NEW YORK TOUGH: 18 MONTHS OF CRISIS LAWYERING TO FIGHT COVID-19 IN NEW YORK'S PRISONS

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COVID-19 has underscored longstanding inequities in the global public health system. In countries with weak public health infrastructures—like the United States[1]—it is no surprise that Black, Indigenous, and People of Color ("BIPOC") communities were disproportionately impacted by the rapid spread of

1. Joseph P. Williams, *Report: Pandemic Exposed a Public Health System 'Hollowed Out' From Lack of Funding and Neglect*, U.S. NEWS & WORLD REP. (Mar. 10, 2021), https://www.usnews.com/news/health-news/articles/2021-03-10/report-pandemic-exposed-a-public-health-system-hollowed-out-from-lack-of-funding-and-neglect [https://perma.cc/N5EX-7S7Z] ("More than a year after the first coronavirus case was recorded in America, a new report has found that the pandemic exposed a national public health network that has been 'hollowed out' from years of underfunding and neglect. That negligence, according to a report from the nonprofit Trust for America's Health, resulted in scores of unnecessary deaths, put unprecedented strain on the health care system and contributed to an economy that is still under pressure."); NAT'L NETWORK OF PUB. HEALTH INSTS., CHALLENGES AND OPPORTUNITIES FOR STRENGTHENING THE US PUBLIC HEALTH INFRASTRUCTURE: FINDINGS FROM THE SCANS OF THE LITERATURE 40 (2021), https://nnphi.org/wp-content/uploads/2021/06/NNPHI-E2A-Kresge-Report-Web.pdf [https://perma.cc/3NLG-AB7H] ("The role of public health has been undermined for years resulting in little investment and funding for public health to carry out necessary duties. This has severely impacted public health workforce pipeline and health department's [sic] ability to modernize labs, informatics, and data systems to identify disease threats.").

this deadly, airborne pathogen.[2] Due to centuries of disinvestment, many BIPOC communities lack the resources and socio-economic capital to access robust medical care.[3] Rather than provide the support necessary to mitigate the impact of COVID-19 in these communities, governments used COVID-19 as a pretext to perpetuate further violence.[4] Nowhere was this reality clearer than in America's prisons and jails, ground zero for the marginalization of BIPOC people. Prisons and jails were ravaged by the spread of the pathogen.[5] But because prisons and jails are de facto warehouses for BIPOC people, the mainstream press failed to adequately cover the spread of the pathogen in these facilities and governments largely ignored it. The unchecked spread of COVID-19 in America's prisons and jails was thus the product of the carceral system's structural racism, or its "extralegal production and exploitation of group-differentiated vulnerability to premature death."[6]

Civil rights lawyers across the country battled virtually immovable state executives and judges in their attempts to protect their incarcerated clients during the pandemic. For the first year-and-a-half of the pandemic—from approximately February 2020 through August 2021—scores of lawyers at New York-based

2. *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Jan. 25, 2022), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html [https://perma.cc/T9RM-FF5U] ("A growing body of research shows that centuries of racism in this country has had a profound and negative impact on communities of color. The COVID-19 pandemic and its disproportionate impact on people from some racial and ethnic groups is a stark example of these enduring health disparities. COVID-19 data shows that Black/African-American, Hispanic/Latino, American Indian and Alaska Native persons in the United States experience higher rates of COVID-19-related hospitalization and death compared with non-Hispanic [w]hite populations. These disparities persist even when accounting for other demographic and socioeconomic factors.").

3. *See generally* Wayne J. Riley, *Health Disparities: Gaps in Access, Quality, and Affordability of Medical Care*, 123 TRANSACTIONS AM. CLINICAL AND CLIMATOLOGICAL ASS'N 167 (2012) (collecting reports and analyses of resource deficiencies in medical care for minority communities).

4. Sandra Soo-Jin Lee, Michael Bentz, & Emily Vasquez, *COVID-19 and America's Racial Violence are Inextricable*, HEALTH AFFS. (June 26, 2020), https://www.healthaffairs.org/do/10.1377/forefront.20200626.937724/full/ [https://perma.cc/B4DL-CBAJ].

5. Katie Park, Keri Blakinger, & Claudia Lauer, *A Half-Million People Got COVID-19 in Prison. Are Officials Ready for the Next Pandemic?*, THE MARSHALL PROJECT (June 30, 2021, 6:00 AM), https://www.themarshallproject.org/2021/06/30/a-half-million-people-got-covid-19-in-prison-are-officials-ready-for-the-next-pandemic [https://perma.cc/E7WC-ZB4C]; *see also* Bill Chappell, *Crowded U.S. Jails Drove Millions of COVID-19 Cases, A New Study Says*, NPR (Sept. 2, 2021, 11:00 AM), https://www.npr.org/2021/09/02/1033326204/crowded-jails-drove-millions-of-covid-19-cases-a-new-study-says [https://perma.cc/32ZK-8YDS]; COVID PRISON PROJECT, https://covidprisonproject.com/ [https://perma.cc/MQ5Z-M9EX] (last visited Feb. 11, 2022).

6. RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 247 (2007); *see also* Katherine LeMasters, Lauren Brinkley-Rubenstein, Morgan Manner, Meghan Peterson, Kathryn Nowotny, & Zinzi Bailey, *Carceral Epidemiology: Mass Incarceration and Structural Racism During the COVID-19 Pandemic*, 7 LANCET PUB. HEALTH e287 (2022), https://www.thelancet.com/action/showPdf?pii=S2468-2667%2822%2900005-6 [https://perma.cc/TG4E-JJUT] (finding that structural racism in American carceral systems impeded those systems from adequately responding to the COVID-19 pandemic).

nonprofit civil rights organizations were engaged in fighting the carceral state's mechanized neglect of BIPOC incarcerated people.[7] Lawyers at the Prisoners' Rights Project of The Legal Aid Society ("PRP"),[8] where I serve as a Supervising Attorney, played a key role in this effort. PRP collaborated with grassroots organizations, law firms, medical experts, and journalists to build and refine a holistic advocacy strategy aimed at improving conditions in, and freeing its clients from, New York State prisons.[9] Together, collaborators invoked New York State's habeas corpus statute to seek the release of medically vulnerable incarcerated people susceptible to serious complications or death from COVID-19. In early 2021, after mixed results, collaborators refined their litigation strategies, working directly with organizers to implement "movement lawyering" models.[10] These new strategies resulted in landmark victories in both federal and state courts.

This article will provide an 18-month retrospective snapshot of PRP's state prison pandemic response. I will tie PRP's coronavirus-related prisoners' rights litigation to the larger decarceration movement by addressing several central strategic considerations about the pitfalls of crisis lawyering, the benefits and drawbacks of traditional civil rights lawyering models, the role of emerging "movement lawyering" models, the oftentimes illusory distinction between success and failure, and the role of the prisoners' rights lawyer within the larger movement for BIPOC lives. I will close by sharing four lessons I learned while fighting for my clients during the first 18 months of the COVID-19 pandemic. My goal is to assist new nonprofit civil rights lawyers—particularly recent law graduates—as they develop their own practices. Ultimately, PRP's 18-month COVID-19 crisis lawyering journey is a case study that can help build a nonprofit civil rights lawyering space that is more responsive to the needs of the movements we exist to serve.

7. *See, e.g.*, Donna Lieberman & Michael Hardy, *With COVID-19 Exploding in Jails and Prisons, Cuomo Must Do More*, N.Y. Civ. Liberties Union (Apr. 29, 2020, 12:00 PM), https://www.nyclu.org/en/news/covid-19-exploding-jails-and-prisons-cuomo-must-do-more [https://perma.cc/BPL4-TJH9] (calling on then-Governor Andrew Cuomo to do more to protect people who are incarcerated from COVID-19, and highlighting the New York Civil Liberties Union and The Legal Aid Society's joint suit against New York State to demand the release of people who were unnecessarily jailed for alleged parole violations); *COVID-19 Information & Resources for Clients*, LEGAL AID SOC'Y, https://legalaidnyc.org/get-help/covid-19/covid-19-information-for-clients/ [https://perma.cc/T54Q-RR2L] (last visited Feb. 11, 2022) (describing The Legal Aid Society's work on COVID-19 issues); *COVID-19 in Jails & Prisons*, KATAL CTR., https://katalcenter.org/covidbehindbars/ [https://perma.cc/99VP-3689] (last visited Feb. 11, 2022) (detailing the Katal Center's work on COVID-19 issues).

8. Throughout this article, I refer to The Prisoners' Rights Project interchangeably as "PRP" and "we."

9. *See* discussion *infra* Part II.

10. Movement lawyering is lawyering "through collective action led and directed by people most affected." Sarah Schwartz & Zoe Bush, *What is Movement Lawyering?* REBELLIOUS LAWYERING CONF. AUSTL., https://reblaw.com.au/what-is-movement-lawyering/ [https://perma.cc/F28G-FQTP] (last visited Aug. 7, 2022). It "strives to build lasting power in historically disempowered communities." *Id.* Movement lawyering is a holistic methodology that leverages multiple advocacy tools—not just litigation—to achieve its goals.

I.
A FAST-MOVING DISASTER: COVID-19 IN NEW YORK'S PRISONS

Prisons are public health disasters. The carceral state is a reflection of America's longstanding indifference to the health and well-being of poor BIPOC people, and the characteristics of the modern prison are indicative of this indifference.[11] In most prisons, incarcerated people are packed tightly into poorly ventilated and unsanitary spaces where they are denied basic cleaning and hygiene supplies, access to sanitary state-provided furnishings, and sufficient nutrition.[12] These conditions catalyze the spread of disease, including infectious airborne pathogens.[13]

For these and other reasons, the prisoners' rights community assembled when COVID-19 hit the United States.[14] Advocates understood that COVID-19's characteristics portended a crisis within prisons. Prior epidemics—including

11. *See generally* BARBARA H. ZAITZOW & ANTHONY K. WILLIS, LAWS, BEHIND THE WALL OF INDIFFERENCE: PRISONER VOICES ABOUT THE REALITIES OF PRISON HEALTH CARE (2021), https://www.mdpi.com/2075-471X/10/1/11/pdf [https://perma.cc/8WS8-R7WC] (describing the ineffectiveness of the prison health care system).

12. *See generally Prison Conditions*, EQUAL JUST. INITIATIVE, https://eji.org/issues/prison-conditions/ [https://perma.cc/Z7MN-J27G] (last visited Feb. 11, 2022) (describing the inhumane conditions that pervade prisons throughout the country); *Prisons in the United States of America*, HUM. RTS. WATCH, https://www.hrw.org/legacy/advocacy/prisons/u-s.htm [https://perma.cc/4G8D-NJ46] (last visited Feb. 11, 2022) (providing an overview of the dirty and unsafe conditions in America's jails and prisons); *Cruel, Inhuman, and Degrading Conditions*, ACLU, https://www.aclu.org/issues/prisoners-rights/cruel-inhuman-and-degrading-conditions [https://perma.cc/X3QX-S4G8] (last visited Feb. 11, 2022) (collecting ACLU resources on the degrading conditions to which people who are incarcerated are subjected); RUTH DELANEY, RAM SUBRAMANIAN, ALISON SHAMES, & NICHOLAS TURNER, VERA INST. JUST., REIMAGINING PRISON 13–30 (2018), https://www.vera.org/downloads/publications/Reimagining-Prison_FINAL3_digital.pdf [https://perma.cc/4FHK-MEQP] (offering a comprehensive look at who is in prison and what their experience is like, with a focus on the trauma engendered and constitutional violations faced).

13. *See generally* USAID, TUBERCULOSIS IN PRISONS: A GROWING PUBLIC HEALTH CHALLENGE (2014), https://www.usaid.gov/sites/default/files/documents/1864/USAID-TB-Brochure.pdf [https://perma.cc/Z6KJ-7RWU]; Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 CLINICAL INFECTIOUS DISEASES 1047, 1047 (2007), https://academic.oup.com/cid/article-pdf/45/8/1047/986547/45-8-1047.pdf [https://perma.cc/62H8-NP7M]; GABRIELLE BEAUDRY, SHAOLING ZHONG, DANIEL WHITING, BABAK JAVID, JOHN FRATER, & SEENA FAZEL, BMJ GLOB. HEALTH, MANAGING OUTBREAKS OF HIGHLY CONTAGIOUS DISEASES IN PRISON: A SYSTEMATIC REVIEW (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7670855/pdf/bmjgh-2020-003201.pdf [https://perma.cc/JD4Q-XL5V]; John Dannenberg, *Prisons as Incubators and Spreaders of Disease and Illness*, PRISON LEGAL NEWS, Aug. 2007, at 1, https://www.prisonlegalnews.org/news/2007/aug/15/prisons-as-incubators-and-spreaders-of-disease-and-illness/ [https://perma.cc/XV4Z-JEKQ].

14. *See* James Hamblin, *Mass Incarceration is Making Infectious Diseases Worse*, ATLANTIC (July 18, 2016), https://www.theatlantic.com/health/archive/2016/07/incarceration-and-infection/491321/ [https://perma.cc/9E2Y-TF4C]; Eric Reinhart, *How Mass Incarceration Makes Us All Sick*, HEALTH AFFS. (May 28, 2021), https://www.healthaffairs.org/do/10.1377/forefront.20210526.678786/full/ [https://perma.cc/9U5H-NZH6].

tuberculosis and novel influenza[15]—foreshadowed the COVID-19 crisis, and advocates feared that carceral agencies were unprepared to respond. These fears were realized. Catalyzed by daily staff movement, transfers, crumbling infrastructure, and other immutable features of the carceral environment, the conditions in America's prisons caused a rapid COVID-19 spike early in the pandemic.[16] At the end of 2020, the COVID-19 positivity rate was as much as four times higher in prisons than in the general population.[17] Many corrections agencies failed to implement the Centers for Disease Control and Prevention's ("CDC") recommendations aimed at preventing COVID-19 from ravaging correctional facilities.[18] Resource deficiencies certainly played a role, but in some instances, corrections agencies simply failed to deploy resources at their disposal.[19]

New York State prisons were harshly impacted by the COVID-19 crisis. The spring and summer of 2020 were disastrous for people incarcerated in New York's prisons, yet the fall and winter of 2020 were even worse. The New York State prison system experienced its largest COVID-19 spike between September and December of 2020.[20] This spike rapidly materialized and did not plateau or drop until well into 2021.[21] For example, on September 28, 2020, Elmira Correctional Facility ("Elmira") and Greene Correctional Facility ("Greene") each reported one

15. *See generally* J. O'Grady, M. Maeurer, R. Atun, I. Abubakar, P. Mwaba, M. Bates, N. Kapata, G. Ferrara, M. Hoelscher, & A. Zumla, *Tuberculosis in Prisons: Anatomy of Global Neglect*, 38 EUR. RESPIRATORY J. 752 (2011); Bick, *supra* note 13, at 1049.

16. Laura Hawks, Steffie Woolhandler, & Danny McCormick, *COVID-19 in Prisons and Jails in the United States*, 180 JAMA INTERNAL MED. 1041, 1041 (2020); Brendan Saloner, Kalind Parish, Julie A. Ward, Grace DiLaura, & Sharon Dolovich, *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 JAMA 602 (2020).

17. Beth Schwartzapfel, Katie Park, & Andrew Demillo, *1 in 5 Prisoners in the U.S. Has Had COVID-19*, THE MARSHALL PROJECT (Dec. 18, 2020, 6:00 AM), https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19 [https://perma.cc/E6LZ-LC5W].

18. *See, e.g.*, Letter from Texas Crim. Just. Coal. to Greg Abbott, Governor, State of Tex. (Mar. 16, 2020), https://www.texascjc.org/blog/mitigating-disaster-urgent-and-just-responses-covid-19-texas-justice-system [https://perma.cc/EG3B-E9ME]; ERIKA TAYAGI, NEAL MARQUEZ, & JOSHUA MANSON, UCLA L. COVID BEHIND BARS DATA PROJECT, A CRISIS OF UNDERTESTING: HOW INADEQUATE COVID-19 DETECTION SKEWS THE DATA AND COSTS LIVES (2021), https://uclacovidbehindbars.org/assets/cfr_report_final.pdf [https://perma.cc/5U4U-7P5U]; Emily Widra & Dylan Hayre, *Failing Grades: States' Responses to COVID-19 in Jails and Prisons*, PRISON POL'Y INITIATIVE (June 25, 2020), https://www.prisonpolicy.org/reports/failing_grades.html [https://perma.cc/8K77-64MC].

19. *See* Tiana Herring & Maanas Sharma, *States of Emergency: The Failure of Prison System Responses to COVID-19*, PRISON POL'Y INITIATIVE (Sept. 1, 2021), https://www.prisonpolicy.org/reports/states_of_emergency.html [https://perma.cc/TV9J-57X9] (grading states on their responses to COVID-19 in prison and noting states that "refused to address basic health . . . needs for those trapped inside").

20. The New York State Department of Corrections and Community Supervision does not publish retrospective statistics on the prevalence of COVID-19 within its prison system. It instead publishes point-in-time statistics, sometimes daily and sometimes less frequently. The Legal Aid Society compiles these statistics into a retrospective format. This information is on file with the author.

21. *Id.*

COVID-19 case.[22] By December 2, 2020, roughly 605 and 162 incarcerated people at each facility, respectively, had tested positive.[23] Similar spikes were reported throughout New York's prison system.[24] The system reported a total of 2,000 cases on December 12, 2020.[25] That number grew to 3,000 cases less than three weeks later, 4,000 cases by January 15, 2021, and over 5,200 cases by February 15, 2021.[26]

The advocacy community quickly sprang into action early in the pandemic. In the wake of New York's first reported COVID-19 case, advocates engaged then-Governor Andrew Cuomo directly and in the press, demanding that he take steps to prevent disaster.[27] Advocates pressured the State to release people who were susceptible to serious complications or death if they contracted COVID-19 and to take steps to improve conditions for those who remained in prison.[28] Between March 2020 and April 2020, Governor Cuomo and prison officials piloted an "early release initiative" nominally designed to reduce New York's prison population and to slow the spread of COVID-19.[29] The State reported that as of November 2020, about 3,147 people had been released "early" pursuant to this initiative.[30] However, the advocacy community has repeatedly characterized this release initiative as too narrow and poorly managed.[31]

Mere weeks after the pandemic began, the State made its intransigence clear. Multiple advocacy groups—nonprofits, legal services providers, law firms, and grassroots organizations—had become coronavirus response outfits, expending robust resources on coronavirus-related advocacy.[32] Some organizations directly engaged the New York Department of Corrections and Community Supervision ("DOCCS") during weekly meetings, reporting conditions in facilities and requesting updates on the State's pandemic response.[33] Others sent letters directly

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *See, e.g.*, Press Release, The Legal Aid Soc'y, Brooklyn Def. Servs., The Bronx Defs., New York Cnty. Def. Servs., & The Neighborhood Def. Serv. of Harlem, Joint Defender Statement Calling for Immediate Release of Vulnerable Incarcerated New Yorkers in Response to Coronavirus (Mar. 12, 2020), https://legalaidnyc.org/wp-content/uploads/2020/03/03-12-20-Joint-Defender-Statement-Calling-for-Immediate-Release-of-Vulnerable-Incarcerated-New-Yorkers-in-Response-to-Coronavirus.pdf [https://perma.cc/XPZ8-AA3B].

28. *Id.*

29. Ryan Tarinelli, *Certain NY Prisoners Will See Release Amid Pandemic Top Cuomo Aide Says*, N.Y.L.J. (Apr. 15, 2020, 12:23 PM), https://www.law.com/newyorklawjournal/2020/04/15/certain-ny-prisoners-will-see-release-amid-pandemic-top-cuomo-aide-says/ [https://perma.cc/W3UV-NFX8].

30. Reuven Blau, *'Hundreds' of Prisoners Approved for Early Release Stuck Behind Bars as COVID-19 Spikes*, CITY (Nov. 24, 2020, 8:59 PM), https://www.thecity.nyc/2020/11/24/21717723/prisoners-approved-for-early-release-stuck-behind-bars-covid [https://perma.cc/F3JE-H3QL].

31. *Id.*

32. *See* sources cited *supra* note 7.

33. *See* discussion *infra* Section II.A.

to Governor Cuomo and prison officials requesting updates about specific clients and put the State on notice of unconstitutional conditions in the prisons.[34] Advocates spearheaded petition drives, letter writing campaigns, and press advocacy.[35] Litigation strategies began to take shape. Despite these efforts, advocacy groups saw very little in the way of a good faith response from the State.[36]

II.
MAKING THE ROAD BY WALKING: COVID'S FIRST WAVE AND PRP'S MASS WRIT STRATEGY[37]

Crises do not accommodate strategic, long-term planning. Pressed into hasty decision-making, humans employ psychological shortcuts—including the "availability heuristic"—to retrieve explanations for, and respond to, emergencies.[38] Crises tend to distract us from potentially relevant information and alternative approaches.[39] This quandary marred PRP's initial response to COVID-19's spread in New York's prisons. Harried by the emergency, we scrambled to engage prison officials. When officials proved unreceptive, we built conventional prison conditions lawsuits within the habeas context. In this process, we overlooked more fruitful, movement-building options—options we eventually employed, with great success.[40]

34. *Id.*

35. *See, e.g.*, *Gov. Cuomo is Forcing Incarcerated People to Make Hand Sanitizer for Less Than $1 a Day. Demand a Humane Response to Coronavirus.*, COLOR OF CHANGE (Mar. 25, 2020), https://act.colorofchange.org/sign/ny_cuomo_coronavirus/?source=RAPP [https://perma.cc/U3PF-WC42]; Stanley Bellamy, *I Am a Prisoner in New York State. I Am Asking Governor Cuomo for Compassion*, GUARDIAN (Apr. 19, 2020, 8:23 AM), https://www.theguardian.com/commentisfree/2020/apr/19/prisoner-new-york-city-governor-cuomo-compassion [https://perma.cc/6W5B-2FG2]; Press Release, Release Aging People in Prison Campaign, Parole Preparation Project, #HALTsolitary Campaign, VOCAL-NY, Worth Rises, Jim Owles Liberal Democratic Club, NY Prisons New COVID-19 Webpage Raises Serious Questions (Apr. 11, 2020), https://rappcampaign.com/april-11-2020-ny-prisons-new-covid-19-webpage-raises-serious-questions-advocatess-press-release-covid-19-briefing/ [https://perma.cc/ED4F-JC54].

36. *See* David Leonhardt, Opinion, *What Cuomo Hasn't Done*, N.Y. TIMES (Mar. 25, 2020), https://www.nytimes.com/2020/03/25/opinion/coronavirus-prisons-cuomo.html [https://perma.cc/WC3V-8WHF] (describing the insufficiency of Governor Cuomo's response to COVID-19 in prisons during the first month of the pandemic).

37. What follows is an overview of PRP's "mass writ" and civil rights litigation strategies to slow the spread of COVID-19 in New York State prisons and free as many people serving time as possible. This paper does not address The Legal Aid Society's efforts to free pretrial detainees incarcerated in New York City jails, the Society's individual writ practice (beyond *MacKenzie*, *infra* Section III.A), or the Society's efforts to free specific populations—such as LGBTQ+ people and pregnant people—from New York State prisons. It also does not address the Society's press, clemency, commutation, and medical parole strategies or its collaboration with other nonprofit civil rights/appellate defender organizations.

38. *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 129–36 (2011).

39. *Id.* at 130.

40. *See* discussion *infra* Part III.

A. The Gift and Curse of Direct Engagement with Prison Officials

The civil rights lawyering landscape has transformed since the Warren Court era, as the Federalist Society has rebuilt the federal bench as a vehicle for the reactionary right.[41] In addition, the Prison Litigation Reform Act,[42] plausibility pleading,[43] and other standards have often prevented incarcerated people from meaningfully accessing the courts. Electoral politics dominate the New York State courts.[44] Against this backdrop, direct engagement with our adversaries—or "administrative advocacy"[45]—provides an indispensable opportunity to work outside corrupted judicial systems to advance justice for our clients. Despite its benefits, administrative advocacy requires us to carefully toe the line between collaboration and co-optation. We often manage this dynamic by meaningfully engaging with directly impacted people and grassroots groups prior to their conversations with adversaries and demanding of adversaries, at least initially, what directly impacted people and grassroots groups would demand if they were in the room.

We typically initiate administrative advocacy through written communications, or "demand letters."[46] Demand letters offer a unique opportunity to frame a legal issue or establish discursive control early in a negotiation process.[47] The demand customarily includes a request for corrective action to

41. Stephen Rohde, *Taking Over the Judiciary: The Impact of the Federalist Society*, L.A. REV. OF BOOKS (Aug. 15, 2013) (quoting MICHAEL AVERY & DANIELLE MCLAUGHLIN, THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS 11–12 (2013)), https://lareviewofbooks.org/article/taking-over-the-judiciary-the-impact-of-the-federalist-society/ [https://perma.cc/XJ6A-J8F7] ("The dockets of the federal courts are brimming with test cases brought or defended by Federalist Society members in the government and in conservative public interest firms to challenge government regulation of the economy; roll back affirmative action; invalidate laws providing access to the courts by aggrieved workers, consumers, and environmentalists; expand state support for religious institutions and programs; oppose marriage equality; increase statutory impediments to women's ability to obtain an abortion; defend state's rights; increase presidential power; and otherwise advance a broad conservative agenda.").

42. Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE (Apr. 26, 2021), https://www.prisonpolicy.org/reports/PLRA_25.html [https://perma.cc/TRP8-78JT].

43. Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 161–66 (2011).

44. *See generally* N.Y. STATE COMM'N TO PROMOTE PUB. CONFIDENCE IN JUD. ELECTIONS, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 5 (2006), http://moderncourts.org/wp-content/uploads/2013/10/FerrickJudicialElection.pdf [https://perma.cc/9LLT-2C2J]. Political party insiders allegedly "'dole out' judgeships as political patronage and . . . candidates must cater to their local political parties to have a chance at an elected position." *Id.* at 19–20.

45. Jeffrey S. Gutman, *Alternatives and Complements to Litigation*, *in* FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS ch. 1.2, ch. 1.2.B. (Sargent Shriver Nat'l Ctr. on Poverty L. ed., 2013), https://federalpracticemanual.org/chapter1/section2/ [https://perma.cc/NS33-QGR2].

46. Demand letters are used in civil rights and other contexts. *See Demand Letter*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/demand_letter [https://perma.cc/H5UX-99DL] (last visited June 28, 2022).

47. *Id.*

prevent litigation or sets parameters for negotiation in advance of litigation.[48] When published either by press or some other means, demand letters can be a tool to support mobilized people or mobilize the non-mobilized public. Questions abound about the appropriate use of demand letters. As part of a direct engagement strategy, demand letters can expose litigants to bad-faith negotiation or strategic disadvantage.[49] Despite this, we have found demand letters useful where the legal landscape is uncertain, there exists a significant informational asymmetry between lawyers and their adversaries, or there is interest convergence between lawyers and their adversaries.

The burgeoning COVID-19 pandemic satisfied some of these criteria, at least initially. Days after the first COVID-19 case was reported in New York, PRP sent a demand letter to DOCCS officials to request information about the agency's COVID-19 protection plan.[50] Shortly after we sent this letter, we spoke with prison officials. We followed this conversation with several additional conversations in subsequent weeks and one additional demand letter.[51] Our engagement was informed by our prior experience litigating infectious disease cases[52] and speaking with clients about their health and safety concerns. However, we missed a crucial opportunity to connect with grassroots advocates prior to these conversations. As I address later, despite significant overlap between our concerns and the concerns of directly impacted people,[53] we failed to address some of the most important concerns that animated the organizing community's approach to the initial spread of COVID-19—concerns we only found out about later, after we engaged with grassroots groups.

About a month into the pandemic, and after extensive direct engagement, it was clear prison officials would not meaningfully address our concerns. We had received reports from incarcerated people that prison officials refused to provide personal protective equipment yet disciplined them for wearing makeshift

48. *Id.*

49. *Why I Don't Write Demand Letters*, CHAMPAGNE L. FIRM (Apr. 5, 2019), https://champagne-law.com/why-i-dont-write-demand-letters/ [https://perma.cc/XQ5N-5PE9].

50. Letter from author, Dori A. Lewis, Supervising Att'y, The Legal Aid Soc'y's Prisoners' Rts. Project, & Karen L. Murtagh, Exec. Dir., Prisoners' Legal Servs. of N.Y., to Anthony Annucci, Acting Comm'r, N.Y. State Dep't of Corr. & Cmty. Supervision, & John Morley, Chief Med. Officer, N.Y. State Dep't of Corr. & Cmty. Supervision (Mar. 4, 2020) (on file with author).

51. Letter from author, Dori A. Lewis, Supervising Att'y, The Legal Aid Soc'y's Prisoners' Rts. Project, & Karen L. Murtagh, Exec. Dir., Prisoners' Legal Servs. of N.Y., to Anthony Annucci, Acting Comm'r, N.Y. State Dep't of Corr. & Cmty. Supervision, & John Morley, Chief Med. Officer, N.Y. State Dep't of Corr. & Cmty. Supervision (Mar. 18, 2020) (on file with author).

52. *See, e.g.*, Docket, *Vega v. Ward*, No. 82-CV-6475 (S.D.N.Y. Mar. 24, 1997) (challenging New York City's failure to treat incarcerated people with Acquired Immunodeficiency Syndrome); *Inmates of N.Y. State with Hum. Immunodeficiency Virus v. Cuomo*, No. 90-CV-252, 1991 WL 16032, at *1–4 (N.D.N.Y. Feb. 7, 1991) (class action challenging New York's failure to treat incarcerated individuals with HIV).

53. *See* discussion *infra* Section II.C.

masks.[54] We also heard from incarcerated people that certain facilities lacked the supplies or infrastructure to implement testing, quarantine, and isolation protocols. It was then that we engaged grassroots organizations and took initial steps to incorporate their goals within our administrative advocacy. Organizations warned us that release was the only remedy sufficient to stave off mass death but harbored strategic disagreements. By early April 2020, many of these organizations remained at loggerheads over which demands to prioritize. These disagreements were aired during strategy sessions, during which some organizations suggested that we demand release only for medically vulnerable elders. A wider margin of organizations, however, suggested that we demand release criteria unconnected to crime of conviction or prison disciplinary history. We mediated these differing approaches internally while crafting a second set of demand letters and developing litigation strategies.

The next steps in our direct engagement approach included our third and fourth demand letters to prison officials, both of which centered the internally mediated demands of grassroots groups.[55] After long organizational conversations, we agreed that release was indeed the best remedy. We narrowed our third demand letter, however, to four incarcerated PRP clients who were medically vulnerable and/or elderly, close to an approved release date, incarcerated for a "nonviolent" crime, and prepared for community release.[56] By this time, we had spoken with scores of incarcerated people via telephone about conditions in the prisons, their COVID vulnerabilities, and the steps prison officials were taking to respond to the pandemic. But despite all this information, we chose to limit our demand to people we thought would be most palatable to prison officials based largely on an assessment of the litigation benefits. In that process, we differed with the balance of grassroots organizations that had advocated for a more ambitious approach. This decision previewed many of the strategic considerations we grappled with during the following 16 months.

54. Reuven Blau, *State Prisoners Punished for Wearing Masks as City Jails OK Them*, CITY (Apr. 3, 2020, 7:37 PM), https://www.thecity.nyc/coronavirus/2020/4/3/21211891/state-prisoners-punished-for-wearing-masks-as-city-jails-ok-them [https://perma.cc/85VQ-XASS].

55. Letter from author to Adam Silverman, Gen. Couns., N.Y. State Dep't of Corr. & Cmty. Supervision, & Cal Whiting, Assistant Sec'y for Pub. Safety, Off. of Governor Andrew Cuomo (Mar. 30, 2020) [hereinafter March 30 Letter to Silverman & Whiting] (on file with author); Letter from author & David Loftis, Att'y-in-Charge, Post-Conviction & Forensic Litig., The Legal Aid Soc'y, to Andrew Cuomo, Governor, State of N.Y., and Anthony Annucci, Acting Comm'r, N.Y. State Dep't of Corr. & Cmty. Supervision (Apr. 6, 2020) [hereinafter April 6 Letter to Governor Cuomo & Comm'r Annucci] (on file with author); Reuven Blau & Rosa Goldensohn, *Call for Cuomo to Free Ailing Prisoners as Virus Spreads*, CITY (Apr. 1, 2020, 6:26 PM), https://www.thecity.nyc/government/2020/4/1/21210376/call-for-cuomo-to-free-ailing-prisoners-as-virus-spreads [https://perma.cc/M4RF-7FDY]; Julia Craven, *Rikers Reports First Coronavirus Death as Legal Aid Calls for Prisoner Release*, SLATE (Apr. 7, 2020, 5:26 PM), https://slate.com/news-and-politics/2020/04/the-coronavirus-crisis-among-incarcerated-people-in-new-york-claims-its-second-fatality.html [https://perma.cc/P83J-WEET].

56. March 30 Letter to Silverman & Whiting, *supra* note 55.

We have found that these considerations—framing demands, leveraging the legal system's incrementalism, mediating the respective positions of grassroots groups—often turn on the utility of triangulation and the fine line between triangulation and disloyalty. Derrick Bell grapples with that line, in a race justice context, in his seminal writings on *Brown v. Board of Education*.[57] In *Silent Covenants: Brown v. Board of Education and Unfulfilled Hopes for Racial Reform*, Bell posits the following:

> [T]he interest of [B]lacks in achieving racial equality will be accommodated only when that interest converges with the interests of whites in policy-making positions. This convergence is far more important for gaining relief than the degree of harm suffered by [B]lacks or the character of proof offered to prove that harm.[58]

This principle, colloquially referred to as the "interest convergence dilemma,"[59] has tremendous implications for civil rights attorneys in all phases of litigation and advocacy. If the principle holds true, social justice movements succeed only where they establish meaningful, common ground with proponents of the prevailing social order, because policymakers do not sanction social justice for social justice's sake—they sanction it only where it serves the interests of the

57. *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) [hereinafter Bell, *Interest-Convergence Dilemma*]; DERRICK A. BELL, JR., SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004) [hereinafter BELL, SILENT COVENANTS].

58. BELL, SILENT COVENANTS, *supra* note 57, at 69.

59. *See generally* Bell, *Interest-Convergence Dilemma*, *supra* note 57.

powerful elite.[60] For civil rights attorneys, this would mean that only carefully calibrated triangulation—in this case, direct engagement strategies that establish common ground with prison officials—stands a chance at success. Bell emphasizes the diminishing returns of strategies aimed at establishing common ground, however: "[e]ven when the interest convergence principle results in an effective racial remedy, that remedy will be abrogated at the point that policymakers fear the remedial policy is threatening the superior social status of whites, particularly those in the middle and upper classes."[61]

As civil rights litigators, we infrequently mention the interest convergence dilemma itself, but frequently speak its language and remain confounded by its implications. In the COVID-19 context, we felt we could establish *some* common ground with prison officials but remained uncertain whether we could overcome

60. One powerful example of interest convergence in a civil rights context emerges from litigation challenging the constitutionality of affirmative action—or, more specifically, race-conscious admissions policies—in public colleges and universities. Affirmative action programs in public higher education were ostensibly designed to benefit students from traditionally underrepresented backgrounds. *See* Staff Writers, *A History of Affirmative Action in College Admissions*, BEST COLLS., Aug. 10, 2020, https://www.bestcolleges.com/news/analysis/2020/08/10/history-affirmative-action-college/ [https://perma.cc/3R3W-CMG3] ("Affirmative action policy has shaped U.S. higher education as we know it. In the late 1960s, admissions departments around the country began considering race as a factor when admitting new students. These policies aimed to accept more students of color who had historically been excluded from colleges and universities."). But, in a nod to the "interest convergence" theory, courts have upheld the constitutionality of affirmative action by pointing to its benefits for the student body at-large—including white students—rather than its remedial benefits for Black and brown students. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 329–30 (2003) ("The Law School's interest is not simply 'to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.' That would amount to outright racial balancing, which is patently unconstitutional. Rather, the Law School's concept of critical mass is defined by reference to the education benefits that diversity is designed to produce. These benefits are substantial. As the District Court emphasized, the Law School's admissions policy promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.' These benefits are 'important and laudable' because 'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'") (citations omitted) (first quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978); then quoting Application to Petition for Certiorari at 246a, *Grutter*, 539 U.S 306 (No. 02-516); and then quoting *id.* at 246a, 244a). One could credibly argue that absent this "interest convergence," between the interests of students of color and white students, the Supreme Court would have struck down, as unconstitutional, affirmative action in higher education, as it appears to be poised to do at the time of this writing, in *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 14-CV-954, 2021 WL 7628155 (M.D.N.C. Oct. 18, 2021), *appeal docketed*, No. 21-2263 (4th Cir. Nov. 10, 2021), *cert. granted before judgment filed*, No. 21-707 (U.S. Nov. 11, 2021).

61. BELL, SILENT COVENANTS, *supra* note 57, at 69.

significant countervailing concerns about "public safety."[62] We were also uncertain whether our remedial goals—namely decarceration—so gravely threatened the social order that neither courts nor prison officials would order them.

In our context, the threat to the social order was clear. The prison system is built upon white supremacy and capital expropriation.[63] Studies suggest that white people rely on the existence of punitive criminal justice policies for peace of mind and perceived protection from harm.[64] Local governments police poor BIPOC people in order to satisfy this racialized desire for peace and protection.[65] Similarly, middle- and upper-class white residents of economically depressed regions rely on the carceral state for jobs and economic advancement.[66] Indeed, New York's white rural middle class exists in large measure by virtue of the existence of the carceral state. Without it, jobs would vanish, and the rural economy would stagnate.[67] If the state ceased to serve the carceral apparatus—perhaps by providing BIPOC people with medical and other resources sufficient to forestall their involvement in the criminal legal system—it would directly subordinate white economic interests.

62. Reactionary media had expressed concerns that by releasing incarcerated people in response to COVID-19, prison and jail officials would imperil "public safety." *See, e.g.*, Larry Celona, Joe Marino, Georgett Roberts, & Bruce Golding, *Scores of NYC Inmates Serving Time on Rikers Set for Early Release Amid Surging Crime*, N.Y. POST (Sept. 6, 2021, 6:33 PM), https://nypost.com/2021/09/06/second-wave-of-nyc-inmates-set-for-early-release-sources/ [https://perma.cc/MKD2-NBQA]. These concerns were rarely supported by specific evidence and have been largely debunked by researchers. *See, e.g.*, NAT'L ACADS. OF SCIS., ENG'G, & MED., DECARCERATING CORRECTIONAL FACILITIES DURING COVID-19: ADVANCING HEALTH, EQUITY, AND SAFETY 3 (2020). This "public safety" discourse factored heavily in our COVID-19 prison advocacy and litigation strategy.

63. *See generally* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 28–39 (Greg Ruggiero ed., 2003) (describing the American prison system as an outgrowth of American chattel slavery and convict leasing).

64. *See generally* NAZGOL GHANDNOOSH, THE SENT'G PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES 20 (2014).

65. *See, e.g.*, Andrea Cipriano, *'Overpolicing' Still Common in NYC Black Neighborhoods, Report Finds*, CRIME REP. (Sept. 23, 2020), https://thecrimereport.org/2020/09/23/overpolicing-still-common-in-nyc-black-neighborhoods-report-finds/ [https://perma.cc/8E4G-R8U6]; Alice Speri, *The NYPD is Still Stopping and Frisking Black People at Disproportionate Rates*, INTERCEPT (June 21, 2021, 7:00 AM), https://theintercept.com/2021/06/10/stop-and-frisk-new-york-police-racial-disparity/ [https://perma.cc/3QMC-65M9]; Prison Pol'y Initiative & VOCAL-NY, PRISON POL'Y INITIATIVE, *Mapping Disadvantage: The Geography of Incarceration in New York State* (Feb. 19, 2020), https://www.prisonpolicy.org/origin/ny/report.html [https://perma.cc/4AND-TZEY].

66. RYAN S. KING, MARC MAURER, & TRACY HULING, THE SENT'G PROJECT, BIG PRISONS, SMALL TOWNS: PRISON ECONOMICS IN RURAL AMERICA 2–5 (2003), https://www.sentencingproject.org/wp-content/uploads/2016/01/Big-Prisons-Small-Towns-Prison-Economics-in-Rural-America.pdf [https://perma.cc/3ZCL-BMJM].

67. *Id. See also* Brian Mann, *Democrats in Albany Rethink Using NY's Prison System as an Economic Engine*, N. COUNTRY PUB. RADIO (July 1, 2019), https://www.northcountrypublicradio.org/news/story/39019/20190701/democrats-in-albany-rethink-using-ny-s-prison-system-as-an-economic-engine [https://perma.cc/Z27T-RHBH].

This is not to say that reactionary white social and economic interests forestall interest convergence. To bear fruit, however, any convergence must supersede these significant countervailing interests. This dynamic had significant implications for our work establishing interest convergence between our clients, who were at risk of contracting COVID-19 behind bars, and the prison system itself. We adduced early on that the prison system's interest in "social justice" for our clients—to the extent it existed at all—was far too abstract, or insufficiently widespread, to establish the interest convergence we were looking for. We considered the interest of corrections employees in the maintenance of a safe work environment and appealed to this interest in our press and related communications.[68] Considering COVID denialism among corrections staff, and their interest in the maintenance of the carceral state, we were worried that standing alone, these appeals would fall flat. Finally, we considered the interest of policymakers—particularly Governor Cuomo—in burnishing their leadership credentials. By April 2020, Governor Cuomo had been hailed as "America's Governor."[69] Cuomo was at least atmospherically interested in protecting public health for all New Yorkers.[70] But again, we considered that, standing alone, this interest was largely offset off by Cuomo's record on prisoners' rights issues.[71]

As our deliberations reflect, the interest convergence dilemma is unsolvable. We wrestled with these considerations for weeks, ultimately settling on what we considered a "third way." Because we viewed our third demand letter as one last opportunity to affirmatively seek the cooperation of prison officials, and particularly because we faced an uncertain litigation landscape, we leveraged each of the potential convergences outlined above. We had hoped that in the aggregate, they would appeal to prison officials. We bolstered our third demand letter with

68. *See, e.g.*, Sydney Pereira & Gwynne Hogan, *Sing Sing Prison Inmate with Coronavirus Dies as Defense Lawyers Demand Release of Vulnerable Prisoners*, GOTHAMIST (Apr. 2, 2020), https://gothamist.com/news/sing-sing-prison-inmate-coronavirus-dies [https://perma.cc/PVB9-HH6W] (quoting March 30 Letter to Silverman & Whiting, *supra* note 55).

69. Susan Milligan, *How Coronavirus Made Andrew Cuomo America's Governor*, U.S. NEWS & WORLD REP. (Mar. 23, 2020, 6:12 PM), https://www.usnews.com/news/health-news/articles/2020-03-23/how-coronavirus-made-andrew-cuomo-americas-governor [https://perma.cc/M9L5-A8YE].

70. *Id.*

71. *See* Rebecca McCray, *Andrew Cuomo Promised Criminal Justice Reforms, but New York is Still Waiting*, APPEAL (Nov. 24, 2020), https://theappeal.org/andrew-cuomo-promised-criminal-justice-reforms-but-new-york-is-still-waiting/ [https://perma.cc/DVH8-TAMV] (outlining former Governor Cuomo's record on prisoners' rights issues); Jim O'Grady, *Advocates Decry Governor Cuomo for Barely Using Clemency, a Tool to Redress the Wrongs of Mass Incarceration*, WNYC (Aug. 23, 2021), https://www.wnyc.org/story/advocates-decry-cuomo-barely-using-clemency-governors-tool-redress-wrongs-mass-incarceration/ [https://perma.cc/TQY7-78QB] (describing former Governor Cuomo's refusal to utilize his clemency authority); Nick Reisman, *Advocates Hope Hochul Will Break with Cuomo on Prison Policies*, SPECTRUM NEWS 1 (Oct. 7, 2021, 5:28 AM), https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2021/10/07/advocates-hope-hochul-will-break-with-cuomo-on-prison-policies [https://perma.cc/HX3P-4TWQ] (parsing the Cuomo Administration's record on prisoners' rights issues).

references to social justice, staff safety, and leadership.[72] Unfortunately, this tactic did not work. Prison officials were unmoved by our appeals. They refused to engage with us and to release our clients, despite their nonviolent convictions and robust release plans.

Before writing our fourth demand letter, we re-engaged several grassroots organizations and legal services providers to learn more about the experiences of vulnerable people in state custody. We also formalized our relationship with The Legal Aid Society's Criminal Appeals Bureau ("CAB"), which represents clients in post-conviction proceedings.[73] During these conversations, we decided that there was little benefit to triangulating further. Prison officials had not responded to our previous demands. Although we limited our fourth demand letter to medically vulnerable and/or elderly people, we included people convicted of "violent" offenses, people with "serious" disciplinary records, and people with remote approved release dates.[74] In addition to PRP and CAB clients, we included incarcerated people working with grassroots organizations such as the Release Aging People in Prison Campaign ("RAPP"), the Parole Preparation Project ("PPP"), and the Defenders Clinic at the City University of New York ("CUNY") School of Law.[75] We squarely demanded release as the only remedy sufficient to protect our clients and used this letter as a press and organizing tool.[76] As we expected, prison officials failed to respond to our fourth demand letter. Energy was mounting around potential litigation and direct-action efforts.

Our fifth and final demand letter centered pregnant and post-partum clients who were susceptible to serious complications or death from COVID-19.[77] Between organizing momentum, press attention unique to this effort,[78] political considerations, and a significantly sympathetic public message—in other words, sufficient interest convergence—prison officials meaningfully engaged us on behalf of this group. Despite this engagement, we were still forced to litigate to free many of these clients.[79]

The results of our direct engagement strategy beg assessment of the utility of direct engagement in decarceration work. Under the guise of direct engagement,

72. March 30 Letter to Silverman & Whiting, *supra* note 55.

73. *Criminal Appeals Bureau*, LEGAL AID SOC'Y, https://legalaidnyc.org/programs-projects-units/criminal-appeals-bureau/ [https://perma.cc/W97C-QFMZ] (last visited Feb. 4, 2022).

74. April 6 Letter to Governor Cuomo & Comm'r Annucci, *supra* note 55.

75. *Id.*

76. *Id.*

77. Letter from D. Lewis & S. Gebreselassie to Anthony Annucci, Acting Comm'r, N.Y. State Dep't of Corr. & Cmty. Supervision, & K. Gibson (Apr. 28, 2020) (on file with author).

78. *See, e.g.*, Caroline Lewis, *NY Women's Prison, Housing Mothers and Newborns, Hit By COVID-19 Outbreak*, GOTHAMIST (Apr. 20, 2020, 10:00 PM), https://gothamist.com/news/ny-womens-prison-housing-mothers-and-newborns-hit-by-covid-19-outbreak [https://perma.cc/ZFY4-Z6EU].

79. *See* Petition for Habeas Corpus, People *ex rel.* Gebreselassie v. Lamanna, No. 55043/2020 (N.Y. Sup. Ct. May 15, 2020).

we took steps that have come under significant fire by activists.[80] First, we engaged grassroots organizations but did not formalize these arrangements, instead using the information we gained from this engagement to fashion our own strategies for attacking state violence. Second, we offset our direct engagement strategy against the incrementalism of our adversaries. This approach was a near abject failure. Apart from a small segment of our pregnant and post-partum clients, prison officials did not report any releases in response to our direct engagement. Although the state announced a meager "early release" initiative, that initiative did not comport with the release criteria we had demanded.[81] We also did not achieve our secondary prison conditions-related goals. We were left to break the news to our clients and their families. In early-April 2020 we pivoted to more adversarial tactics, disheartened that direct engagement had largely failed.

B. Release Is the Only Remedy—Habeas Proceedings in Westchester and Oneida Counties

During our ongoing conversations, our clients and their grassroots advocates insisted that release was the only remedy adequate to forestall a mass casualty situation in the prisons. By late April 2020, we had devoted significant time to tactical conversations with directly impacted people and non-legal organizations agitating on behalf of incarcerated people. As lawyers in service of the decarceration and prisoners' rights movements, we explained the pitfalls of litigation options, including prison conditions litigation in federal court, prison conditions litigation in state court, and mandamus actions in state court. Directly impacted people and their advocates uniformly reported what we later embraced—our role as movement lawyers is to pursue the predominant litigation goals of the movement and of directly impacted people, so long as viable litigation paths exist. Amid a deadly global pandemic, the movement's predominant litigation goal was decarceration through release. Our partners in the movement were largely unreceptive to more conservative approaches. This dynamic required us to depart from the conventional strategies civil rights lawyers frequently employ. Yet it took us several months and two rounds of legal filings to adequately tie the movement's litigation goal to our litigation strategy.[82]

We started by defining the "movement" itself. In internal conversations, we informally defined the "movement" as the mobilized, non-legal, directly impacted constituencies working on prisoners' rights and prisoners' liberation initiatives in the State of New York. In other words, we did not define the movement as

80. *See* Law for Black Lives, *Movement Lawyering in Moments of Crisis: Some Things White Allies (and Others) Can Do*, HUM. RTS. MAG., Jan. 2021, at 22 (laying out the critical components of movement lawyering, including building meaningful relationships with directly impacted communities and organizers, taking direction from directly impacted communities and organizers, and pursuing the goals of directly impacted communities and organizers).

81. *See* Blau, *supra* note 30.

82. *See* discussion *infra* Section 0.

consisting of various formalized, incorporated, and well-resourced legal organizations working on these issues. Similarly, we did not define the movement as consisting of organizations that are predominantly white and wealthy, think tanks, or large corporations. We defined the movement to exclusively include the people who stand to suffer or thrive as a direct result of the existence of the carceral system.

We acknowledged that the movement consists of individual people with sometimes divergent viewpoints—including reformist and even reactionary viewpoints[83]—and that robust debate exists in movement spaces. We also acknowledged that line-drawing is a crucial aspect of any coherent movement—advocates cannot act on every potentially contradictory idea that gains traction in movement spaces. But by defining the movement as we did, we identified the mobilized constituencies that had already drawn these lines and organized around pre-existing priorities for liberation. These mobilized constituencies included people organizing in New York's prisons—people with pre-existing relationships with PRP—including the RAPP, PPP, the Campaign for Alternatives to Isolated Confinement, Mental Health Alternatives to Solitary Confinement, and other grassroots organizations.

Once we defined the movement, we had to identify precisely what it meant to work "for" the movement, particularly during a pandemic. This is yet another dilemma we often face and a source of much disagreement.[84] For us, working "for" the movement means building sustainable partnerships with directly impacted people and grassroots organizations over *years* and developing a common and mutually reinforcing theory of change without which we cannot build those sustainable partnerships.[85] Without sustainable partnerships, collaboration is functional rather than consistent. Without consistent collaboration, we are leeches, looking for the movement's support only when it feeds ivory tower projects. Work "for" the movement must be symbiotic. There must be a commitment on the part of civil rights organizations to exercise these partnerships, even when it is difficult. With consistency, it is easier to partner during emergencies. Players and stakeholders know and trust each other at the outset.

By the same token, we do not believe working "for" the movement means jettisoning strategic and tactical debate and disagreement. Ultimately, our value in

83. For an explanation of law and order, reform, and abolitionist viewpoints, see Sonali Kolhatkar, *Abolition Through the Ages: Reform Versus Transformation, Then and Now*, YES! MAG. (Nov. 15, 2021), https://www.yesmagazine.org/social-justice/2021/11/15/abolition-reform-vs-transformation [https://perma.cc/E2MQ-J8VT]; Molly Lipson, *Reform vs. Abolition: An Introduction*, FOR EVERYONE COLLECTIVE (Mar. 3, 2022), https://www.foreveryoneco.com/post/reformvsabolition [https://perma.cc/P76F-R9NH]; Chelsea Miller, *Prison Reform/Prison Abolition*, STATES OF INCARCERATION, https://statesofincarceration.org/story/prison-reformprison-abolition [https://perma.cc/Q5X4-PDQ4] (last visited Jan. 6, 2022).

84. Betty Hung, *Law and Organizing from the Perspective of Organizers: Finding a Shared Theory of Social Change*, 1 L.A. PUB. INT. L.J. 4 (2009).

85. *Id.*

any movement is tied to our legal expertise. Our unique skillset is our understanding of the law, and our chief contribution is our ability to foresee and explain the consequences of various legal strategies. In designing legal strategies for liberation, we are uniquely positioned to describe the unique forms of oppression exercised by the courts. But directly impacted people must ultimately craft legal goals. Our role is to ensure that they make informed and strategic choices. And our challenge is to impart information while maintaining client- and movement-centeredness, particularly where directly impacted people insist upon pursuing a legal strategy that, per our legal assessment, is likely to fail. We confronted this challenge as we crafted a litigation strategy aimed at release.

The legal strategy we settled on attempted to both vindicate organizers' ambitions and preserve alternatives for conservative jurists. We crafted the theory that by incarcerating people who were deemed by the CDC to be uniquely vulnerable to a deadly pathogen, in conditions where preventative measures were effectively impossible, prison officials were "deliberately indifferent" to a serious risk of medical harm in violation of the Eighth Amendment to the United States Constitution and its corollary in the New York State Constitution.[86] This argument was a straightforward application of Eighth Amendment jurisprudence in infectious disease cases.[87] What was novel, however, was our argument that these claims were cognizable in New York State's habeas statute, Article 70 of the New York Civil Practice Law and Rules ("Article 70").[88] It was one thing to establish a constitutional violation. It was another thing altogether to establish that release from custody was the only remedy adequate to abate that constitutional violation. Typically, successful prison conditions lawsuits resolve in court orders to improve conditions, not release orders.[89]

We crafted this strategy amidst a legal landscape that was unclear on the availability of habeas relief as a remedy for unconstitutional conditions of confinement. While the plain language of Article 70 renders habeas available for petitioners who are "illegally imprisoned or otherwise restrained in [their] liberty within the state,"[90] the statute does not define illegal imprisonment.[91] In our early research we framed an argument that neither the plain language of Article 70 nor its legislative history suggested that its codification abrogated centuries of

86. *See* Petition for Writ of Habeas Corpus at 39–51, People *ex rel.* Short v. Capra, No. 54538/2020 (N.Y. Sup. Ct. Apr. 16, 2020).

87. Helling v. McKinney, 509 U.S. 25, 33 (1993); Jolly v. Coughlin, 76 F.3d 468 (2d Cir. 1996).

88. N.Y. C.P.L.R. §§ 7001–7012 (CONSOL. 2021). Prior to our habeas effort, no court had held that prison conditions claims were cognizable under Article 70.

89. *See* 18 U.S.C. § 3626(a)(3) (2018). This provision of the Prison Litigation Reform Act, customarily referred to as the "prisoner release order" provision, bars courts from ordering prisoner releases in prison conditions cases unless plaintiffs satisfy very narrow requirements.

90. N.Y. C.P.L.R. § 7002 (CONSOL. 2021).

91. *Id.*

common law on the availability of habeas relief in New York.[92] The common law established that habeas is flexible and adaptable to previously unanticipated circumstances.[93] We harnessed Court of Appeals dicta that the hallmark of habeas is its malleability.[94] Courts evaluating COVID-19 habeas claims brought by pre-trial detainees held that where the government could not confine detainees consistent with constitutional guarantees—in this case, humane prison conditions—habeas was indeed available, and release was the appropriate remedy.[95] Nothing in the plain language of Article 70 or the common law differentiated pre-trial detainees from people serving sentences.[96]

It would be several months before the law was partially clarified in this area—in one of our COVID-19 habeas corpus appeals.[97] In the meantime, we attempted to reconcile the movement's goal of release with our desire to preserve options for conditions relief. We determined that we could combine our request for release with a request for conversion to a form of proceeding—specifically, a proceeding under Article 78 of the New York Civil Practice Law and Rules—that could provide conditions relief within the prison short of release.[98] We picked

92. *See* Brief for Petitioners-Appellants at 18–25, People *ex rel.* Short v. Fennessy, 195 A.D.3d 1463 (N.Y. App. Div. 2021) (No. KAH 20-01420).

93. *Id.* at 20–21 (citing People *ex rel.* Keitt v. McMann, 220 N.E.2d 653, 655 (N.Y. 1966); and then citing Matter of Morhous v. New York Supreme Ct., 293 N.Y. 131, 139–40 (1944)).

94. *Keitt*, 220 N.E.2d at 655.

95. *See, e.g.*, People *ex rel.* Stoughton v. Brann, 122 N.Y.S.3d 866, 869–70 (N.Y. Sup. Ct. 2020) (holding, in mass habeas action brought by pretrial detainees, that where the government cannot confine persons consistent with constitutional limits, "the court must accord a remedy—including, where appropriate, release from prison").

96. N.Y. C.P.L.R. § 7002.

97. *See infra* pp. 440–41.

98. "[I]f a court has obtained jurisdiction over the parties to [an] action, the court shall not dismiss the action solely because it is not brought in the proper form," but instead convert it to the proper form of proceeding. N.Y. C.P.L.R. § 103 (CONSOL. 2022). Pursuant to this rule, New York courts have converted scores of habeas corpus actions to Article 78 actions or declaratory judgment actions, and vice versa. *See, e.g.*, People *ex rel.* Negron v. Superintendent, 94 N.Y.S.3d 703 (N.Y. App. Div. 2019) (converting habeas action to Article 78 action challenging Sexual Assault Reform Act residency restriction as applied to petitioner); Arroyo v. Annucci, 85 N.Y.S.3d 700 (N.Y. Sup. Ct. 2018) (converting Article 78 action to a hybrid declaratory judgment and habeas corpus action); People *ex rel.* Durham v. Dep't of Corr. and Cmty. Supervision, 89 N.Y.S.3d 823 (N.Y. Sup. Ct. 2018) (converting habeas corpus action to Article 78 action); People *ex rel.* Allen v. Yelich, 73 N.Y.S.3d 635 (N.Y. App. Div. 2018) (declining to dismiss as moot, but instead converting habeas action to Article 78 action); People *ex rel.* Green v. Superintendent, 25 N.Y.S.3d 375 (N.Y. App. Div. 2016) (applying mootness exception and converting habeas corpus action to declaratory judgment action). We expressly sought, as alternative relief, conversion from a habeas corpus action to an Article 78 mandamus action. "The Article 78 proceeding supersedes the common law writs of mandamus, prohibition, and certiorari" and affords petitioners a vehicle to challenge State administrative action. DAVID D. SIEGEL & PATRICK M. CONNORS, NEW YORK PRACTICE § 557 (6th ed. 2018). Mandamus actions seek to compel a State administrative agency to comply with a non-discretionary duty enjoined upon it by law. Klostermann v. Cuomo, 463 N.E.2d 588, 595–96 (N.Y. 1984); Grisi v. Shainswit, 507 N.Y.S.2d 155, 157 (N.Y. App. Div. 1986) (characterizing ministerial acts as "nondiscretionary and nonjudgmental") (quoting Peirez v. Caso, 421 N.Y.S.2d 627, 627 (N.Y. App. Div. 1979)). We were prepared to argue that DOCCS had failed to comply with its non-discretionary duty to protect our petitioners from COVID-19 infection.

petitioners with whom we had preexisting relationships and who had nonviolent convictions, thin prison disciplinary records, and viable release plans. Again, we thought a conservative approach in petitioner selection would aid us in establishing good law in this area because we have found that judges, when evaluating with experimental civil rights claims, tend to behave conservatively. Later developments forced us to question this strategy.

We wrote our first two COVID-19 habeas petitions, briefed motions, and interfaced with our adversaries without the involvement of the grassroots organizations with which we had worked. We also did not demand a hearing, instead permitting judges to decide our petitions on the papers. Later developments forced us to question these decisions. We filed our first COVID-19 habeas petition on April 16, 2020: *The People of the State of New York ex rel. Stefen R. Short o/b/o Christopher et al. v. Capra et al.* (N.Y. Sup. Ct., Westchester County) (No. 54538/2020) ("*Christopher*"). We commenced our litigation by Order to Show Cause.[99] Unfortunately, our assigned judge sat on our Order to Show Cause application, refusing to sign it. It was not until we reached out to the Clerk of the Court that we learned why:

> The court reviewed the application and determined the submitted Order to Show Cause does not raise a legitimate allegation of an illegal detention as required by the Article 70 statute. There is absence of a legally sufficient claim within the papers which could entitle the petitioners to the relief they are seeking pursuant to CPLR Article 70. Consequently, the Order to Show Cause was not signed.[100]

This was an early setback for us and required that we again revisit the wisdom of our release claim. We were thoroughly convinced, however, that our assigned judge had misapprehended the reach of the habeas corpus statute.[101] Additionally, collateral estoppel did not attach to our assigned judge's failure to sign the Order

99. Pursuant to N.Y. C.P.L.R. § 403 (CONSOL. 2022), a movant may bring a special proceeding—including a habeas action or Article 78 action—by notice of motion or order to show cause. Unlike a notice of motion, an order to show cause is an *ex parte* application. It serves chiefly to expedite the resolution of the proceeding and "specifies the time and place of the hearing of the motion, and resolves issues—when they arise—of how to serve the papers, when to serve them, on whom, etc." David D. Siegel, *Use of Order to Show Cause Does Not Take Burden of Proof Off Moving Party*, 169 SIEGEL'S PRAC. REV. 2 (2006). Pursuant to N.Y. C.P.L.R. § 403(d) (CONSOL. 2022), courts have discretion whether to sign an order to show cause. N.Y. C.P.L.R. § 5704 (CONSOL. 2022) affords a petitioner a right to appeal from a trial court's refusal to sign an order to show cause.

100. E-mail from Jeannette Estevez, Sec'y, Chambers of Hon. Susan Cacace, to author (Apr. 21, 2020, 9:30 AM EDT) (on file with author).

101. *See supra* pp. 434–35.

to Show Cause, so we were not precluded from simply refiling the case.[102] We therefore re-filed the lawsuit on May 6, 2020, as *The People of the State of New York ex rel. Stefen R. Short o/b/o Gianna Carriuolo et al. V. Capra, et al.* (County Court, Westchester County) (No. 54815/2020) ("*Carriuolo*"). On May 8, 2020, our assigned judge signed the Order to Show Cause commencing *Carriuolo*.[103] Twelve days earlier we had filed *The People of the State of New York ex rel. Stefen R. Short o/b/o Frateschi et al. v. Fennessy et al.* (N.Y. Sup. Ct., Oneida County) (No. ECFA2020-000910) ("*Frateschi*"), a petition nearly identical to *Christopher* and *Carriuolo*, brought on behalf of people incarcerated at three prisons in Oneida County. Again, we did not invite grassroots advocates into the process of litigating *Frateschi*.

We ultimately lost the *Carriuolo* and *Frateschi* cases. The *Frateschi* court held that habeas corpus was categorically unavailable to people already serving their sentences (as opposed to pre-trial detainees), reasoning that "[n]o matter the risk, and even were the Court to find on the merits that respondents have acted with deliberate indifference toward petitioners' serious medical needs, in violation of the Eighth Amendment, the relief to be afforded is not immediate release."[104] This narrow view of habeas relief would be rejected by a New York appellate court mere months later.[105] The *Frateschi* court similarly refused to convert the lawsuit to an Article 78 proceeding or any other form of proceeding, essentially holding that petitioners were without a state court remedy for the serious rights violations they alleged.[106] This decision represents the judicial abdication we feared. Indeed, the decision re-surfaced many of the foregoing strategic questions that eventually informed our second wave habeas corpus strategy.

The *Carriuolo* court took a similar approach to the *Frateschi* court. Rather than reading plain language, common law, and high court dicta as a license to stretch Article 70, the court held that habeas corpus is categorically unavailable to people serving sentences.[107] The court reasoned that "no authority delineates

102. Collateral estoppel, also known as issue preclusion, applies where

> (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits.

Conason v. Megan Holding, L.L.C., 29 N.E.3d 215, 224 (N.Y. 2015) (citations omitted). In our case, our order to show cause sought only incidental relief to commence the proceeding—the type of relief typically sought by an order to show cause. *See* Siegel, *supra* note 99**Error! Bookmark not defined.**. Similarly, our assigned judge's decision not to sign our order to show cause was not a final decision on the merits of our petition.

103. Order to Show Cause, People *ex rel.* Short v. Capra (*Carriuolo*), No. 54815/2020 (N.Y. Sup. Ct. May 8, 2020).

104. Decision, Order, & Judgment at 11, People *ex rel.* Short v. Fennessy (*Frateschi*), No. EFCA2020-910 (N.Y. Sup. Ct. May 11, 2020) [hereinafter Decision, Order, & Judgment, *Frateschi*].

105. *See infra* pp. 440–41.

106. Decision, Order, & Judgment, *Frateschi*, *supra* note 104, at 11–12.

107. Decision & Order at 2, *Carriuolo*, No. 54815/2020 [hereinafter Decision & Order, *Carriuolo*].

under which circumstance . . . immediate release is warranted . . . and there is an established procedure, other than a writ of habeas corpus, for such an action when the remedy would be some kind of modification to the offending conditions."[108] To twist the knife, the court found in dicta that petitioners had failed to prove deliberate indifference.[109] Rather than apply the N.Y. C.P.L.R. 3211(a)(7) standard[110]—which requires courts to treat petitioners' well-pled allegations as true—the court credited hearsay affidavits of prison officials outlining DOCCS's general COVID-19 mitigation plan.[111] The court did not bother to evaluate the only relevant inquiry: whether DOCCS's plan had been implemented *at respondents'* prisons.[112] Indeed, the court ignored petitioners' allegations that DOCCS had not implemented its plan, concluding as a general matter that DOCCS had "established protocols to attempt to control the spread."[113] The court characterized the petition as a simple "disagreement" about the efficacy of these protocols.[114] We chose not to appeal either of these decisions for fear of kneecapping our statewide effort—a decision we determined was best for our clients and the movement.

We had attempted to reconcile the community's call for release with a more traditional litigation approach. We had picked "nonviolent" petitioners rather than people with more complicated histories who might have needed more help. For expediency, we had verified the petition ourselves and relied exclusively on an expert affidavit, rather than an expert affidavit in addition to affidavits of personal knowledge from each petitioner.[115] We did not seek hearings. Ultimately, these tactics did not help our effort. Our losses also confirmed our suspicions that courts would be inhospitable to COVID-19-related habeas lawsuits, no matter the petitioner. We needed to retool.

We decided to leverage future lawsuits as organizing tools by working directly with grassroots partners, eventually bolstering our habeas petitions with affidavits of personal knowledge and using the press to build momentum. We piloted this approach while developing our second series of COVID-19 lawsuits and associated clemency applications, administrative advocacy, and press strategies.

108. *Id.*

109. *Id.* at 1–2.

110. N.Y. C.P.L.R. § 3211(a)(7) (CONSOL. 2022) (the New York State analog to Federal Rule of Civil Procedure 12(b)(6), requiring courts to accept all well-pled allegations as true for the purposes of a motion to dismiss).

111. Decision & Order, *Carriuolo*, *supra* note 107, at 2.

112. *Id.*

113. *Id.*

114. *Id.*

115. An expert witness is a person with specialized knowledge who can help a court or jury understand relevant facts. In our cases, we initially relied exclusively on medical experts to explain to the court the characteristics of COVID-19 and its spread in correctional settings. We did not include separate fact affidavits from our petitioners or other incarcerated people.

C. Refining and Rebuilding—Habeas Proceedings in Dutchess, Orange, and Ulster Counties

Together with RAPP and PPP, PRP and CAB developed a far more ambitious strategy for our second series of COVID-19 lawsuits. We chose to eschew the "perfect petitioner" model, instead seeking release for as many vulnerable people as our resources could accommodate, irrespective of crime of conviction or prison disciplinary record. We also broadened our pleading style. Rather than narrowly focusing on the legal inquiry, we framed our lawsuits as attacks on mass incarceration, the racism of carceral systems, and COVID-19's disproportionate impact on oppressed and neglected communities of color. With this reframing, we aimed to situate our litigation within community-led movements for justice.

We exercised these aims in two ways. First, we directly collaborated with RAPP and PPP in drafting our second series of COVID-19 habeas petitions. Many of the petitioners in our Dutchess County habeas lawsuit—*The People of the State of New York ex rel. Short o/b/o Bellamy et al. V. Royce et al*. (N.Y. Sup. Ct., Dutchess County) (No. 2020-51175) ("*Bellamy*"), filed on May 11, 2020—were people RAPP or the CUNY Clinic had worked with for years.[116] Due in part to structural and racial inequities in New York's parole system, these people had been repeatedly denied parole, medical parole, clemency, or commutation.[117] We used *Bellamy* as a vehicle to bring these stories before the court and as an organizing tool to support RAPP's mission of ending death by incarceration. CAB, which led our Orange County and Ulster County litigation teams, also eschewed the "perfect petitioner" model, representing several clients who were serving life sentences. This approach strengthened the litigation effort by aligning our strategies with the community's organizing strategies and ultimately led to two of the three greatest successes in our COVID-19 habeas effort.

Second, in a CAB-led effort, we partnered with PPP to train Big Law associates to take COVID-19 habeas cases on behalf of people incarcerated in New York's prisons. We had partnered with Kasowitz Benson Torres LLP to litigate our mass writs to that point, but we took steps to formalize and expand these arrangements in our refining and rebuilding process. We have found that a crucial piece of any movement building exercise is the formation of unique

116. Petition for Habeas Corpus, People *ex rel.* Short v. Royce (*Bellamy*), No. 2020-51175 (N.Y. Sup. Ct. May 11, 2020).

117. *See, e.g.*, Michael Winerip, Michael Schwirtz, & Robert Gebeloff, *For Blacks Facing Parole, Signs of Broken System in New York*, N.Y. TIMES, Dec. 4, 2016, at A1; *NY More Likely to Parole Whites Than Minorities*, CRIME REP. (Nov. 23, 2020), https://thecrimereport.org/2020/11/23/ny-more-likely-to-parole-whites-than-minorities/ [https://perma.cc/Z8BE-9B2D]; Rahsaan Thomas, *Parole Grants Skewed by Race in New York State*, SAN QUENTIN NEWS (Feb. 9, 2017), https://sanquentinnews.com/parole-grants-skewed-by-race-in-new-york-state/ [https://perma.cc/L5DA-5DUP]; Edward McKinley & Amanda Fries, *A 'Broken' Parole Process: Data Shows Widened Racial Bias*, TIMES UNION (Nov. 23, 2020, 10:44 AM), https://www.timesunion.com/news/article/A-broken-parole-process-Data-show-widening-15739596.php [https://perma.cc/6825-BAZZ].

alliances and the maintenance of resources sufficient to combat the relative limitlessness of the state's resources. These types of partnerships can be crucial to movement lawyering efforts. As scholars have written, "Professional trends toward greater specialization, the rise of organized pro bono, a well-developed plaintiff's bar, and restrictions on funding for nongovernmental legal organizations have boosted public-private partnerships within progressive legal practice, particularly when high-stakes and expensive litigation is a salient feature of a social movement campaign."[118]

Our partners at PPP took on a significant role in training Big Law associates and used training sessions as a component of a coordinated effort to litigate as movement lawyers. Because PPP and CAB collaborated on the training, it was imbued with the strategies and tactics of public defenders engaged in direct representation. Trainings included workshops on establishing working relationships with marginalized people, situating the legal effort within the context of larger abolitionist movements, and working collaboratively with clients and organizers in service of larger decarceration goals. By concertedly engaging with organizers during trainings—and continuing that engagement during the litigation itself—we turned partnerships with pro bono counsel into valuable activist lawyering opportunities. This approach led to one of our biggest second-wave successes, *The People of the State of New York ex rel. Edward MacKenzie v. Tedford et al.* (N.Y. Sup. Ct., Essex County) (No. CV20-499) ("*Mackenzie*"), a collaboration with law firm associates and affiliates on behalf of a RAPP and PPP constituent.[119]

We had persisted with our habeas effort knowing that courts were unlikely to order prison officials to release our petitioners. However, we decided that by fostering connections with grassroots organizations and well-resourced law firms, we would force the State to reckon with the movement for COVID justice in state prisons and foster continued exposure. We also preserved our requests for conversion to Article 78 or another form or proceeding to ensure conditions relief remained available through our habeas filings.[120] We inundated the State with litigation commitments and began to experience success.

For the first time during the pandemic, we made good law in *Bellamy*, where the Court held that habeas was indeed available to people serving sentences:

> The fact that Petitioners are incarcerated pursuant to a lawful judgment of sentencing commitment is not dispositive. If petitioners are being subjected to cruel and unusual punishment by virtue of a deliberate indifference to their medical needs that constitutes punishment well in excess of the imposed sentence, the judiciary may not ignore that solely because there is a lawful

118. Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1701 (2017).

119. Petition for Habeas Corpus at 53, People *ex rel.* MacKenzie v. Tedford, 141 N.Y.S.3d 265 (N.Y. Sup. Ct. 2021) (No. CV20-499).

120. *Id.* at 50–52.

> sentence and commitment order. Under such circumstances, habeas corpus is available to remedy an ongoing constitutional violation.[121]

The Court did not find deliberate indifference, but its decision on habeas availability further illustrated that litigation conservatism is not always the best path to a positive result.[122] Unlike the *Frateschi*, *Christopher*, and *Carriuolo* petitioners, the *Bellamy* petitioners were selected solely for vulnerability—not "palatability"—and had worked directly with grassroots advocacy organizations. Nearly all of them were incarcerated for "violent" offenses.

In *The People of the State of New York ex rel. Lauren E. Jones o/b/o Barnes et al. v. Lee et al.* (N.Y. Sup. Ct., Ulster County) (No. 2020-1112) ("*Barnes*"), the Court evaluated petitioners' claims quite differently. Disregarding New York law, the *Barnes* Court struck petitioners' factual allegations because they were verified by petitioners' attorneys, not petitioners themselves.[123] In so doing, the Court disregarded N.Y. C.P.L.R. § 3020(d)(3)—which permitted petitioners' attorneys to verify the petition—thereby muzzling incarcerated petitioners solely because their lawyers amplified their voices. By contrast, the Court treated the affidavit of a prison official—someone who had not stepped foot in the prisons in question during the relevant time period—as an affidavit of personal knowledge concerning prison conditions.[124] Adding stereotyping to its misapprehension of the law, the Court wrote that even if it had considered petitioners' allegations, "their credibility would be questionable in light of the understandable incentive they would have to be less than candid."[125] The Court then ignored the deliberate indifference test, dispensing of the lawsuit because "petitioners fail to address what most concerns this court—the potential danger to the public of releasing such inmates."[126]

The *Barnes* decision is oppressive. By misapplying the evidentiary rules and ignoring the relevant constitutional inquiry, the *Barnes* Court sanctioned its own reflexive acceptance of the government's narrative. We decided, however, that *Barnes* did not merit a reconsideration of our new approach. *Christopher*, *Carriuolo*, and *Frateschi* showed us that we could not insulate our strategy from the impact of law-and-order jurisprudence, no matter how "carefully" we chose our petitioners. We instead altered our evidentiary approach by introducing affidavits of personal knowledge where possible. These affidavits had a double benefit—they addressed the *Barnes* Court's contrived evidentiary concern, and they afforded directly impacted people another opportunity to tell their story. Affidavits of personal knowledge—and declarations in a future federal case—

121. Decision & Order at 3, *Bellamy*, No. 2020-51175.

122. *Id.*

123. Decision & Order at 2–3, People *ex rel.* Jones v. Lee, No. 2020-1112 (N.Y. Sup. Ct. June 11, 2020).

124. *Id.*

125. *Id.* at 3.

126. *Id.* at 5.

would make a significant difference in our second-wave litigation efforts, particularly *MacKenzie*.

On appeal, the Orange County litigation team secured the decision that opened the door to further State prison habeas corpus litigation. The Orange County Supreme Court had refused to sign the proposed Order to Show Cause commencing *The State of New York ex rel. Tomoeh Murkami Tse, o/b/o Alicea et al., v. Barometre et al.* ("*Alicea*"), reasoning that because petitioners were serving sentences, the Court lacked the authority to release them.[127] Surprisingly, the trial court cited the Prison Litigation Reform Act—which is plainly inapplicable to Article 70 proceedings—to support its decision that habeas relief was foreclosed.[128] On appeal, the Second Department rejected this stunted view of habeas, holding instead that habeas relief is available to people serving sentences:

> Here, the petition alleged that the inmates were being unlawfully imprisoned in violation of the Eighth Amendment of the United States Constitution because, in light of certain physical conditions and attributes specific to them as well as unalterable conditions of incarceration at Otisville, there were no measures that could be taken to protect them from the grave risk of death or serious illness posed by COVID-19 while they were incarcerated at the facility. Thus, the petitioner alleged, the only remedy to cure the illegality of the inmates' detention would be their immediate release. Contrary to respondents' contention and the conclusion of the Supreme Court, these allegations are properly cognizable in habeas corpus.[129]

As Arthur Kinoy famously wrote:

> [T]he test of success for a people's lawyer is not always the technical winning or losing of the formal proceeding. Again and again, the real test was the impact of the legal activities on the morale and understanding of the people involved in the struggle. To the degree that the legal work helped to develop a sense of strength, an ability to fight back, it was successful. This could even be achieved without reaching the objective of a formal victory.[130]

Bellamy, *Barnes*, and *Alicea* did not produce a release order, but the *Bellamy* Court was the first mass writ court to side with petitioners on either the objective or subjective prong of the constitutional question, as well as the availability of habeas for people serving sentences. And because the *Alicea* Second Department decision

127. Decision & Order at 3–4, People *ex rel.* Tse v. Barometre (*Alicea*), No. EF002364-2020 (N.Y. Sup. Ct. May 13, 2020) [hereinafter Decision & Order, *Alicea*], *rev'd*, 131 N.Y.S.3d 896 (N.Y. App. Div. 2020).

128. 18 U.S.C. § 3626(g)(2) (2018); Decision & Order, *Alicea*, *supra* note 127, at 3.

129. *Alicea*, 131 N.Y.S.3d at 897.

130. ARTHUR KINOY, RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE'S LAWYER 57–58 (1983).

remains the only appellate court decision squarely addressing the availability of habeas corpus relief for sentenced people, it is binding on all New York State trial courts.[131]

These decisions materially aided our litigation efforts, opened the door to second-wave habeas strategies, and put the state on the defensive, thereby empowering incarcerated people. They also proved the utility of a more "inclusive" litigation strategy keyed explicitly to the demands of the movement. When combined with other strategies—including filing clemency, commutation, and medical parole applications for hundreds of people;[132] organizing in various capacities in conjunction with RAPP and other advocacy groups;[133] appearing on television, on the radio, and on podcasts to spread the word about COVID-19 in New York's prisons;[134] securing increased Big Law pro bono resources;[135] and directly engaging with executive agencies[136]—our refined mass writ strategy was part of a holistic COVID-19 decarceration strategy that culminated in second wave victories.

III.
BATTLING ADVERSITY AT THE GENESIS OF THE SECOND WAVE

131. Stewart v. Volkswagen of Am., Inc., 584 N.Y.S.2d 886, 889 (N.Y. App. Div. 1992) ("[T]he rule in New York is that the trial courts must follow an Appellate Division precedent set in any department in the State until its own Appellate Division decides otherwise."), *rev'd on other grounds*, 613 N.E.2d 518 (N.Y. 1993).

132. See Chelsia Rose Marcius, *Legal Aid Society Calls for Clemency for 40 People in NY Prisons*, N.Y. DAILY NEWS (Apr. 24, 2020, 7:28 PM), https://www.nydailynews.com/coronavirus/ny-coronavirus-legal-aid-society-clemency-20200424-yeio253bgrdapk3iwkkgke5z2u-story.html [https://perma.cc/G4SF-T3NM]; Parker Quinlan, *New York Case Underscores Coronavirus Urgency Around Clemency*, JUV. JUST. INFO. EXCH. (Apr. 22, 2020), https://jjie.org/2020/04/22/new-york-case-underscores-coronavirus-urgency-around-clemency/ [https://perma.cc/38V9-D53D]; David Lombardo, *Cuomo Leaving Office with Unfulfilled Clemency Pledge*, CAPITOL PRESSROOM, at 00:39 (Aug. 19, 2021), https://capitolpressroom.org/2021/08/19/cuomo-leaving-office-with-unfulfilled-clemency-pledge/ [https://perma.cc/LPE4-VLVV].

133. *See, e.g.*, Letter from The Legal Aid Society to Andrew Cuomo, Governor, State of N.Y., Anthony Annucci, Acting Comm'r, N.Y. State Dep't of Corr. & Cmty. Supervision,, Tina Stanford, Chairwoman, N.Y. State Bd. of Police, & Letitia James, Att'y Gen., State of N.Y. (Apr. 20, 2020) (on file with author).

134. *See, e.g.*, Ayana Harry, *Coronavirus Behind Bars: Advocates Say Cases Surging in NY Prisons*, PIX 11 (Dec. 21, 2020, 8:42 PM), https://pix11.com/news/local-news/coronavirus-behind-bars-advocates-say-cases-surging-in-ny-prisons/ [https://perma.cc/8QHY-XM8K]; *Watch: LAS Talks COVID-19 and the New York Prison System*, LEGAL AID SOC'Y (Dec. 11, 2020), https://legalaidnyc.org/news/covid-19-ny-prison-system-lisa-evers-street-soldiers/ [https://perma.cc/965H-4GNA]; *Listen: LAS Calls on Governor to Release More Incarcerated New Yorkers*, LEGAL AID SOC'Y (May 7, 2020), https://legalaidnyc.org/news/legal-aid-release-more-inmates-capitol-pressroom-podcast/ [https://perma.cc/FE92-SKPN]; The Brian Lehrer Show, *Fear and Health Anxiety in NY Prisons*, WNYC (Sept. 1, 2020), https://www.wnyc.org/story/fear-and-health-anxiety-ny-prisons/ [https://perma.cc/E8YQ-NJUU].

135. *See supra* p. 440.

136. *See supra* pp. 424–32.

On the heels of *Bellamy*, *Barnes*, and *Alicea*, the State commenced a surprising plan to establish a prison nursing home deep in the Adirondacks.[137] Ostensibly as a COVID-19 mitigation measure, the State bussed groups of medically vulnerable elders to Adirondack Correctional Facility ("Adirondack"), which it had maintained for years as a small juvenile facility.[138] The State cited the low COVID-19 prevalence rate in the Adirondacks but did not specify whether it had taken any steps to keep transferees safe.[139] RAPP and other grassroots groups immediately mobilized and contacted us for legal support. When news of these transfers hit, we were in an interregnum between the foregoing habeas decisions and later successes. We decided that in addition to refining our habeas strategy—including by redoubling our efforts to secure affidavits of personal knowledge and additional expert affidavits and by bolstering our "conversion" argument[140]—we should formalize our relationship with grassroots organizations. We were working more closely with organizers than ever before, but we were not litigating *with* them. We began exploring ways to bring grassroots organizations into the courtroom.

A. The Prison Nursing Home: Developing MacKenzie *and* Harper

By early summer, our collaboration with Big Law firms had borne fruit. Several firms were carrying caseloads, and our pro bono partners were deeply engaged in COVID-19 habeas work.[141] We had also spoken extensively with RAPP and, beyond our demand letter collaboration, had collaborated on other advocacy campaigns.[142] RAPP had to set aside some of its work on parole reform

137. Noah Goldberg, *Families Fear 'Nursing Home' Coronavirus Outbreak at Upstate NY Prison for Older Inmates*, N.Y. DAILY NEWS (June 25, 2020, 6:24 PM), https://www.nydailynews.com/coronavirus/ny-coronavirus-adirondack-prison-20200625-untmjdnuhnbufh2f44yuuodgbe-story.html [https://perma.cc/RRA8-8WRQ]; Gwynne Hogan, *"They Sent Us to just Fade away and Die": Men Incarcerated at Cuomo's Prison Nursing Home Say they Can't Access Medical Care*, GOTHAMIST (Aug. 23, 2020), https://gothamist.com/news/men-incarcerated-at-cuomos-prison-nursing-home-say-they-cant-access-medical-care [https://perma.cc/WWE8-JNMY]; Susan Arbetter, *Are Older Inmates Receiving Appropriate Healthcare at Adirondack Correctional?*, SPECTRUM NEWS 1 (Sept. 8, 2020, 5:08 PM), https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2020/09/08/are-older-inmates-receiving-appropriate-healthcare-at-adirondack-correctional- [https://perma.cc/M3X7-FQJY].

138. Goldberg, *supra* note 137.

139. *Id.*

140. *See* sources cited *supra* note 98.

141. *See, e.g.*, Petition for Habeas Corpus, People *ex rel.* Sabatino v. Lilley, No. E2020-2038 (N.Y. Sup. Ct. Dec. 19, 2020) (offering an example of an individual COVID-19 habeas lawsuit brought by Dechert LLP pursuant to our COVID-19 habeas pro bono partnership); Petition for Habeas Corpus, People *ex rel.* Harris v. Howard, No. E2020-2003 (N.Y. Sup. Ct. 2020) (providing another example of an individual COVID-19 habeas lawsuit brought by pro bono counsel pursuant to our COVID-19 habeas pro bono partnership).

142. *See, e.g.*, *Save Our Seniors: Tell Governor Cuomo to Release All Aging People at the Adirondack Correctional Facility*, COLOR OF CHANGE, https://act.colorofchange.org/sign/save-our-seniors-cuomo/ [https://perma.cc/P8JP-BF6C] (last visited Feb. 10, 2022).

and other systemic issues to battle the prison nursing home initiative,[143] and it developed deep ties with many of the people incarcerated there. Some of these ties, of course, were preexisting.[144] Like our team, our pro bono partners were in contact with RAPP about conditions at Adirondack and offered their legal expertise and litigation support.

Out of these initial conversations came *MacKenzie*, a piece of litigation that, for the first time since the pandemic began, tied together four of our overarching strategic goals: [1] seek release as a community demand, despite the difficult litigation landscape; [2] work directly with mobilized, grassroots organizations; [3] create and refine unique alliances with pro bono partners as a movement-building exercise; and [4] learn from setbacks and refine litigation strategies to increase our chances at success. This effort later achieved our goal of building power among the people at Adirondack and birthing new litigation and organizing strategies.

Because we insisted upon learning from our setbacks, the process of developing the *MacKenzie* case was painstaking. We meticulously developed the *MacKenzie* record to account for the evidentiary issues we confronted while litigating *Barnes*.[145] Through Mr. MacKenzie, and with RAPP's assistance, we carefully researched conditions at Adirondack. We contextualized Mr. MacKenzie's experiences with reference to conditions across the state and included with our petition a detailed affidavit of personal knowledge.[146] We solicited the help of additional experts, including a nurse to review Mr. MacKenzie's medical records and opine on his susceptibility to COVID-19 infection and complications.[147] We preempted the State's spurious and legally insignificant "public safety" argument by pleading allegations about Mr. MacKenzie's excellent disciplinary record and extensive release plans.[148] Finally, we insisted upon a hearing—a right we failed to invoke while litigating our mass writs.[149] The hearing proved essential.

Our robust pleading style was a unique departure from what is contemplated by Article 70, a "special proceeding" statute.[150] We theorized that by litigating *MacKenzie* as if it were a plenary action—as opposed to a summary action, which

143. Complaint, Harper v. Cuomo, No. 21-CV-19, 2021 WL 1540483 (N.D.N.Y. Apr. 20, 2021) [hereinafter Complaint, *Harper*].

144. Because RAPP was singularly focused on working with incarcerated elders, many of the people Governor Cuomo had transferred to Adirondack Correctional Facility had been working with RAPP prior to transfer.

145. *See supra* pp. 441–42.

146. Affidavit of Edward MacKenzie, People *ex rel.* MacKenzie v. Tedford, 141 N.Y.S.3d 265 (N.Y. Sup. Ct. 2021) (No. CV20-499).

147. Affidavit of Jennifer Grossman at 2, *MacKenzie*, 141 N.Y.S.3d 265 (No. CV20-499).

148. Petition for Habeas Corpus at 4–6, *MacKenzie*, 141 N.Y.S.3d 265 (No. CV20-499).

149. *Id.* at 52.

150. SIEGEL & CONNORS, *supra* note 98, at § 547 ("A special proceeding is a quick and inexpensive way to implement a right. It's as plenary as an action, culminating in a judgment, but is brought on with the ease, speed, and economy of a mere motion.").

is what a habeas action is—we would increase our prospects for success. Throughout this process, Mr. MacKenzie was in contact with RAPP, his litigation team, community partners, and the press. As a jailhouse lawyer,[151] Mr. MacKenzie elected to use his lawsuit as an organizing tool. All of this work—responding to setbacks, aligning our strategy with movement lawyering principles, and insisting upon a hearing—led to a favorable result. Unlike the other COVID-19 habeas courts, the *MacKenzie* Court engaged our request for conversion during the hearing and ultimately decided that conversion was appropriate.[152] Despite the Court's refusal to order Mr. MacKenzie's release, it held that New York State's COVID-19 vaccine prioritization schedule created an entitlement to vaccination for incarcerated New Yorkers over the age of 65.[153] This was a significant result considering the State's unclear plan to vaccinate incarcerated New Yorkers.[154] The Court ordered DOCCS to vaccinate Mr. MacKenzie to satisfy this entitlement.[155] In February 2021, Mr. MacKenzie become the first person in State custody inoculated against COVID-19.[156] This result illustrates the potential of a litigation effort that brings grassroots organizations, pro bono partners, and movement lawyering principles together. It also illustrates that there are many ways to "win" a case.

With partners from Neighborhood Defender Services, The Bronx Defenders, Brooklyn Defender Services, and the New York Civil Liberties Union, we leveraged *MacKenzie* to file companion Article 78 actions demanding that the State authorize the vaccination of all incarcerated people.[157] In addition to an "arbitrary and capricious" claim under N.Y. C.P.L.R. 7803(3), our partners crafted an ambitious Equal Protection claim that we asserted in *Holden v. Zucker*.[158] These companion lawsuits resulted in a landmark March 22, 2021 order requiring the State to immediately offer the vaccine to incarcerated people statewide.[159] This effort illustrates the brilliance of our collaborators and the importance of *MacKenzie* as a carefully crafted and litigated steppingstone to broader, systemwide relief.

151. *See What is a Jailhouse Lawyer?*, NAT'L LAWS. GUILD, https://www.nlg.org/jailhouse-lawyer-members/ [https://perma.cc/SMS9-EZFM] (last visited Feb. 11, 2022) ("A Jailhouse lawyer refers to a prisoner that, though usually never having practiced law on the outside, through conditions of necessity, learns to advocate for themselves and assist other prisoners in legal matters relating to their sentence, to their conditions in prison, or to civil matters of a legal nature.").

152. *MacKenzie*, 141 N.Y.S.3d at 272.

153. *Id.*

154. Gwynne Hogan, *Court Orders State to Vaccinate Older Inmate in Cuomo's "Prison Nursing Home"*, GOTHAMIST (Jan. 21, 2021), https://gothamist.com/news/court-orders-state-to-vaccinate-older-inmate-in-cuomos-prison-nursing-home [https://perma.cc/4M2K-K8P7].

155. *MacKenzie*, 141 N.Y.S.3d at 273.

156. Hogan, *supra* note 154.

157. Petition, Holden v. Zucker, No. 801592/2021E, 2021 N.Y. Misc. LEXIS 3263 (N.Y. Sup. Ct. Mar. 29, 2021) [hereinafter Petition, *Holden*]; Petition, Woods v. Zucker, No. 902450-21 (N.Y. Sup. Ct. Mar. 17, 2021).

158. Petition, *Holden*, *supra* note 157, at 28–29.

159. *Holden*, 2021 N.Y. Misc. LEXIS 3263, at *38–39.

Mere days before *MacKenzie* was decided, we filed *Harper v. Cuomo*, a constitutional challenge to conditions at Adirondack.[160] This lawsuit represented our most direct collaboration with grassroots organizers. Beyond just assisting with the litigation effort, RAPP litigated *Harper* as an organizational plaintiff.[161] *Harper* was also the product of our expanded collaboration with the private bar. Relman Colfax PLLC, a national civil rights law firm,[162] co-led the *Harper* effort.[163] RAPP leveraged this litigation effort as an organizing tool, partnering with Color of Change and other grassroots advocates on petition drives and community engagement related to the lawsuit.[164] Similarly, The Intercept utilized *Harper* as a vehicle to update its prior exposé on conditions at Governor Cuomo's prison nursing home.[165] *Harper* galvanized the organizing and civil rights communities and represented a crystallization of the many principles that informed our COVID-19 efforts during the first year of the pandemic.

On the heels of the filing, the State engaged in a coordinated strategy to moot *Harper*. That is, after the case was filed, Defendants acted to permanently stop transfers to Adirondack, implement social distancing at the facility, cease unnecessary congregation, and—on the heels of the *MacKenzie* decision—vaccinate as many putative class members as possible.[166] Plaintiffs faced litigation roadblocks because Defendants responded to the lawsuit by improving conditions at Adirondack[167]—a very common pattern in prisoners' rights litigation.[168] After litigating a seven-day evidentiary hearing, we lost our motion for a preliminary injunction.[169] But our loss was based in part on the Court's assessment that conditions had materially improved—partially as a direct result of the litigation

160. Complaint, *Harper*, *supra* note 143.

161. *Id.* at 1. Under Article III of the United States Constitution, an organization can sue in its own capacity if it has a "personal stake in the outcome of the controversy," by virtue of a "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources." Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982). To make out organizational standing, the organizational plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Friends of the Earth, Inc. v. Laidlaw, 528 U.S. 167, 180–81 (2000).

162. RELMAN COLFAX PLLC, https://www.relmanlaw.com/ [https://perma.cc/SK3K-9PG4] (last visited Jan. 27, 2022).

163. *Case Profiles: Harper, et al. v. Cuomo, et al.*, RELMAN COLFAX PLLC (Jan. 14, 2021), https://www.relmanlaw.com/cases-391 [https://perma.cc/3N7P-9AFP].

164. *See supra* note 142.

165. Alice Speri, *New York's Prison Transfers Increased COVID-19 Risk for Sick, Elderly Men*, INTERCEPT (Jan. 8, 2021, 8:07 AM), https://theintercept.com/2021/01/08/covid-new-york-prison-nursing-home-lawsuit/ [https://perma.cc/4J2U-U7S6].

166. Harper v. Cuomo, No. 21-CV-19, 2021 WL 1821362, at *8–9 (N.D.N.Y. Mar. 1, 2021).

167. *Id.*

168. Michele C. Nielsen, *Mute and Moot: How Class Action Mootness Procedure Silences Inmates*, 63 UCLA L. REV. 760, 764 (2016).

169. Harper v. Cuomo, No. 21-CV-19, 2021 WL 1540483 (N.D.N.Y. Apr. 20, 2021) (order denying preliminary injunction).

itself.[170] With the direct participation of RAPP, we leveraged *Harper* into a June 25, 2021, stipulation of settlement requiring the State to afford consistent and uninterrupted vaccine access at Adirondack.[171] Unlike many of our prospective relief orders,[172] the *Harper* order contains no sunset provision. By August 2021, our affirmative litigation effort had closed.

IV.
THE REEDUCATION OF THE "CAUSE" LAWYER: THE COVID-19 CRISIS AND MOVEMENT LAWYERING LESSONS

Our work is far from over, but our first 18 months of COVID-related litigation and advocacy were unique. We learned a great deal about what movement lawyering looks like in praxis, deepened our understanding of the principles that inform our practice, and reevaluated methods for implementing those principles. Of the lessons I learned or re-learned over this 18-month whirlwind, four predominate:

A. Use Your Work to Advance the Articulated Goals of Directly Impacted, Mobilized People and Build Power Among Those People. This Goal Must Transcend Your Desire to "Win" the Case.

Nonprofit civil rights organizations often engineer litigation based on an abstract understanding of marginalization and its impact, then find plaintiffs.[173] This is the modern iteration of a longstanding process by which some impact litigators displace the needs and desires of their clients. The process has morphed since Derrick Bell articulated its major drawbacks in *Serving Two Masters*,[174] but it persists and must be critically evaluated.

We must eschew this process in favor of actually asking what directly impacted people want. Through our COVID-19 work, we learned the importance of centering the overwhelming preference of directly impacted people—in this case, release from prison—rather than potentially easier to attain, less ambitious goals. Our decisions, particularly *Bellamy*, *Alicea*, *MacKenzie*, and *Holden*, exposed as a false choice the distinction between a responsive litigation strategy and a pragmatic one. Civil rights lawyers are trained to leverage incrementalism and manage demands and expectations, lest they lose. Our experiences cast doubt on the wisdom of this training.

170. *Id.* at *3, *5.

171. Stipulation of Discontinuance, *Harper*, 2021 WL 1540483.

172. 18 U.S.C. § 3626(a)(1) (2018) (requiring that prospective relief in a prison conditions cases extend "no further than necessary").

173. *See generally* Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 136 (2015) (describing the plaintiff selection process in civil rights impact litigation cases).

174. *See* discussion *supra* Section IV.A.

B. Remain Flexible and Adaptable. Use Every Tactic—Especially Non-Litigation Tactics—to Advance the Goal. Transcend the Strictures of Your Organization.

We aim to practice what movement lawyers call "integrated advocacy."[175] Central to this effort is a commitment to "support strategic collaboration with nonlawyer activists and encourage analysis about the potential consequences—intended and unintended—of legal interventions."[176] Integrated advocacy is aimed at

> break[ing] down persistent divisions between lawyers and nonlawyers, litigation and nonlitigation strategies, and court-centered versus politics-centered advocacy campaigns . . . by deemphasizing the centrality of any one type of legal intervention . . . in favor of flexibly coordinating organizational and tactical resources across different institutional spaces . . . to achieve short-term policy reform and long-term cultural and social change.[177]

We had pursued integrated advocacy before the pandemic and collaborated with many of the organizations in New York's prisoners' rights space. The integrated advocacy we engaged in during our first 18 months of COVID work, however, grew to become robust and fully inclusive. After some initial mistakes, we ceased litigating at arm's length from the nonlawyer activists with whom we collaborated. We instead dismantled silos and keyed our litigation to near-constant feedback from the advocacy community.

C. Use Every External Communication as an Opportunity to Solicit Non-Mobilized People's Support for the Articulated Goals of Directly Impacted, Mobilized People.

The 24-hour news cycle is not always conducive to our often nuanced message, but the press is nonetheless a powerful organizing tool. We have found press particularly potent where we use it to connect our work to the work of organizers across the country, or with the objectives of the movement writ large. Again, after some initial mistakes, we developed a press plan and press strategies that situated our COVID-19 work within larger decarceration and abolition efforts. This aided the *non-mobilized* public in recognizing incarceration as a public health and budgetary crisis that can be solved with people power. Recognition helped us build new relationships with people outside of our space, increasing the scope and power of our message and our movement.

175. Cummings, *supra* note 118, at 1653.
176. *Id.*
177. *Id.*

D. Constantly Reassess Your Place—and Your Organization's Place—in the Effort and the Broader Movement.

As movement lawyers, we must embrace shifting roles. Sometimes we must lead, but far more often, we must follow, building power among marginalized people rather than exercising our own power as professionals. The same is true of legal organizations, which have typically exercised three different advocacy legal models: [1] the civil legal aid model, [2] the test case model, and [3] the social rescue model.[178] All three of these models posit that the legal system is fundamentally just and that with access to lawyers and legal help, marginalized people can reliably leverage the legal system to their benefit.[179] By contrast, the community lawyering model posits that the legal system is a system that fosters inequality and actively oppresses BIPOC and other marginalized people.[180] Only by building power among these people can lawyers render themselves useful in movements for justice.[181] Community lawyering means stepping back when necessary, stepping forward when asked, and altering our participation in social justice endeavors to suit the larger purpose directly impacted people have chosen to pursue. It has taken time, but our COVID-19 work has turned us confidently in this direction.

V.
LOOKING FORWARD

There remains much work to be done. At the time of this writing, March 2022, America is still losing thousands of people per day to COVID-19 on average.[182] At least three new variants—each deadlier than the first—have spread.[183] So long as state violence exists and bureaucratic indifference persists, prisons will bear a disproportionate share of this suffering. But prisons will also remain sites of resistance, and lawyering strategies will evolve alongside the resistance of incarcerated people. The movement lawyer's commitment is to use legal strategies to support, amplify, and achieve the demands of people in the crosshairs of state violence and bureaucratic indifference. Our 18 months of COVID-19 state prison

178. Joseph Phelan, *Purvi & Chuck: Community Lawyering*, CMTY. JUST. PROJECT (June 15, 2010), http://communityjusticeproject.com/media/2014/9/24/purvi-chuck-community-lawyering [https://perma.cc/8XCT-UD79].

179. *Id.*

180. *Id.*

181. *Id.*

182. *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Mar. 14, 2022), https://www.nytimes.com/interactive/2021/us/covid-cases.html [https://perma.cc/89PL-UME8] (showing that as of March 14, 2022, the United States of America was averaging 1,291 COVID-19 deaths per day).

183. Michelle Roberts, *What Are the Covid Variants and Will Vaccines Still Work?*, BBC NEWS (Dec. 23, 2021), https://www.bbc.com/news/health-55659820 [https://perma.cc/5F9A-BTXL].

litigation and advocacy have sharpened our strategies, deepened our commitment, and heightened our resolve to grow with the movement, always honoring our role.