

**MASS INCARCERATION:
Where Do We Go From Here?**

**NEW YORK
CITY BAR**

MASS INCARCERATION: WHERE DO WE GO FROM HERE?

JANUARY 2017

Table of Contents

I.	INTRODUCTION.....	1
II.	LOOKING BACK ON THE PAST YEAR	3
A.	Making Criminal Justice Reform a National Priority.....	3
B.	New York as a Model for Reform	5
1.	<i>Rikers Commission</i>	6
2.	<i>Warrant and Summons Reform</i>	7
3.	<i>Funding for Indigent Representation</i>	7
4.	<i>Alternatives to Incarceration</i>	8
III.	LOOKING AHEAD TOWARD FURTHER REFORM.....	9
A.	Maintaining the Momentum Nationally	9
1.	<i>Sentencing Reform</i>	9
2.	<i>Early Release Programs</i>	10
3.	<i>Reentry Programs</i>	10
4.	<i>Improving the Conditions of Incarceration—Substance Abuse and Mental Health Treatments</i>	11
B.	Building on Key Initiatives in New York.....	11
1.	<i>Bail Reform</i>	11
2.	<i>Second Chance Amendment and Earned Early Release Legislation</i>	12
3.	<i>Parole Reform</i>	13
4.	<i>Raise the Age Reform</i>	13
5.	<i>Minimizing Collateral Consequences</i>	13
IV.	CONCLUSION	15
	ENDNOTES.....	16

* This report was developed by the New York City Bar Association’s Task Force on Mass Incarceration (see <http://www.nycbar.org/member-and-career-services/committees/mass-incarceration-task-force-on>), under the leadership of Task Force Chair John F. Savarese. Special thanks go to Mr. Savarese’s colleagues, Carol Miller and Robinson Strauss, at Wachtell, Lipton, Rosen & Katz for so expertly guiding this process.

I. INTRODUCTION

The devastating consequences of mass incarceration have drawn unprecedented attention over the past few years. Journalists, academics and public interest groups have published extensive research, written compelling articles and lobbied politicians on both sides of the aisle to take concrete steps to reduce both our nation's prison population and the terrible toll mass incarceration continues to inflict on vulnerable communities.¹ As we show in this Report, progress has been made in the year since our Task Force was established, but much remains to be done. There also is considerable uncertainty about whether successful past initiatives will be carried forward by the Trump administration. This Report therefore aims, in section II below, to chronicle past successes (as well as frustrations) at both the federal and state/local levels in reducing the country's prison population and the harmful consequences and burdens of mass incarceration. Then, in section III below, we look ahead to areas for potential further action, again at the federal and the state/local levels. We close with a plea to public officials to use the information and initiatives highlighted here to recognize the enormous economic and social costs of over-incarceration, to emulate the promising examples of progress and reform recounted here, and to be creative in seeking to reduce the public cost and burden of our over-reliance upon incarceration while still maintaining public order and safety in all communities.

As noted, mass incarceration has been a focus at all levels of federal, state and local government. President Obama has made criminal justice reform a priority during the latter part of his tenure. He has instituted a federal clemency initiative under which more than 1,000 individuals have had their sentences commuted,² and has recommended the creation of a presidential commission to study mass incarceration and suggest high-impact reforms.³ The President has also taken steps to end the federal subsidization of mass incarceration⁴ and has proposed a rule "banning the box" on applications for federal employment.⁵ For its part, Congress, in a welcome display of bipartisanship, has been focusing on sentencing reform by considering a broadly supported bill that would reduce mandatory minimums.⁶

Many states have acted to address some of the root causes of mass incarceration in the past year.⁷ In New York, the State Legislature unanimously passed a bill to shift the cost of providing legal representation for indigent defendants from individual counties to the state.⁸ On the local level, New York City has been working to reduce the jail population through a series of targeted efforts across the criminal justice system,⁹ among other things establishing the Rikers Commission to reduce this massive jail's population, and further acting to reduce the number of individuals incarcerated for low-level offenses.¹⁰

Notwithstanding the efforts undertaken to date, our country continues to incarcerate people at a rate far higher than anywhere else in the world. The American criminal justice system currently holds more than 2.2 million people in an estimated

1,719 state prisons, 102 federal prisons, 942 juvenile correctional facilities, 3,283 local jails, and 79 Indian Country jails, as well as in military prisons, immigration detention facilities, civil commitment centers, and prisons in the U.S. territories.¹¹ No matter how many times the statistics are repeated, they remain shocking: The United States has 4% of the world's population and 21% of the world's prisoners, nearly 40% of whom are African-American.¹² If the prison population were a state, it would be the country's 36th largest -- bigger than Delaware, Vermont and Wyoming combined.¹³

Unsurprisingly, correctional budgets have grown exponentially to support these incarceration levels and are now a substantial burden on taxpayers. In recent years, government expenditures on corrections in the United States have totaled nearly \$80 billion annually, which in real terms is more than 350% higher than the \$17 billion spent in 1980.¹⁴ Federal, state and local spending all follow similar patterns which experts believe have "been driven almost entirely by increased numbers of prisoners."¹⁵ Per prisoner, states on average spend \$37,000 per year,¹⁶ while the average annual cost for each individual incarcerated in federal prisons in 2015 was nearly \$32,000.¹⁷ Skyrocketing correctional spending is now growing faster than almost all other government services.¹⁸ A recent federal Department of Education report indicates that state and local spending on prisons and jails grew at triple the rate of spending on public education from 1980 to 2013.¹⁹ Clearly, there is an enormous amount of work still to be done.

A little over one year ago, the New York City Bar Association issued a report calling for action by our federal, state and local leaders to reduce the jail and prison population as well as the extraordinary costs and unnecessary burdens associated with mass incarceration.²⁰ Specifically, the City Bar highlighted the need for reforms such as repealing or reducing mandatory minimum sentencing provisions, reducing sentences recommended by sentencing guidelines for non-violent offenses, expanding alternatives to incarceration available to judges, eliminating or reducing financial conditions of pretrial release, providing the opportunity for individuals with misdemeanor or non-violent felony convictions to seal their records, and raising the age of juvenile jurisdiction in New York from 16 to 18 years old. The City Bar also formed the Task Force on Mass Incarceration, made up of representatives of government, leaders of not-for-profit institutions, academics and private practitioners.

Since its formation, the Task Force has harnessed the resources of the City Bar to draw attention to these issues, monitor developments on the federal, state and local levels, encourage dialogue among various groups with differing interests, and advocate for reform. Through the efforts of our six subcommittees, we have held two conferences and co-sponsored numerous others,²¹ supported legislation, and lobbied lawmakers and agency representatives for change.²²

Reducing the incarcerated population and addressing the pervasive impact of mass incarceration will continue to require a multi-faceted approach. To have the

greatest impact, all initiatives will need bipartisan support. Our newly elected officials in Washington and in Statehouses across the country must be encouraged to recognize mass incarceration's scope, breadth and impact on millions of people and countless communities across the country.

As our Nation prepares for a change of leadership in Washington, we have prepared this Report as part of the City Bar's effort to carry forward the momentum generated in the Obama years, and with the hope that progress will not stall during the new administration. Below, we highlight the positive steps that have been taken over the past year, and identify key priorities for the new administration and lawmakers going forward.

II. LOOKING BACK ON THE PAST YEAR

A. Making Criminal Justice Reform a National Priority

Over the last year, President Obama has made progress on a number of initiatives designed to reduce mass incarceration and make the criminal justice system fairer. President Obama has demonstrated his commitment to improving the system by becoming the first U.S. president to visit a federal prison while in office.²³

One of the most highly publicized reforms is the Clemency Initiative through which -- since its inception in 2014 -- President Obama has pardoned or commuted the sentences of more than 1,000 people convicted of non-violent offenses.²⁴ He has recognized that the vast majority of these people sentenced years ago would receive a lower sentence today and has adjusted sentences accordingly. Although the clemency program has affected the lives of thousands of prisoners and their families, and has inspired countless attorneys to represent incarcerated individuals on a pro bono basis, its scope is limited, as is its effect: it has affected less than one-tenth of one percent of the national prison and jail population. The Task Force would welcome and applaud additional bold acts of clemency in the final days of President Obama's administration, and we urge President-elect Trump to follow his lead. We encourage the states to develop similar programs to rein in the overuse of state prisons as well.

Recognizing the importance of higher education and training for incarcerated persons in order to improve their chances of success once released, the Department of Education announced a pilot program to provide higher education and training programs to about 12,000 incarcerated individuals.²⁵ This Second Chance Pell program, which connects 67 educational institutions with more than 100 federal and state correctional institutions,²⁶ will begin to compensate for Congress's misguided decision in 1994 to eliminate Pell Grant eligibility for incarcerated students.²⁷ We strongly encourage President-elect Trump to continue and expand this initiative.

The Obama administration has taken significant steps to address the conditions of confinement, announcing early in 2016 that federal prisons would no longer permit solitary confinement for juveniles. The President has also acted to reduce reliance on solitary confinement more generally. The Justice Department developed guiding principles to reduce the use of so-called “restrictive housing” throughout the criminal justice system.²⁸

The Justice Department has also focused on reducing recidivism by developing guidelines to facilitate adoption of reentry reforms at the federal level.²⁹ These multi-agency efforts include crafting reentry plans for individuals leaving federal custody, improving educational opportunities,³⁰ and providing assistance with obtaining employment and affordable housing. As noted above, President Obama has called on Congress to enact “ban the box” legislation and, in response to a presidential memorandum, the Office of Personnel Management has recently proposed rules banning the box (i.e., removing questions about applicants’ arrest and criminal conviction histories) on most federal job applications.³¹

More recently, the Justice Department announced it would phase out the use of private prisons, based in part on the success of the 2013 Smart on Crime Initiative.³² Deputy Attorney General Sally Yates stressed that private prisons “compare poorly to our own Bureau facilities. They simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and as noted in a recent report by the Department’s Office of Inspector General, they do not maintain the same level of safety and security.”³³

There have been some major disappointments since our first report. Chief among them is the failure to make headway on federal sentencing reform. Conditions seemed ripe for change when the Sentencing Reform and Corrections Act of 2015 (SRCA)³⁴ was endorsed by the Senate Judiciary Committee in October 2015, and the Sentencing Reform Act of 2015, a companion bill to the SRCA, was introduced in the House of Representatives and approved by the House Judiciary Committee in November 2015.³⁵

As part of a criminal justice reform package, however, the House Judiciary Committee also approved H.R.4002 which would create a criminal intent element (*mens rea*) for all federal crimes that are presently silent with regard to *mens rea*. The law would require prosecutors to prove that defendants “knew, or had reason to believe, the conduct was unlawful.”³⁶ On a panel in January 2016, House Judiciary Committee Chairman Bob Goodlatte warned that criminal justice reform efforts would not move forward without *mens rea* reform, saying that “a deal that does not address this issue [*mens rea*] is not going anywhere in the House of Representatives.”³⁷ The vocal opposition of several Republican Senators has also contributed to Senate Majority Leader Mitch McConnell’s reluctance to move the legislation forward.³⁸

Thus, despite initial high hopes for progress, and encouraging, concerted efforts to reach bipartisan agreement, federal criminal justice reform efforts have stalled in Congress. None of these bills have been brought to the House or Senate floor for a vote. The City Bar has previously written to the congressional leadership arguing that even well-meaning efforts to address the issue of *mens rea* should not be permitted to block sentencing reform that both parties agree is long overdue and sorely needed.³⁹

B. New York as a Model for Reform

As noted above, over the past few years, New York has succeeded in decreasing the rate of incarceration through a variety of policies on diversion and enforcement, demonstrating opportunities for reform that can be realized. In 2015, the State had the 12th lowest incarceration rate in the country.⁴⁰ New York City continues to have the lowest incarceration rate of the 10 largest cities in the U.S., as its jail population has dropped by half in the last 20 years and by 14% in the past two years.⁴¹ New York City also has the highest rate of those released on recognizance at arraignment in the nation (70%),⁴² and the majority of people who are released on bail generally post bail within one week of admission.⁴³ At the same time that jail and prison populations have decreased dramatically, New York City has also experienced an unprecedented reduction in crime.⁴⁴

The City is continuing to invest in strategies to reduce the number of people who enter jail as well as the length of time they stay, the two factors that drive the jail population. For example, supervised release as an alternative to detention, which began in March 2016, has diverted approximately 2,000 individuals who would otherwise likely have been held on bail.⁴⁵ The City also has one of the most robust alternatives to incarceration programs in the country, which provides post-sentencing diversion options for approximately 2,800 otherwise jail-bound individuals. Upcoming initiatives include an expansion of supervised release, the expansion of bail funds for those detained on misdemeanors with bails of less than \$2,000, a revision of the City's failure to appear tool to increase the number of individuals released on recognizance, and an expansion of alternatives to incarceration for individuals receiving City sentences.

The City is also focusing on reducing case delay in an effort to reduce the amount of time people spend in the City's jails through a partnership with the courts, district attorneys, the defense bar, and the Department of Correction. In the first phase of the initiative, the City focused on eliminating the backlog of cases older than one year in which the defendant remains incarcerated; approximately 90% of the over 1,400 cases originally identified in April 2015 have been resolved through these efforts.⁴⁶ The City's next phase is to develop more enduring system changes (including recommending case milestones between critical points during the life of felony cases) to reduce the amount of time individuals spend in jail. Thus far, this effort is showing encouraging results across boroughs.

Although the City has seen an historic reduction in its jail population, and current efforts are producing noticeable reductions, there is still work to be done. Like all jurisdictions, the City's jails hold people who are awaiting trial and have not been convicted of the crime of which they are accused. Posting bail, even a "low" amount of \$500 or \$1,000, may be challenging for some individuals.⁴⁷ On any given day, approximately 400 individuals are detained on bail of less than \$2,500.⁴⁸ Finally, the physical location of Rikers Island, which requires time-consuming travel for family visitors as well as for detainees attending court appearances, exacerbates the effects of incarceration. In November 2016, the City Council announced that it had added \$600,000 to the 2017 budget to allow video visitation at 22 library branches around the City; previously, this program only existed in Brooklyn.⁴⁹

1. *Rikers Commission*

The Rikers Commission, formally called the Independent Commission on New York City Criminal Justice and Incarceration Reform, was proposed by New York City Council Speaker Melissa Mark-Viverito to look at additional ways to reduce the population of the Rikers Island jail facilities, with the ultimate aim being the possible closing of the jail.⁵⁰

Although the City has seen an historic reduction in its jail population, Rikers continues to exemplify the need for criminal justice reform.⁵¹ Roughly 75% of individuals incarcerated on Rikers Island are awaiting trial or have otherwise pending cases, and have not been convicted of any crime.⁵² As noted above, many simply cannot afford bail. And like other jails, Rikers disproportionately holds people of color and the mentally ill; 88% of those incarcerated in New York City jails are black or Latino,⁵³ and almost 40% have been diagnosed with some form of mental illness.⁵⁴

The Rikers Commission, which is fully independent and chaired by former New York State Court of Appeals Chief Judge Jonathan Lippman, is considering how to further shrink the population of Rikers, including by examining procedural changes that reduce the time spent on Rikers Island, alternatives to the bail system, how to shorten case delays, and how to expand alternative-to-incarceration programs.⁵⁵ The Commission also is examining how a jail would ideally look if it were being built from scratch today.⁵⁶

The Rikers Commission expects to issue a report of its findings and recommendations in April 2017. Its creation marks a significant opportunity to rethink incarceration in New York City and improve our criminal justice system from the inside out.

2. *Warrant and Summons Reform*

New York City has also taken steps to reduce the number of people who spend time in jail for low-level offenses. A set of eight bills (collectively, the “Criminal Justice Reform Act” or “Act”), which went into effect in 2016, are designed to address the huge number of criminal summonses issued each year, by permitting the New York Police Department (“NYPD”) to issue civil, rather than criminal, summonses.⁵⁷ In 2015, the NYPD issued over 150,000 criminal summonses for low-level infractions, such as having an open container of alcohol, being in a park after hours, littering, or public urination.⁵⁸ Overwhelmingly, these cases are dismissed; only 21% of people are found guilty and the penalty is usually a fine – no jail time. However, the summonses generally require a court appearance and a failure to appear can result in the issuance of an arrest warrant. In addition, the summonses can result in a permanent criminal record.⁵⁹ In contrast, when civil summonses are issued, appearances can be made by phone, fines can be paid online, and an individual who receives a civil summons does not run the risk of a warrant, arrest and a permanent criminal record. The City Council expects that, through the use of civil summonses, over 100,000 cases will be diverted from the criminal justice system and put into New York City’s Office of Administrative Trials and Hearings each year, thereby reducing the number of warrants as well as related collateral consequences, the financial burden of penalties, and lightening the touch of low-level law enforcement.⁶⁰

3. *Funding for Indigent Representation*

In New York, the financial costs of making good on the constitutional promise of counsel for all defendants, regardless of ability to pay, has historically been placed on individual counties. The resulting patchwork of services has proven insufficient to meet the needs of New York’s indigent defendants. In 2005, the New York Civil Liberties Union sued the State of New York on behalf of criminal defendants, alleging that the State’s failure to adequately fund and oversee the public defense system resulted in violations of the constitutional right to meaningful and effective assistance of counsel.⁶¹ That case, *Hurrell-Harring v. State of New York*, was resolved by a settlement under which the State agreed to provide increased funding for five counties⁶² and to ensure quality legal representation in those counties. New York’s 57 other counties, however, remain without any additional funding.

In June 2016, both houses of the New York State legislature unanimously passed A.10706/S.8114, a bill that would require increased funding throughout the rest of the State. The legislation would shift some of the cost of providing legal services to the State, which would pay approximately \$390 million currently funded by county governments and New York City.⁶³ The Task Force has written in support of the bill.⁶⁴ Following the Governor’s decision to veto the bill on December 31, 2016, the Task Force plans to review any alternative bills introduced this legislative session and will continue its advocacy in support of this important change in the law.

4. *Alternatives to Incarceration*

New York City currently funds and oversees 20 alternatives to incarceration programs citywide. In fiscal year 2016, approximately 2,800 individuals who would ordinarily be facing jail or prison sentences were diverted to treatment or other programs through these efforts. A rise in the use of non-incarcerative sentences corresponded to the substantial drop in the jail population over the past 20 years.⁶⁵

On the federal level, in January 2012 the Pretrial Opportunity Program (“POP”), a specialized drug court, was created at the direction of the Board of Judges of the U.S. District Court for the Eastern District of New York. In 2013, the Special Options Services program, which provides intensive supervision for youthful offenders, was expanded to include regular meetings between participants and magistrate judges.⁶⁶ Their recent successes affirm the importance of these types of programs and offer examples that could be emulated across the country.

POP is a presentence program which offers participants the opportunity to avoid incarceration entirely. Participants meet with drug counselors, pretrial services officers, and judges in programs designed to provide support and motivation. To successfully complete the program, participants must meet certain requirements, including remaining drug-free and participating in monthly meetings for at least twelve months. Participation can result in early termination of supervised release, which reduces both costs and recidivism rates.

The results are impressive. As of January 2015, of those who successfully completed the program only one participant was rearrested (and those charges eventually were dropped). All participants retained their jobs, and one had his charges dismissed entirely. The report issued in 2015 by the Board of Judges recognizes these achievements, but also acknowledges that there is still much left to be done – including additional study of alternatives to incarceration programs to improve and expand them.⁶⁷

Another successful diversion initiative is the Law Enforcement Assisted Diversion (“LEAD”) program which is being tested in Albany. The LEAD program, developed by national experts in harm reduction, racial justice and criminal process (and initially piloted in Seattle), empowers police officers to divert into drug treatment and other social services individuals they would ordinarily have arrested for low-level drug possession and use crimes.⁶⁸ In its pilot phase, the LEAD program has been proved to reduce recidivism, not only by providing needed treatment, but by helping individuals avoid the myriad collateral consequences of a criminal conviction.⁶⁹ Law enforcement agencies in Albany are testing the LEAD program now, anticipating that it will allow almost 500 individuals the chance of beating addiction and avoiding the collateral consequences that may follow even a minor arrest.⁷⁰ The program should be piloted across the state.

III. LOOKING AHEAD TOWARD FURTHER REFORM

A. Maintaining the Momentum Nationally

Notwithstanding discouraging signals from the campaign trail that may portend a return to reflexive over-reliance upon incarceration, along with its attendant enormous costs and harmful social consequences, we remain hopeful that President-elect Trump and the newly constituted Congress will continue to build on bipartisan initiatives to address the problem of mass incarceration.

1. *Sentencing Reform*

We cannot stress enough the importance of making headway on sentencing reform. As noted above, although other sentencing reform bills have previously been submitted to Congress, the Sentencing Reform and Corrections Act is the first to have significant support from both sides of the aisle. Though it does not go far enough, we urge Congress to make the passage of this legislation one of its highest priorities in 2017. Among other key provisions, the bill would:

- Reduce enhanced mandatory minimum sentences for individuals with prior drug felonies (in some cases retroactively), specifically by reducing the mandatory minimum sentence from life to 25 years for people convicted of three drug-related crimes under the federal “three strikes law”; and the reduction of the mandatory minimum sentence for a second drug conviction from 20 years to 15 years;
- Give judges more discretion to impose sentences below the statutory minimums for defendants who have not been involved in violent crimes or possessed firearms, and who are not part of a “continuing criminal enterprise”;
- Reduce sentences retroactively for incarcerated persons who were sentenced under harsh guidelines for possession of crack cocaine that were required by federal law until 2011, with the goal of eliminating the unfair disparity in mandatory minimum sentences for possession of crack cocaine and crack; and
- Allow for expungement and sealing of certain types of juvenile records; and authorizing reentry demonstration projects that could include substance use disorder treatment services and vocational and educational training, designed to support effective reintegration into the community.⁷¹

In addition to sentencing reform, the Task Force encourages our legislators in Washington to support other initiatives aimed at reducing the prison population. Specifically, we urge Congress to consider policies, a number of which are outlined below, which would encourage the early release of individuals who are least likely to be

convicted of new crimes and increase and enhance reentry programs. We also believe that improving the conditions of incarceration and offering desperately needed substance abuse and mental health services will assist many individuals in making a more successful transition back to their communities once their prison terms are over.

2. *Early Release Programs*

In 2015, the U.S. Sentencing Commission lowered the Sentencing Guidelines for drug offenses through a provision called “drugs minus two” that reduced the guidelines portion of federal sentences.⁷² A further amendment made this change retroactive, applying to an estimated 46,000 individuals serving time under the old Guidelines.⁷³ The sentence reductions are not automatic—the defendant must meet certain specified conditions, and, separately, a district judge must determine whether or not a sentence reduction is appropriate.⁷⁴

The Department of Justice should work with judges and other relevant stakeholders to address the cases of all those individuals eligible for the reduction whose files have not yet been processed. Furthermore, the Sentencing Commission should consider other amendments which would have the effect of permitting non-violent individuals early release and, accordingly, consider the application of those amendments retroactively. Indeed, the Task Force has advocated for an amendment to the Sentencing Guidelines expressly authorizing a downward departure for judge-involved intensive presentence supervision programs.⁷⁵

3. *Reentry Programs*

As noted above, the Obama administration has already explored reforms aimed at eliminating and/or reducing the many significant barriers that individuals face on release when seeking employment, looking for housing, or obtaining public assistance. In April, the Justice Department published its “Roadmap to Reentry,” a series of principles designed to reduce recidivism through improved reentry outcomes at the Federal Bureau of Prisons.⁷⁶ The goal is to implement these principles of reform throughout the prison system. These principles include, among others: the requirement that every individual receive an individualized reentry plan; that while incarcerated every individual be provided with education, employment training, life skills, substance abuse and mental health treatments, and other programs that maximize his or her likelihood of success upon release; and that, before leaving custody, each individual be provided with comprehensive reentry-related information and access to resources necessary to succeed in the community. The Task Force wholeheartedly supports these guiding principles and we urge federal legislators to ensure that adequate funding and support for these efforts is made available. We also hope that new leadership at the Justice Department recognizes the importance of this initiative and continues to make reentry reform a top priority.

4. *Improving the Conditions of Incarceration—Substance Abuse and Mental Health Treatments*

In 2010, more than half of all individuals in federal custody met the medical criteria for substance use disorder. However, only 11% of those individuals received treatment for their conditions.⁷⁷ The Center for Addiction and Substance Abuse posits that, over the long term, substance use disorder treatment could save the country approximately \$90,000 per incarcerated individual per year—a significant sum over the long term.⁷⁸ We urge the federal government to invest in substance addiction programs for incarcerated persons, both to improve the likelihood of a successful reentry and to realize substantial financial savings.

The relationship between incarceration and mental illness is well-established. Estimates suggest that “at least 400,000 inmates currently behind bars in the United States suffer from some sort of mental illness, and, likewise, between 25% and 40% of all mentally ill Americans” will face some form of incarceration.⁷⁹ This obvious link warrants attention on multiple levels. *First*, more resources need to be devoted to treating mental health issues while in prison. *Second*, the use of solitary confinement, which has been shown to be strongly associated with severe psychological side-effects, needs to be reexamined as a method of punishing incarcerated individuals and, ultimately, should be severely limited.

B. Building on Key Initiatives in New York

As noted above, New York has achieved historic reductions in its jail population over the past two years and is in the process of implementing several new initiatives that aim to realize further reductions.

1. *Bail Reform*

Approximately 47,000 people will stay in jail this year in New York City - before they ever get a trial or are convicted - simply because they can't pay bail.⁸⁰ As noted above, the City is taking steps to ameliorate this problem, including a supervised release program launched in March 2015.⁸¹ Under this program, judges can now assign eligible lower-risk defendants to a supervisory program rather than rely on monetary bail. The eligibility of defendants for this program is risk-driven; a tool developed by the City's Criminal Justice Agency is designed to help identify eligible candidates and set appropriate levels of supervision as conditions of release.⁸² All participants in this program will receive phone calls or text messages reminding them of court dates and other critical dates.⁸³ The Mayor's office also requires that supervised release providers conduct a monthly, individualized assessment to determine whether levels of supervision should be adjusted.⁸⁴ Once fully implemented, this program is expected to involve 3,000 individuals each year.⁸⁵

In partnership with state courts, the City is now working to launch the first-ever online bail payment system that will allow families to post bail earlier and more easily.⁸⁶ This program will help defendants avoid unnecessary jail time; indeed, obstacles to posting bail are reported to contribute to approximately 12,000 unnecessary jail stays each year.⁸⁷ To facilitate payment for those with bail set at arraignment, the City will install ATMs in the courthouses and will allow for online bail payment starting in the spring of 2017.⁸⁸ Additionally, the City is working with the City Council, the Department of Finance, and the Office of Management and Budget to eliminate a 3% fee that is currently imposed when a defendant released on bail ultimately pleads guilty or is found guilty.⁸⁹ This will ensure that anyone who pays bail will have the full bail amount returned as long as the defendant makes all required court appearances. In addition, a City Council backed bail fund, The Liberty Fund, will launch in 2017 to assist those charged with non-violent misdemeanors who have bail set at \$2,000 or less.⁹⁰ The Task Force applauds State and City officials for continuing to make bail reform a high priority.

The City is engaging in other bail reforms as well. To better assess a defendant's risk of failure to appear ("FTA") at a future court date, the City is planning to introduce a new risk assessment tool which will provide judges with guidelines on defendants' level of FTA risk with the intent of reducing the number of people held. While the City is continuing an effort to consider danger as well as flight risk in making the bail decision by submitting legislation at the state level,⁹¹ prior efforts to pass legislation that, among other things, would allow judges to consider dangerousness in bail determinations have met with opposition, including from the City Bar in a 2013 report.⁹² However, as long as New Yorkers who have not been convicted of any crime are jailed simply because they are too poor to pay bail, the need for reform is undeniable. The Task Force looks forward to studying any new legislation that is introduced in the upcoming session. In the meantime, judges should be encouraged to use all facets of the current bail system to reduce unnecessary incarceration and should set bail amounts only after taking into account an individual's ability to pay. For example, judges can allow bail to be secured with a credit card that will be charged only if the person fails to appear, or with an unsecured bond that will come due only if the person fails to return to court. These non-cash forms of bail are routinely used elsewhere and are already legal options in New York.

2. *Second Chance Amendment and Earned Early Release Legislation*

We urge State lawmakers to consider adding a new subsection to Criminal Procedure Law 440.20 (governing motions to set aside a sentence) that would allow an individual under certain circumstances to petition the original sentencing judge to request that his or her sentence be reduced or modified on the ground that the sentence is excessive -- that is, greater than necessary to achieve the purposes of incarceration. This would give individuals the chance to prove, while still serving their sentences, that they deserve a reduced sentence. Petitioners would be allowed to present evidence about good behavior and achievements while incarcerated, as well as information about their age,

personal circumstances, and medical condition. Permitting this mid-sentence reset opportunity would incentivize good behavior and participation in educational and vocational programs.⁹³

We also support the development of legislation that would provide an avenue to automatic sentence reductions – beyond the current merit and good-time programs – based on an individual’s conduct while incarcerated. This legislation would incentivize people to complete educational and rehabilitative programs and meet goals consistent with evidence-based practices that will help them successfully reenter society after release. Unlike merit time, which requires a discretionary decision by the parole board, and the proposed Second Chance amendment, which would require a discretionary decision by the sentencing judge, this proposal would create an automatic sentence reduction when the reentry factors have been met, as determined by the New York State Department of Corrections and Community Supervision.

3. *Parole Reform*

The Task Force supports State efforts to bring much needed reform to the parole system. A recent investigatory series in the *New York Times* has highlighted the discriminatory impact of parole release decisions, including a racial disparity in determinations of parole for low-level felonies.⁹⁴ Governor Cuomo has directed the State Inspector General to investigate any parole disparities and has announced positive steps toward reform including new Parole Board appointments, which will ensure that the Board is more diverse and reflective of the State’s population.⁹⁵ We urge the Governor to make those appointments promptly and urge the Senate to act on them without delay. Additionally, we support proposed revisions to Parole Board regulations that would require the Board to better use “risk and needs” principles in guiding parole decisions. Finally, we believe that there should be greater transparency in parole decisions.⁹⁶

4. *Raise the Age Reform*

In 2015, Governor Cuomo rightly called upon the New York State Legislature to enact legislation to raise the age of adult criminal responsibility to, at a minimum, 18 years old.⁹⁷ To date, the Legislature has failed to act.⁹⁸ As we noted in our 2015 report, New York remains one of only two states in the country that automatically prosecutes all 16 and 17 year-old children as adults.⁹⁹ We urge the newly elected state legislators to remedy this situation and raise the age of criminal responsibility to a minimum of 18 years.

5. *Minimizing Collateral Consequences*

As experience and common sense reflect, the harsh consequences that flow from criminal convictions -- *e.g.*, difficulty in obtaining employment and access to benefit programs, limited eligibility for subsidized housing, obstacles to obtaining educational

benefits -- often set up recently released individuals for failure.¹⁰⁰ The Task Force strongly supports legislation to seal or expunge criminal records in certain circumstances¹⁰¹ so that individuals do not face the kinds of collateral consequences that create virtually insurmountable barriers to successful reentry into their communities.

We urge the State to enact legislation that is similar to New York City's Fair Chance Act. This Act makes it unlawful for "most employers in New York City to ask about the criminal record of job applicants before making a job offer."¹⁰² This ban applies to ads, applications, and interview questions.¹⁰³ If, upon making a job offer, the employer wants to revoke the offer due to the applicant's criminal record, it must provide the applicant with "Fair Chance Notice" explaining its reasons.¹⁰⁴ The employer must also provide the applicant the criminal record information that informed its decision.¹⁰⁵ While there is some evidence that this type of ban-the-box legislation may have a negative impact on job applicants of color, the studies are conflicting.¹⁰⁶

Recognizing the potential barriers faced by individuals seeking educational opportunities upon release from incarceration, the SUNY Board of Trustees recently voted to "ban the box" on college applications and will now refrain from inquiring about arrest and conviction histories on applications.¹⁰⁷ We urge other colleges and universities, public and private, to follow suit.

We also favor legislation that would create a uniform "Certificate of Rehabilitation" in lieu of the current Certificates of Relief from Disabilities and Good Conduct.¹⁰⁸ The Certificate of Rehabilitation would have all the attributes of the two current documents and none of the apparent disadvantages:¹⁰⁹ among other things, it would lift automatic bars to occupational licensing, and employers would be required to consider the Certificate when evaluating job applicants and current employees.

We urge New York lawmakers to focus resources on prison programs that facilitate successful reentry, and penal institutions should implement validated programming to prepare individuals for release. To that end, we encourage the development of a system for measuring successful reentry programs and policies undertaken by New York State prisons, both across the system and prison by prison. We recommend a data-driven management system -- modeled after NYPD's CompStat -- to track key reentry performance measures for people returning home to their communities from New York State prisons, in particular recidivism, as well as the percentage of people with stable housing, employment, a plan for drug treatment and mental health services, valid personal identification, health insurance, and an accurate criminal history report. The primary goal should be to enable individuals leaving state custody to be in the best possible position to return to their communities as contributing law-abiding citizens.

IV. CONCLUSION

The effort to reduce the huge numbers of people incarcerated across our nation and the consequences that flow from this incarceration and from criminal convictions themselves, should not be partisan issues. The pernicious effects of mass incarceration affect individuals, families, communities, employers, and hard-pressed government budgets in *all* states and in *all* communities across the country. We remain cautiously optimistic that voices of reason on both sides of the aisle will succeed in toning down the divisive rhetoric that accompanied the campaign, and that our elected representatives will make a concerted effort to work together on implementing criminal justice reforms, including the many initiatives we have highlighted in this Report. As the new administration grapples with these important issues for the first time, however, achieving progress at the state and local levels may become more crucial than ever. We urge all of our elected leaders in the strongest possible terms to sustain the momentum for meaningful reform in the coming year.

Task Force on Mass Incarceration
John F. Savarese, Chair

January 2017

ENDNOTES

¹ See, e.g., Dr. James Austin et al., Brennan Center for Justice, *How Many Americans Are Unnecessarily Incarcerated?* (Dec. 2016), <https://www.brennancenter.org/publication/how-many-americans-are-unnecessarily-incarcerated>; Elizabeth Swavola et al., Vera Institute of Justice, *Overlooked: Women and Jails in an Era of Reform* (Aug. 15, 2016), <https://www.vera.org/publications/overlooked-women-and-jails-report>; The Sentencing Project, *Strategizing for Reform: State Campaign Successes* (Oct. 5, 2016), <http://www.sentencingproject.org/wp-content/uploads/2016/10/Strategizing-for-Reform-State-Campaign-Successes.pdf>; Clare Foran, *What Can the U.S. Do About Mass Incarceration?*, The Atlantic (Apr. 28, 2016), <http://www.theatlantic.com/politics/archive/2016/04/ending-mass-incarceration/475563/>.

² Juleyka Lantigua-Williams, *President Obama Hits Another Commutation Milestone*, The Atlantic (Nov. 22, 2016), <https://www.theatlantic.com/amp/article/508538/>; Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 Harv. L. Rev. 811 (2017). See sources cited *infra* note 24.

³ Grainne Dunne, Brennan Center for Justice, *Four Ways the Obama Administration Has Advanced Criminal Justice Reform* (May 19, 2016), <https://www.brennancenter.org/blog/four-ways-obama-administration-has-advanced-criminal-justice-reform>. See generally Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, *supra* note 2.

⁴ *Id.* For example, the Justice Department has adopted meaningful changes to the Edward Byrne Memorial Justice Assistance Grant (JAG) Program, the nation's largest criminal justice grant program. The JAG program previously included perverse incentives to increase unnecessary incarceration as funding relied on outdated statistics such as arrest volume and the number of new drug-related cases. The Justice Department will now utilize a "success-oriented funding" model that creates incentives for states, cities and local police to reduce "both crime and unnecessary incarceration" as funding will be based upon data including crime rate changes and the percent of cases where alternatives to prison were recommended by prosecutors. Jon Frank, Brennan Center for Justice, *Justice Department Issues Changes to Largest Criminal Justice Grant* (Jan. 8, 2016), <https://www.brennancenter.org/blog/justice-department-issues-changes-largest-criminal-justice-grant>.

⁵ In April, President Obama issued a presidential memorandum to formally establish the Federal Interagency Reentry Council "to ensure that the Federal Government continues" to focus on the "rehabilitation and reintegration of individuals returning to their communities from prisons and jails." This Memorandum also directed the heads of executive departments and agencies to, among other things, implement rules prohibiting federal agencies from asking whether job applicants have a criminal record until the final phase of the hiring process. Presidential Memorandum on Promoting Rehabilitation and Reintegration of Formerly Incarcerated Individuals, 81 Fed. Reg. 26993 (Apr. 29, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-05-04/pdf/2016-10662.pdf>. See also sources cited *supra* note 31 (discussing a "ban the box" rule proposed by the Office of Personnel Management); Federal Interagency Reentry Council, *A Record of Progress and a Roadmap for the Future* (Aug. 2016), <https://csgjusticecenter.org/wp-content/uploads/2016/08/FIRC-Reentry-Report.pdf>; Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, *supra* note 2.

⁶ See e.g., FAMM, *Sentencing Reform and Corrections Act of 2015 (S. 2123)* (last accessed Jan. 4, 2017), <http://famm.org/sentencing-reform-and-corrections-act-of-2015/> (analyzing provisions and potential impact of sentencing reform bills introduced during the 114th Congressional session). As we discuss on pages 4-5 *infra*, none of these bills were adopted.

⁷ Brennan Center for Justice, *Justice Update: Majority of States Cut Both Crime and Incarceration* (June 16, 2016), <https://www.brennancenter.org/newsletter/justice-update-majority-states-cut-both-crime-and-incarceration>; Rebecca Silber et al., Vera Institute of Justice, *Justice in Review: New Trends in State Sentencing and Corrections 2014-2015* (May 2016), <http://archive.vera.org/sites/default/files/resources/downloads/state-sentencing-and-corrections-trends-2014-2015.pdf> (detailing how "[i]n 2014

and 2015, 46 states enacted at least 201 bills, executive orders and ballot initiatives to reform at least one aspect of their sentencing and corrections systems”).

⁸ A.10706/S.8114, <https://www.nysenate.gov/legislation/bills/2015/s8114/amendment/original>; Joel Stashenko, *Indigent Defense Proponents Hail ‘Historic Moment’ in NY*, N.Y.L.J. (June 21, 2016), <http://www.newyorklawjournal.com/id=1202760482280/Indigent-Defense-Proponents-Hail-Historic-Moment-in-NY>. See also Task Force Letter to Gov. Cuomo, *infra* note 22, and related discussion *infra* p. 7. Regrettably, this bill was vetoed by Governor Cuomo on December 31, 2016, with the Governor indicating that he will introduce his own statewide indigent defense funding plan for consideration by the Legislature this session. Governor’s Veto Message – Veto No. 306 of 2016, <http://politi.co/2ikRBZ0>. The Task Force plans to continue its advocacy on this important issue.

⁹ See *infra* pp. 5-8.

¹⁰ Hon. Jonathan Lippman, Independent Commission on New York City Criminal Justice and Incarceration Reform, *Rethinking Rikers Island*, More Just NYC (July 13, 2016), <http://www.morejustnyc.com/about-us/rethinking-rikers-island>.

¹¹ Peter Wagner & Bernadette Rabuy, Prison Policy Initiative, *Mass Incarceration: The Whole Pie 2016*, (Mar. 14, 2016), <http://www.prisonpolicy.org/reports/pie2016.html>.

¹² Roy Walmsley, Institute for Criminal Policy Research, *World Prison Population List 5* (11th ed. 2016), http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf; Federal Bureau of Prisons, *Inmate Race*, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp (37.8% of Federal inmates are African-American as of Oct. 29, 2016 per “[s]tatistics based on prior month’s data.”). See also Nat’l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 1 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014), <http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes> (noting that the U.S. incarceration rate is “5 to 10 times higher than the rates in Western European and other liberal democracies”).

¹³ Lauren-Brooke Eisen & Inimai N. Chettiar, Brennan Center for Justice, *The Reverse Mass Incarceration Act* 1 (Oct. 12, 2015), <https://www.brennancenter.org/publication/reverse-mass-incarceration-act>.

¹⁴ See Melissa S. Kearney et al., The Hamilton Project, *Ten Economic Facts about Crime and Incarceration in the United States* 13 (May 2014), http://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/v8_THP_10CrimeFacts.pdf (noting that in FY 2010, more than 57% of correctional spending was by the states, 33% by local governments, and 10% by the federal government). From 1985 to 2012, state-level correctional spending increased from \$6.7 to \$53.2 billion; by 2010 spending on jails totaled \$26.8 billion. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, *supra* note 12, at 315. The Bureau of Prisons (“BOP”) budget increased from \$330 million in FY 1980 to nearly \$7.5 billion in FY 2016. The BOP budget in FY 1980 “accounted for 15% of the total amount appropriated for DOJ; in FY 2016 it was 26%.” Nathan James, Congressional Research Service, *The Federal Prison Population Buildup: Options for Congress* 2-3 (May 20, 2016), available at <https://fas.org/sgp/crs/misc/R42937.pdf>.

¹⁵ *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, *supra* note 12, at 315.

¹⁶ *Id.* at 316.

¹⁷ *Annual Determination of Average Cost of Incarceration*, 81 Fed. Reg. 46957 (July 19, 2016), <https://www.federalregister.gov/d/2016-17040>.

¹⁸ *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, *supra* note 12, at 314-15.

-
- ¹⁹ U.S. Dept. of Education, *State and Local Expenditures on Corrections and Education 1* (July 2016), <https://www2.ed.gov/rschstat/eval/other/expenditures-corrections-education/brief.pdf>.
- ²⁰ New York City Bar, *Mass Incarceration: Seizing the Moment for Reform* (Sept. 2015), http://www2.nycbar.org/pdf/report/uploads/Mass_Incarceration_Seizing_the_Moment_for_Reform-20150928.pdf.
- ²¹ On November 15, 2016, the Task Force held its first annual event, *A New President, A New Approach to Sentencing Reform*. Other City Bar conferences have included *Mass Incarceration: Causes and Solutions* (May 3, 2016); *Examining Conditions of Confinement in New York's Correctional Facilities: A Focus on Prisoner's Rights* (Sept. 21, 2016); and *Perpetual Punishment? The Afterlife of Hyper-Incarceration in the U.S.* (June 28, 2016).
- ²² See, e.g., *Report on Legislation by the Task Force on Mass Incarceration* (May 2016), <http://onenorth-nyc-bar.s3.amazonaws.com/files/ade67af6d9e1aa9f274d1f55ef92251f.pdf> (approving A.6202-C/ S.6341-B (requiring New York State to fully fund indigent defense services in all counties)); Task Force Letter to Hon. Andrew Cuomo, Support the Full Funding of Indigent Defense Services (Aug. 1, 2016), http://s3.amazonaws.com/documents.nycbar.org/files/20073150-Indigent_Defense_Services_Full_Funding_Mass_Incarceration_Report_FINAL_8.1.16.pdf (urging Gov. Cuomo to sign bill A.10706/S.8114); Task Force Letter to Chief Judge Patti Saris, Chair, U.S. Sentencing Commission, Inclusion of a Sentencing Department for Successful Alternatives to Incarceration (Sept. 21, 2016), http://documents.nycbar.org/files/20073160-SentencingDepartment_MassIncarceration_ReportFINAL_9.21.16.pdf.
- ²³ Tom LoBianco, "President Barack Obama Makes Historic Trip to Prison, Pushes Reform," CNN (July 17, 2015), <http://www.cnn.com/2015/07/16/politics/obama-oklahoma-federal-prison-visit/>.
- ²⁴ See Press Release, U.S. Department of Justice, Announcing New Clemency Initiative, Deputy Attorney General James M. Cole Details Broad New Criteria for Applicants (Apr. 23, 2014); Press Release, Clemency Project 2014, As Thanksgiving Approaches, President Obama Announces 79 New Clemency Grants; Total Grants Surpass 1,000 (Nov. 22, 2016), <https://www.clemencyproject2014.org/media/161122>; Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, *supra* note 2, at 836-38.
- ²⁵ Press Release, U.S. Department of Education, 12,000 Incarcerated Students to Enroll in Postsecondary Educational and Training Programs Through Education Department's New Second Chance Pell Pilot Program (June 24, 2016), <http://www.ed.gov/news/press-releases/12000-incarcerated-students-enroll-postsecondary-educational-and-training-programs-through-education-departments-new-second-chance-pell-pilot-program>; Danielle Douglas-Gabriel, *12,000 Inmates to Receive Pell Grants to Take College Classes*, *The Washington Post* (June 24, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/06/24/12000-inmates-to-receive-pell-grants-to-take-college-classes/?utm_term=.627c3a08e124.
- ²⁶ Press Release, U.S. Department of Education, 12,000 Incarcerated Students to Enroll in Postsecondary Educational and Training Programs Through Education Department's New Second Chance Pell Pilot Program (June 24, 2016).
- ²⁷ See *Mass Incarceration: Seizing the Moment for Reform*, *supra* note 20, at 5-6.
- ²⁸ Press Release, The White House, Fact Sheet: Department of Justice Review of Solitary Confinement (Jan. 25, 2016), <https://www.whitehouse.gov/the-press-office/2016/01/25/fact-sheet-department-justice-review-solitary-confinement>; U.S. Dept. of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing* (Jan. 2016), <https://www.justice.gov/dag/file/815551/download>.
- ²⁹ See U.S. Dept. of Justice, *Roadmap to Reentry: Reducing Recidivism through Reentry Reforms at the Federal Bureau of Prisons* (Apr. 25, 2016), <https://www.justice.gov/reentry/roadmap-reentry>.

-
- ³⁰ U.S. Dept. of Education, White House Announces New Commitments to Fair Chance Higher Education Pledge (Sept. 14, 2016), <http://www.ed.gov/news/press-releases/fact-sheet-white-house-announces-new-commitments-fair-chance-higher-education-pledge>.
- ³¹ Recruitment, Selection, and Placement (General) and Suitability, 81 Fed. Reg. 26173 (May 2, 2016) (to be codified at 5 C.F.R. pts. 330 & 731), <https://www.gpo.gov/fdsys/pkg/FR-2016-05-02/pdf/2016-10063.pdf>; Beth F. Cobert, Director, Office of Personnel Management, “*Banning the Box*” in *Federal Hiring*, OPM Director’s Blog (Apr. 29, 2016, 9:30 a.m.), <https://www.opm.gov/blogs/Director/2016/4/29/Banning-the-Box-in-Federal-Hiring/>; Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, *supra* note , at 833-34. *See also* sources cited *supra* note 6.
- ³² Memorandum from Sally Yates, Deputy Attorney General to the Acting Director, Federal Bureau of Prisons, *Reducing Our Use of Private Prisons 1* (Aug. 18, 2016), <https://www.justice.gov/opa/file/886311/download>. That initiative involved, among other things, a shift away from putting “low-level, nonviolent” offenders behind bars.
- ³³ *Id.*
- ³⁴ S.2123, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/2123>. The SRCA bill would, among other things: abolish certain mandatory minimum sentences, limiting mandatory minimums to serious drug felonies and violent crimes; give judges greater discretion in sentencing; ban solitary confinement for juveniles; make juveniles eligible for parole after a maximum of 20 years; and promote reentry services for people nearing the ends of their sentences. *See* U.S. Senate Judiciary Committee, *The Sentencing Reform and Corrections Act of 2015* (last accessed Jan. 4, 2017), <https://www.judiciary.senate.gov/download/sentencing-reform-and-corrections-act-section-by-section>; FAMM, *The Revised Sentencing Reform and Corrections Act of 2015 (S.2123)* (last accessed Jan. 4, 2017), <http://famm.org/wp-content/uploads/2016/05/FS-S2123-Sentencing-Reform-Corrections-Act.pdf>.
- ³⁵ H.R.3713, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/3713>.
- ³⁶ H.R.4002, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/4002>. Sen. Orrin Hatch (R-UT) introduced a similar bill named “Mens Rea Reform Act of 2015” requiring prosecutors to prove that a defendant acted “willfully, with respect to any element [of a criminal statute or regulation] for which the text of the covered offense does not specify a state of mind.” S.2298, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/2298>.
- ³⁷ Ben Geman, *Obama’s Capitol Hill Wish List*, *The Atlantic* (Jan. 12, 2016), <http://www.theatlantic.com/politics/archive/2016/01/obamas-capitol-hill-wish-list-a-few-possibilities-peek-through-in-sotu/459102/>.
- ³⁸ *See* Perry Bacon Jr., *Are Bipartisan Efforts on Criminal Justice Reform at an Impasse?*, *Meet the Press* (June 6, 2016), <http://www.nbcnews.com/meet-the-press/are-bipartisan-efforts-criminal-justice-reform-impasse-n584921>; Maurice Chapman, *Two Parties, Two Platforms on Criminal Justice*, *The Marshall Project* (July 18, 2016), <https://www.themarshallproject.org/2016/07/18/two-parties-two-platforms-on-criminal-justice#.uHsfjHm6>; Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, *supra* note 2, at 827-29.
- ³⁹ *See* Letter from Ira Feinberg, Chair, Federal Courts Committee of the City Bar, to the Hon. Charles E. Grassley et al. (Aug. 16, 2016), <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/letter-expressing-concerns-regarding-the-mens-rea-reform-act-of-2015-and-the-criminal-code-improvement-act-of-2015>.
- ⁴⁰ E. Ann Carson, U.S. Dept. of Justice, Bureau of Justice Statistics, *Prisoners in 2015*, at 9 (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf>.

-
- ⁴¹ Judith Greene & Vincent Schiraldi, *Better by Half: The New York City Story of Winning Large-Scale Decarceration While Increasing Public Safety*, 26 Federal Sentencing Reporter 22 (Oct. 2016), https://www.hks.harvard.edu/ocpa/cms/files/criminal-justice/research-publications/fsr2901_04_greeneschiraldi.pdf.
- ⁴² Mayor's Office of Criminal Justice, *Safely Reducing the New York City Jail Population* (last accessed Jan. 4, 2017), <http://www.justice-data.nyc/safely-reducing-the-jail-population/> (citing arraignment outcomes in 2014).
- ⁴³ *Id.*
- ⁴⁴ See e.g., Greene & Schiraldi, *Better by Half: The New York City Story of Winning Large-Scale Decarceration While Increasing Public Safety*, *supra* note 42.
- ⁴⁵ Estimate of supervised release participants provided by Mayor's Office of Criminal Justice. See also Press Release, Office of the Mayor, Mayor de Blasio Announces Citywide Rollout of \$17.8 Million Bail Alternative, *infra* note 82.
- ⁴⁶ Mayor's Office of Criminal Justice, *Cutting Case Processing Times*, http://www1.nyc.gov/site/criminaljustice/work/cutting_case_processing_times.page (last updated Sept. 29, 2016, citing Office of Court Administration statistics).
- ⁴⁷ Hon. Jonathan Lippman, Independent Commission on New York City Criminal Justice and Incarceration Reform, *Rethinking Rikers Island*, More Just NYC (July 13, 2016), <http://www.morejustnyc.com/about-us/#about-us/rethinking-rikers-island>.
- ⁴⁸ This includes individuals charged with misdemeanor and felony offenses. Mayor's Office of Criminal Justice (analysis of Department of Correction data).
- ⁴⁹ Erin Durkin, *More library branches to offer video conferencing for families of Rikers Island inmates*, N.Y. Daily News (Nov. 30, 2016), <http://www.nydailynews.com/new-york/library-branches-offer-video-chat-rikers-families-article-1.2893506>.
- ⁵⁰ *Rethinking Rikers Island*, *supra* note 47.
- ⁵¹ The story of Kalief Browder, who was sent to Rikers Island at age 16 for allegedly stealing a backpack, remains a heartbreaking example of the conditions faced by incarcerated persons and, in particular, by young people. Browder was subjected to beatings by both staff and incarcerated persons and almost two years of solitary confinement. Unable to post \$3,000 bail, he was released after waiting three years for trial when the charges against him were dropped. He committed suicide two years later. His story, and his mother's pain and suffering in the aftermath of his death, are detailed in recent articles. See e.g., The Marshall Project, *Kalief's Mother on Her Torment* (Oct. 17, 2016), <https://www.themarshallproject.org/2016/10/17/kalief-s-mother-on-her-torment>.
- ⁵² *Rethinking Rikers Island*, *supra* note 47.
- ⁵³ *Id.*
- ⁵⁴ Michael Winerip & Michael Schwartz, *For Mentally Ill Inmates at Rikers Island, a Cycle of Jail and Hospitals*, N.Y. Times (Apr. 10, 2015), <http://www.nytimes.com/2015/04/12/nyregion/for-mentally-ill-inmates-at-rikers-a-cycle-of-jail-and-hospitals.html> (Individuals with diagnosed mental illness at Rikers total approximately "4,000 men and women at any given time, more than all the adult patients in New York State psychiatric hospitals combined.").
- ⁵⁵ *Rethinking Rikers Island*, *supra* note 47. As noted *infra*, there has, in fact, been a citywide expansion of supervised release (a pre-trial diversion program) and a multi-agency effort to reduce unnecessary pretrial detention for low-risk detainees.

⁵⁶ *Rethinking Rikers Island*, *supra* note 47. The Commission will also explore possibilities for potential use of Rikers Island if it is no longer used as a jail. It will consult with city planners, land use experts, environmentalists, architects, and others to consider options that may include residential, manufacturing, recreational, entertainment, and transportation uses, among others. The City, however, will make the final determinations on the future of Rikers Island.

⁵⁷ Press Release, Office of the Mayor, Mayor de Blasio Signs the Criminal Justice Reform Act (June 13, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/530-16/mayor-de-blasio-signs-criminal-justice-reform-act>.

⁵⁸ New York City Council, *Criminal Justice Reform Act*, <http://labs.council.nyc/legislation/criminal-justice-reform/>. The District Attorneys' Offices across the City have also experimented with warrant days—opportunities for those with outstanding warrants to clear their records in a non-traditional and non-confrontational manner in a safe, neighborhood environment. *See, e.g.*, Press Release, Brooklyn District Attorney's Office, Brooklyn District Attorney Ken Thompson Announces Initiative to Address Backlog of Summons Warrants by Helping to Resolve Them in a Fair and Efficient Manner (June 19, 2015), <http://brooklynda.org/2015/09/10/brooklyn-district-attorney-ken-thompson-announces-initiative-to-address-backlog-of-summons-warrants-by-helping-to-resolve-them-in-a-fair-and-efficient-manner/>.

⁵⁹ *Criminal Justice Reform Act*, *supra* note 58. Communities of color and low-income communities have been disproportionately impacted by criminal summonses. For instance, one study found that between 2008 and 2011, eight criminal summonses were issued for riding a bicycle on the sidewalk in a Park Slope precinct, while 2,050 were issued for the very same activity in a Bedford-Stuyvesant precinct. *See* Commission on the Future of Indigent Defense Services, *Final Report to the Chief Judge of the State of New York* 26 (June 18, 2006), http://www.nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf.

⁶⁰ *Criminal Justice Reform Act*, *supra* note 59.

⁶¹ *Hurrell-Harring v. State of New York*, Index No. 8866-07 (N.Y. Sup. Ct. Albany Cty.). *See also* Press Release, NYCLU, *Hurrell-Harring et al. v. State of New York* (challenging New York State's failure to provide adequate public defense services), <http://www.nyclu.org/node/1538>.

⁶² Press Release, NYCLU, Settlement Begins Historic Reformation of Public Defense in New York State (Oct. 21, 2014), <http://www.nyclu.org/news/settlement-begins-historic-reformation-of-public-defense-new-york-state>. The counties covered by the settlement are: Onondaga, Ontario, Schuler, Suffolk and Washington.

⁶³ According to the New York Office of Indigent Legal Services ("ILS"), in 2015 the State contributed only \$80 million. This shift in fiscal responsibility would take place over seven years, with full implementation in 2023. *See* Hon. William Cherry & Stephen J. Acquario, New York State Association of Counties, *Indigent Legal Defense Services: Balanced Justice and Mandate Relief* (June 2016), [http://nysac.membershipsoftware.org/files/NYSAC_Indigent_Legal_Defense_Services_White_Paper\(1\).pdf](http://nysac.membershipsoftware.org/files/NYSAC_Indigent_Legal_Defense_Services_White_Paper(1).pdf) (citing ILS data). *See also* *Indigent Defense Proponents Hail 'Historic Moment' in NY*, N.Y.L.J., *supra* note 8.

⁶⁴ *See* New York City Bar, *Report on Legislation by the Task Force on Mass Incarceration* (May 2016), <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-in-support-of-legislation-to-fully-fund-indigent-legal-services-throughout-new-york-state>.

⁶⁵ Greene & Schiraldi, *Better by Half: The New York City Story of Winning Large-Scale Decarceration While Increasing Public Safety*, *supra* note 41.

⁶⁶ The Special Options Services program was originally instituted in 2000.

-
- ⁶⁷ *Alternatives to Incarceration in the Eastern District of New York: The Pretrial Opportunity Program and The Special Options Services Program, Second Report to the Board of Judges* (Aug. 2015), https://img.nyed.uscourts.gov/files/local_rules/ATI.EDNY_SecondReport.Aug2015.pdf.
- ⁶⁸ Law Enforcement Assisted Diversion (LEAD), *About LEAD*, <http://leadkingcounty.org/about/>.
- ⁶⁹ See Susan E. Collins et al., University of Washington LEAD Evaluation Team, *Summary of “LEAD Program Evaluation: Recidivism Report”* (Apr. 7, 2015), <https://depts.washington.edu/harrtlab/wordpress/wp-content/uploads/2015/04/2015-04-08-LEAD-Press-Release-and-Evaluation-Summary.pdf> (Quantitative analyses found “significantly reduced recidivism” among LEAD participants).
- ⁷⁰ Press Release, City of Albany, NY, Albany Police Department Receives Grant to Aid Implementation of Innovative “Lead” Program to Address Root Causes of Crime (Dec. 15, 2015), http://www.albanyny.org/newsandevents/news/15-12-15/albany_police_department_receives_grant_to_aid_implementation_of_innovative_%e2%80%9clead%e2%80%9d_program_to_address_root_causes_of_crime.aspx.
- ⁷¹ See sources cited *supra* note 34.
- ⁷² U.S. Sentencing Commission, *FAQ-Retroactive Application of the 2014 Drug Guidelines Amendment* (July 24, 2014), http://www.ussc.gov/sites/default/files/pdf/amendment-process/materials-on-2014-drug-guidelines-amendment/20140724_FAQ.pdf.
- ⁷³ *Id.*
- ⁷⁴ *Id.*
- ⁷⁵ See Task Force Letter to Chief Judge Patti B. Saris (Sept. 21, 2016), *supra* note 22.
- ⁷⁶ U.S. Dept. of Justice, *Roadmap to Reentry: Reducing Recidivism through Reentry Reforms at the Federal Bureau of Prisons* (Apr. 25, 2016), <https://www.justice.gov/reentry/roadmap-reentry>. See also Remarks of Attorney General Loretta E. Lynch, *infra* note 100.
- ⁷⁷ The National Center on Addiction and Substance Abuse, *CASA Report Finds 65% of all U.S. Inmates Meet Medical Criteria for Substance Abuse Addition, Only 11% Receive Any Treatment* (Feb. 26, 2010), <http://www.centeronaddiction.org/newsroom/press-releases/2010-behind-bars-II>.
- ⁷⁸ *Id.*
- ⁷⁹ Matt Ford, *America’s Largest Mental Hospital is a Jail*, *The Atlantic* (June 8, 2015), <http://www.theatlantic.com/politics/archive/2015/06/americas-largest-mental-hospital-is-a-jail/395012/>.
- ⁸⁰ Press Release, Office of the Mayor, Mayor De Blasio Launches Bail Lab to Safely Reduce Overreliance on Money Bail (Oct. 13, 2015), <http://www1.nyc.gov/office-of-the-mayor/news/711-15/mayor-de-blasio-launches-bail-lab-safely-reduce-overreliance-money-bail>. See also The Mayor’s Office of Criminal Justice, *Bail in New York City, Data Profile* (last accessed Jan. 4, 2017), <http://bail-lab.nyc/data-profile-2>.
- ⁸¹ In the last year, the City has tripled the number of people awaiting trial at home instead of in jail through its supervised release program. The Mayor’s Office of Criminal Justice, *Bail: Prediction in the Dark?* (Sept. 26, 2016), <http://us10.campaign-archive1.com/?u=b08c13d9bd46c3921750dffa2&id=1acd822658>.
- ⁸² Press Release, Office of the Mayor, Mayor de Blasio Announces Citywide Rollout of \$17.8 Million Bail Alternative Program (Apr. 8, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/336-16/mayor-de-blasio-citywide-rollout-17-8-million-bail-alternative-program>. Some have expressed concern that this tool has had a racially disparate impact. We encourage the City to continue to study and monitor the use and effect of the tool to ensure that it is applied in a racially neutral manner.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Press Release, Office of the Mayor, Mayor de Blasio Announces Online Bail Payment, Helping to Reduce Unnecessary Jail Time (Nov. 1, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/858-16/mayor-de-blasio-online-bail-payment-helping-reduce-unnecessary-jail-time>.

⁸⁷ *Id.*; See also Andrew Denney, *With Online Bail Payments, City Hall Aims to Curtail Unnecessary Jail Stays*, N.Y.L.J. (Nov. 3, 2016), <http://www.newyorklawjournal.com/home/id=1202771445690/With-Online-Bail-Payments-City-Hall-Aims-to-Curtail-Unnecessary-Jail-Stays>.

⁸⁸ Mayor de Blasio Announces Online Bail Payment, Helping to Reduce Unnecessary Jail Time, *supra* note 86.

⁸⁹ Press Release, New York City Council, Speaker Melissa Mark-Viverito to Introduce Department of Correction Reform Package (Sept. 12, 2016), <http://council.nyc.gov/html/pr/091216pr-b.shtml>.

⁹⁰ The Liberty Fund, supported by \$1.4 million allocated in the City's FY 2017 budget, expects to assist nearly 1,000 people annually and will join two other existing bail funds operating citywide. Samar Khurshid, *City Council Bail Fund Continues Slow Path to Reality*, Gotham Gazette (Dec. 3, 2016), <http://www.gothamgazette.com/city/6650-city-council-bail-fund-continues-slow-path-to-reality>. See also Alysa Santo, *Bail Reformers Aren't Waiting for Bail Reform*, The Marshall Project (Aug. 23, 2016), <https://www.themarshallproject.org/2016/08/23/bail-reformers-aren-t-waiting-for-bail-reform#.zBcuoJIWZ>.

⁹¹ Press Release, Office of the Mayor, Mayor de Blasio Calls for Change in State Law to Better Ensure Dangerous Defendants are Detained (Oct. 23, 2015), <http://www1.nyc.gov/office-of-the-mayor/news/750-15/mayor-de-blasio-calls-change-state-law-better-ensure-dangerous-defendants-detained>.

⁹² New York City Bar, *Report on Legislation by the Criminal Courts Committee and the Corrections and Community Reentry Committee* (July 2013), <http://www2.nycbar.org/pdf/report/uploads/20072490-BailLegislation.pdf>.

⁹³ The present statute allows a sentence to be set aside upon the ground that it was unauthorized, illegally imposed, or otherwise invalid as a matter of law. The Task Force is currently working on proposed language to be added as CPL 440.20(5) that it hopes to submit to State legislators early this session.

⁹⁴ Michael Winerip et al., *For Blacks Facing Parole in New York State, Signs of a Broken System*, N.Y. Times (Dec. 4, 2016), <http://www.nytimes.com/2016/12/04/nyregion/new-york-prisons-inmates-parole-race.html>.

⁹⁵ Michael Schwirtz et al., *Governor Cuomo Orders Investigation of Racial Bias in N.Y. State Prisons*, N.Y. Times (Dec. 5, 2016), <http://www.nytimes.com/2016/12/05/nyregion/governor-cuomo-orders-investigation-of-racial-bias-in-ny-state-prisons.html>.

⁹⁶ See Press Release, Office of the Governor, Governor Cuomo Announces Proposal of New Regulations to Ensure Consideration of Risk and Rehabilitation During Parole Decisions (Oct. 18, 2016), <http://www.governor.ny.gov/news/governor-cuomo-announces-proposal-new-regulations-ensure-consideration-risk-and-rehabilitation>; Joel Stashenko, *Parole Reform Groups Say Proposed New Rules Don't Go Far Enough*, N.Y.L.J. (Dec. 13, 2016), <http://www.newyorklawjournal.com/id=1202774594531/Parole-Reform-Groups-Say-Proposed-New-Rules-Dont-Go-Far-Enough?>.

⁹⁷ Press Release, Office of the Governor, Governor Cuomo Calls on Legislature to Raise the Age of Criminal Responsibility This Session (May 28, 2015), <https://www.governor.ny.gov/news/governor->

[cuomo-calls-legislature-raise-age-criminal-responsibility-session](#). Governor Cuomo renewed his call for New York to raise the age of criminal responsibility in his State of the State address delivered in New York City on January 9, 2017. See Press Release, Office of the Governor, Governor Cuomo Presents the 12th Proposal of the 2017 State of the State Agenda: Launching the “New York Promise” Agenda to Advance Social Justice and Affirm New York’s Progressive Values (Jan. 9, 2017), <https://www.governor.ny.gov/news/governor-cuomo-presents-12th-proposal-2017-state-state-agenda-launching-new-york-promise-agenda>. Governor Cuomo has also said that he will use his executive pardon power to relieve individuals who were convicted of crimes at ages 16 and 17, and have lived crime-free for ten years from the ongoing stigmatization of a criminal conviction. Press Release, Office of the Governor, Governor Cuomo Offers Executive Pardons to New Yorkers Convicted of Crimes at Ages 16 and 17 (Dec. 21, 2015), <https://www.governor.ny.gov/news/governor-cuomo-offers-executive-pardons-new-yorkers-convicted-crimes-ages-16-and-17>. We applaud Governor Cuomo for living up to this promise and granting conditional pardons to 101 individuals on December 30, 2016, and urge him to extend this initiative to even more individuals in 2017. Matthew Hamilton, *Cuomo Pardons 101 New Yorkers Convicted as Minors*, Times Union (Dec. 30, 2016), <http://blog.timesunion.com/capitol/archives/270666/cuomo-pardons-101-new-yorkers-convicted-as-minors/>. Governor Cuomo has, in addition, taken action to improve the conditions of juvenile confinement through the issuance of an executive order to separate teens from adult prisoners in State facilities. Press Release, Office of the Governor, Governor Cuomo Signs Executive Order to Separate Teens from Adult Prisoners (Dec. 22, 2015), <https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-separate-teens-adult-prisoners>.

⁹⁸ See e.g., Mark Hay, *Why Is New York Still Prosecuting 16-Year-Olds as Adults?*, Gothamist (Nov. 3, 2016), http://gothamist.com/2016/11/03/new_york_raise_the_age.php; Raise the Age New York, *Get the Facts*, <http://raisetheagency.com/get-the-facts>.

⁹⁹ See *Mass Incarceration: Seizing the Moment for Reform*, *supra* note 20, at 6.

¹⁰⁰ For a detailed description of the hardships that expungement might alleviate, see *Doe v. United States*, 110 F.Supp.3d 448 (E.D.N.Y. 2015). Although that case was reversed by the Second Circuit on jurisdictional grounds, 883 F.3d 192 (2d Cir. 2016), the Court noted that Congress may well want to consider the merits of giving courts jurisdiction to expunge records of conviction. See also Loretta E. Lynch, Attorney General, Remarks at National Reentry Week Event in Philadelphia (Apr. 25, 2016), <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-national-reentry-week-event>. “[T]oo often,” the Attorney General said, “the way that our society treats Americans who have come into contact with the criminal justice system ... turns too many terms of incarceration into what is effectively a life sentence.”

¹⁰¹ *Mass Incarceration: Seizing the Moment for Reform*, *supra* note 20.

¹⁰² New York City Commission on Human Rights, *Fair Chance Act* (last accessed Jan. 4, 2017), <http://www1.nyc.gov/site/cchr/media/fair-chance-act-campaign.page>. See also Bryce Covert, *New York City’s Ambitious Ban-The-Box-Law Is Already Transforming Lives*, Think Progress (Apr. 20, 2016), <https://thinkprogress.org/new-york-citys-ambitious-ban-the-box-law-is-already-transforming-lives-332a4e08d641#>; Lauren Evans, *NYC Employers Can No Longer Immediately Discriminate Against Applicants With Criminal Records*, Gothamist (June 30, 2015), http://gothamist.com/2015/06/30/fair_chance_bill.php.

¹⁰³ New York City Commission on Human Rights, *Fair Chance Act*, *supra*.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Compare Amanda Y. Agan & Sonja B. Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, Univ. of Michigan Law & Econ. Research Paper No. 16-012 (June 14, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795795; and Jennifer L. Doleac & Benjamin

Hanseny, *Does “Ban the Box” Help or Hurt Low-skilled Workers? Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden* (October 2016), http://jenniferdoleac.com/wp-content/uploads/2015/03/Doleac_Hansen_BanTheBox.pdf; with Maurice Emsellem & Beth Avery, National Employment Law Project, *Racial Profiling in Hiring: A Critique of New “Ban the Box” Studies* (Aug. 2016), <http://www.nelp.org/content/uploads/Policy-Brief-Racial-Profiling-in-Hiring-Critique-New-Ban-the-Box-Studies.pdf>.

¹⁰⁷ Press Release, State University of New York, SUNY Board Votes to “Ban the Box” Following Student Assembly Recommendation, Campus Visits (Sept. 14, 2016), <https://www.suny.edu/suny-news/press-releases/september-2016/9-14-16-ban-the-box/suny-board-votes-to-ban-the-box-following-sa-recommendation-campus-visits.html>.

¹⁰⁸ In *Doe v. United States*, 168 F.Supp.3d 427 (E.D.N.Y. 2016), Judge Gleeson issued a “certificate of rehabilitation” to a woman he had sentenced 13 years earlier, certifying that she has been rehabilitated. He stated “I believe a certificate of rehabilitation can significantly alleviate the collateral effects of a criminal record by emitting a powerful signal that the same system that found a person deserving of punishment has now found that individual fit to fully rejoin the community.” *Id.* at 442.

¹⁰⁹ Among the criticisms of the existing certificates is that many courts are disinclined to certify rehabilitation as early as sentencing and that employers and others are not willing to rely on them. See Collateral Consequences Resource Center, *New York Certificates Fall Short in Practice*, (Feb. 29, 2016), <http://ccresourcecenter.org/2016/02/29/new-york-certificates-of-relief-fall-short-in-practice/>. Judge Gleeson’s *Doe* opinion, *supra* note 100, discusses the process for applying for these certificates.