



**A PATHWAY OUT OF
MASS INCARCERATION
AND TOWARDS A
NEW CRIMINAL JUSTICE SYSTEM:
RECOMMENDATIONS FOR THE
NEW YORK STATE LEGISLATURE**

**Report by the Mass Incarceration Task Force,
Corrections and Community Reentry Committee,
and Criminal Justice Operations Committee**

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I. INTRODUCTION

The call to end mass incarceration has now been sounded for years. It is past time for New York to answer this call through comprehensive legislative changes to the penal law, criminal procedure law and corrections law. The goal is to create a criminal justice system focused on public safety, fairness, proportionality and equality. The New York City Bar Association (City Bar) urges the New York State Legislature to implement sweeping revisions to the criminal justice system, so that its central purpose is to address the root causes of crime, and more effectively and compassionately prevent further crime.

Structural reforms aimed at ending mass incarceration are imperative for all New Yorkers. However, the need is particularly acute for Black and Latinx communities which have been disproportionately impacted by the systemic racism embedded in our criminal justice system. As we noted in our foundational report: “Our country’s massive and reflexive use of incarceration as the solution to all criminal problems has had a disproportionate (and devastating) impact on African-American and Latino young men. African-Americans and Latinos collectively account for 30% of our population, but they represent 60% of our current inmates. The raw numbers are striking: approximately one in every 35 African-American men, and one in 88 Latino men is presently serving time behind bars (in contrast to one in 214 white men).”¹ Women of color are over-represented in prison as well; in 2019, Black women were imprisoned at 1.7 times the rate of white women, and Latinx women were imprisoned at 1.3 times the rate of white women.²

To truly transform the criminal justice system, we must reimagine its role in our society. Punishment and incapacitation have been the focus of the criminal justice system for decades, often to the exclusion of rehabilitation. This results in undue suffering for criminal justice involved individuals, their families and their communities, and fails to adequately prevent future

¹ “Mass Incarceration: Seizing the Moment for Reform,” New York City Bar Association (Sept. 2015), *available at* https://www2.nycbar.org/pdf/report/uploads/Mass_Incarceration_Seizing_the_Moment_for_Reform-20150928.pdf.

² See “Incarcerated Women and Girls,” The Sentencing Project (Nov. 2020), *available at* <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/#:~:text=Race%20and%20Ethnicity%20in%20Prisons,48%20per%20100%2C000>. Of additional concern is that even as imprisonment rates are dropping for men, they are increasing for women, both in raw and proportional numbers. See *id.*; see also “Incarceration Trends in New York,” Vera Institute of Justice (Dec. 2019), *available at* <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-new-york.pdf>.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

crimes. Too often, ensuring public safety and criminal justice reform are treated as if they are in tension, with reform coming at the expense of public safety. In this report, we suggest that is a false dichotomy, and that comprehensive, thoughtful reform will make communities safer. In our current system, individuals typically emerge from the criminal justice system with the root causes of their criminal activity unaddressed and their future prospects hampered by a criminal conviction that makes accessing employment and needed services more difficult. Moreover, they are often further traumatized by over-long incarceratory sentences that only increase the likelihood of recidivism. The system thereby increases the likelihood that an individual commits a future crime, rather than being rehabilitated.

This report advocates for laws that make specific reforms to all stages of the criminal justice system, and calls for a broader re-imagining of the purpose of the criminal justice system and its place in our society. It suggests that the criminal justice system must be re-focused to address the reasons for criminal activity, rather than seeking exclusively to punish people who commit crimes. These reforms also seek to reduce the number of people who are involved with the criminal justice system at each stage of the process, which stems from a core belief that the criminal justice system is grossly overutilized in New York State and, indeed, across the country. Too many people – and, notably, too many people of color – are arrested, prosecuted, convicted and incarcerated in New York. As discussed in detail in the report, we recommend:

- A. Arrest fewer people:** the Legislature should carefully reconsider which actions should be punished through the criminal system and decriminalize several minor crimes.
- B. Arraign fewer people:** the Legislature should increase availability and funding for pre-arraignment diversion programming and mandate that it be offered for certain individuals.
- C. Convict fewer people:** the Legislature should increase the availability of post-arraignment diversion by adjusting the requirements of the current drug diversion statute to make it more accessible and less punitive; and create new diversion programs, including programs to address mental health concerns and for individuals facing their first felony conviction.
- D. Send fewer people to prison:** the Legislature must create mechanisms to decrease the number of individuals sent to prison by creating a presumption of a non-incarceratory sentence for misdemeanors, low level felonies and drug felonies, repealing restrictions on plea bargaining, and creating and funding alternative to incarceration programming.
- E. Reduce prison sentences:** the Legislature should overhaul the sentencing structure in New York to decrease high mandatory minimum sentences, reduce reliance on overbroad and overly punitive categorization, increase availability of youthful offender eligibility and create mechanisms to reduce long prison sentences.

- F. Reform prisons:** the Legislature should act to completely reform prisons and transform them into institutions that provide rehabilitative services rather than traumatize and degrade incarcerated individuals.
- G. Reform parole and re-entry:** the Legislature should transform parole into a system that provides re-entry services rather than a punitive program that unnecessarily and unjustly increases incarceration.
- H. Expand sealing of convictions:** the Legislature should greatly increase the availability and ease of sealing convictions.
- I. Recognize mental health issues and concerns:** in making reforms, the Legislature must be cognizant of the way in which the criminal justice system has become a repository for individuals suffering from mental illness and act to direct such individuals out of the system, and ensure their illnesses are considered and treatment is offered when these individuals enter the criminal justice system.
- J. Include those convicted of crimes of violence in reform:** the Legislature must not exclude those who are accused of so-called “violent” crimes from reforms. Public safety, justice and proportionality require ensuring that those accused of violent crime are not left behind in reform efforts, with the causes of their criminal actions unaddressed and subject to disproportionate punishment.

A few caveats to our recommendations. First, these suggested reforms must be tempered with a need for proportionality and justice, with programming designed to meet the needs of individuals in a manner that is proportional to the acts that brought them to the system and proportional to their needs. Second, these reforms must be funded. We are confident that these reforms will result in long term cost savings to the state by reducing reliance on prison and increasing public safety. In the short term, however, these reforms will require start up capital and will only be successful if meaningfully funded. Finally, these reforms are focused only on the criminal justice system itself. In order to truly end mass incarceration and over-reliance on the criminal justice system, we must ensure resources are provided to communities, particularly Black and Latinx communities, to help prevent the need for engagement with the criminal justice system in the first place.

This report builds on the work of many other advocates and activists. We seek here to pull together many different strands of reform and show that when implemented together in a comprehensive framework, a fundamental shift in the goals and impact of the criminal justice system can be achieved. This report and the suggested changes are not a final step to ending mass incarceration. But they would put us on the road to a different, individual-based and compassionate criminal justice system. We hope it provides the beginning steps on the long road to addressing the inhumanity and injustice that have plagued the criminal justice system in New York since its inception.

II. RECOMMENDATIONS

A. Arrest Fewer People

1. *Decriminalize certain types of acts*

Too many minor acts and actions are criminalized in New York State and New York City, and police and prosecutors most frequently charge Black and Latinx individuals with such low-level crimes.³ The Legislature and the New York City Council should take a systematic look at minor misdemeanors and common offenses for which criminal summonses are issued, and consider legalization, or confine any sanctions exclusively to the civil system, rather than unnecessarily involving people in the criminal justice system for what are often crimes stemming from poverty and/or substance use disorders. The Legislature has recently taken positive steps in this direction, including legalizing marijuana,⁴ repealing the crime of Loitering for the Purposes of Prostitution,⁵ and ending the process of suspending driver's licenses for unpaid fines which often led to criminal sanctions.⁶ In continuation of that work, the City Bar recommends repealing the following criminal laws:

a) Theft of Services

Criminalizing failure to pay for a subway or bus ride, but not criminalizing a failure to pay a parking fee, discriminates against those with lower incomes and people of color who more frequently rely on public transportation. It unnecessarily involves the criminal justice system in extremely minor offenses that frequently stem from poverty, and the costs of enforcing this law, both in terms of policing and court budgets, certainly outweigh any minor deterrence-based gains.

³ Of the 52,235 criminal court summonses issued by the NYPD to people (as opposed to businesses) in 2019, only 5,002 (or less than 10 percent) were issued to white people. In contrast, police officers issued 25,549 criminal summonses to Black people (48.9%) and 17,347 (33.3%) to Hispanics. *See* Data on NYPD criminal summonses, available at <https://www1.nyc.gov/site/nypd/stats/reports-analysis/c-summons.page>.

⁴ A.1248-A/S.854-A, Chp. 92 (NYS 2021). *See also* “City Bar Applauds Passing of the Marijuana Regulation and Taxation Act, Ending New York’s Marijuana Prohibition,” New York City Bar Association (March 31, 2021), <https://www.nycbar.org/media-listing/media/detail/city-bar-applauds-enactment-of-the-marijuana-regulation-and-taxation-act-ending-new-yorks-marijuana-prohibition>.

⁵ A.3355/S.1351, Chp. 23 (NYS 2021). *See also* “Repeal the ‘Walking While Trans’ Ban,” New York City Bar Association (Feb. 1, 2021), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/repeal-the-walking-while-trans-ban>.

⁶ A.7463-B/S.5348-B, Chp. 382 (NYS 2020). *See also* “Report in support of the Driver’s License Suspension Reform Act,” New York City Bar Association (Dec. 23, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/drivers-license-suspension-reform-act>.

b) Possession and Sale of Syringes and Possession of Buprenorphine

The Legislature should decriminalize harm reduction equipment, such as syringes,⁷ and addiction medication, such as buprenorphine,⁸ as a means to reduce the current population of incarcerated individuals and end ineffective methods of attempting to prevent drug use. It is well-documented that criminalizing drug use is not an effective prevention tactic. Instead, criminalizing drug use has led to more dangerous conditions, including lack of access to safe drug paraphernalia and addiction medication, police harassment, and violence while incarcerated. Support for decriminalizing syringes and buprenorphine is widespread, both in New York State and around the country.

Within the last decade, thousands of New Yorkers have been arrested for possessing a hypodermic instrument, such as a syringe or needle, which is a class A misdemeanor carrying a punishment of up to one year in jail. Individuals possessing syringes cannot be prosecuted if they are over the age of 18 and obtained the syringe from a licensed pharmacy or healthcare provider. But individuals who did not obtain syringes from a licensed pharmacy or healthcare provider are subject to criminal liability. As such, the exception only narrows the methods through which a drug user can obtain or distribute safe, unused syringes.

Many drug users are not aware that syringe exchange programs fall within the exception; stigma surrounding illicit syringes creates fear of potential criminal consequences. This alone drives down the number of individuals using syringe exchange programs. Harm reductionist and public health experts, including the City Bar's former HIV/AIDS Committee and Drugs and the Law Committee, are therefore advocating for decriminalizing possession and distribution of hypodermic needles and syringes as a means to decrease transmission of diseases such as HIV and Hepatitis C.⁹ Decriminalizing possession and distribution will allow for widespread access to syringe and needle exchange programs while also reducing the population of incarcerated individuals.

Similarly, harm reductionist and public health experts are advocating for legislators to decriminalize buprenorphine---an opioid addiction treatment drug that is currently considered a schedule III substance. Legislation has been introduced to amend New York State's controlled substance schedule to exempt buprenorphine from the penal law.¹⁰ Decriminalizing buprenorphine will not only reduce arrests in New York State, but will also help save lives by preventing individuals addicted to opioids from using deadlier alternatives.

⁷ This would be accomplished by pending legislation A.868/S.2523 (NYS 2021), <https://www.nysenate.gov/legislation/bills/2021/s2523>.

⁸ This would be accomplished by pending legislation A.612/S.2524 (NYS 2021), <https://www.nysenate.gov/legislation/bills/2021/s2524>.

⁹ See "Report on Legislation Regarding the Possession and Use of Hypodermic Syringes and Needles," New York City Bar Association, Committees on HIV/AIDS and Drugs and the Law (Feb. 2016), available at <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-on-legislation-regarding-the-possession-and-use-of-hypodermic-syringes-and-needles>.

¹⁰ *Supra* note 8.

The City Bar supports efforts to decriminalize syringes and to exempt buprenorphine as a controlled substance.

2. *Police Reform*

There is a need for fundamental reform to policing in New York City and the State as a whole. As described more fully in the City Bar’s 2020 report, “Police Reform Efforts in New York State and New York City: More to Do,”¹¹ we call on the State Legislature and New York City Council to take the following steps to reform policing: (i) create alternatives to police, such as employing different responders for mental health related calls, and invest in community mental health programs; (ii) review impacts of disability, ableism, and audism in policing practices and policies; (iii) invest in violence intervention programs; (iv) reduce and reimagine school safety officers; (v) rethink traffic enforcement; (vi) change NYPD priorities, decreasing focus on low level crimes and increasing focus on violent crimes; (vii) enhance police training; (h) demilitarize the police and reduce use of military tactics during protests; (viii) continue to decriminalize low level crimes; (ix) reform discipline processes; (x) create an independent prosecutor for police misconduct; and, (xi) require information sharing among District Attorney offices in New York City when misconduct by an officer is determined to have occurred.

B. Arraign Fewer People

Even if an individual is arrested for a criminal offense, far fewer should ever be arraigned in criminal court. Innovative programs like Project Reset and Project HOPE, based on the consent of district attorneys and/or the police department, divert individuals who have committed minor crimes back to their communities for therapeutic programming and drug treatment. If an individual completes the program, their case is dismissed without the individual ever having to appear in court. The success of these programs in terms of recidivism, lowered rates of overdose, and fiscal savings is well-documented.¹² A recent study showed that “nonprosecution of a

¹¹ “Police Reform Efforts in New York State and New York City: More to Do,” New York City Bar Association (Sept. 2020), available at <https://www.nyctbar.org/member-and-career-services/committees/reports-listing/reports/detail/additional-police-reform-efforts-ny-abuse-and-violence>.

¹² Project Reset currently exists in several NYC boroughs with varying eligibility criteria set by individual District Attorney’s offices. Eligible individuals charged with low level misdemeanors such as trespassing, criminal mischief and petit larceny attend two days of programs with Project Reset and, if they successfully complete the program, the District Attorney declines to prosecute their case. One study of the services provided to 16- and 17-year olds in Manhattan through Project Reset found that “Project Reset participants were significantly less likely to be convicted on a new arrest...(2% vs. 8%)... were less likely to have a new violent felony arrest (0% vs. 2%) and had fewer new arrests than those in the comparison group. Thus, the program may slightly reduce recidivism and poses no increased risk to public safety.” See Kimberly Dalve and Becca Cadoff, “Project Reset: An Evaluation of a Pre-Arraignment Diversion Program In New York City,” Center for Court Innovation (Jan. 2019), https://www.courtinnovation.org/sites/default/files/media/document/2019/projectreset_eval_2019.pdf.

Project HOPE in Staten Island involved giving individuals suffering from substance use disorder who were arrested on minor offenses the option of attending drug treatment rather than being brought to court. If they attended drug treatment, their case was dismissed without the individual ever going to court. “At the end of the program’s first year of operations, 94 percent of participants meaningfully engaged in services, which resulted in the dismissal of their arrest cases. Meaningful engagement was associated with a reduction in subsequent arrests and HOPE participants were considerably less likely to be rearrested than a comparison population (19 percent were rearrested compared to 44 percent).” See Heroin Overdose Prevention and Education (HOPE) Program, Criminal Justice

nonviolent misdemeanor offense leads to large reductions in the likelihood of a new criminal complaint over the next two years.”¹³ However, as of now, these programs are only available in certain counties, with their budgets constantly in flux. The criteria vary between counties, forcing service providers to adjust their programs in response to the priorities of a given district attorney and changing budgets.

The State Legislature should pass a law specifying individuals who must automatically be given the opportunity to engage in pre-arraignment diversion programming for minor misdemeanor offenses, such as those without significant criminal records who are charged with petit larceny, trespassing, criminal mischief or criminal possession of a controlled substance in the seventh degree. In addition, this law should allow for discretion allowing a wider range of circumstances in which police or prosecutors can refer individuals to pre-arraignment diversion.

More broadly, for individuals whose crimes are minor (whether misdemeanors or even some low-level felonies), and are the result of homelessness, substance use disorders and/or mental illnesses, police officers must have the ability to direct people to services rather than to courts, and services in those situations must be available and funded. Simply because an individual commits a crime does not mean that person should be brought into court and formally arraigned. Police officers and district attorneys regularly make discretionary decisions not to arrest or prosecute individuals. However, there are too few other options open to both police and district attorneys. The government must fund and encourage the use of alternative pathways that seek to address the reasons people commit crimes before they ever enter a courthouse.

C. Convict Fewer People

Currently, the only post-arrest diversion programming that is available to individuals without prosecutorial consent is drug treatment diversion court. While a useful beginning, this court is too limited when it comes to both its eligibility criteria and the treatment offered. Individuals charged with many crimes or with certain types of criminal history are barred from participation, and if an individual needs assistance with anything other than a substance use disorder there is no formal mechanism to give such assistance. In addition, the current drug treatment court is overly punitive with respect to perceived failures and requires unnecessarily long terms of treatment, creating a situation where individuals are unnecessarily set up to fail or frequently choose short prison terms rather than drug court diversion.

Problem-solving courts, including mental health courts, have been established throughout New York State by the Office of Policy and Planning.¹⁴ However, participation in these courts is contingent on prosecutorial referral or consent, and the criteria are often so stringent as to

Knowledge Bank, <https://knowledgebank.criminaljustice.ny.gov/heroin-overdose-prevention-and-education-hope-program>.

¹³ Agan, A., et al., “Misdemeanor Prosecution,” Nat’l Bureau of Econ. Research, at 1 (March 2021), *available at* https://www.nber.org/system/files/working_papers/w28600/w28600.pdf.

¹⁴ See “Problem-Solving Courts,” New York State Unified Court System, *available at* https://ww2.nycourts.gov/courts/problem_solving/drugcourts/index.shtml.

exclude those most in need of help.¹⁵ Informal versions of more expansive post-arraignment diversion exist in various counties. In some counties, individuals plead guilty in dedicated court parts that help specific populations; in others, judges take what are frequently known as “repleaders” on an *ad hoc* basis, where individuals agree to plead guilty to a felony, then complete a program, and upon completion of the program their guilty plea is withdrawn and a plea to a misdemeanor or violation is taken in its place. These programs provide an important and necessary service, recognizing that prison and the collateral consequences of felony convictions frequently work counter to the interests of public safety by failing to address the underlying causes of a criminal action, and increasing the hurdles an individual must overcome in order to have a stable life free of the criminal justice system.

However, programs that are available only in some counties and only with prosecutorial consent are insufficient. The Legislature must create a comprehensive statutory diversion scheme that would allow individuals to avoid a felony conviction in return for completion of appropriate programming, in particular focusing on broadening access to diversion for individuals who are facing their first felony conviction, or who need mental health or substance abuse treatment, just as drug diversion court was opened to more individuals by legislation, without the requirement of prosecutorial consent, in 2009.

1. *First Time Felony Diversion Court*

As outlined in the City Bar’s report from December 2020, individuals facing their first felony conviction face harsh collateral consequences for that conviction.¹⁶ A felony conviction puts employment, housing, public benefits and immigration status at substantial risk, and the costs to an individual, their family, their community and the public are wide-ranging and severe. For example, a recent Brennan Center report found that a felony conviction without incarceration reduces an individual’s future earnings by 22%, a reduction that not only affects the individual but also their family and their community.¹⁷

The moment a person is facing their first felony conviction can serve as a crucial moment for intervention, when a person can be evaluated to determine the factors that led them to commit a crime, and then provided with individualized programming to assist with education, therapy, job training and placement, housing, and other needs. Upon completion of the program, the case against the individual would be dismissed. As a result, the individual would not only have received assistance aimed at addressing the reasons they committed a crime, but diversion would also enable the individual to continue their life with these new resources free of the burdens of a felony conviction.

¹⁵ See, e.g., Queens Mental Health Court (QMHC), http://ww2.nycourts.gov/courts/11jd/supreme/criminalterm/mhc_part.shtml (eligible individuals must seek a referral to QMHC by the Queens District Attorney’s Alternative Sentencing Director, Douglas Knight).

¹⁶ See “Creating a First Time Felony Diversion Court,” New York City Bar Association (Dec. 2020), available at <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/creating-a-first-time-felony-diversion-court>.

¹⁷ See Terry-Ann Craigie, Ames Grawert, and Cameron Kimble, “Conviction, Imprisonment and Lost Earnings: How Involvement in the Criminal Justice System Deepens Inequality,” Brennan Center for Justice, at 14 (Sept. 15, 2020), available at https://www.brennancenter.org/sites/default/files/2020-09/EconomicImpactReport_pdf.pdf.

2. *Mental Health Court*

It is critical that greater attention and resources be allocated to the diversion of the mentally ill from incarceration. Jails and prisons have been coined the “new asylums,” as they have absorbed disproportionate numbers of the mentally ill among those who are incarcerated.¹⁸ People who are mentally ill remain incarcerated on average longer than others who are incarcerated, have elevated suicide rates, create behavioral management problems, and their incarceration is more costly.¹⁹

With the goal of including reducing recidivism and ending the “revolving door” for justice-involved people with mental illness, we recommend adopting legislation for the creation of mental health courts within New York’s criminal justice system.²⁰ According to studies cited by the Center for Court Innovation, participants in these specialized problem-solving courts, whose rates of compliance are more than 80%, are 46% less likely to be rearrested than comparison groups.²¹ Thus, mental health courts radically increase public safety by actually addressing the mental health issues that cause participants to commit these crimes.

While Article 216 of the Criminal Procedure Law authorizes judicial diversion for eligible individuals with substance use disorders, there is no provision in New York for judicial diversion (without prosecutorial consent) of individuals in criminal proceedings who are mentally ill.²² Thus, it is recommended that, just as with drug courts, the determination of an individual’s eligibility for mental health court should be made by a judge using an evidence-based framework with consideration of relevant factors.²³

¹⁸ See “Serious Mental Illness (SMI) Prevalence in Jails and Prisons,” Treatment Advocacy Center (Sept. 2016), available at <https://www.treatmentadvocacycenter.org/evidence-and-research/learn-more-about/3695>. As one publication noted, as of May 18, 2020, half of New Yorkers in the city jail system had a mental illness, an increase of seven percent since the March 16, 2020 lockdown, as those with mental illness were less likely to be released due to COVID-19-related decarceration efforts. See “People with Mental Health Diagnosis Left Out of ‘Historic’ NYC Decarceration,” (May 26, 2020), available at <https://filtermag.org/rikers-mental-illness-coronavirus/>.

¹⁹ See *id.*

²⁰ See Warren A. Reich, Sarah Picard-Fritsche, Lenore Cerniglia and Josephine Wonsun Hahn, “Predictors of Program Compliance and Rearrest in the Brooklyn Mental Health Court,” Center for Court Innovation (June 2014), available at https://www.courtinnovation.org/sites/default/files/documents/MHC_Brooklyn.pdf; see also Shelli B. Rossman, Janeen Buck Willison, Kamala Mallik-Kane, KiDeuk Kim, Sara Debus-Sherrill, and P. Mitchell Downey, “Criminal Justice Interventions for Offenders with Mental Illness: Evaluation of Mental Health Courts in Bronx and Brooklyn, New York,” Center for Court Innovation (July 2012), available at <https://www.courtinnovation.org/publications/criminal-justice-interventions-offenders-mental-illness-evaluation-mental-health>.

²¹ See “Brooklyn Mental Health Court,” Center for Court Innovation, available at <https://www.courtinnovation.org/programs/brooklyn-mental-health-court>.

²² See CPL 216.05 (“When an authorized court determines . . . that an eligible defendant should be offered alcohol or substance abuse treatment, or when the parties and the court agree to an eligible defendant's participation in alcohol or substance abuse treatment, an eligible defendant may be allowed to participate in the judicial diversion program offered by this article”); see also <https://ww2.nycourts.gov/mental-health-courts-overview-27066>.

²³ See CPL 216.05 [3].

3. *Adjust Requirements of Drug Diversion*

The drug diversion statute as it is currently written is too restrictive, both in terms of its eligibility requirements and in terms of how it treats individuals who choose to enter the program. In particular, the current legislative scheme should change to: (i) require credit in terms of lower pleas and non-incarceratory sentences for partial completion of programming; (ii) increase the availability of entering diversion programming without pleading guilty; (iii) require fair alternative offers, meaning that if a person is accepted into diversion and fails immediately, the sentence they receive should be the same as (or less than) any plea offer or sentence they would have received if they did not enter the program; and (iv) a wider range of individuals should be eligible, including individuals who are currently charged with or in the past have been convicted of violent crimes.²⁴

D. Send Fewer People to Prison

The criminal justice system in New York must be transformed so that prison becomes a punishment of last resort rather than the default. A prison sentence should never be handed down reflexively or automatically, but only with careful thought and attention. Even with respect to the most severe crimes, there may be individual circumstances that should be considered by a judge prior to imposition of any prison sentence. The negative effects of prison are overwhelming, and prison often exacerbates the stressors that cause individuals to commit crimes. Many of those in prison have suffered trauma,²⁵ and prison rarely provides services to address that trauma; instead, trauma is often compounded by one's experience in prison.²⁶ A prison sentence removes people from their community, disrupting families in ways that have ripple effects for generations,²⁷ and

²⁴ For a more thorough review of the need for these types of reforms to the diversion structure, see "Creating a First Time Felony Diversion Court," New York City Bar Association (Dec. 2020), available at <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/creating-a-first-time-felony-diversion-court>.

²⁵ See Eric Martin, "Hidden Consequences: the Impact of Incarceration on Dependent Children," NIJ Journal 278 (March 2017), available at <https://nij.gov/journals/278/Pages/impact-of-incarceration-on-dependent-children.aspx>; Sarah Wakefield, Ph.D. and Christopher Wildeman, Ph.D., "How Parental Incarceration Harms Children and What to Do About It," National Council on Family Relations (Jan. 2018), available at https://www.ncfr.org/sites/default/files/2018-01/How%20Parental%20Incarceration%20Harms%20Children%20NCFR%20Policy_Full%20Brief_Jan.%202018_0.pdf.

²⁶ "Several researchers found that people in prison may be diagnosed with posttraumatic stress disorders, as well as other psychiatric disorders, such as panic attacks, depression, and paranoia; subsequently, these prisoners find social adjustment and social integration difficult upon release. Other researchers found that the incarceration experience promotes a sense of helplessness, greater dependence, and introversion and may impair one's decision-making ability. This psychological suffering is compounded by the knowledge of violence, the witnessing of violence, or the experience of violence, all too common during incarceration." M. DeVeaux, "The Trauma of the Incarceration Experience," Harvard Civil Rights-Civil Liberties Review 48:1, 259 (Winter 2013), available at https://harvardcrcl.org/wp-content/uploads/sites/10/2013/04/DeVeaux_257-277.pdf.

²⁷ "For incarcerated adult males, trauma exposure rates range from 62.4 to 87%." <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4134447/#:~:text=For%20incarcerated%20adult%20males%2C%20trauma.range%20from%2062.4%20to%2087%20%25.&text=In%20a%20study%20of%20124,traumatic%20event%20during%20their%20lifetime>. For incarcerated men, "rates of current PTSD symptoms and a lifetime PTSD diagnosis (30 to 60 %) are higher than rates found in the general male populations (3 to 6.3 %)." *Id.*

reduces an individual's future earning potential by 52%.²⁸ Incarceration is also costly to the state, both in the immediate sense of the cost of prison itself, and in the longer term by decreasing wages earned, increasing familial reliance on public benefits, and destabilizing communities. Finally, the evidence suggests that sending people to prison often does not work to reduce crime.²⁹ In sum, the negatives of incarceration frequently outweigh any positive effect, and the consequences of incarceration are severe and wide-ranging, detrimental to individuals, families and communities. Thus, New York must reduce the criminal justice system's reliance on prisons, a change that will benefit individuals and the wider community.

1. *Presumptions of a Non-Incarceratory Sentence*

The Legislature should create a rebuttable presumption of a non-incarceratory sentence for all misdemeanors, low level felonies and drug felonies. These types of crimes are typically best addressed outside of the harsh setting of prisons, and the costs of prison for people accused of these types of crimes typically outweigh any perceived benefits. Short jail and prison stays associated with these type of crimes simply destabilize the lives of those imprisoned, frequently creating a vicious and expensive cycle of individuals losing any semblance of stability in housing, provision of services, familial ties, and employment, which leads to the commission of a new crime and re-entry into prison or jail, only to start the cycle again upon release.³⁰ This is not to say that prison would never be appropriate in these cases, but judges and prosecutors should be required to articulate why it is appropriate to incarcerate someone convicted of such a crime, taking into account their individual circumstances and the details of the specific crime. In tandem with increasing the availability of programming outside the prison setting, as described below, such a presumption has the potential to dramatically reduce prison rates, while increasing public safety by providing programming to address the reasons individuals commit crimes. Problem-solving courts, well-funded probation programs, and community alternatives to

A study by the Bureau of Justice Statistics found that 53% of incarcerated women meet the criteria for lifetime PTSD. See Shannon M. Lynch, Dana D. DeHart, Joanne Belknap, Bonnie L. Green, "Women's Pathways to Jail: The Roles and Intersections of Serious Mental Illness and Trauma," U.S. Department of Justice Bureau of Justice Assistance (Sept. 2021), available at https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/Women_Pathways_to_Jail.pdf.

²⁸ See Terry-Ann Craigie, Ames Grawert, and Cameron Kimble, "Conviction, Imprisonment and Lost Earnings: How Involvement in the Criminal Justice System Deepens Inequality," Brennan Center for Justice, at 14 (Sept. 15, 2020), available at https://www.brennancenter.org/sites/default/files/2020-09/EconomicImpactReport_pdf.pdf.

²⁹ A review of studies of incarceration's specific deterrent effect found that "the findings suggested that prison is not more effective than non-custodial sanctions at reducing recidivism. In fact, they suggested that the effect of prison is either null or slightly criminogenic." The Bureau of Justice Statistics found in a 30-state study that 83% of those incarcerated were re-arrested within nine years, 44% in the first year after release. See Jennifer E. Copp, "The Impact of Incarceration on the Risk of Violent Recidivism," 103 Marq. L. Rev. 775, 781-82 (2020), available at <https://scholarship.law.marquette.edu/mulr/vol103/iss3/5>.

³⁰ See e.g., "Five Charts That Explain the Homelessness-Jail Cycle – and How to Break It," Urban Institute (Sept. 16, 2020), available at <https://www.urban.org/features/five-charts-explain-homelessness-jail-cycle-and-how-break-it> ("Homelessness and the criminal justice system are deeply intertwined. People experiencing homelessness are more likely to interact with the justice system because being forced to live outside can lead to citations or arrests for low-level offenses like loitering or sleeping in parks. And people currently or previously involved in the justice system, who are often disconnected from supports and face housing and job discrimination, are more likely to experience homelessness").

incarceration allow people to maintain family and community ties, find and keep jobs, and address the underlying factors that may have led an individual to commit crimes.³¹

2. *Alternatives to Incarceration Programming and Courts*

Currently in New York there is a patchwork of alternative to incarceration (ATI) programs and courts. Each program is driven by prosecutorial consent, resulting in different criteria, requirements and programming in various counties, with many counties in the state lacking any formalized system for offering alternative options to individuals who would normally be incarcerated, especially for those charged with felonies. A study of New York City alternatives to incarceration programming aimed at reducing the New York City jail population found lower recidivism rates among those who participated in ATI programming compared with those who did not.³² While the two felony alternative to incarceration courts in Brooklyn and Manhattan are too new for long-term studies, participants in the long-standing gun diversion court in Brooklyn (YCP), which provides programming to young people who are accused of a gun crime instead of prison, had a 22% lower rate of re-arrest compared to their peers.³³ A similar gun court in Monroe County that was a collaboration between law enforcement, the courts and public defenders was strikingly successful. They found after two years that the gun court had “a success rate of 82 percent” compared to “the conventional system” which had “a failure rate of about 77 percent.”³⁴ These two gun diversion courts do not just give participants a second chance, they actually decrease crime by giving participants the tools they need to live stable and law-abiding lives.

The Legislature should create alternatives to incarceration for which judges, and not just prosecutors, are gatekeepers. Across the state, judges should have the option to offer someone who would normally be required, or expected, to receive an incarceratory sentence to instead receive a program that would address the causes of crime, such as substance abuse or mental health, without removing them unnecessarily from their families and communities. Such a sentencing scheme could work in tandem with the diversion programs described above. For example, if a judge believes that a person would benefit from Mental Health Court but believes a criminal record is warranted, the Legislature should provide a mechanism to allow for that. If an individual was facing a mandatory prison term, but a judge believed housing assistance and job training would be more just and/or protect public safety more effectively than prison, there should be a mechanism for a judge to send an individual to such a program. The same staff that

³¹ This is not to say that individuals who currently receive, for example, a conditional discharge, should now be required to go through intensive programming to avoid jail. Those implementing these reforms should be mindful of the burdensome nature of these programs, and the risk of incarceration that may follow from failure, only requiring programming when needed and appropriate.

³² See “RNR ATI Report: Executive Summary,” Mayor’s Office of Criminal Justice (2019), *available at* <http://criminaljustice.cityofnewyork.us/wp-content/uploads/2020/10/MOCJ-ATI-RNR-Report-2019-Executive-Summary.pdf>.

³³ See Emily Bazelon, “De Blasio Doesn’t Get It: Not Everyone Who Carries a Gun Is a Shooter” (July 11, 2019), *available at* <https://www.nytimes.com/2019/07/11/opinion/deblasio-guns-prison.html>.

³⁴ Thomas Moran, “Monroe County Gun Court Success Result of Collaboration Not Confrontation,” (May 3, 2018), *available at* <https://www.democratandchronicle.com/story/opinion/guest-column/2018/05/03/monroe-county-gun-court-success-result-collaboration/574919002/>.

evaluates participants in diversion-based programming could also evaluate individuals for alternative to incarceration programming. In other words, judges and prosecutors need a robust range of options available to them, including the ability to impose sanctions other than prison, and to determine whether an individual should carry the burden of a criminal conviction in their specific situation. The Legislature should enshrine such pathways into the criminal procedure law.

3. *Repeal C.P.L. 220.30*

Criminal Procedure Law (C.P.L) section 220.30 places restrictions on felony plea bargaining. This creates, in essence, mandatory minimum sentences even when a prosecutor may believe incarceration is not necessary. In order to offer a defendant a plea outside the restrictions placed by C.P.L. § 230, a prosecutor has to file a request to dismiss the top counts of an indictment, and if there are no lesser charges on the indictment the defendant then has to be re-arrested on lesser crimes. The effect of 220.30 is to frame the expectations of plea bargaining in the average case within narrow parameters that create a presumption of a felony conviction and a prison sentence in indicted cases. It also creates bureaucratic disincentives to plea offers. Thus, the Legislature should repeal this law to ensure that prosecutors are free to offer lesser charges in appropriate cases.

4. *Require That Services Be Available For Those Serving Probation*

Supervised probation and parole are a significant contributing cause of New York State's and the country's mass incarceration problem.³⁵ Evidence suggests that emphasis on surveillance and monitoring during supervision has been a driving force behind incarceration, whereas the alternative--promoting success and providing resources and services to individuals on supervision--has been proven to reduce re-arrest and recidivism. The State's probation offices should be required to make available to participants job training and placement, education, mental health services, housing and other similar services with the goal of reducing participants' future involvement in the criminal justice system.

For example, New York City's Arches Transformative Mentoring program (Arches) reduced one-year felony reconviction by over two-thirds and two-year felony reconviction by over half. Arches services youth and adults ages 16 to 24 who are on probation, and seeks to reduce recidivism by providing education and workforce resources through mentoring, among other programming. More specifically, Arches provides strength-based mentoring that focuses on identifying and building individuals' strengths rather than their deficits. Programs like this should be available to all individuals placed on probation. While more costly than current probation structures, the long-term effects of these programs would be to reduce crime and rates of incarceration in ways that would be a net benefit to the State's budget.

Investing in connecting individuals on probation with community-based services, rather than focusing on supervision, has been proven to be the better path forward. Many states are now

³⁵ According to the Pew Research Center, individuals on supervised probation or parole have increased nearly 240 percent over the last forty years, with nearly 1 in 55 U.S. adults on probation or parole. See <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/10/31/1-in-55-us-adults-is-on-probation-or-parole>.

enacting reforms to support community-based services as an alternative to outdated supervision. These services are important for keeping people out of jail: lack of stable housing can impede an individual's ability to comply with supervision conditions, and homelessness can contribute to both physical and mental health issues that make it hard to maintain a steady job.

5. *Legislate and Expand Restorative Justice*

The Legislature should also promote and fund the use of restorative justice programming and aim to expand programs over time throughout the state, such that long-term restorative justice could be used to resolve criminal cases involving harm to an identifiable victim or community before resorting to the use of incarceration and other punitive sentencing options. After programs are created, expanded and studied, the Legislature should consider requiring prosecutors to contemplate restorative justice processes in all appropriate cases.

Today, very few court-involved defendants and victims are provided with opportunities to participate in restorative justice practices or programming as part of the adjudication and disposition of criminal cases.³⁶ Historically, the criminal justice system has removed court-involved defendants from the community through incarceration and/or orders of protection and done little to help parties resolve or heal following criminal behavior and court involvement.

Restorative Justice is a theory of justice that emphasizes the reparation of the harm caused to the victim by the criminal behavior. A core tenet of restorative justice is to involve the defendant in repairing the harm caused to the victim and/or community in order to re-integrate the defendant into the community. The victim and community's needs also play a role in shaping restorative processes. Restorative processes can produce better options and outcomes for defendants and victims alike, who may feel re-victimized by their involvement in the traditional criminal justice system.³⁷

In restorative processes, the victim and defendant are often brought together in a moderated setting to discuss and agree upon how to repair the harm, for example, through the Peacemaking Program,³⁸ mediation, family therapy, or sentencing circles. Other restorative

³⁶ For a discussion of the benefits of restorative justice from a practitioner in New York City, see Danielle Sered, "Accounting for Violence: How to Increase Safety and Break Our Failed Reliance on Mass Incarceration," New York: Vera Institute of Justice (2017), available at <https://d3n8a8pro7vhmx.cloudfront.net/commonjustice/pages/82/attachments/original/1506608259/accounting-for-violence.pdf?1506608259>.

³⁷ See e.g. D. Wilson, et al. "Effectiveness of Restorative Justice Principles in Juvenile Justice: A Meta-Analysis," George Mason University Department of Criminology, Law and Society (May 12, 2017), available at <https://www.ojp.gov/pdffiles1/ojdp/grants/250872.pdf> (finding "The bottom line for restorative justice programs and practices is that the evidence is promising, suggesting possible but still uncertain benefits for the youth participants in terms of reduced future delinquent behavior and other non-delinquent outcomes. Victim participants in these programs, however, do appear to experience a number of benefits and are more satisfied with these programs than traditional approaches to juvenile justice. Additional high quality research of these programs is clearly warranted given these promising but uncertain findings.").

³⁸ See "Peacemaking Program," Center for Court Innovation, available at <https://www.courtinnovation.org/programs/peacemaking-program>.

practices such as restitution, community service, and supportive services for victims also attempt to make the victim and/or community whole.³⁹

Voluntary participation for both victims and defendants alike is central to the success of restorative programming. No victim or defendant should ever be forced into participation but, rather, should be given the option by the prosecutor prior to attempts to resolve a criminal case in a traditional manner. When both parties enter into restorative programming freely, the process stands its best chance of success. For this reason, diversion into restorative programming should be done pre-plea and on a voluntary basis.

Legislative action and funding is needed to remove roadblocks to more robust participation in restorative justice practices and programming. Only a few select programs of restorative justice exist currently.⁴⁰ In addition, individual prosecutors willing to use restorative practices must currently seek permission from their supervisor and/or the consent of the judge hearing the case. Consequently, participation in restorative justice practices depends heavily upon prosecutorial, judicial, and defense counsel's familiarity with both the goals of restorative justice practices and the availability of restorative-justice oriented programming, and many lack the familiarity to routinely divert cases. Legislation and funding would allow restorative justice programming to become the first-line option presented to victims in cases involving harm to an identifiable victim or community.

Legislating the use of restorative justice programming would provide necessary structure and guidance to resolve cases. The rights of defendants and victims voluntarily participating in restorative programs should be defined and protected. Establishing guidelines governing the selection of cases, monitoring the processes and outcomes of restorative programming, and establishing a procedure for judicial review when one of the parties objects to the outcome would protect the fundamental due process rights of parties participating in restorative justice

³⁹ To make the abstract concrete through the use of an example, imagine a commonplace Criminal Court scenario of two neighbors involved in a longstanding dispute. One of the neighbors is arrested and charged with Aggravated Harassment in the Second Degree (PL 240.30). The arrainging judge issues a Full Order of Protection requiring the defendant-neighbor to have no contact with the victim-neighbor. Typically, such cases might resolve with a plea to the charge or to Disorderly Conduct (PL 240.20) with a Full Order of Protection (FOP) requiring the defendant-neighbor to have no contact with the victim-neighbor, or a 6-month Adjournment in Contemplation of Dismissal (ACD) and a FOP. In this outcome, the criminal justice system has failed to provide a mechanism for the neighbors to resolve their ongoing dispute.

However, statutorily requiring the prosecutor to explore with the victim the possibility of resolving the case using restorative programming would transform the court-involvement into an opportunity for conflict resolution. Having obtained the victim-neighbor's consent to participate, the prosecutor would then offer to the defendant via defense counsel a proposed disposition to the case based upon successful completion of the restorative programming. The neighbors could participate in programming geared toward the resolution of their ongoing dispute and the adjudication of the court case.

⁴⁰ Common Justice and the Center for Court Innovation are two of the institutions currently providing Restorative Justice in New York State. More information on each can be found at <https://www.commonjustice.org> and https://www.courtinnovation.org/areas-of-focus/restorative-justice?gclid=Cj0KCQjw0oCDBhCPARIsAII3C_FZ0B03no0Bb4q7eh6CICoU3lJQeB8MeTnQtTdrXvnsmlU6h_eLIdIaAltW_EALw_wcB.

programming. Legislation is also necessary to define, expand and fund restorative justice oriented programs and ensure that necessary resources and programming are available.

By funding, creating and studying restorative justice programs, and ultimately aiming to create a requirement that prosecutors offer victims and defendants the option to participate in restorative justice in appropriate cases, New York can help shift the criminal justice system's focus from punishment and incarceration and toward restorative practices, thereby promoting a victim-centered option for the peaceful resolution and remediation of court-involved conflict.

E. Reduce Prison Sentences

Hand in hand with offering alternatives to incarceration is reducing prison sentences, and the frequency with which mandatory prison sentences are enshrined within the penal law. Mandatory minimum sentences and lengthy prison terms are counterproductive, unnecessary⁴¹ and expensive. Even the most serious of crimes may involve mitigating circumstances or context that make some measure of mercy appropriate or necessary. Mandatory prison terms mean that even if an individual has been able to stabilize their life through services provided by public defenders, supervised release or their own initiative while their case is pending, their strides can be dismantled by legislation that requires they enter prison even if prison makes it more, not less, likely that they will commit a new crime and even if the judge wants to impose a non-incarceratory sentence.

Consider, for example, an individual who has benefitted from the new bail laws. He is charged with a non-violent crime but was convicted of a felony in the last ten years so faces a mandatory prison term. As a result of the new bail laws, he is not held in jail, but is required to attend supervised release. He takes advantage of the voluntary services offered by supervised release, including mental health treatment and job training. He is able to secure employment while his case is pending. And yet, unless the prosecutor is able or willing to offer a plea to a lesser charge, if he is convicted, a judge is constrained to sentence him to prison, causing him to lose his job and separating him from the mental health treatment that has helped him thrive. Or perhaps an individual obtains employment and housing while her case is pending, but she will be forced to give up both if an incarceratory sentence is required. Such outcomes are both counterproductive and all too common in our current system.

Harsh mandatory sentencing also prevents people from seeking a suppression hearing or trial, even when they may have a viable ground for suppression or defense at trial. Offers from prosecutors to lesser crimes that allow for non-incarceratory or shorter prison sentences are frequently only available before hearing or trial. If judges had discretion equivalent to the plea bargaining power of prosecutors, more individuals would be able to exercise their constitutional rights to hearings and trial.

⁴¹ Lengthy prison sentences are cruel, unnecessary and counterproductive. A study of Florida, Maryland and Michigan “found little or no evidence that longer prison terms for many nonviolent offenders produced either incapacitation or deterrence effects. That is, the extra time behind bars neither prevented crimes during the period of incarceration nor kept offenders from committing crimes once released from prison.” <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2013/10/08/prison-time-served-and-recidivism>.

Changes must also be made to sentencing lengths at both the front end (by reducing or eliminating mandatory minimums) and the back end (by reducing maximum sentences). Below we outline some steps the Legislature could take to restore discretion to judges and allow for individualized determinations as to whether an individual should be sentenced to prison and for how long. We also suggest that when the Legislature makes changes to sentencing laws, it should consider provisions allowing for re-sentencing of individuals sentenced under prior laws.

1. *Abolish Predicate Felon and/or Violent Predicate Status*

One of the simplest ways to transform New York's sentencing structure into one where whether to incarcerate someone and for how long can be carefully considered on an individual basis is to eliminate the notion of "predicate felons" and attendant mandatory prison sentences. In New York, for those who are convicted of a felony and termed "predicate felons," *i.e.*, have been convicted of a felony in the last ten years, with various factors including incarceration tolling that time, incarceration is all but mandatory. Restrictions on post-indictment plea bargaining for predicate felons and those charged with felonies mean that, even in plea bargaining, prosecutors' hands are tied unless they are willing to ask permission of the court to dismiss the top counts of the indictment. Discretion must be returned to judges even when individuals are facing their second felony offense to determine whether incarceration is just and in the public interest.

The manifest unjustness that stems from predicate felon status is easily seen in the context of larceny. Under current law, if an individual is convicted of stealing property worth more than \$1,000, such as a cellphone, and within ten years is once again convicted of the E felony of stealing property worth more than \$,1000, a judge is required to sentence that individual to a minimum term of imprisonment of one-and-a-half to three years in jail. In contrast, if it is an individual's first time stealing property, the state must prove that individual has stolen property worth \$1 million for a mandatory minimum sentence to be imposed. The unjustness of a judge having discretion when a person steals \$999,999 worth of property, but having no discretion when, within a period of ten years, an individual steals two cellphones, makes clear why discretion must be restored to judges even when an individual has previously been convicted of a crime. All judges will consider a defendant's criminal history when sentencing; thus, the Legislature need not mandate minimum sentences based on prior criminal history to ensure that the history is considered.

If the Legislature is not prepared to eliminate the category of predicate felon, at a minimum the category of violent predicate felon should be eliminated. Right now, there is a stark difference in the sentences for those who have previously been convicted of "non-violent" crime as compared to those who have previously been convicted of a so-called "violent" crime. For example, in the drug sentencing context, if a person is convicted of selling a small amount of crack cocaine, and they have previously been convicted of a "non-violent" crime, their mandatory minimum sentence is two years in prison. In contrast, if an individual was previously convicted of a "violent" crime, their mandatory minimum sentence for that same crime is six years in prison. Often, these violent crimes were committed more than 20 years ago due to incarceration-based tolling, may not include any actual violence or there are mitigating

circumstances surrounding the former crime, and yet there is still a huge disparity of punishment for these individuals even if the current crime for which they are convicted is much less serious.

Removing the category of violent predicate felon would not prevent a judge from imposing a higher sentence in light of the specifics of the prior crimes committed by an individual, but rather would restore *discretion* to the judge to fully weigh what impact an individual's prior criminal convictions should have on a sentence.

We urge the Legislature to repeal Penal Law Section 70.04 and 70.06, which establish the categories of second felony offenders and second violent felony offenders. This will allow judges to make individualized determinations of how the nature of an individual's prior history should affect their sentence. If the Legislature is unprepared to take this step, at a minimum Penal Law 70.04, establishing the status of violent predicate felon, should be repealed, and Penal Laws 70.06, 70.70, 70.71 should be reformed to eliminate the vast majority of mandatory minimum sentences, including those for drug felonies and second felony offenders.

2. *Repeal or Amend the Persistent Violent Felony Offender Law*

The persistent violent felony offender law (Penal Law § 70.08) was enacted in 1978 during a time of panic about escalating crime. It mandated life sentences and long minimum terms before parole eligibility upon a person's third conviction of a felony classified as "violent." The violent felony offender category (Penal Law § 70.02) was created at the same time. Despite the name, "violent felonies" in New York include many offenses that do not involve causing physical injury to another person or even threatening to do so (*e.g.*, burglary in the second degree,⁴² robbery in the second degree,⁴³ and criminal possession of a weapon in the second degree⁴⁴). In 1995, mandatory minimum sentences under the persistent violent felony category were *doubled* as part of the Sentencing Reform Act. The minimum sentences are now especially harsh: 20 years to life for Class B felonies, 16 years to life for Class C felonies and 12 years to life for Class D felonies. These harsh minimum terms handcuff judges by preventing them from imposing appropriate sentences based on the facts and circumstances of each case. The mandatory minimums also interfere with plea bargaining because individuals are understandably resistant to pleading guilty to a "violent" felony when the conviction will result in a life sentence with long-term imprisonment before any parole eligibility. In many cases, prosecutors are effectively forced to offer plea bargains to non-violent felonies (*e.g.*, burglary in the third degree) in order to avoid the persistent violent felony law's minimums and otherwise reach a fair and just resolution of the charges. Individuals, in turn, are effectively forced to accept such plea offers – even when they might otherwise have a viable defense to the charges – because the consequences of a violent felony conviction after trial would be disastrous.

The persistent violent felony offender law is a relic of another time and it no longer serves any useful purpose in New York's criminal justice system. Terms of imprisonment for first and second violent felony offenders were greatly increased in the 1990s when New York

⁴² Penal Law § 140.25 (2)

⁴³ Penal Law § 160.10 (1)

⁴⁴ Penal Law § 265.03

switched from an indeterminate to a determinate sentencing scheme. Since then, judges have had discretion to impose extremely long sentences for even first-time violent felonies when circumstances warrant harsh punishment (*e.g.*, 25 years for Class B felonies and 15 for Class C felonies). But sentencing courts also have discretion to impose lesser terms when circumstances call for judicial moderation or mercy. The mandatory persistent violent felony offender law should be repealed in its entirety because it is an unjust law that impedes the fair administration of justice.⁴⁵ The Legislature should also allow for those who were sentenced under the persistent violent felony offender law to apply for resentencing.

3. *Repeal the Discretionary Persistent Felony Offender Law*

New York’s persistent felony offender law (Penal Law § 70.10) authorizes sentences from 15 to 25 years to life imprisonment for a third felony conviction when the individual’s previous felony convictions were punished by sentences longer than 1 year. Unlike all other New York predicate felony offender sentencing laws, the persistent felony offender classification does not include a 10-year look back period. Convictions can date back decades and nevertheless count for eligibility purposes. These harsh sentences are authorized for any third felony conviction – even for relatively minor non-violent crimes like stealing more than \$1,000 of merchandise from a store. The statute gives no real guidance about when courts should exercise discretion and impose such harsh sentences. Sentencing courts are merely directed to consider the “history and character of the defendant and the nature and circumstances of his criminal conduct” to determine whether “extended incarceration and lifetime supervision . . . are warranted to best serve the public interest.”⁴⁶ Perhaps because the authorized sentences are draconian, the persistent felony offender law is hardly ever invoked to impose life terms on persons convicted of lower-level felonies. It is most often applied when the crime of conviction is a serious violent felony. The Department of Corrections and Community Supervision (DOCCS) reports that of 81 persons committed to state prison in 2017 under a general “persistent felony offender category” (which includes mandatory persistent violent felony offenders under Penal Law § 70.08), 77 of them (95%) were convicted of violent felonies.

Thus, as a practical matter the persistent felony offender law is wildly overinclusive. Its prior conviction criteria apply to thousands of persons charged with felonies each year, but courts actually exercise discretion to impose life sentences in an extremely small percentage of these cases, risking arbitrariness and a racially disparate impact. And in the overwhelming majority of situations where the statute is invoked, the crime of conviction is a violent felony which otherwise would have carried a long sentence in its own right, without regard to the persistent felony offender law. Penal Law § 70.10 mainly functions to pervert the plea-bargaining process by enhancing the leverage of prosecutors. By arming prosecutors with the ability to threaten individuals with a life sentence in situations where the punishment is clearly unwarranted, the statute injects a coercive effect into negotiations and skews the plea-bargaining

⁴⁵ If the Legislature is unprepared to take this step, an alternative option is to allow mandatory minimums under this section to be restored to their original 1978 levels (10 years to life for Class B felonies, 8 years to life for Class C felonies, and 6 years to life for Class D felonies). These reductions could be accomplished by simply allowing the section of the 1995 Sentencing Reform Act that doubled minimum terms to expire when the law is next scheduled to sunset on September 1, 2021.

⁴⁶ CPL § 400.20 (1)

process in the prosecution's favor. And in those rare instances where the statute is invoked for less serious felonies, the persistent felony offender law can and does result in arbitrary and unjust life sentences.

4. *Category Changes*

The New York State Penal Law relies on various categories of crimes which at times radically increase the sentence, both at the minimum and maximum level, in ways disproportionate to the crime that has actually taken place. The City Bar recommends the following category changes to decrease the dramatic over-criminalization of certain crimes in New York State.

a) Change from Violent to Non-violent Felony

Many crimes in New York are inaccurately and needlessly classified as "violent" crimes, and thus require the imposition of severe mandatory minimum sentences, when these crimes do not consist of any actual violent conduct. New York should re-examine all penal law offenses with an eye toward re-categorization, but most immediately, should re-classify burglary in the second degree (dwelling subsection)⁴⁷ and robbery in the second degree (aided subsection)⁴⁸ as non-violent crimes.

A person who commits burglary in the second degree under the dwelling subsection, knowingly entering a dwelling with the intent to commit a crime, is necessarily unarmed (if armed, they would be charged with a different subsection, or with burglary in the first degree), no one has been hurt (again, a different subsection), and often, no one is home. Indeed, courts have interpreted this subsection as applying to anyone who enters the lobby of an apartment building, or who enters a commercial establishment for which there are apartments on upper floors. While this conduct would still be considered criminal under the Penal Law, it should not be categorized as "violent," as the Legislature recognized in excluding this offense from those violent offenses that are qualifying offenses under the bail reform legislation.

Similarly, the first subsection of robbery in the second degree raises robbery in the third degree (forcible stealing), a non-violent crime, to robbery in the second degree, a violent crime, if a person is "aided by another." Again, a person who commits robbery while armed, or who causes physical injury, can be charged under other subsections with a violent crime. A person charged with robbery in the second degree, aided, but who is not armed and has not caused physical injury, if "aided" by another, can be charged with a violent crime. The Legislature similarly recognized that this subsection should not be considered "violent" by including it in those offenses for which release pre-trial was required under the bail reform legislation.

Both of these crimes are currently C violent felonies, which means that even if the individual involved had never before been convicted of a crime, if that person stole a package from the lobby of an apartment building, or two people together forcibly grabbed a cellphone

⁴⁷ PL 140.25 (2)

⁴⁸ PL 160.10 (1)

from an individual, they would face mandatory prison terms. Categorizing both these offenses as non-violent would render this legislative recognition consistent across the Penal Law, and permit a judge to craft an appropriate sentence, rather than be required to impose a lengthy prison sentence for what is, for example, essentially petit larceny (stealing a package from an apartment lobby) or third-degree robbery (when two people forcibly take a phone from another).

b) Increase Misdemeanor/Felony Cut Off to \$2,000 for Larceny and Criminal Mischief

Currently, the value that results in criminal mischief being chargeable as a felony is \$250 and for larceny, \$1,000. We recommend that the threshold for a felony be increased to, at a minimum, \$2,000 for both these crimes. The threshold for criminal mischief to be a felony has been \$250 since 1915, more than a hundred years ago (or more than \$6,400 when adjusted for inflation). The threshold has been \$1,000 for larceny since 1986 (more than \$2,300 when adjusted for inflation). Inflation alone would make such an increase rational, but in addition, the advent of the smartphone, with the result that people frequently carry an item around that costs more than \$1,000, necessitates this change. Damaging someone's cellphone or stealing it off a table should not result in a felony conviction and all the attendant direct and collateral consequences that come with such a conviction.⁴⁹

c) A1, A2 and Major Narcotics Trafficker Reform

Reform is desperately needed to A1, A2 and the Major Narcotics Drug statute. Currently in New York, sale of one-half ounce or possession of four ounces of a narcotic is an A2 felony, while sale of two ounces or possession of eight ounces of a narcotic is an A1 felony.⁵⁰ For a first-time felony offender, the mandatory minimum sentence is three and eight years in prison, respectively. For a predicate felon, the mandatory minimum is 6 and 12 years in prison, respectively. Finally, for a violent predicate felon, the mandatory minimum is 8 and 15 years in prison, respectively.

The problem with these strict mandatory minimums and weight-based classifications is that narcotics crimes are frequently nuanced in a way that makes fair categorization difficult. These weights are "aggregate weights," meaning when a narcotic is cut with another substance, that adds to the total. The reason for using aggregate weight is one of resources (it is easier to test aggregate weight than pure weight), and based on the drug trade; typically speaking, a person possessing a large quantity of a drug, even if it is relatively low purity, intends to sell to more people. Pure weight is also a difficult measure because different narcotics have radically different potencies. A tiny portion of the strongest fentanyl analogues available right now are far more potent than pure heroin in a quantity orders of magnitude larger.

While the decision to use aggregate weight thus may seem logical, it also creates unjust results, particularly in the context of prescription drugs. One of the most frequently prescribed

⁴⁹ See e.g., "Too Many People Are Locked Up For Small Thefts" (Mar. 29, 2021), available at <https://www.nytimes.com/2021/03/29/opinion/felony-theft-law-new-york.html>.

⁵⁰ These also have separate subsections for various other substances, but narcotics are the most frequently charged.

(and thus more easily accessible on the black-market) forms of oxycodone is Percocet. Percocet pills typically contain either 5 or 10mg of oxycodone, and 325mg of acetaminophen (*i.e.*, Tylenol). Selling approximately 25 Percocet pills is thus an A2 drug crime, mandating a three-year minimum sentence, while the sale of approximately one hundred Percocet is an A1 drug crime, mandating an eight-year mandatory minimum sentence. A heavy abuser of Percocet will consume more than 20 Percocet pills per day and will easily illegally possess quantities large enough to trigger mandatory minimum sentences even when they are not a seller of these drugs. A monthly supply of Percocet from a doctor is often 120 pills or more. Thus, if an individual sells one bottle of their medication, they trigger extremely harsh sentences entirely out of proportion with the crimes committed.⁵¹

Similarly, even those accused of possessing what one traditionally thinks of as an A1 drug crime, for example, a person transporting a kilo of cocaine, is often not a “trafficker” such that these sentences are appropriate. Drug traffickers frequently pay people paltry amounts, sometimes as little as a few hundred dollars, to transport large quantities of drugs, or to act as a middleman by accepting mailings of large quantities of drugs and passing them off to the true narcotics dealer. Thus, the high attendant mandatory minimum sentences are manifestly unjust when weighed against the individual’s actual role.

In addition, the Major Narcotics Trafficker statute,⁵² which carries a mandatory term of imprisonment of 15 years to life,⁵³ is over-inclusive and confusing. One can be guilty under this statute by virtue of (1) directing a controlled substance organization which sells one or more controlled substances over the course of a year that have an aggregate value of seventy-five thousand dollars; (2) acting as a profiteer, selling in six months a narcotic drug where the value collected or due from such sales is seventy-five thousand dollars or more; (3) acting as a profiteer, possessing in six months a narcotic drug where the value collected or due from such sales is seventy-five thousand dollars or more. The term profiteer has multiple meanings, including one who “arranges, devises or plans one or more transactions constituting a felony under this article so as to obtain profits or expected profits,” though the definition does not extend to those “acting only under the direction and control of others and exercises no substantial independent role in arranging or directing the transactions in question.”⁵⁴ Even with that carve-out, these terms are so broad as to allow almost anyone possessing \$75,000 or more of a controlled substance to be chargeable under this statute. Three kilograms of heroin or cocaine, or even less, can easily cross this threshold, but those caught transporting those drugs may only see a few thousand dollars profit, thus making the 15 to life minimum sentence unconscionably high.

We call on the Legislature to revise these crimes and reduce the sentencing attendant to them. We recommend (i) increasing the A1 and A2 “sale” weights to match the “possession” weights (*i.e.*, requiring that a person sell 2oz of a narcotic to be guilty of an A2 crime and sell

⁵¹ Federal sentencing guidelines were amended to take into account this injustice. *See* <https://www.ussc.gov/guidelines/amendment/657>.

⁵² P.L. 220.77 (Operating as a major trafficker).

⁵³ The Court can instead impose a determinate sentence of 8 or more years imprisonment if it finds the 15 to life term is “unduly harsh.”

⁵⁴ P.L. 220.03(20).

8oz to be guilty of an A1 crime); (ii) eliminating mandatory minimums for A1 and A2 drug crimes; and, (iii) re-writing the Major Narcotics Trafficker statute to limit its application to only true narcotics trafficking activity and reducing the mandatory minimum sentence.

5. *Support Extending the Age of Eligibility for Youthful Offender*

Increasingly we have begun to recognize that the criminal justice system needs to radically change the way it treats children and recognize that the maturation process does not end at 18. Imprisoning children and young adults is cruel and counter-productive, and so too is saddling young people with the lifelong detrimental effects of a criminal record. This is particularly true in light of the dramatic ways in which people change and grow through their teenage years and well into their twenties. Young adults should not be endlessly punished for acts they commit before they have finished maturing.

We believe it is critical that the Legislature expand the availability of youthful offender adjudications for more individuals, both individuals who are older than eighteen and for individuals accused of crimes that currently do not permit a youthful offender adjudication. The definition and availability of youthful offender status must be altered to reflect our current understanding of young adults.⁵⁵

6. *Create Mechanisms for Reducing Long Prison Terms*

Even when a long prison term is appropriately imposed, mechanisms should exist to reconsider those sentences, either by judges or the parole board, in order to take into account changed circumstances. In addition, there should be mechanisms to reconsider long prison terms that were imposed in ways at odds with current approaches to criminal justice. There are a variety of bills that have been proposed to accomplish this, a few of which are below.

a) Second Chance Act

One of the driving forces of mass incarceration is excessively long sentences. We now recognize that, too often, individuals are locked up for far too long, often after they have shown that they are rehabilitated, or that the sentence imposed was excessive, given the particular circumstances of the crime and the individual. Research now shows, for example, that young brains develop differently, and a long sentence imposed on a young person who has changed and developed serves no purpose and has huge costs for society. Similarly, long sentences result in a growing population of elderly prisoners, many of whom have long been rehabilitated, and whose further incarceration is both unnecessary and costly. Yet New York has no mechanism to address these excessively long sentences, and indeed, does not permit a sentencing court to reduce an individual's sentence, but only to set aside a sentence that has been illegally imposed or is otherwise “invalid.”⁵⁶

⁵⁵ A.3536-A (NYS 2021)—which would grant certain individuals youthful offender status and add new categories of individuals eligible for young adult offender status and first offender status—would be a first step in this direction, though we urge an expansion beyond even that contemplated in this proposed bill. *See* <https://www.nysenate.gov/legislation/bills/2021/a3536>.

⁵⁶ C.P.L. 440.20 (1).

The Second Chance Amendment, initially proposed by the City Bar,⁵⁷ will parallel other innovative legislative proposals across the country that seek to remedy this aspect of mass incarceration. The Act would allow an individual to petition for re-sentence if serving an aggregate sentence of ten years or more and having served at least a third of that sentence. An individual's age, personal circumstances, medical condition, and confinement record may be considered by the court, as well as any evidence that the sentence would now be considered excessively harsh in light of present-day knowledge and research. The Second Chance Amendment will incentivize participation in rehabilitative programs, will ultimately save taxpayer dollars, and it will give those who are eligible a chance to reclaim their future.

b) Age 55 Bill

Nearly 1 in 5 people in DOCCS' custody is serving a life or virtual life sentence (with a maximum sentence of 50 years or more) – a total of over 9,000 people. Of this group, over 1,200 are serving a sentence of life without parole or a virtual life without parole sentence (a minimum term of 50 years or more) and are effectively sentenced to die in prison without any individualized review or public safety assessment. Even as the total DOCCS' population has fallen by more than 30 percent since 2000, the number of older people in prison has more than doubled during the same time period as a result of these long sentences. There are now over 10,000 people aged 50 and older and over 5,700 people age 55 and older in DOCCS' custody. They represent more than 20 percent of all people in New York's prisons. Older incarcerated people often have serious health problems and the cost of incarcerating them is conservatively estimated to be \$1 billion per year.

Years of evidence, including decades of DOCCS' own data, shows that people age out of crime, and that older people pose the lowest risk of recidivism when released.⁵⁸ The Age 55 bill would permit the Board of Parole to evaluate all incarcerated people over the age of 55 who have served at least 15 years in prison for possible parole release. It does not mandate release, but allows the Board to make an individualized public safety assessment to determine whether an individual is safe to be released to parole supervision even if he or she has not completed the court-imposed minimum term. We urge the Legislature to pass this sensible reform that allows the parole board to consider release for this population, which would permit consideration of an individual's own rehabilitative process, changing norms around sentencing, and an acknowledgement of the unnecessary harshness of imprisoning people well past the age where they are likely to commit further crimes.

⁵⁷ S.1179 (NYS 2021), <https://www.nysenate.gov/legislation/bills/2021/s1179>. See also "Report in Support of the Second Chance Amendment," (Feb. 7, 2020), available at <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/the-second-chance-amendment-report-in-support>.

⁵⁸ "Nationwide, 43.3 percent of all released individuals recidivate within three years, while only 7 percent of those aged 50-64 and 4 percent of those over 65 are returned to prison for new convictions—the lowest rates among all incarcerated demographics." See "The High Costs of Low Risk: The Crisis of America's Aging Prison Population," The Osborne Association, at 5 (2014) available at <http://www.osborneny.org/resources/resources-on-aging-in-prison/osborne-aging-in-prison-white-paper/>.

⁵⁹ A.3475-A/S.15-A (NYS 2021), <https://www.nysenate.gov/legislation/bills/2021/s15>.

c) Expanding Parole Eligibility for Young and Emerging Adults

The Legislature should expand parole eligibility for individuals who were 25 years of age or younger when they committed the crime for which they were sentenced, in recognition of new science and precedent that has changed the ways we think about young people. One potential reform would be to pass a law making individuals who were 25 years of age or younger when they committed a crime automatically eligible for parole, no matter the length of their sentence, after a certain amount of time has passed. The time periods could be dependent on the category of crime. For example, such an individual could be automatically eligible for parole after incarceration for:

- Ten years where the underlying conviction is a class A-1 or A-II drug offense, or any class B felony or less;
- Fifteen years where the underlying conviction is for a non-drug AII felony;
- Twenty years where the underlying conviction is for a non-drug A-1 felony and the person is not serving a life without the possibility of parole sentence;
- Twenty-five years if the person is serving a sentence of life without the possibility of parole.

This legislation would allow for a reconsideration of long sentences imposed before we had a clear understanding of how long it takes for young brains to fully mature. In addition, all that would be required is that the parole board *consider* parole for these individuals, thus allowing an individualized determination of whether release is appropriate in light of the individual circumstances.

d) Create a Compassionate Release Provision

Unlike many states and the federal government, New York does not have a compassionate release statute that allows for release to parole based upon “extraordinary and compelling circumstances.” The COVID-19 pandemic alone has made clear the desperate need for such a statute in New York.⁶⁰ The Legislature should create such a provision, mirroring the

⁶⁰ Throughout the pandemic, the City Bar and other organizations have repeatedly stressed the critical need for the State move quickly to release inmates who have health issues, have committed nonviolent crimes, or are near their release date. *See i.e.* “Statement of the New York City Bar Association Urging Immediate Steps to Reduce Prison and Jail Populations to Prevent Spread of the COVID-19 Virus,” (March 20, 2020), https://s3.amazonaws.com/documents.nycbar.org/files/COVID_Prison_Jails_Statement_FINAL.pdf; “Letter to Governor Cuomo Urging Release of New York State Prison Inmates at Risk of Coronavirus Infection,” (March 25, 2020), <https://s3.amazonaws.com/documents.nycbar.org/files/2020675-CommutationsforElderlyandInfirmInmates.pdf>; “Statement of New York City Bar Association Setting Forth Legal Authority to Release Certain Categories of Incarcerated Persons from Local, State and Federal Jails and Prisons to Prevent the Further Spread of COVID-19,” (March 25, 2020), https://s3.amazonaws.com/documents.nycbar.org/files/COVID19_Prisoner_Release_Guidance_Statement_FINAL.pdf; “Statement of the New York City Bar Association Urging Swifter Action to Reduce Prison and Jail Populations in Light of Coronavirus Pandemic,” (April 15, 2020),

federal mechanism to allow release under appropriate and extraordinary circumstances even if one's sentence is not yet completed.

F. Reform Prisons

Too often the prison system is left out of criminal justice reform efforts. As long as the state intends to continue to imprison individuals, a wholesale overhaul of the prison system *must* occur. Prisons in New York are dehumanizing and violent, discriminate against individuals with disabilities, and are completely ill-suited to giving individuals the tools and resources necessary to lead stable and law-abiding lives upon their release from prison.

1. *Mandate an Individualized Re-entry Plan for All Those Entering Prison*

The State should mandate that any individual who is entering the prison system take part in an intake process involving an individualized determination of programming that would best address the pressures that led the individual to commit the crime for which they were incarcerated and the development of a plan for re-entry into the community. From day one the focus of all prison sentences should be on preparing individuals for re-entry into their communities, including giving individuals new tools and skills, as well as helping individuals maintain connections with their family and community.

Developing a detailed re-entry plan is especially critical for individuals with intellectual or developmental disabilities (I/DD) or psychiatric disabilities. One of the most pressing problems undermining successful reentry after incarceration is the lack of housing and community based mental health supports and services. Individuals with serious mental illness can be held long past their lawful release dates. Alternately they are shuffled through a revolving door of homeless shelters, state operated institutions and hospitals and subjected to reincarceration.⁶¹ The state, through agencies like the New York State Office of Mental Health, must make available necessary community based mental health housing and supportive services for which the individual may be eligible.

https://s3.amazonaws.com/documents.nycbar.org/files/Prison_Jail_Reductions_COVID_FINAL.pdf; “Letter to Governor Cuomo Urging Further Action to Enhance Health & Safety Protections for Incarcerated People During COVID-19 Pandemic,” (May 15, 2020), <https://s3.amazonaws.com/documents.nycbar.org/files/2020710-PrisonReformCOVID19Cuomo.pdf>; “Prioritizing COVID-19 Vaccine Distribution to Incarcerated People,” (Jan. 29, 2021), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/prioritizing-covid-19-vaccine-distribution-to-incarcerated-people>; and “Reiterating the Importance of Releasing New York State Prison Inmates at Risk of Coronavirus Infection and Prioritizing Vaccination,” (Feb. 5, 2021), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/prioritize-prisoner-covid-release-and-vaccine-distribution>.

⁶¹ See *M.G. v Cuomo*, No. 7:19-cv-00639 (S.D.N.Y. Jan. 23, 2019). Disability Rights New York and the Legal Aid Society filed a class action lawsuit in the Southern District of New York on behalf of prisoners with disabilities who have completed their sentences or have reached their approved parole dates but have not been released from prison because of a lack of community based mental health programs. The suit alleges that the failure by the DOCCS and OMH to develop a comprehensive discharge plan and appropriate housing for individuals with serious mental illness constitutes a violation of the integration mandate of the Americans with Disabilities Act and section 504 of the Rehabilitation Act which requires that services are provided to individuals with disabilities in the most integrated setting.

2. *Mandate the Creation and Use of Screening Tools That Identify Individuals with Disabilities within Prison and Jails*

Individuals with disabilities must be identified upon entry to the correctional system and must be provided with an individualized plan to assess the supports and services that they require. This is particularly true of individuals with “invisible disabilities” like I/DD or psychiatric disabilities. The rate of individuals with disabilities in the nation’s jails and prisons is high. The Bureau of Justice Statistics Special Report tracks the nature and prevalence of disabilities in jails and prisons across the U.S.⁶² The Report found that 20% of those in state prison and 30% of those in local jails reported having a “cognitive disability.”⁶³ The rates of incarcerated individuals diagnosed with psychiatric disabilities are also extraordinarily high. According to the Bureau of Justice Statistics, more than 37% of prisoners had been told by a professional that they had a mental health disorder such as a major depressive disorder, bipolar disorder, post-traumatic stress disorder, personality disorder, schizophrenia or another psychotic disorder.⁶⁴

Jails and prisons must develop screening and assessment tools that identify individuals with these disabilities. Across the nation, prisons and jails fail to use screening protocols that accurately identify individuals with disabilities.⁶⁵ While DOCCS does conduct some assessments to identify individuals with disabilities, evidence suggests that these tests are underinclusive and fail to capture all individuals with intellectual disabilities.⁶⁶ This failure to identify and develop individualized accommodations for these individuals could result in violations of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

⁶² BUREAU OF JUSTICE STATISTICS, *supra* note 27, at 2 (Issued in 2015, the Special Report is the most current, official and national report tracking the prevalence of disabilities among individuals incarcerated in prisons and jails across the US. Although the report provides some indication of the rate and categorization of disability across prisons and jails, the authors acknowledge that some who are incarcerated were unable to participate “due to serious cognitive limitations that precluded them from further understanding the informed consent procedures or the survey questions.” In addition, “some inmates with a particular disability (e.g., a hearing disability) may have had a harder time completing the survey than inmates without a disability.” As a result, the rate of disability is probably higher than that reflected in the report.)

⁶³ *Id.* at 3. (The Special Report defined cognitive disability as “a variety of medical conditions affecting the ability to undertake tasks like problem solving, reading, comprehension, attention and remembering.”)

⁶⁴ See Jennifer Bronson and Marcus Berzofsky, “Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-2012,” Bureau of Justice Statistics, NCJ250612 (June 2017), available at <https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf>.

⁶⁵ See Chiara Eisner, “Prison Is Even Worse When You Have a Disability Like Autism,” The Marshall Project (Nov. 2, 2020), available at <https://www.themarshallproject.org/2020/11/02/prison-is-even-worse-when-you-have-a-disability-like-autism>.

⁶⁶ See “Report and Recommendations on the Treatment of Individuals with Disabilities at Sullivan Correctional Facility,” Disability Rights New York (July 2016), available at <https://www.prisonlegalnews.org/media/publications/Report%20and%20Recommendations%20on%20the%20Treatment%20of%20Individuals%20with%20Disabilities%20at%20Sullivan%20Correctional%20Facility%2C%20DRNY%2C%202016.pdf>.

3. *Mandate Mental Health Care for All Incarcerated Persons*

Every individual in prison should have consistent access to mental health care, including therapy focused on addressing past trauma. The vast majority of individuals who are incarcerated have experienced trauma, and many have serious and undertreated mental illnesses.⁶⁷ All individuals who are incarcerated should be evaluated for trauma and mental health illnesses. The baseline assumption should be that all those who are incarcerated have access to regular mental health treatment when they enter, to be reduced or ended only in consultation with the individual who is incarcerated.

4. *Medication Assisted Treatment Available for Substance Use Disorder and a Plan for Continued Treatment upon Release*

A critical aspect of reforming prisons in New York includes greatly expanding access to medication-assisted therapy (MATs) for the treatment of opioid use disorder, including methadone and buprenorphine. In 2019, nearly 4,000 New Yorkers died of fatal overdoses, most of which could have been prevented with proper treatment.⁶⁸ People who have recently been released from jail or prison are at greatest risk of fatal overdose – up to 129 times more likely to die of an opioid overdose than the general population due to the lowered tolerance caused by a period of forced abstinence while incarcerated.⁶⁹ MATs are the only intervention proven to reduce mortality by as much as 38 to 59 percent. While such treatments are typically widely available in community-based health-care facilities, they are greatly underutilized in New York State prisons. New York City has successfully been administering MATs for over 30 years in its jails, but their efforts have been greatly hampered by the fact that until recently MATs were completely unavailable in state prisons. As a result, those who were incarcerated and possibly facing state prison terms—the majority of those in City custody—had limited access to MATs due to the possibility that at any moment they could be transferred to state custody. For those who were offered treatment, city health officials were required to taper off treatment before

⁶⁷ The rates of trauma among those incarcerated are astronomical. “[A] 1999 study at Bedford Hills found that 94% of the women interviewed had experienced physical or sexual violence, and 82% had been physically or sexually abused as children.” See “Women’s Incarceration: the Experience in New York’s Prisons,” Correctional Association of New York, available at <https://static1.squarespace.com/static/5b2c07e2a9e02851fb387477/t/5cc08885fa0d60251a568084/1556121734338/2019+Women%27s+Incarceration+Fact+Sheet.pdf> ; see also Nancy Wolff, Jessica Juening, Jing Shi, and B. Christopher Frueh, “Trauma Exposure and Posttraumatic Stress Disorder Among Incarcerated Men,” U.S. National Library of Medicine, National Institutes of Health (May 28, 2014), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4134447/> (“A random sample of adult males ($N = 592$) residing in a single high-security prison were screened for trauma exposure and posttraumatic stress disorder (PTSD) symptoms. Trauma was a universal experience among incarcerated men. Rates of current PTSD symptoms and lifetime PTSD were significantly higher (30 to 60%) than rates found in the general male populations (3 to 6%)”).

⁶⁸ See “Addressing Addiction and Preventing Overdose in NY: Providing Medication-Assisted Treatment (MAT) in Jails and Prisons,” Katal Center for Equity, Health, and Justice (Feb. 2019), available at https://d3n8a8pro7vhm.cloudfront.net/katal/pages/2043/attachments/original/1551809986/MAT_in_Jails_and_Prisons_-_NYS_Factsheet_2.28.2019.pdf?1551809986.

⁶⁹ See Lauren Jones, “New York State Must Take Action to Reduce Opioid Overuse Deaths,” Vera Institute of Justice (Jun. 14, 2019), available at <https://www.vera.org/blog/new-york-state-must-take-action-to-reduce-opioid-overuse-deaths>.

patients were transferred to state custody. DOCCS has made small steps towards beginning to offer MATs, including a pilot program providing MATs for those coming from city custody who are to serve a sentence of fewer than two years in state custody.⁷⁰ However, much more needs to be done, including expanding access to all those in state custody who need it regardless of locality or the length of their sentence.⁷¹

5. Increase Wages Paid to Incarcerated Persons by Passing the Prison Minimum Wage Act

Fairer compensation is needed for incarcerated laborers in New York correctional facilities, both to acknowledge the dignity of the work of incarcerated individuals and to ensure incarcerated individuals' basic needs are met. According to 2017 data, people incarcerated in New York State are among the lowest paid in the incarcerated population nationwide with wages on average varying between \$0.10 and \$0.33 per hour.⁷² These numbers have largely remained the same since prison wages were last increased in 1993.⁷³ While prison laborers are provided these meager wages, Corcraft, a state-owned entity within DOCCs that utilizes prison labor, generates approximately \$50 million in annual sales due to the underpaid work of incarcerated workers.⁷⁴ Incarcerated people in New York State prisons are required to pay out of pocket for the costs of phone calls, stamps, and commissary items, such as food, clothes, and personal hygiene products. Further, various fees, such as mandatory court fees and surcharges, crime victim assistance fees, and DNA fees, are levied on individuals such that any prison wages are reduced by 40 percent until only one encumbrance remains.⁷⁵ The current wages are insufficient to ensure these basic needs are met, let alone to allow incarcerated people to provide financial support to loved ones back home or save up in anticipation of facilitating the reentry process.

Therefore, we urge the Legislature to adopt the Prison Minimum Wage Act, which will provide a \$3.00 per hour minimum wage for labor performed by people in prison.⁷⁶ This

⁷⁰ See “City/State/Private Partnership to Enhance Care for Patients with Opioid Use Disorder Transferred from New York City Jails to New York State Prisons,” NYC Health + Hospitals (Jun. 20, 2019), *available at* <https://www.nychealthandhospitals.org/pressrelease/correctional-health-services-enhances-care-for-patients-with-opioid-use-disorder/>.

⁷¹ See Alison Knopf, “Methadone Now Allowed in Upstate NY Prison, If Inmates Come From Rikers OTP First,” (Aug. 7, 2019), *available at* <https://atforum.com/2019/08/methadone-allowed-upstate-ny-prison-inmates-come-from-rikers-otp-first/>.

⁷² See “State and Federal Prison Wage Policies and Sourcing Information,” Prison Policy Initiative (Apr. 10, 2017), *available at* https://www.prisonpolicy.org/reports/wage_policies.html.

⁷³ Amanda Luz Henning Santiago, “How New York Uses Prison Labor” (Mar. 10, 2020), *available at* <https://www.cityandstateny.com/articles/politics/new-york-state/how-new-york-uses-prison-labor.html>.

⁷⁴ *Id.*

⁷⁵ See “Report by the Committee on Criminal Justice Operations, the Committee on Corrections and Community Reentry, the Committee on Criminal Courts and the Task Force on Mass Incarceration: New York Should Re-Examine Mandatory Court Fees Imposed on Individuals Convicted of Criminal Offenses and Violations,” New York City Bar Association, at 8-10 (May 2019), *available at* <https://s3.amazonaws.com/documents.nycbar.org/files/2018410-MandatorySurchargesCriminalCharges.pdf>.

⁷⁶ A.1643/S.287 (NYS 2021), <https://www.nysenate.gov/legislation/bills/2021/S287>.

legislation is a critical step to upholding the spirit of the Thirteenth Amendment—the eradication of slavery and mandatory labor without compensation—and protecting the human rights of incarcerated people.

6. *Increase Connections to Community*

Allowing imprisoned individuals to maintain ties to their family and friends is critical to treating people humanely and to smoothing the process to re-entry. Creative measures should be taken to increase these connections through technology (allowing for easy, frequent and free videocalls, for instance), and increasing length and accessibility of in-person visits. At a minimum, DOCCS should continue its current policies with regard to phone calls and messages that it instituted during the COVID-19 pandemic. During the pandemic, DOCCS pledged to provide two free 30-minute phone calls per week and two free secure messages per week to allow incarcerated individuals to communicate with family members. This policy should be continued after COVID; and while this is a step in the right direction, more needs to be done. The Task Force calls on DOCCS to make all phone calls and emails free, even once the threat of COVID-19 has passed and in-person visits have resumed. This step has already been taken by New York City which permits incarcerated individuals in jails to make free phone calls, ensuring that people in custody have the opportunity to remain connected with their lawyers, families and support networks. This saves the poorest families critical funds, lowers recidivism, and reduces much of the administrative costs associated with accounts and billing.

7. *Provide Basic Needs*

All basic needs of individuals in prison should be met, including the provision of healthy food, medications, adequate hygiene items, clothing and bedding. The requirement that items such as deodorant be purchased by people using their meager prison wages and their commissary money which often comes from family and friends of limited means, is inhumane and counterproductive. Minimum requirements for items given to those in prison should be legislated and strictly enforced. To strip individuals of their humanity by requiring them to scrimp and save for toothpaste is cruel and counterproductive.

In addition, minimum requirements for the prison facilities themselves, including everything from maximum and minimum temperatures to be maintained in facilities, and guaranteed access to mental and physical health treatment, should be legislated with strict independent oversight required by the Legislature.

8. *Data Collection*

All prisons should be required to gather data on recidivism rates of those who spend time in their prisons, and the rates of violence and sexual assault at those prisons. Those metrics should be used to evaluate prisons and determine which prisons should be closed as the prison population decreases in size. In addition, specific statistics-based goals should be required of prisons, and prisons should be required to justify their existence on their ability to maintain a safe environment and to reduce the frequency with which individuals who were in their prisons commit crimes in the future.

9. *Require Re-training of All Correctional Officers and Training of Top Officials*

Comprehensive programming must be developed for all correctional officers and those who have authority over them. Prisons will not be successfully reformed until there is a complete change in the culture of corrections officers.⁷⁷ Re-training of all of those involved in the prison system must be thoughtfully created, in consultation with individuals who have previously been incarcerated in New York State, and mandated so that individuals in prisons are treated by all those who staff the prisons as human beings. Correctional officers must also be provided with training relating to their obligations under the Americans with Disabilities Act, the need to provide accommodations to prisoners with disabilities, and the form that accommodations must take.

10. *Change How Correctional Officers are Investigated and Held Accountable for Violence, Smuggling Contraband and Other Criminal Behavior Committed on the Job*

It is urgent that the manner in which correction officers are held accountable for violence, mistreating those imprisoned and/or violating the law be radically changed. A survey of women imprisoned at Bedford Hills showed that “74% of 110 respondents identified that they had witnessed some form of violence or abuse by staff, including physical, sexual, and verbal abuse, while 53% of respondents reported experiencing these acts of violence by staff themselves.”⁷⁸ There are regular reports of violence by corrections’ officers that are unaddressed.⁷⁹ In 2015, the Correctional Association, which is an independent non-profit with authority to inspect New York State prisons, reported “As [Correctional Association] reports on Clinton, Attica, Greene, Fishkill, and other prisons have long documented, and as revealed by the brutal beating of George Williams at Attica and the recent killing of Samuel Harrell at Fishkill, a deeply entrenched and severe environment of violence and abuse by prison security staff, as well as the routine infliction of the torture of solitary confinement, characterizes life not only at Clinton, but at prisons all across New York State.”⁸⁰ Many of the proposals made to reform policing can and should be extended to correction officers, including limitations on unions’ ability to negotiate discipline structures and the creation of an independent agency to investigate wrong-doing. One

⁷⁷ See Brian Mann, “Reports of Prison Guard Brutality in New York Draw a Harsh Spotlight” (Oct. 20, 2016), available at <https://www.npr.org/2016/10/20/498688702/reports-of-prison-guard-brutality-in-new-york-draw-a-harsh-spotlight>.

⁷⁸ “It Reminds Us How We Got Here: (Re)producing Abuse, Neglect, and Trauma in New York’s Prisons for Women,” Correctional Association of New York, available at https://static1.squarespace.com/static/5b2c07e2a9e02851fb387477/t/5f99bdf952472e2e73ea83f7/1603911175422/CANY_WomensReport-ExecutiveSummary_F.pdf.

⁷⁹ See “10 Things You Need to Know About Brutality and Abuse at Clinton C.F.,” Correctional Association of New York (Sept. 2015), available at <https://static1.squarespace.com/static/5b2c07e2a9e02851fb387477/t/5c4f5d1b21c67cd91a85d4cd/1548705052202/015+Prison+Monitoring+Report+-+Clinton.pdf>.

⁸⁰ *Id.* at 3.

possible solution is the creation of a correctional ombudsman as enshrined in a bill pending before the Legislature.⁸¹

G. Reform Parole and Re-entry

1. *Reform Parole to Make It Less Punitive and Incarceratory, Beginning with the Passage of the Less is More Act*

Parole supervision is intended to achieve rehabilitative purposes and reintegrate individuals into society after a prison term. However, New York’s parole system too often serves as a revolving door back to incarceration and as a barrier to successful reentry. Technical violations of parole alone—those violations of parole conditions that do not constitute a new crime, such as missing curfew or failing a drug test—accounted for 40 percent of people sent to state prison in 2018.⁸² In fact, New York re-incarcerates more people for technical violations than any state, except for Illinois.⁸³ The human and financial costs of the parole apparatus are dire: even brief periods of incarceration can result in lost jobs and housing, and disruption of community-based treatments, education and childcare arrangements.⁸⁴ Per 2019 estimates, New York spends approximately \$350 million per year on state prison re-incarcerations for technical parole violations and \$300 million annually on local jail costs for individuals awaiting disposition of their alleged parole violations.⁸⁵ Further, New York’s parole system is rife with racial disparities, with Black and Latinx people disproportionately harmed by the system.⁸⁶

Widespread, systemic reforms are necessary to turn parole from its current system of stringent conditions that serve as “tripwires” back to prison (and which result in stark racial disparities), into a mechanism that assists individuals in their reentry. For example, experts have proposed the following changes: reversals to policies and laws with inequitable impacts, reductions to the number of people under supervision, maximum time limits of one to two years for supervision terms, reductions to supervision terms for compliant behavior, elimination of

⁸¹ A.905/S.2175 (NYS 2020), <https://www.nysenate.gov/legislation/bills/2021/s2175>.

⁸² See “Report on Legislation by the Corrections and Community Reentry Committee, Criminal Courts Committee, Criminal Justice Operations Committee, and Mass Incarceration Task Force: The Less is More Act,” New York City Bar Association, at 2 (Feb. 2021), available at https://s3.amazonaws.com/documents.nycbar.org/files/2020648-LessisMoreReport_FINAL_2.21.20.pdf.

⁸³ Kendra Bradner, Vincent Schiraldi, Natasha Mejia, and Evangeline Lopoo, “More Work to Do: Analysis of Probation and Parole in the United States, 2017-2018,” Columbia University Justice Lab, at 11 (Aug. 2020), available at <https://justicelab.columbia.edu/sites/default/files/content/More%20Work%20to%20Do.pdf>.

⁸⁴ New York City Bar Association, *supra* note 82, at 3.

⁸⁵ New York State Bar Association, *Report of the New York State Bar Association Task Force on the Parole System* (Nov. 2019), 4, <https://nysba.org/NYSBA/Advocacy%20and%20Leadership/House%20of%20Delegates/November%202019/NYSBA%20Task%20Force%20on%20the%20Parole%20System%20Final%20Report.pdf>.

⁸⁶ Bradner et al., *supra* note 83, at 12 (noting that Black and Latinx people are under New York State Parole supervision at 6.8 and 2.5 times the rate of white people, and Black people are incarcerated on technical violations in New York State prisons at five times the rate as white people while Latinx individuals are 30 percent more likely than white people to be in state prison for a parole violation).

incarceratory sentences for technical violations, and investment of saved costs in those communities most impacted by parole.⁸⁷

As an interim stopgap, the Less is More Act: Community Supervision Revocation Reform Act⁸⁸ is an important first step that has garnered wide support including from seven district attorneys.⁸⁹ The Less is More Act would eliminate incarceration for most technical parole violations, afford individuals alleged to have violated parole a prompt hearing, limit revocation sanctions for all parole violations, reduce parole terms on the basis of good behavior, and allow for release when the conduct underlying the parole violation otherwise requires pretrial release under the new bail laws.⁹⁰ We urge the Legislature to adopt the Less is More Act, while also acknowledging that further reforms are required to comprehensively address the failings of the State's parole system.

2. *Create Systems to Provide Re-entry Services*

In addition, re-entry services should be guaranteed to those who have been incarcerated, which follows through on the plan established when an individual was first incarcerated. Individuals released from prison should have access to stable housing, continuity of mental health and medical care, and assistance with job placement. While perhaps one could consider relegating this work to parole, the truth is that parole has so long functioned exclusively as a system of punishment, control and re-incarceration, that it would be difficult for the culture of parole offices to allow for the successful provision of these types of services. However, numerous non-profits provide these services. Funding to these non-profits could be increased to allow them sufficient resources to provide services to all who are released. Regardless of who provides the services, these services must and should be provided. They are a common-sense way to reduce crime and the harm to individuals from incarceration.⁹¹ In addition, the costs of successful provision of services will be offset in the long term by reducing reincarceration and recidivism.

H. Expand Sealing of Convictions

Conviction records can create lifetime barriers to full participation in the community and the economy. Estimates are that one in seven New Yorkers has a conviction record, and because of discriminatory policing and prosecution norms, Black and Latinx New Yorkers bear this burden at rates far exceeding those of their white counterparts. Given the economic devastation COVID-19 has wrought, these inequalities have only been highlighted as individuals struggling to regain a foothold in the economy face discrimination and job denials on the basis of their

⁸⁷ See, e.g., Bradner et al., *supra* note 83, at 12-13.

⁸⁸ A.5576/S.1144 (NYS 2021), <https://www.nysenate.gov/legislation/bills/2021/S1144>.

⁸⁹ See “With 2021 Session Underway in Albany, Community Organizations, Advocacy Groups, and District Attorneys Call on Legislative Leaders & Governor Cuomo to Pass ‘Less Is More’ Parole Reform Bill,” Katal Ctr. for Equity, Health, and Just. (Jan. 27, 2021), available at <https://www.katalcenter.org/less-is-more-parole-reform>.

⁹⁰ See generally, New York City Bar Association, *supra* note 82, at 4-6.

⁹¹ See “Stopping the Revolving Prison Door,” Massachusetts Institute of Technology News (May 10, 2017), available at <https://news.mit.edu/2017/stopping-revolving-prison-door-reducing-recidivism-mit-jpal-0510>.

conviction histories. New York State’s current petition-based conviction records law, C.P.L. §160.59, a well-intentioned first step in records clearance, has proven woefully inadequate. This is due to the law’s strict eligibility criteria (including 10-year-since-last-conviction timeframe, and exclusion of those who have more than two criminal convictions in their lifetimes or a violent felony conviction) and complicated procedures (requiring drafting a petition addressing several factors and application to the sentencing court). Since C.P.L. §160.59 was enacted in 2017, only 2,350 New Yorkers – fewer than 0.5% of the already small number of those eligible – have succeeded in having their records sealed through this law, many of whom were represented by paid counsel.

The City Bar has generally supported creation of a path to records clearance for all New Yorkers. Legislation dubbed “Clean Slate NY” drafted to achieve this purpose has been introduced in the New York State Legislature.⁹² Clean Slate NY provides for automatic sealing for civil purposes (making the records inaccessible to employers, landlords, etc., but still available to criminal system actors such as the courts, prosecution and police) after passage of time (currently one year for misdemeanors and three years for felonies) since completion of sentence with no new criminal convictions. After passage of an additional period of time (currently five years for misdemeanors and seven years for felonies – again, with no new criminal convictions), civil sealing is followed by automatic sealing for most criminal justice purposes several years later. Clean Slate NY legislation is backed by a statewide coalition of advocates, individuals with lived experience, faith, labor, and business leaders. The City Bar will study how to best support this legislation and how we can further vital records clearance policies such as those contained in the federal Next Step Act bill introduced by Sen. Cory Booker in 2019.⁹³

I. Recognize Mental Health Issues and Concerns

A separate note is warranted as to mental health. Throughout this report and its proposals, we have attempted to weave in acknowledgement that those suffering from mental health conditions are frequently shunted through the criminal justice system when treatment is the appropriate and humane choice. Failure to treat mental illness as an illness is not only cruel, but is also hugely detrimental to public safety. The criminal justice system is incapable of adequately responding to the reality of the problem when it comes to punishment of those with mental illness. Other mechanisms must be created to ensure people receive the treatment they need rather than being senselessly and repeatedly harmed by the criminal justice system.

We have attempted throughout this report to note changes that could be made to the criminal justice system to address the massive over-representation of those with mental illness at every stage of the criminal justice process. We must begin to fund mental health treatment outside the criminal justice system and, when individuals with mental illness commit crimes, divert them wherever possible to treatment. Individuals with mental illness in particular must be arrested less, arraigned less, convicted less and imprisoned less, and we must treat the mental

⁹² A.6399/S.1553-A (NYS 2021), <https://www.nysenate.gov/legislation/bills/2021/S1553>. See also Clean Slate NY, <https://www.cleanslateny.org/>.

⁹³ S.697, 116th Congress (2019-2020), <https://www.congress.gov/bill/116th-congress/senate-bill/697/text>.

illnesses of those who are in prison if we are to truly make the criminal justice system a just and equitable system.

1. 730 Law Changes

In addition to more holistic change, reform is needed to Criminal Procedure Law 730, which dictates the process for evaluating an individual's ability to understand the proceedings and assist in their own defense, as well as the process that occurs should an individual be found unfit during such proceedings. Three fundamental reforms are needed to the 730 law.

First, following a finding of incapacity, C.P.L 730.50 permits either inpatient or outpatient commitment, but outpatient commitment cannot be ordered without the consent of the District Attorney. This section should be amended to remove the requirement that the DA's office consent to outpatient commitment.

Second, section 730.50(1) and (2) permits commitment for a period of a year for care and treatment, to determine if a defendant can be restored to competency. Such a determination should not take a year, and in many cases can be made in a far shorter time period. Penal Law 730.50(1) and (2) should be amended to reflect a shorter time period in place of "one year," such as 120 days. New York State Office of Mental Hygiene (OMH) would then have 60 days to evaluate individuals and could notify the court and the individual of its determination 60 days prior to the expiration of the 120-day order.

Third, nothing in C.P.L 730 provides a mechanism for individuals to seek release when there is not a substantial probability that they will attain capacity in the foreseeable future, despite Supreme Court precedent requiring such release. The Supreme Court's ruling in *Jackson v. Indiana* (406 U.S. 715)—which requires that individuals be released when there is not a substantial probability that they will attain capacity in the foreseeable future (and it is the People's burden to make the showing of a substantial probability of restoration)—should be written into C.P.L 730. The Court of Appeals, in *People v. Schaffer*, 86 N.Y.2d 460 (1995), made clear that it is permissible for the court to consider a *Jackson* application at the initial competency hearing.⁹⁴ C.P.L 730 should be amended to provide an explicit procedure by which individuals and their counsel can, at any time, seek release pursuant to *Jackson* and demand a hearing at which it is the People's burden to demonstrate by a preponderance that the individual in question has a substantial probability of attaining competency in the foreseeable future.

J. Include Those Convicted of Crimes of Violence in Reform

It is imperative that any statutory reform not universally exclude those convicted of so-called "violent" crimes. As of 2018, 67% of individuals housed in New York State prisons were

⁹⁴ *People v. Schaffer*, 86 N.Y.2d 460, 468 (1995) ("To the extent that the Appellate Division concluded that it was premature, at defendant's initial CPL 730.30 competency hearing, for the court to consider defendant's motion to be released under *Jackson*, that ruling is in error. The vindication of a permanently incompetent defendant's constitutional rights under *Jackson v. Indiana* cannot be compelled to await the statutory commitment periods provided for in article 730.").

convicted of violent crimes.⁹⁵ We cannot and will not end mass incarceration by targeting reforms at only “non-violent” offenders.

In addition, the success of mental health courts and drug diversion courts shows that we fail our communities and make them *less safe* when we send people to jail but do nothing to address the *reasons* that the crimes have occurred. If we want to prevent crime, we have to invest in better ways to assist those who may be driven to commit violent acts.

Too often, violent crimes are used as a boogeyman to prevent and narrow criminal justice reform. Indeed, we have seen that happen with the recent bail reform rollback in New York State despite available data showing bail reform has not had a negative impact on public safety.⁹⁶ Criminal law is often created in knee-jerk response to the worst possible crime in the news, a violent crime that the public perceives as preventable. These outlier cases are seen as a reason to toughen the system against all and derail reform efforts. But we do not stop to consider how frequently we fail to prevent crimes in the traditional criminal justice system. For every person in a program who commits a violent felony offense, we ignore the dozens who will not commit a crime in the future because they went to a program instead of to jail. Thus, the Legislature must include individuals accused of violent offenses in reform efforts if they truly wish to end mass incarceration and keep our communities safe.

III. CONCLUSION

It is important to note that even if each and every one of the steps outlined in this report were implemented by the New York State Legislature, more would still need to change to create a truly fair and equitable criminal justice system and to redress the terrible wrongs committed against Blacks and Latinxs by the criminal justice system. Activists and advocates are calling for a total re-imagining of the place of the criminal justice system in our society and demanding that its very existence be justified. We have confined ourselves, in this report, to changes that maintain the core structures of the criminal justice system. However, we believe that by implementing the changes outlined in this report, New York can help transform that system. In particular, we seek to change the criminal justice system from one that almost exclusively focuses on the punishment of *what* a person has done, to a system that seeks to address the root causes of criminal activity, and to *prevent* further criminal activity.

We would be remiss, however, to fail to point out that many of the most important changes that must happen to prevent abuses within, or indeed, even obviate the need for, the criminal justice system, involve investing in resources that assist individuals so that the criminal justice system would be irrelevant. Strengthening our communities and public schools, increasing access to quality housing and mental and physical health care, and providing

⁹⁵ See “People Incarcerated in New York: Population Profile and Recent Trends,” Correctional Association of New York (2019), available at <https://static1.squarespace.com/static/5b2c07e2a9e02851fb387477/t/5c5ae47a971a184de7158ad9/1549460603410/CANY+Issue+Brief+-+Population+Profile.pdf>.

⁹⁶ See Krystal Rodriguez, Michael Rempel, and Matt Watkins, “The Facts on Bail Reform and Crime in New York City,” Center for Court Innovation (Feb. 2021), available at <https://www.courtinnovation.org/publications/bail-crime-nyc>.

alternative resources to people in all types of crises will decrease reliance on the criminal justice system. We must stop turning to the criminal justice system again and again to solve societal problems, but rather seek to provide resources to people and communities long before problems occur.

That said, we hope this report provides a blueprint that those seeking criminal justice reform can use in the present moment to prevent the continued perpetuation of mass incarceration in New York State. Few of the ideas contained in this report are novel. Many have been suggested by other activists and organizations for years, and it is their tireless work that made this report possible. However, we hope that, by bringing these ideas together in one place, we can showcase how the Legislature can transform the criminal justice system into a system that holds out a helping hand rather than solely brings down a hammer.

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May 2021

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