organizers and advocates have been pushing for even before the pandemic: resources that have been used to maintain criminalization, punishment, and detention should be directed toward preventative health and physical and mental well-being. Institutional actors have yet to meaningfully embrace a more capacious definition of public safety, one that recognizes the important role that public health plays in keeping all individuals safe.

165. See Letter from New York City's Five District Attorneys and Special Narcotics Prosecutor, to Bill de Blasio, Mayor of N.Y.C., and Cynthia Brann, Comm'r, N.Y.C. Dep't of Corr. (Mar. 30, 2020), <https://www.bronxda.nyc.gov/downloads/pdf/pr/2020/NYC-DAs-Letter-DOC-Mayor-and-D-A-Clark-Letter.pdf>. [<https://perma.cc/T8XA-HV6U>].

166. Jenny E. Carroll, *Pretrial Detention in the Time of Covid-19*, 115 NW. U. L. REV. ONLINE 59, 71–72 (2020), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1291&context=nulr_online [<https://perma.cc/58QA-LBKK>].

167. See *id.*

B. Deep Entrenchment of Institutional Cultural Norms Impedes Decarceral Progress

The prolonged isolation that many people experienced for the first time during the pandemic has opened up the potential to shift public and political sentiment about our liberal use of confinement in the criminal legal context. While the ills of detention, police violence, and structural racism are not new, the stillness of a pandemic has made it harder for some people to look away. This has led to a heightened awareness of the need to reduce our reliance on carceral responses. Although a mandated public health quarantine in one's home and the perils of pretrial detention are extremely different, a common link can be found in the deprivation of social contact and the attendant senses of despondence, anxiety, and powerlessness that follow.¹⁶⁸ Many who previously may not have thought very critically about the deep impact of a person being deprived of their liberty are now questioning how our criminal legal system resorts to criminal detention so casually.¹⁶⁹ This awareness has also come at a time of great social unrest and organizing around issues of police violence and persistent racial inequities in the criminal legal system and our larger society.¹⁷⁰ Increased public concern about the deep impact of structural racism and each person's individual responsibility for effectuating consequential change has never been more urgent.¹⁷¹ Yet, this current social

168. *See id.*

169. *See id.*

170. Racial inequities have been observed at numerous points of the criminal legal process. Drug polices and enforcement have a significantly disproportionate impact on people of color. *See* AM. C.L. UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE* (2013), <https://www.aclu.org/sites/default/files/assets/100413-mj-report-rfs-rel1.pdf> [<https://perma.cc/AM8D-XL7R>] (describing how policing of marijuana has served as a mechanism for targeting communities of color); *see also* Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 *CRIME & JUST.* 1, 17–21 (2008) (observing that racial disparities in the criminal legal system exist in all crime categories cannot be fully explained by demographic differences in criminal involvement). *See generally* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (discussing the political background of the War on Drugs and the racial disparities in drug offenses). Aggressive policing and mass incarceration generally have a disproportionate impact on individuals and communities, and families of color. *See* Jeffrey Fagan, Valerie West & Jan Holland, *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 *FORDHAM URB. L.J.* 1551, 1552 (2003) (examining high incarceration rates within a community as a factor that increases crime and perpetuates social and economic marginalization); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 *STAN. L. REV.* 1271, 1277 (2004) (discussing how racial disparities in incarceration of adults disrupt Black families); Brett G. Stoudt et al., *Growing Up Policed in the Age of Aggressive Policing Policies*, 56 *N.Y.L. SCH. L. REV.* 1332 (2012) (providing data and analysis on the impact of aggressive policing on youth in New York City).

171. *See* Hannah Giorgis, *Quarantine Could Change How Americans Think of Incarceration*, *ATLANTIC* (Apr. 28, 2020),

reality sits in tension with the well-entrenched cultural norms of the legal, law enforcement, and political institutions in New York City.

The City's institutional actors must go beyond surface-level support and commit to shifting the cultural norms of their individual offices in order to facilitate decarceral progress.¹⁷² It is clear from the overall response to COVID-19 in the criminal legal system that universal support for decarceration does not exist among the City's institutional actors. The NYPD's aggressive and racially disparate treatment of New Yorkers during the height of the pandemic and racial justice protests demonstrates that decarceration does not fit within the organizational and cultural values of the NYPD. Political actors tasked with moving decarceration ahead have missed key opportunities to counteract the actions of the NYPD and to stimulate cultural change within their own organizations. For example, in trying to appear responsive to the demands of social justice activists calling for the defunding of the NYPD, New York City leaders agreed to cut \$1 billion from the NYPD's \$6 billion operating budget.¹⁷³ Yet, as many have observed, without changes to the fundamental nature of the carceral arms of New York City government — such as policing, prosecution and correction — decarceral efforts will continue to fall short.¹⁷⁴

Even the City's self-styled progressive prosecutors missed opportunities to take bold steps to advance organizational change within their offices that would support decarceration. Chief prosecutors are responsible for setting “the tone and culture of the office’ and . . . determin[ing] the direction in which prosecutors working under them exercise their discretion in individual cases.”¹⁷⁵ Throughout the height of the pandemic, prosecutors' offices across the City continued to move slowly and resisted taking decisive, proactive steps to reduce the Rikers jail population. Brooklyn's District Attorney, Eric Gonzalez, took the most noteworthy steps toward public tone setting by releasing a public statement about declining to prosecute

<https://www.theatlantic.com/culture/archive/2020/04/quarantine-could-change-how-americans-think-incarceration/610831/> [<https://perma.cc/G285-YFNK>] (discussing many mutual aid networks “through which communities come together to share resources,” and that address the needs of those “hurt both within correctional institutions and outside them”).

172. *See id.*

173. *See* Jeff Coltin, *Did de Blasio Actually Defund the NYPD?*, CITY & ST. N.Y. (July 1, 2020),

<https://www.cityandstateny.com/articles/politics/new-york-city/did-de-blasio-actually-defund-nypd.html> [<https://perma.cc/JF4W-AWHK>].

174. *See* Dana Rubinstein & Jeffery C. Mays, *Nearly \$1 Billion Is Shifted from Police in Budget That Pleases No One*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/06/30/nyregion/nypd-budget.html> [<https://perma.cc/TR5Z-777V>].

175. Marie Gottschalk, *Bring It On: The Future of Penal Reform, the Carceral State, and American Politics*, 12 OHIO ST. J. CRIM. L. 559, 574 (2015).

“low-level offenses that don’t jeopardize public safety” and publicly releasing the numbers of COVID-19 related arrests in the borough.¹⁷⁶ While those measures were a start, there remains substantial work to be done in terms of changing culture, tone, and approach within local prosecutors’ offices in supporting decarceration.

Judges, government officials, and district attorneys are not accustomed to thinking differently about punitiveness and social control. Mass incarceration exists in large part because of the punitive sensibilities of these actors, and without directly confronting our reliance on punitiveness, decarceration cannot be achieved.¹⁷⁷ Decarceration requires that these actors use their positions to support health-oriented interventions at the front end of the system and make sure that a restorative perspective is reflected in their discretionary decisions at the back end of the criminal legal process. Persistent community pressure, true institutional buy-in, and organizational culture reform will help to move decarceration forward.¹⁷⁸ A mobilized public will continue to have a role in disrupting entrenched political and institutional norms.¹⁷⁹

C. Decarceration Requires Changing the Narrative About Violence

Grappling with how we treat so-called violent offenders is perhaps one of the most challenging and important aspects of public safety and decarceration considerations. The City’s pre-COVID-19 plans for decarceration raise this challenge and resolve it simply by asserting that jail and criminalization will be reserved for violent offenders, while greater options and alternatives will exist for others.¹⁸⁰ During the height of the COVID-19 outbreak, district attorneys and the news media zeroed in on

176. See *Statement from Brooklyn DA Eric Gonzalez Regarding the Coronavirus (COVID-19)*, BROOKLYN DIST. ATT’Y (Mar. 17, 2020), <http://brooklynda.org/wp-content/uploads/2020/03/Statement-from-the-Brooklyn-DA’s-Office-regarding-the-Coronavirus-COVID-19.pdf> [<https://perma.cc/R7E6-47K3>].

177. See Joseph E. Kennedy, *Decarcerating the Punitive Society*, 26 FED. SENT’G REP. 263, 263 (2014).

178. See Jacobson et al., *supra* note 3, at 403.

179. When the public mobilizes on criminal justice reform, the election of district attorneys, judges, and local political officials who support reform follows. And, as pro-reform interest groups become stronger and gain further victories, the same politicians who today fear appearing “soft on crime” might come instead to fear appearing overly harsh on crime. A mobilized public can similarly pass ballot initiatives to make the system less punitive. See Rebecca Goldstein, *The Politics of Decarceration, Prisoners of Politics: Breaking the Cycle of Mass Incarceration* by Rachel Elise Barkow, 129 YALE L.J. 446, 471 (2019).

180. See SMALLER SAFER FAIRER, *supra* note 75, at 17–21.

concerns about releasing violent offenders and defaulted to traditional narratives about what public safety requires.¹⁸¹

From the outset, it is worth noting that “violent offender,” as it is used within the criminal legal system, carries many different meanings and understandings. First, the term “violent” often has a more specific meaning in law that does not always correspond to popular perception, and it is critical that the facts of each person’s case be considered on an individualized basis.¹⁸² Designating certain offenses as violent does not always accurately convey the individual person’s level of involvement in, or the underlying facts of, the alleged crime. For example, in New York, possession of a loaded firearm is considered a violent offense, but the definition of “loaded” requires only that the individual charged was in possession of bullets.¹⁸³ Burglary, as another example, is considered a violent crime even when no weapon is involved and no assaultive conduct occurs.¹⁸⁴ Robbery is also considered a violent offense even if no actual use of force is alleged or an injury sustained.¹⁸⁵ Further, in the pretrial context, those charged with offenses termed “violent” are the most likely to be held on high bail that they are unable to afford, making them most susceptible to coercive plea deals.¹⁸⁶ For example, of the 39,326 cases charged as violent felonies in New York State in 2016, 33% were dismissed entirely while only 22% ended with a felony conviction.¹⁸⁷

Finally, even understanding how the term “violent” is often over-inclusive and how many cases labeled as violent are dismissed or resolved without a felony conviction, the simple truth remains that in a pretrial context, there will be people accused of offenses that involve physically aggressive conduct. Does being in jail pretrial for what is deemed a violent offense

181. See Christina Carrega & Aaron Katersky, *Inmates Charged with Violent Crimes Poised for Release Due to COVID-19*, ABC NEWS (Mar. 31, 2020, 4:59 AM), <https://abcnews.go.com/US/alleged-violent-offenders-poised-release-rikers-island-due/story?id=69863436> [https://perma.cc/N2K2-ABXJ].

182. See N.Y. PENAL LAW § 70.02 (McKinney 2020) (defining violent felonies).

183. See Eli Hager, *When “Violent Offenders” Commit Nonviolent Crimes*, MARSHALL PROJECT (Apr. 3, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/04/03/when-violent-offenders-commit-nonviolent-crimes> [https://perma.cc/4RB8-ZXKG].

184. See *id.*

185. See *Matter of Rongene D.*, 820 N.Y.S.2d 845 (Fam. Ct. 2006) (finding that Robbery in the Second Degree, a class C violent felony offense is established where the accused and others surrounded a complainant, grabbed his cell phone, and threatened to punch him if he did not let go).

186. See *New York Passed Historic Reforms to Its Bail, Discovery and Speedy Trial Laws: Here’s the Good and the Bad*, FWD.US, <https://www.fwd.us/news/ny-session-impact/> [https://perma.cc/4DC7-K3WN] (last visited Oct. 16, 2020).

187. See Hager, *supra* note 183.

mean that you must automatically assume a heightened risk of contracting a deadly virus?¹⁸⁸ Violent offenses raise some of the most challenging questions and more deliberate considerations by institutional actors are needed.¹⁸⁹ During the initial response to the pandemic, the mayor and district attorneys publicly hued to a more traditional interpretation of public safety by assuring the public that people pegged as violent offenders would not be released regardless of their COVID-19-related health risks.¹⁹⁰ The media and elected officials on both the local and national levels consistently play into the belief that the general public does not want to know that government is “soft on crime.”¹⁹¹ A true commitment to decarceration means that all people involved in making the system function are responsible for explaining the nuanced and individualized assessments that go into each case. It requires an evaluation and communication of actual data and evidence-based information, so that we do not simply rely on fear and speculation.

188. This discussion relates to people held pretrial on charges deemed to be violent and not people held on technical violations of parole for criminal convictions deemed to be violent. Technical violations of parole usually relate to a failure to follow parole requirements, such as not attending a required program or consistently testing positive during substance screenings. The City’s roadmap contemplates changes to state law to address diversion from jail. See SMALLER SAFER FAIRER, *supra* note 75, at 25 (“Current state law requires that everyone arrested on a parole violation be immediately jailed. The City is calling on the State to replace this law with a risk-driven system in which those who pose a high risk are detained and those who pose a lower risk have an opportunity to remain in the community by being assigned to an alternative to jail program.”); see also Reuven Blau & Rosa Goldensohn, *Too Many Parolees Being Sent Back to Rikers Unnecessarily*, *Advocates Say*, CITY (Aug. 31, 2020, 8:32 PM), <https://www.thecity.nyc/2020/8/31/21407412/parolees-being-sent-back-to-rikers-jail-nyc> [<https://perma.cc/32TP-J9YX>].

189. See discussion *supra* Section II.B.

190. In one instance of a more traditional, less nuanced response to public safety concerns, New York City’s five District Attorneys wrote a letter to the Mayor and the Commissioner of the Department of Correction expressing concern about the requests for release that were coming from their offices. The letter stated: “[T]he reports that those released may include violent offenders, are creating a public perception that our city’s jails may be incapable of providing sufficient health care for the remaining population of inmates. We believe this perception is wrong.” Letter from New York City’s Five District Attorneys and Special Narcotics Prosecutor, *supra* note 165; see also Carrega & Katersky, *supra* note 181.

191. See Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 444–46 (2006); see also RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 106–07, 111 (2019); Gottschalk, *supra* note 175, at 589 (“Qualitative gauges of public opinion (such as focus groups) and surveys that permit respondents to rank their policy preferences indicate that Americans have much more nuanced views of spending on criminal justice than the popular media or public policy debates suggest. Public opinion about crime and punishment is highly racialized, with considerable gaps between whites and blacks on key issues.”).

Jails are not capable of providing safety and adequate healthcare for those detained there, and the number of people who are categorized as violent is often over-inclusive. There is already important work being done by restorative justice advocates in the post-plea, alternative to incarceration context to address violence. While the pretrial detention context, which ostensibly carries a presumption of innocence, is quite different, some of the core understandings of restorative justice may prove instructive. It is important to emphasize that “[v]iolence is driven by shame, exposure to violence, isolation and an inability to meet one’s economic needs — all of which are core features of imprisonment.”¹⁹² Taking on a more careful understanding of what motivates and perpetuates violence, shrinking the number of cases that are deemed violent, and finding creative, innovative pretrial solutions for offenders that cause harm is imperative to furthering meaningful decarceration.

D. The Economic Impact of COVID-19 Will Present Challenges for Lasting Decarceration

The swift and steady downturn of the economy due to COVID-19, along with backlash from the racial justice movement, will potentially create a number of factors that can threaten decarceration efforts in New York City. One uncomfortable lesson that comes from the response related to COVID-19 is that we have to be able to tolerate a certain level of regression while we are working toward lasting decarceration. Many justice-involved people struggled financially even when the economy was at its best. Now, with severe budget deficits and record levels of unemployment brought on by the economic crisis of COVID-19, marginalization for justice-involved people will only deepen. As Professor Chaz Arnett warns, “[f]inancial downturns may act not only to generate economic insecurity, but also to increase punitiveness. This can happen in several ways during times of economic instability, from scapegoating particular people or communities, to seeking political traction through punitive measures for symbolic value.”¹⁹³

There is already evidence of this scapegoating and political posturing. As crime rates in New York City have ticked up, the Mayor and Police Commissioner have claimed that the pandemic, the protests, and the state

192. Michelle Alexander, *Reckoning with Violence*, N.Y. TIMES (Mar. 3, 2019, 11:03 AM), <https://www.nytimes.com/2019/03/03/opinion/violence-criminal-justice.html> [<https://perma.cc/RDX7-6DE7>].

193. Chaz Arnett, *From Decarceration to E-carceration*, 41 CARDOZO L. REV. 641, 661 (2019).

reforms to the bail statute are responsible.¹⁹⁴ Others within law enforcement have placed blame on detainees released because of COVID-19.¹⁹⁵ However, many of these claims have been proven to be unfounded. The NYPD's own data confirms that "the state's new bail law and the mass release of inmates from city jails in recent months because of the coronavirus outbreak played almost no role in the spike in shootings."¹⁹⁶ Of the 1,500 people released from Rikers during the height of the pandemic in March and April, only seven had been rearrested in connection with weapons offenses.¹⁹⁷

Many in law enforcement who have not supported decarceration at any point will seize on economic and social challenges to fuel deeper entrenchment of "get tough" policies and approaches.¹⁹⁸ In light of the economic fallout from COVID-19 and political efforts to impede decarceral progress, bold reentry reforms such as incarceration-related debt relief and social safety net programs that are inclusive of people with criminal histories are needed.¹⁹⁹

CONCLUSION

The outbreak of COVID-19 highlights the deep-seated resistance to decarceration in the City of New York and the challenges for decarceration across the country. Even in the face of calls from the physicians responsible for caring for the population of New York City's jails to rapidly decarcerate, city officials and prosecutors moved slowly and conservatively in reducing the jail population. City officials must embrace valuable lessons from their response to the COVID-19 outbreak in order to improve prospects for the City's larger decarceral agenda.

194. See Alan Feuer, *The Mayor Blames the Virus for Shootings. Here's What Crime Data Shows.*, N.Y. TIMES (Aug. 4, 2020, 10:33 AM), <https://www.nytimes.com/2020/08/04/nyregion/nyc-shootings-coronavirus.html> [https://perma.cc/NH5T-6NMQ].

195. See Melissa Russo, *NYPD Brass: We're Arresting Too Many Prisoners on Early COVID Release*, NBC N.Y. (June 13, 2020, 3:08 PM), <https://www.nbcnewyork.com/news/local/crime-and-courts/released-from-rikers-in-covid-measure-man-arrested-4-times-in-3-months/2460035/> [https://perma.cc/82NL-MA8G].

196. Feuer, *supra* note 194.

197. *See id.*

198. *See id.*

199. See Sarah Figgatt, *Reentry Reforms Are More Critical Than Ever Amid the Coronavirus Pandemic*, CTR. FOR AM. PROGRESS (Apr. 30, 2020, 9:03 AM), <https://www.americanprogress.org/issues/poverty/news/2020/04/30/484168/reentry-reforms-critical-ever-amid-coronavirus-pandemic/> [https://perma.cc/KK7W-Q8UA].