RESOURCE ATTACKS ON THE CRIMINAL LEGAL SYSTEM

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ABSTRACT

Many of the most widely discussed and influential criminal legal reform proposals of the last several years, including "defund the police," "no new jails," and plea strikes, are resource attacks. Resource attacks reduce the footprint of the criminal legal system by creating an imbalance between the resources available to it and the resources it needs to continue status quo operations. Forced into a resource crunch, the theory goes, institutions such as the police, prosecutors, and criminal courts will triage and scale back. There is substantial evidence that resource attacks can, and have, meaningfully reduced incarceration, misdemeanor prosecutions, and executions.

Yet, despite their effectiveness, popularity, and political influence, resource attacks presently exist without a name or identity in the criminal legal scholarship. This article fills that gap, beginning with a definition and a catalog of resource attack case studies and proposals. The catalog includes a novel case study: in 2020, New York rewrote its discovery law to impose substantial new burdens on prosecutors. Prosecutors were quickly overwhelmed—following the law's implementation, the rate of dismissals of misdemeanor cases in New York City jumped from 32.6% of cases just prior to reform to 55.2% after.

Resource attacks can deliver tremendous impact quickly and at low political cost. However, their effects are often temporary as affected institutions adapt to constraints or secure additional funding. Resource attacks can even backfire, forming the foundation for a bigger, more destructive criminal legal system. The article concludes with guidance for architects of prospective resource attacks: they should tailor their plans to a jurisdiction's particular legal and institutional features, prepare to stay engaged well after their intervention's launch, and promote statutory changes that make the temporary effects of a resource attack permanent.

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INTRODUCTION

Defund the police.[1] No new jails.[2] Go to Trial: Crash the System.[3] The proposals encapsulated in these slogans share something in common. They are *indirect* attacks on the criminal legal system, aiming to limit its capacity to cause harm—in contrast to direct attacks that abolish or restrict its harmful practices outright.[4] This principle is the shared foundation of some of the present moment's most-discussed criminal legal reform proposals. And yet, it exists without a name or identity and has largely avoided scholarly attention. That gap deserves filling.

1. *Infra* notes 46–50 and accompanying text.
2. *Infra* notes 85–86 and accompanying text.
3. *Infra* notes 109–112 and accompanying text.
4. Examples of direct attacks include banning solitary confinement, eliminating cash bail, decriminalizing conduct such as drug possession, and lessening the severity of statutory sentencing ranges. *See infra* Part I.B.

Resource attacks are a coherent and distinct approach to decreasing the footprint of the criminal legal system. The criminal system requires a staggering volume of resources to function at its present capacity.[5] These include large-scale physical infrastructure such as prisons, jails, courthouses, and police precincts; small-scale infrastructure such as pistols, handcuffs, and uniforms; digital infrastructure; human capital; and billions of dollars to pay for it all. At status quo, the criminal system sits at a tenuous resource equilibrium: it consumes all of the resources available to it.[6] Unbalancing that equation—decreasing the resources it has ("defund the police") or increasing the resources it needs ("go to trial: crash the system")—can force the system to triage, and, consequently, reduce the harm it causes.

Resource attacks are not just academic thought experiments or political rally chants. Rather, they have a long history as a policymaking tool,[7] they are alive in the public consciousness,[8] and they form the foundation of policy proposals before legislatures and in academic publications.[9] In practice, they can be powerfully impactful. And yet, resource attacks, applied as a coherent and distinct strategy to scale back the criminal legal system, have garnered little attention, and lack even a name, in the academic literature.[10] This article provides that missing name and offers a definition. Working from that definition allows for the identification, comparison, and systematic analysis of past resource attacks—many of which previously evaded study as resource attacks because that was not their stated purpose. There are compelling practical reasons for beginning a more deliberate study of resource attacks. Resource attacks are blunt instruments, and they ought to be wielded carefully: both for the sake of their proponents, so that they affect the policies they intend for them to affect, and for society at large, so that dangerous unintended consequences may be avoided. Academic attention and analysis should inform the design and execution of future interventions.

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5. *Infra* note 19 and accompanying text.

6. *Infra* note 128 and accompanying text.

7. For decades, conservative lawmakers in particular have deployed this strategy, and to great effect. *Infra* notes 32–35 and accompanying text (discussing initiatives to reduce funding for public television, research on gun violence, and reproductive health, among others).

8. *Infra* Part I.C.i.

9. *Infra* Part I.A.

10. Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187 (2017) comes the closest and invites this paper's more thorough exploration of resource attacks. Bierschbach and Bibas recognize that many criminal system institutions do not bear the costs of their actions, and thus overuse destructive practices like incarceration, warrantless searches, and pre-trial detention. *Id.* at 200. They propose various interventions to force the internalization of these costs. *Id.* at 209–10. Doing so would, in many cases, strain the resources of institutions accustomed to a "correctional free lunch at the all-you-can-eat buffet." *Id.* at 246 (internal quotation marks omitted). The authors expect that this may "force police, prosecutors, judges, and other actors to do triage, focusing their efforts on the most socially beneficial intervention." *Id.* at 193. With this observation, Bierschbach and Bibas articulate, in brief, the theory underlying resource attacks as a tool to scale back the criminal legal system. This article picks up where they left off: providing the thorough exploration of resource attacks so far missing in the academic literature.

The remainder of the article proceeds as follows: Part I defines resource attacks and identifies their key features. It begins by describing the history and purpose of resource attacks as applied to scale back the scope and destructive footprint of the criminal legal system. It then provides the definition used throughout the article: resource attacks create a resource shortfall within a criminal legal system institution, forcing that institution to triage, and, for some period of time, reducing the harm it causes.[11] Part I concludes with a catalog of case studies of successful resource attacks and proposals for prospective resource attacks. The catalog is divided into two broad categories corresponding to the way that the resource attack creates a resource constraint. Some, such as defunding or prison capacity limits, reduce the resources available to a targeted criminal legal system institution. Others, such as plea strikes that force more cases to trial, increase the resources needed by the institution while holding the resources available to it constant.

Part II surveys resource attacks' advantages and disadvantages as a tool to scale back the criminal legal system. Resource attacks are attractive because of their potential to deliver enormous impact and to do so quite rapidly. In addition, resource attacks may be entirely grassroots organized.[12] Grassroots interventions are especially valuable in jurisdictions where elected officials, prosecutors, and law enforcement are not representative of, and ignore the interests of, their constituents who are most affected by the criminal legal system. Grassroots resource attacks also have tremendous capacity to scale: well-organized community participation can quickly overwhelm institutions that, in many instances, are already running at or near capacity.

However, resource attacks also carry a considerable risk of backfire: an intervention that reduces harm in the short term may form the foundation for a criminal system that consumes more public resources, touches more people, and uses more destructive practices over the long term. Resource constraints put discretion in the hands of the very actors whose conduct was objectionable in the first place—forced to reallocate scarce resources, police, prosecutors, and prison guards may double down on their most harmful practices and abandon others that were less harmful, or even beneficial. Finally, resource attacks are subject to reversal and are often short-lived. A funding gap can be filled with more funding. Technology and improved processes can obviate the need for lost physical or human infrastructure.

Part III is an in-depth exploration of an ongoing resource attack. In January 2020, revisions to New York's discovery law took effect, dramatically increasing the burden on prosecutors to seek out materials relevant to their cases and share

11. This article's definition is phrased to apply to resource attacks directed at the size and reach of the criminal legal system. However, resource attacks are a tool that may be used to influence government action and policy in many other contexts. *See, e.g.*, *infra* notes 32–35 and accompanying text. The definition could be adapted accordingly.

12. Examples include plea strikes and acts of civil disobedience that overwhelm police, prosecutors, and jails. *Infra* notes 113–114, 138–143 and accompanying text.

them with the defense. This discovery scheme, which requires prosecutorial disclosure of discoverable materials early in a case's lifecycle, was a radical departure from pre-reform practice, where prosecutors typically made discovery disclosures on the eve of trial. Following the law's implementation, prosecutors were often unable to meet their discovery obligations within the strict timelines set by New York's statutory speedy trial clock. Dismissals at the speedy trial deadline skyrocketed, especially in misdemeanor cases. In New York City, misdemeanor dismissal rates increased from 32.6% pre-reform to 55.2% post-reform (a 22.6 percentage point, or 69.3%, increase).[13] A pattern in the timing of these dismissals indicates that many are discovery compliance related. In comparison to other reforms aimed at scaling back misdemeanor prosecutions, the effects of New York's discovery reform at its peak are considerable.[14] For example, policy changes by progressive prosecutors in Boston and Philadelphia reduced misdemeanor prosecutions on the order of six to ten percentage points.[15]

However, like many resource attacks, New York's discovery reform cannot be characterized as an unmitigated success: in just three years following the discovery reform's implementation, New York has allocated over $300 million to assist police and prosecutors with their new discovery-related burdens, significantly expanding the monetary footprint of the criminal legal system.[16] Meanwhile, dismissal rates appear to be declining from their peak and the law's robust enforcement mechanism faces threats from both the judiciary and state legislature.

Part IV builds on the prior Parts' observations and case studies to guide the architects of prospective resource attacks. Resource attacks are prone to reversal and even backfire: becoming the foundation for a larger and more harmful criminal legal system. To prevent that outcome, advocates should prepare to stay engaged well after the initial creation of a resource constraint. They must lobby against funding increases and policy changes that would relieve resource constraints or mitigate their effects.[17] Most importantly, advocates should prepare to lock in the positive effects of a resource attack. The best opportunity to do so will often be as a part of a two-step maneuver: orchestrate a resource crunch to expose the unnecessary expanse of the criminal legal system, then capitalize on that exposure to make its effects permanent. For example, the COVID-19 pandemic's emergency release of older prisoners, 99.85% of whom had committed no new crimes as of September 2022, makes the case for policies

13. This paper's analysis draws on data obtained via Freedom of Information Law request that was previously unavailable to the public. Methodology discussed further *infra* Part III.C.i.

14. *Infra* Part III.C.ii.

15. *Infra* Part III.C.ii.

16. *Infra* note 168 and accompanying text.

17. *See, e.g.*, *infra* notes 240–249 and accompanying text.

permanently expanding compassionate and early release.[18] Similarly, the rise in misdemeanor dismissal rates to over 50% following New York's discovery reform invites consideration of whether cases dismissed at such high rates should be diverted from the criminal legal system entirely.

I.
RESOURCE ATTACKS

A. History and Purpose

The United States criminal legal system is massive in its reach and cost.[19] This system projects severe burdens onto the millions of people it touches, beginning, but not ending, with the tangible effects of incarceration, surveillance, and monetary penalties. Criminal charges, whether or not they end in conviction, show up on background checks, inhibiting educational opportunities and career advancement.[20] The experience of arrest is traumatic.[21] These destructive consequences are not limited to the individual who is arrested and prosecuted. Research shows powerful spillover effects of criminal system involvement onto

18. Molly Gill, *Thousands Were Released from Prison During Covid. The Results Are Shocking*, WASH. POST (Sept. 29, 2022), https://www.washingtonpost.com/opinions/2022/09/29/prison-release-covid-pandemic-incarceration/ [https://perma.cc/DT8E-X34T].

19. At the end of 2020, about 1.7 million Americans were incarcerated and almost 3.9 million more were under supervision. RICH KLUCOW & ZHEN ZENG, U.S. DEP'T OF JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2020, at 1 (2022), https://bjs.ojp.gov/content/pub/pdf/cpus20st.pdf [https://perma.cc/5SL9-54VL]. Approximately 13 million people each year are charged with misdemeanor offenses. ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME 2 (2018). The most recent Justice Department data from 2017 estimate the cost of the criminal legal system to be $305 billion, over 1.5% of the United States Gross Domestic Product. EMILY D. BUEHLER, U.S. DEP'T OF JUST., JUSTICE EXPENDITURES AND EMPLOYMENT IN THE UNITED STATES, 2017, at 1 (2022), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/jeeus17.pdf [https://perma.cc/8JXW-QJKD]; News Release, U.S. Bureau of Econ. Analysis, Gross Domestic Product, 4th Quarter and Annual 2017 (Third Estimate) (Mar. 28, 2018), https://www.bea.gov/system/files/2018-03/gdp4q17_3rd.pdf [https://perma.cc/H8LZ-DRAC] (stating that the U.S. Gross Domestic Product in the fourth quarter of 2017 was $19,754.1 billion). These costs are only direct monetary expenses such as the cost of police, prisons, and courts. *Id.* at 2. They do not include the incalculable opportunity costs of disrupting millions of people's lives annually.

20. Wayne A. Logan & Andrew Guthrie Ferguson, *Policing Criminal Justice Data*, 145 MINN. L. REV. 541, 566 (2016), https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1144&context=mlr [https://perma.cc/CP46-4CQP]; Abigail E. Horn, *Wrongful Collateral Consequences*, 87 GEO. WASH. L. REV. 315, 320, 330–31, 339 (2019), https://www.gwlr.org/wp-content/uploads/2019/04/87-Geo.-Wash.-L.-Rev.-315.pdf [https://perma.cc/R8T6-WZGL].

21. Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 313–20 (2016), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1495&context=mlr [https://perma.cc/3AZK-JLDH].

families and communities, including monetary costs,[22] lost earning opportunity,[23] and trauma from separation with loved ones.[24]

The incalculable harm inflicted by the criminal legal system does not appear to produce social benefits that would justify it.[25] Though the United States is one of the most punitive nations on earth, it is far from the safest: crime rates are high

22. *See generally* Joshua Page & Joe Soss, *The Predatory Dimensions of Criminal Justice*, 374 SCIENCE 291 (2021), https://www.science.org/doi/10.1126/science.abj7782?url_ver=Z39.88-2003&rfr_id=ori:rid:crossref.org&rfr_dat=cr_pub%20%200pubmed [https://perma.cc/7ZJ8-3WZB] (describing the criminal system's "predation" effects on low-income and Black communities); Joshua Page, Victoria Piehowski & Joe Soss, *A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Predation*, 5 RUSSELL SAGE FOUND. J. SOC. SCI. 150 (2019), https://www.rsfjournal.org/content/rsfjss/5/1/150.full.pdf [https://perma.cc/723Q-XY34] (explaining how the commercial bail industry extracts monetary resources from low-income communities of color, with a disproportionate impact on women of color).

23. Any prison sentence reduces an individual's lifetime earning potential by over half. Individuals with a criminal conviction but without time incarcerated experience lesser, though still significant reductions as well. TERRY-ANN CRAGIE, AMES GRAWERT & CAMERON KIMBLE, BRENNAN CTR. FOR JUST., CONVICTION, IMPRISONMENT, AND LOST EARNINGS 4, 6 (2020), https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal [https://perma.cc/4MPZ-5XPN].

24. *See generally* Hedwig Lee & Christopher Wildeman, *Assessing Mass Incarceration's Effects on Families*, 374 SCIENCE 277 (2021), https://www.science.org/doi/10.1126/science.abj7777 [https://perma.cc/K3RH-C2J2] (parental incarceration has dramatic negative effects on children's mental health and educational achievement, and these burdens fall disproportionately on low income people and people of color); Christopher Wildeman, *Parental Incarceration, Child Homelessness, and the Invisible Consequences of Mass Imprisonment*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 74 (2014), https://journals.sagepub.com/doi/abs/10.1177/0002716213502921 [https://perma.cc/HY3K-2XVB] (children with an incarcerated father disproportionately experience homelessness); Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013, 2047–48 (2022), https://harvardlawreview.org/wp-content/uploads/2022/06/135-Harv.-L.-Rev.-2013.pdf [https://perma.cc/759L-Q7Z7] ("[U]tterly banal and harmless conduct—like sending a tweet or a text message to a loved one—becomes a serious felony when undertaken by a prisoner.")

25. As scholar Ronald Wright wrote:

> Criminal justice systems in the United States ran an extraordinary social experiment for two generations between 1975 and 2015. An upturn in per capita crime rates during the 1960s and 1970s prompted a breathtaking and sustained increase in rates of imprisonment. . . . Whatever one might think about the early effects of this experiment, there is now a basic consensus among attorneys, judges, and other "insider" professionals who work in criminal justice: somewhere along the way, this experiment became a bad idea with tragic consequences . . . . [I]t is common to find system insiders who believe that the continued growth of prisons and jails no longer delivers enough crime control benefit. The law of diminishing returns applies here.

Ronald F. Wright, *Reinventing American Prosecution Systems*, 46 CRIME & JUST. 395, 397 (2017), https://www.journals.uchicago.edu/doi/abs/10.1086/688463 [https://perma.cc/C2SS-F4U5].

in comparison to other high-income countries.[26] Disturbingly, both the punitive fist of the criminal system *and* the worst effects of crime fall disproportionately on people of color, particularly Black people.[27] This is not an accident—the origins of our modern criminal system lie in attempts to preserve the antebellum white-dominant social order.[28]

Critics argue that it is unconscionable for a government of the people, by the people, and for the people to cause so much pain and destruction with so little to show for it. The past several decades have witnessed a robust and diverse movement to reform or dismantle the U.S. criminal legal system.[29] A multidisciplinary scholarly literature has emerged to describe and inform this movement.[30] This article contributes to that scholarship by identifying, defining, and classifying resource attacks as a distinct, effective, and increasingly popular approach to reduce the destructiveness of the criminal legal system.

The concept of advancing a policy goal indirectly by creating a resource shortage is not new. In the 1960s, overwhelming police and jails was an integral part of civil rights leaders' strategy.[31] Political conservatives have sought to restrict government funding as a means to tighten access to birth control and

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26. Holger Spamann, *The U.S. Crime Puzzle: A Comparative Perspective on U.S. Crime and Punishment*, 18 AM. L. & ECON. REV. 33, 34–36 (2016), https://academic.oup.com/aler/article-abstract/18/1/33/2195556 [https://perma.cc/4B9S-UBVF] (concluding that the "low effectiveness of mass incarceration" helps explain why "[w]ithin the OECD, the United States is a high outlier for homicides and serious drug abuse and above average for other crimes . . . . At the same time, the United States incarcerates five times more people per capita than the OECD average, more than any other country in the world."); Justin McCrary & Sarath Sanga, *General Equilibrium Effects of Prison on Crime: Evidence from International Comparisons*, 2 CATO PAPERS ON PUB. POL'Y 165 (2012), https://www.cato.org/sites/cato.org/files/serials/files/cato-papers-public-policy/2013/6/cppp-2-4.pdf [https://perma.cc/PF2H-JVXJ] (concluding that sharp increases in U.S. incarceration rates beginning in 1970 did not have substantial public safety benefits).

27. Spamann, *supra* note 26, at 70; JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 14, 76 (2017).

28. *See generally* KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2010); Dorothy E. Roberts, *Crime, Race and Reproduction*, 67 TUL. L. REV. 1945, 1946 (1993), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2384&context=faculty_scholarship [https://perma.cc/7BK2-CLD5] ("The American criminal justice system has historically served as a means of controlling blacks.")

29. Some efforts aim to transform the criminal system from destructive to constructive, using it to deliver drug treatment, job training, and therapy to people who need it and otherwise cannot access it. *See, e.g.*, Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 UC DAVIS L. REV. 1573, 1575–77 (2021), https://lawreview.law.ucdavis.edu/issues/54/3/articles/files/54-3_Collins.pdf [https://perma.cc/L49C-9T7J]. Others work to reduce its scale: the number of people it ensnares and the extent to which it affects the lives of those it touches. *See, e.g.*, Frampton, *supra* note 24, at 2020. Others still fight to abolish or curtail the system's most harmful practices entirely. *See, e.g.*, Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 4–6 (2019), https://harvardlawreview.org/wp-content/uploads/2019/11/1-122_Online.pdf [https://perma.cc/86CM-ZQPS].

30. *See, e.g.*, *supra* notes 20–29; *infra* notes 39, 42, 44, 47, 51.

31. *See, e.g.*, MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 68 (Signet Classics 2000) (1964).

abortions,[32] constrain art and television programming perceived to promote liberal ideology,[33] and quash research into gun violence,[34] among other examples.[35] Resource constraints played a role in bringing about the era of mass incarceration: denying Medicaid expansion,[36] restricting SSI benefits,[37] and reducing education funding for prisoners[38] shaped the contemporary criminal legal system.

Academics have also advanced proposals to reduce the footprint of the criminal system by straining or overwhelming its resources. In *Rationing Criminal Justice*, Richard Bierschbach and Stephanos Bibas argue that criminal system institutions should internalize the true costs of destructive tools like incarceration,

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32. YANA VAN DER MEULEN RODGERS, THE GLOBAL GAG RULE AND WOMEN'S REPRODUCTIVE HEALTH: RHETORIC VERSUS REALITY 1–13 (2018); Mary Ziegler, *Sexing* Harris*: The Law and Politics of the Movement to Defund Planned Parenthood*, 60 BUFF. L. REV. 701, 703–04 (2012), https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=4619&context=buffalolawreview [https://perma.cc/XKU4-UDEF].

33. David M. Stone, *US Public Broadcasting, Target of Trump Cuts, Found Its Voice Amid Presidential Scandal*, COLUM. JOURNALISM REV. (Mar. 20, 2017), https://www.cjr.org/analysis/public-broadcasting-trump-pbs-cbp.php [https://perma.cc/32TJ-49JG]; JAMES T. BENNETT, THE HISTORY AND POLITICS OF PUBLIC RADIO: A COMPREHENSIVE ANALYSIS OF TAXPAYER-FINANCED US BROADCASTING 99–103 (2021) (discussing efforts to defund the Corporation for Public Broadcasting by the Republican House majority of the mid-1990s).

34. *See* Nidhi Subbaraman, *United States to Fund Gun-Violence Research After 20-Year Freeze*, 577 NATURE 12 (2020), https://www.nature.com/articles/d41586-019-03882-w [https://perma.cc/8QAH-9NTY] (noting that the "Dickey Amendment" of 1996, written by Republican congressman Jay Dickey, effectively prevented the CDC from using federal funds to research gun violence); David S. Meyer & Kaylin Bourdon, *Social Movements and Standing in the American Gun Debate*, 69 Emory L.J. 919, 983–985 (2020) (noting that, "[a]lthough the Dickey Amendment did not directly ban research on gun violence," the spending bill to which it was attached "cut $2.6 million . . . from the CDC's budget, the precise amount that had been spent on gun violence research in the previous year").

35. Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 200 n.31 (2014), https://www.virginialawreview.org/wp-content/uploads/2020/12/Brown_Book.pdf [https://perma.cc/H623-W4JN] (describing budget cuts used as a means to restrict federal firearms regulation, tax collection, and Securities and Exchange Commission enforcement); Laura Weiss, *In First Act, GOP-Controlled House Takes Aim at IRS Funding*, ROLL CALL (Jan. 10, 2023), https://rollcall.com/2023/01/10/in-first-act-gop-controlled-house-takes-aim-at-irs-funding/ [https://perma.cc/4QWF-VNM5].

36. *See* Jessica T. Simes & Jaquelyn L. Jahn, *The Consequences of Medicaid Expansion Under the Affordable Care Act for Police Arrests*, 17 PLOS ONE 1, 8 (2022) (finding that Medicaid expansion resulted in a decline in arrest rates).

37. *See* Manasi Deshpande & Michael Muller-Smith, *Does Welfare Prevent Crime? The Criminal Justice Outcomes of Youth Removed from SSI*, 137 Q.J. ECON. 2263, 2265–66 (2022) (finding that losing Supplemental Security Income increases an individual's risk of criminal charges and incarceration).

38. Richard Tewksbury & Jon Marc Taylor, *The Consequences of Eliminating Pell Grant Eligibility for Students in Post-Secondary Correctional Education Programs,* 60 FED. PROB. 60, 61–62 (1996), https://ojp.gov/ncjrs/virtual-library/abstracts/consequences-eliminating-pell-grant-eligibility-students-post [https://perma.cc/P6M3-C96S]. But note, in contrast to other examples provided in this paragraph, cuts to prisoner education had bipartisan support. *See* Joshua Page, *Eliminating the Enemy: The Import of Denying Prisoners Access to Higher Education in Clinton's America*, 6 PUNISHMENT & SOC'Y 357, 358–59 (2004).

warrantless searches, and pre-trial detention.[39] Some of the policies they discuss, like capping the number of prison beds and death sentences a jurisdiction's prosecutor may seek, resemble resource attacks.[40] Miriam Baer proposed a "Pigouvian tax" on searches by police—charging police departments for each search they conduct, with disruptive and intrusive searches costing the most.[41] She suggests that forcing police to devote a portion of their budget to account for the destructiveness of their search activity will result in fewer and less disruptive searches.[42] Andrew Crespo proposed coordinated "plea strikes" by criminal defendants.[43] These strikes would sharply increase the number of trials needed to resolve criminal cases at pre-strike rates.[44] By overwhelming prosecutors, defense attorneys, judges, and court staff, any substantial increase in trials would "crash the system," forestalling or preventing scores of convictions and sentences.[45]

In the past decade, progressive critics of the criminal legal system have elevated resource attacks into the general public dialogue. Following George Floyd's murder in 2020, "defund the police" became a household phrase.[46] The "defund" movement extended to encompass abolitionists' calls to restrict, hamstring, and ultimately dismantle prisons, criminal courts, and prosecutors'

39. Bierschbach & Bibas, *supra* note 10. Bierschbach and Bibas's conclusion that "solutions should strive to put the bloated American carceral state on the diet it sorely needs," *id.* at 246, invites this paper's thorough analysis of resource attacks.

40. *Id.* at 228–32.

41. Miriam H. Baer, *Pricing the Fourth Amendment*, 58 WM. & MARY L. REV. 1103 (2017).

42. *See id.* at 1138.

43. Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999, 2003–04 (2022).

44. *Id.* at 2007.

45. *Id.* (quoting Michelle Alexander, Opinion, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 11, 2012), https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html [https://perma.cc/6W26-CKP8]).

46. Amna A. Akbar, *How Defund and Disband Became the Demands*, N.Y. REV. BOOKS (June 15, 2020), https://www.nybooks.com/online/2020/06/15/how-defund-and-disband-became-the-demands/ [https://perma.cc/4GYZ-UGCQ]; Jennifer Cobbina-Dungy, Soma Chaudhuri, Ashleigh LaCourse & Christina Delong,*"Defund the Police:" Perceptions Among Protesters in the 2020 March on Washington,* 21 CRIMINOLOGY & PUB. POL'Y 147, 148–49 (2022); *see also Merriam-Webster's Word of the Year 2020*, MERRIAM-WEBSTER https://www.merriam-webster.com/words-at-play/word-of-the-year-2020-pandemic/coronavirus [https://perma.cc/DG2J-NJ8T] (last visited July 23, 2023) (listing "defund" as one of Merriam-Webster's words of the year for 2020); Tiffany Yang, *"Send Freedom House!": A Study in Police Abolition*, 96 WASH. L. REV. 1067, 1070–71 (2021), https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=5184&context=wlr [https://perma.cc/9ZNH-UHFD] (connecting a rise in popular awareness of police abolitionism to the murder of George Floyd, Breonna Taylor, Tony McDade, and Rayshard Brooks). In an indication of the prominence of "defund" in the zeitgeist, following the FBI's raid of Mar-a-Lago in August 2022, supporters of President Trump have called for "defunding the FBI." Petula Dvorak, *Defund the FBI? Sounds Familiar. But Not from This Crowd*, WASH. POST (Aug. 15, 2022), https://www.washingtonpost.com/dc-md-va/2022/08/15/defund-fbi-mar-a-lago-trump/ [https://perma.cc/JT7Z-JCWU].

offices.[47] Calls to "defund" became so prominent among progressives that centrists within the Democratic party have publicly distanced themselves from the movement: in his 2022 State of the Union address, President Biden vowed to "fund the police."[48]

In direct response to calls to defund the police, some states and municipalities did exactly that.[49] Academic articles have begun to engage the legal and practical implications of defunding or disbanding the police.[50] Though not as prominent as the "defund" movement, other policies grounded in creating resource constraints within the criminal system have received considerable popular attention. Most prominently, calls to end mass incarceration and human rights abuses at prisons and jails bolstered the movement to close New York's Rikers Island jail complex.[51] The facilities to replace it will have substantially less capacity, requiring large decreases to New York City's incarcerated population.[52] Many

47. *See, e.g.*, Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CAL. L. REV. 1, 36–37 (2022), https://www.californialawreview.org/s/Clair-Woog-35-preEIC.pdf [https://perma.cc/V9MH-8CG3] (advocating defunding and reinvestment as strategies for criminal court abolition); Udi Ofer, *Defunding Prosecutors and Reinvesting in Communities: The Case for Reducing the Power and Budgets of Prosecutors to Help End Mass Incarceration*, 2 HASTINGS J. CRIME & PUNISHMENT 31, 54–56 (2021), https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1022&context=hastings_journal_crime_punishment [https://perma.cc/QLW9-KGLA] (arguing that the principles of the defund-the-police movement "must be applied to prosecutors").

48. President Joe Biden, State of the Union Address as Prepared for Delivery (Mar. 1, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/01/remarks-of-president-joe-biden-state-of-the-union-address-as-delivered/ [https://perma.cc/VDY2-6VYF] ("We should all agree: The answer is not to defund the police. The answer is to FUND the police with the resources and training they need to protect our communities.").

49. Jemima McEvoy, *At Least 13 Cities Are Defunding Their Police Departments*, FORBES (Aug. 18, 2020), https://www.forbes.com/sites/jemimamcevoy/2020/08/13/at-least-13-cities-are-defunding-their-police-departments/ [https://perma.cc/7PHC-XKA2] (citing reductions to police budgets in Austin, Texas; Seattle, Washington; New York City, New York; Los Angeles, California; San Francisco, California; Oakland, California; Philadelphia, Pennsylvania; Washington, D.C.; Baltimore, Maryland; Portland, Oregon; Hartford, Connecticut; Norman, Oklahoma; and Salt Lake City, Utah).

50. *See, e.g.*, Shawn E. Fields, *The Fourth Amendment Without Police*, 90 U. CHI. L. REV 1023 (2023) (exploring the implications of defunding or supplanting traditional police for Fourth Amendment jurisprudence); Anthony O'Rourke, Rick Su & Guyora Binder, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1327 (2021) (evaluating the political, legal, and practical obstacles to disbanding police and exploring possibilities to overcome them); Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 281–318 (2023) (exploring whether the police and prison abolition movements will advance or hinder progress toward lessening the destructiveness of the criminal legal system).

51. INDEP. COMM'N ON N.Y.C. CRIM. JUST. & INCARCERATION REFORM, A MORE JUST NEW YORK CITY (2017), https://www.innovatingjustice.org/sites/default/files/media/documents/2017-11/lippmancommissionreportfinalsingles.pdf [https://perma.cc/GX7N-MN2X] (advocating for the closure of the Rikers Island jail complex as "an essential step" toward "replac[ing] mass incarceration with something that is more effective *and* more humane").

52. *See* Rich Calder, *NYC's New Mayor Is Caught Between Pledges over Rikers Island and Rising Crime*, WASH. POST (Mar. 21, 2022), https://www.washingtonpost.com/nation/2022/03/21/nycs-new-mayor-is-caught-between-pledges-over-rikers-island-rising-crime/ [https://perma.cc/QL4Y-LV2U].

more policies have functioned as resource attacks even though that was not their primary purpose.[53]

B. Definition

Resource attacks reduce the harm caused by the criminal legal system by restricting the system's capacity to inflict suffering. Every harm-inflicting act of the criminal system, including incarceration, branding someone a "felon," imposing and collecting fines, and pulling someone over, requires resources. These resources include police officers, prosecutorial and court personnel, buildings, scientific instruments, databases, and public money to pay for it all.

A resource attack creates a deficit between the resources available to a criminal system institution[54] and the resources it needs to continue its status quo operations. This resource constraint may force the targeted institution to triage—dispensing with some operations it had been performing prior to the onset of the resource constraint. A resource attack succeeds when this triage reduces the harm caused by the affected institution.[55]

Resource attacks contrast with "direct reforms" (or "direct attacks") that explicitly prohibit or limit the use of specific harm-causing practices. Direct reforms include decriminalizing conduct, outlawing police action such as chokeholds and suspicionless stops, abolishing the death penalty, eliminating solitary confinement, reducing the use and length of carceral sentences, and ending cash bail.

This article's definition of resource attacks is outcome oriented: if an intervention creates a resource constraint, and that resource constraint facilitates a reduction in harm, for the purposes of this article, that intervention is a resource attack, regardless of the intent behind it. In fact, many of the interventions discussed in this article were designed primarily, or entirely, as direct reforms. In practice, however, they function as both direct reforms and resource attacks: directly prohibiting a particular criminal system harm, and indirectly reducing other harm by creating a resource constraint.[56] This definition opens the door to comparing interventions that have previously escaped comparison because they share little in common on the surface.

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53. *Infra* Section I.C.

54. Criminal system institutions include police, prosecutors, and criminal courts.

55. This definition is agnostic with respect to what constitutes criminal system harm, allowing for subjectivity in determining whether or not a resource attack was successful. In order to illustrate the full breadth and potential of resource attacks, this article takes an expansive view of what constitutes criminal system harm. *See supra* notes 21–24 and accompanying text; *infra* notes 179–183 and accompanying text. However, one may take a far narrower view and still accept the article's definition.

56. For example, the 2020 changes to New York's discovery law were designed as a direct reform to relieve the pressure on criminal defendants to make uninformed decisions about their cases. It has done so: prosecutors must now share troves of discovery in every case and do so early in the case's life cycle. *Infra* Section III.A. It has also functioned as a resource attack, creating a resource constraint that resulted in the dismissal of thousands of misdemeanor cases. *Infra* Sections III.B–C.

C. Catalog of Resource Attacks

The next subsections catalog resource attacks—both existing and proposed. The catalog is divided by the manner in which the resource attack creates a resource constraint: the first part focuses on interventions that create a resource constraint by reducing resource availability, typically by decreasing funding or access to needed infrastructure. The second part focuses on interventions that create a resource constraint by increasing the resource needs of the targeted criminal legal system institution while holding the resources available to it constant.[57]

1. Reducing Resources

a. Institutional Reduction

Following George Floyd's murder by a police officer in 2020, "defund the police" became a rallying cry for public protest movements.[58] Calls to extend the defund movement to prisons, prosecutors' offices, and criminal courts soon followed.[59] These calls, taken at face value, aim to reduce funding to criminal system institutions as a whole. Institutional defunding is a blunt instrument and advocates have different reasons for supporting it. Some, including police and prison abolitionists, view police, prisons, and prosecutors as rotten to the core. Accordingly, *any* reduction in their budget and operations is inherently beneficial.[60] Additionally, at high enough levels, defunding is tantamount to outright abolition or elimination—the movements' ultimate objective.

More moderate advocates may support institutional defunding because the criminal legal system's most destructive and problematic practices are often its

57. There are many ways to classify and categorize resource attacks. The catalog uses the method of creating a resource constraint because the creation of a resource constraint is frequently the resource attack's identity—for instance, "defund the police" and "no new jails" both speak to the creation of a resource constraint by decreasing available resources.

58. *See supra* note 46 and accompanying text.

59. *See supra* note 47 and accompanying text.

60. *See, e.g.*, Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1553–54 (2022) ("Recognizing that the criminal legal system is not broken but rotten, the abolitionist goal is not 'improving a killing machine' but 'to try and figure out how to take incremental steps—a screw here, a cog there—and make it so the system cannot continue—so it ceases to exist.'" (quoting Interview by True Leap Press with Rachel Herzing, Co-Founder, Critical Resistance, *Black Liberation and the Abolition of the Prison Industrial Complex* (2016), *in* 1 PROPTER NOS 62, 65 (2016), https://trueleappress.files.wordpress.com/2016/08/propnos_final-draft-compressed1.pdf [https://perma.cc/8VXR-Y5QM])); DERECKA PURNELL, BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM 28 ("Reforms lead to browner, gayer, more women cops to lock up poor, dark, queer, disabled people. In other words, reforms only make police polite managers of inequality. Abolition makes police and inequality obsolete."); Clair & Woog, *supra* note 47, at 27 (contrasting "reformist reforms" that legitimize existing institutions with abolitionist reforms that weaken and delegitimize them).

most expensive. These include incarceration,[61] executions,[62] and police militarization.[63] Budget shortages, conceivably, nudge criminal system institutions to reconsider their most expensive practices. In a world of limited government funding, defunding police and prosecutors could also be viewed as a necessary prerequisite to scaling up more appropriate institutions, such as mental health response units and community violence interrupters.[64]

b. Targeted Reductions

In contrast to institutional reductions, targeted reductions reduce or disrupt the availability of particular instruments, people, and processes that the criminal system relies upon. The criminal legal system requires reams of infrastructure.[65] Its physical infrastructure includes prisons, courthouses, and police stations. This concrete infrastructure is supported by smaller-scale physical infrastructure: handcuffs, vehicles, guns, ankle monitors, computers, paper, pens, tables, and chairs. These physical instruments are wielded by human infrastructure: judges, prosecutors, clerks, police officers, corrections officers, public defenders, and social workers. Virtual infrastructure is increasingly important: the modern legal system would not function without video conferences, emails, e-discovery, e-

61. Ben Gifford, *Prison Crime and the Economics of Incarceration*, 71 STAN. L. REV. 71, 93 (2019), https://review.law.stanford.edu/wp-content/uploads/sites/3/2019/01/Gifford-71-Stan.-L.-Rev.-71-2019.pdf [https://perma.cc/8EP6-GQTT] (estimating the total economic cost of incarceration to be between $54,000 and $98,000 annually per person incarcerated).

62. Margot Garey, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221, 1268–69 (1985), https://lawreview.law.ucdavis.edu/issues/18/4/comment/DavisVol18No4_Garey.pdf [https://perma.cc/FQ2H-GUZF]; Justin F. Marceau & Hollis A. Whitson, *The Cost of Colorado's Death Penalty*, 3 U. DENV. CRIM. L. REV. 145, 152–55 (2013), https://www.law.du.edu/documents/criminal-law-review/issues/v03-1/Cost-of-Death-Penalty.pdf [https://perma.cc/7G2E-7YGX].

63. Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 919–29 (2015), https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-90-3-Harmon.pdf [https://perma.cc/F6TE-66KS]; KARA DANSKY, AM. C.L. UNION, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING (2014), https://www.aclu.org/sites/default/files/field_document/jus14-warcomeshome-text-rel1.pdf [https://perma.cc/NBW8-AMA6].

64. Fields, *supra* note 50, at 13 ("While different commentators use different terminology—defund, disaggregate, disentangle, unbundle—the basic concept remains the same: remove from policing the social work, traffic, and other noncriminal functions currently assigned to officers and redirect funding to nonpolice agencies better trained and equipped to respond to these social problems."); *id.* at 11, 17 (2023) (citing studies showing 50% to 90% of police functions are social work in nature and less than 5% of police responses address violent incidents); Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925, 979–80 (2021), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9733&context=penn_law_review [https://perma.cc/ZVM9-L9JK] ("Much harm occurs because we send armed people—who are trained and see their mission as force and law—to deal with myriad problems not particularly susceptible to this solution.").

65. Incarceration requires jails and jailers. Convicting a person of criminal possession of a controlled substance requires a police officer to arrest her, a lab technician to test the substances she carried, a prosecutor to pursue the case, a defense attorney to represent her, a judge to oversee litigation, and court clerks and officers to facilitate all the steps in between.

filing, and databases to track court appearances, criminal charges, and criminal records.[66] Limiting the availability of any infrastructure component has the potential to interrupt the criminal system's operations.[67] Such circumstances form fertile ground for a resource attack.[68]

Three different types of infrastructure interventions are discussed below: those affecting large-scale physical infrastructure, small-scale physical infrastructure, and human infrastructure.[69]

There could be no mass incarceration without massive capacity to incarcerate. Case studies demonstrate that imposing constraints on a jurisdiction's prison and jail capacity consistently engender decarceration. Consider the following three examples: First, in 1980, Minnesota's Sentencing Commission enacted changes to

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66. *See generally* Logan & Ferguson, *supra* note 20, at 549–56; Katherine L.W. Norton, *Avoiding the Great Divide: Assuring Court Technology Lightens the Load of Low-Income Litigants Post-COVID-19*, 88 TENN. L. REV. 771 (2021), https://ir.law.utk.edu/cgi/viewcontent.cgi?article=1036&context=tennesseelawreview [https://perma.cc/QDF3-4CQM]; Anne Skove, Colleen M. Berryessa, Lonnie Schaible & Ibrahim Aissam, *Justice in the New Digital Era: The Pitfalls and Benefits of Rapid Technology Adoption by Courts*, 2021 TRENDS STATE CTS. 61 (2021), https://www.ncsc.org/__data/assets/pdf_file/0026/66329/justice_in_the_new_Skove-Berryessa-Schaible-Aissam.pdf [https://perma.cc/BA5C-PNL3]; Andrew Guthrie Ferguson, *Courts Without Court*, 75 VAND. L. REV. 1461 (2022), https://cdn.vanderbilt.edu/vu-wordpress-0/wp-content/uploads/sites/278/2022/10/19121620/Courts-Without-Court.pdf [https://perma.cc/GG2U-LHKV]; Joshua H. Hernandez, *A Survey of Civil Procedure: Technology Responses to COVID-19 Within State Courts*, 105 MARQ. L. REV. 963 (2022), https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=5522&context=mulr [https://perma.cc/6BE3-SJDA].

67. The onset of the COVID-19 pandemic provided a case study: physical infrastructure was devastated as courtrooms closed and distancing requirements went into effect in jails and police stations. Consequently, rates of arrest, conviction, and incarceration plummeted. *See* Wendy Sawyer, *Untangling Why Prison & Jail Populations Dropped Early in the Pandemic*, PRISON POL'Y INITIATIVE (Mar. 24, 2022), https://www.prisonpolicy.org/blog/2022/03/24/covid_admissions/ [https://perma.cc/U969-KBJ8].

68. The examples in this subsection illustrate several ways that criminal system infrastructure may be constrained: Infrastructure components may be restricted or eliminated outright. A jurisdiction might decrease the maximum capacity of a prison or order its closure outright. Where the budgeting process permits it, a similar result may be achieved by targeted defunding: for example, eliminating grants for police-military equipment or a scandal-ridden police unit. Alternatively, an infrastructure shortage may materialize following a decrease in supply: companies could cease to manufacture or sell criminal system infrastructure such as drugs used to perform lethal injections or technology used for e-carceration.

69. Resource attacks targeting digital infrastructure are not discussed here, but are conceivable. Efficiency gains, critics argue, enable the vast overreach of our criminal system. *See generally* Brown, *supra* note 35; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 535–39 (2001), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1908&context=mlr [https://perma.cc/YR8H-8SVP]. Though bizarre, a resource attack could discourage investment in technology and require inefficient processes such as paper recordkeeping and in-person appearances. These interventions would, essentially, insert bureaucratic "sludge" into the criminal system. *Cf.* Cass R. Sunstein, *Sludge and Ordeals*, 68 *DUKE L. J.* 1843, 1844–52 (2019), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3988&context=dlj [https://perma.cc/G7SW-JFAU]. However, such a strategy carries serious risk of backfire. *See infra* notes 164–165 and accompanying text.

the state's sentencing guidelines.[70] The guidelines included a "strict prison capacity constraint"—state prisons were not to exceed 95% of their intended capacities.[71] The restriction proved to be a successful anti-incarceration measure: Minnesota's incarceration rates increased only slightly at a time when incarceration across the country exploded.[72] In contrast to Minnesota, incarceration rates in California rose sharply in the 1980s and 1990s.[73] By the 2000s, California's prisons were dangerously overcrowded: in *Brown v. Plata*, the Supreme Court held that conditions in California's prisons violated inmates' Eighth Amendment rights and ordered the state to depopulate its overcrowded facilities.[74] At the time of the *Plata* ruling in 2011, California's state prisons housed 162,000 individuals, nearly 200% of the system's intended capacity.[75] *Plata* affirmed a three-judge district court's order requiring California to reduce its prison population to 137.5% of design capacity within two years.[76] In order to comply with the Court's ruling, California passed the 2011 Public Safety Realignment Act.[77] The law's effects were fast and sweeping. By the end of 2013, California's prison population had dropped to 125,000—a decrease of 22.8% or 37,000 individuals.[78] Although part of the realignment involved rehousing state prisoners in local jails, data show that increased local jail populations offset only one third of the state prison decline.[79] In just one year following realignment, California's total incarcerated population declined approximately nine percent, or

70. Richard S. Frase, *Sentencing Reform in Minnesota, Ten Years After*, 75 MINN. L. REV. 727, 727 (1991), https://scholarship.law.umn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1548&context=faculty_articles [https://perma.cc/2SZZ-DWVN]. Interestingly, the sentencing commission was an independent body—not a part of the state's legislature or executive branch. *Id.*

71. *Id.* at 734.

72. *Id.* ("Between 1980 and 1984, Minnesota's prison population increased only 8%, while the total U.S. prison population increased 41%."). These figures are especially impressive in light of another change to the guidelines, the elimination of parole release. *Id.* at 733 ("parole no longer serve[d] as a 'safety valve' to relieve prison overcrowding"); Franklin E. Zimring, *The Scale of Imprisonment in the United States: Twentieth Century Patterns and Twenty-First Century Prospects*, 100 J. CRIM. L. & CRIMINOLOGY 1225, 1228 (2010), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7374&context=jclc [https://perma.cc/XLX3-NDBR]; *see also* Bierschbach & Bibas, *supra* note 10, at 230 (citing additional studies on the effects of Minnesota's 1980 sentencing guidelines).

73. Franklin E. Zimring & Gordon Hawkins, *The Growth of Imprisonment in California*, 34 BRIT. J. CRIMINOLOGY 83, 84 (1994), https://lawcat.berkeley.edu/record/1115089/files/fulltext.pdf [https://perma.cc/UY3X-6MFA].

74. 563 U.S. 493, 499–503 (2011).

75. Joan Petersilia, *California Prison Downsizing and Its Impact on Local Criminal Justice Systems*, 8 HARV. L. & POL'Y REV. 327, 327 (2014), https://journals.law.harvard.edu/lpr/wp-content/uploads/sites/89/2014/08/HLP208.pdf [https://perma.cc/TXX3-AJBM].

76. *Id.* at 330; *Plata*, 563 U.S. at 541–45.

77. Petersilia, *supra* note 75, at 332.

78. *Id.* at 333.

79. Magnus Lofstrom & Steven Raphael, *Prison Downsizing and Public Safety: Evidence from California*, 15 CRIMINOLOGY & PUB. POL'Y 349, 353–55 (2016), https://gspp.berkeley.edu/assets/uploads/research/pdf/Lofstrom_et_al-2016-Criminology__Public_Policy.pdf [https://perma.cc/35UJ-GAJS].

20,000.[80] In the years that followed, California's incarcerated population continued to decline, though the pace of decarceration slowed.[81] Third, COVID-19 created a sudden decrease in states' capacities to incarcerate. Overcrowded facilities were a breeding ground for the virus, the number of prisoners with urgent medical needs increased sharply, and there were new obstacles to arresting, charging, sentencing, and transporting incarcerated individuals. State and federal governments responded with rapid and dramatic decarceration.[82] A Marshall Project and Associated Press study estimates that between March and June 2020, state and federal prison populations declined by 100,000.[83]

Building on these examples of decarceration following prison capacity constraints, anti-incarceration advocates have promoted capacity limits as a resource attack.[84] "No New Jails" is the name of a network of organizations devoted to "community-led efforts towards freedom and abolition, by demanding governments divest from jail construction and invest in a stronger social safety net."[85] No New Jails was particularly prominent in discussions around closing Rikers Island, New York City's notorious jail complex.[86] What was once a provocative abolitionist proposal moved to mainstream political dialogue and became official policy in 2017, when then-Mayor Bill DiBlasio announced a

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80. *Id.* at 355.

81. *Id.* at 352.

82. *E.g.*, Exec. Order No. 124, N.J. ADMIN. CODE (2020), https://nj.gov/infobank/eo/056murphy/pdf/EO-124.pdf [https://perma.cc/D9JS-EX3K]; Gill, *supra* note 18; John Myers & Phil Willon, *California to Release 8,000 Prisoners in Hopes of Easing Coronavirus Crisis*, L.A. TIMES (July 10, 2020), https://www.latimes.com/california/story/2020-07-10/california-release-8000-prisoners-coronavirus-crisis-newsom [https://perma.cc/MMT6-DJ49]; Josh Gerstein, *Feds Again Shift Guidance on Prisoner Releases Due to Coronavirus*, POLITICO (Apr. 23, 2020), https://www.politico.com/news/2020/04/23/coronavirus-prisons-206155 [https://perma.cc/4B3W-UQZP]. For an exhaustive catalog of state and federal prison authorities' responses to the COVID-19 pandemic, see *Reducing Jail and Prison Populations During the COVID-19 Pandemic*, BRENNAN CTR. FOR JUST. (Feb. 16, 2021), https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic [https://perma.cc/AS3V-2MPG].

83. Damini Sharma, Weihua Li, Denise Lavoie & Claudia Lauer, *Prison Populations Drop by 100,000 During Pandemic*, MARSHALL PROJECT (July 16, 2020), https://www.themarshallproject.org/2020/07/16/prison-populations-drop-by-100-000-during-pandemic [https://perma.cc/A2AA-XNDG]. Notably, this study attributes most of the reduction to a decrease in the rate that the criminal system incarcerated new people, rather than an increase in the rate of releasing currently incarcerated people.

84. Though not discussed in this article, the principle of scaling back the criminal legal system's operations by limiting large scale infrastructure could be applied to essential buildings other than prisons, such as police stations and courthouses.

85. *Building a World Without Jails*, NO NEW JAILS NETWORK (July 2020), https://www.nonewjails.org/manifesto [https://web.archive.org/web/20220708085334/https://www.nonewjails.org/manifesto].

86. For a survey of movements to limit incarceration capacity in San Francisco, Los Angeles, and Seattle, *see* Stahly-Butts & Akbar, *supra* note 60, at 1554–57.

roadmap to close the facility.[87] The Mayor's plan, which was ultimately adopted by the City Council, called for replacing Rikers Island with four new community-based jails.[88] While far from "No New Jails," the plan would dramatically reduce New York City's capacity to incarcerate. Rikers Island once held as many as 20,000 individuals and in 2017 held approximately 10,000.[89] As of December, 2023, New York City jails held approximately 6,000 people.[90] The latest version of the plan to replace Rikers Island has capacity to incarcerate just 3,300.[91] Meeting that capacity constraint will require significant decarceration.

Resource attacks may also target physical infrastructure far smaller than buildings. The death penalty imposes the ultimate harm on individuals in the criminal system. In the second half of the 20th century, popular opinion and medical research drove legislative changes and court decisions to restrict allowable methods of executions.[92] Currently, the federal government and all but one of the states that permit capital punishment use lethal injection as the exclusive or primary method of execution.[93] Lethal injections involve administering extreme doses of anesthetic compounds akin to those used in surgery and animal euthanasia.[94] The ability to carry out lethal injections depends on states' ability to

87. Raven Raki & Ashoka Jegroo, *How the Push to Close Rikers Went from No Jails to New Jails*, APPEAL (May 29, 2018), https://theappeal.org/how-the-push-to-close-rikers-went-from-no-jails-to-new-jails/ [https://perma.cc/7P2W-ZBKL]; *see also* INDEP. COMM'N ON N.Y.C. CRIM. JUST. & INCARCERATION REFORM, *supra* note 53.

88. *Id.*

89. N.Y.C. OFF. OF THE MAYOR, BEYOND RIKERS: TOWARDS A BOROUGH-BASED JAIL SYSTEM 2 (2018), https://rikers.cityofnewyork.us/wp-content/uploads/Brooklyn-CB2-Hearing-on-BBJS_Final.pdf [https://perma.cc/TCH7-TBMK].

90. DIV. OF CRIM. JUST. SERVS., N.Y. STATE, MONTHLY JAIL POPULATION TRENDS 2 (2024), https://www.criminaljustice.ny.gov/crimnet/ojsa/jail_population.pdf [https://perma.cc/JX66-92PS].

91. *Id.*; *A Roadmap to Closing Rikers: NYC Borough Based Facilities*, NEW YORK CITY DEPT. CORRECTIONS, https://rikers.cityofnewyork.us/nyc-borough-based-jails/ (last visited Feb. 12, 2024). The capacity target has fluctuated over time, but has consistently called for substantial reductions in New York City's capacity to incarcerate relative to current incarceration levels. *See* P.R. Lockhart, *Why a Vote to Close New York's Rikers Island Is Being Met with Backlash*, VOX (Oct. 18, 2019, 6:50 PM), https://www.vox.com/identities/2019/10/18/20921389/rikers-island-new-york-jail-close-new-jails [https://perma.cc/3P6A-QSA3].

92. *See, e.g.,* Atul Gawande, *When Law and Ethics Collide—Why Physicians Participate in Executions*, 354 NEW ENG. J. MED. 1221, 1222 (2006), https://www.nejm.org/doi/full/10.1056/nejmp068042 [https://perma.cc/8UNW-J7LR] (describing medical research and popular opinion that informed changes in execution methods); Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 59–75 (2007), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4294&context=flr [https://perma.cc/ZKM6-KUDR] (summarizing lethal injection's rise to prominence following the Supreme Court's decision in *Gregg v. Georgia*, 428 U.S. 153 (1976)).

93. *Methods of Execution*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/methods-of-execution [https://perma.cc/R2R7-9F3B] (last visited July 24, 2023).

94. Ty Alper, *The Truth About Physician Participation in Lethal Injection Executions*, 88 N.C. L. REV. 11, 19–21 (2009), https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=4401&context=nclr [https://perma.cc/2TMP-7XQZ]; AUSTIN SARAT, GRUESOME SPECTACLES 117–22 (2014).

acquire these drugs. In recent years, the drugs' unavailability has, in fact, prevented and delayed executions.[95] The reasons for this unavailability include pharmaceutical companies' refusal to provide them for fear of bad public relations and legal restrictions on their import from foreign countries.[96] Resource attacks could use the same means that halted executions—public pressure on corporations and advocacy and litigation for laws limiting manufacture and imports—to restrict the availability of other instruments of harm in the criminal system. These include, for example, handguns, tasers, and handcuffs, as well as e-carceration tools such as ankle monitors and remote toxicology devices.

Looking beyond physical infrastructure, resource attacks may target human infrastructure: specifically, specialized personnel who are legally necessary for the system to function. In a study of the effects of judicial vacancies on U.S. federal courts, Crystal Yang estimated that federal judicial vacancies led to about 1,000 fewer federal prisoners per year.[97] Yang concludes that prosecutors confronting judicial scarcity appeared to prosecute fewer cases and make more favorable plea offers in order to avoid protracted litigation.[98] For several years, the United States has refused to approve the nomination of judges to the World Trade Organization's Appellate Body.[99] Consequently, the Organization now lacks a

95. Lincoln Caplan, *The End of the Open Market for Lethal-Injection Drugs*, NEW YORKER (May 21, 2016), https://www.newyorker.com/news/news-desk/the-end-of-the-open-market-for-lethal-injection-drugs [https://perma.cc/4NJE-R5X8] ("Twenty of the thirty-one states with the death penalty on the books now have a formal or informal moratorium on executions, in almost all cases because they have been unable to obtain approved drugs to use in lethal injections."); *see also* Jolie McCullough, *How Many Doses of Lethal Injection Drugs Does Texas Have?*, TEX. TRIB., https://apps.texastribune.org/execution-drugs/ [https://perma.cc/P8YL-6RYM] (June 30, 2023).

96. Caplan, *supra* note 95 (describing pharmaceutical companies' strategies to end production of, or limit states' abilities to acquire, drugs used in executions); Cook v. FDA, 733 F.3d 1 (D.C. Cir. 2013) (enjoining the Food and Drug Administration from allowing the import of foreign manufactured sodium thiopental).

97. Crystal S. Yang, *Resource Constraints and the Criminal Justice System: Evidence from Judicial Vacancies*, 8 AM. ECON. J.: ECON. POL'Y 289, 291 (2016), https://pubs.aeaweb.org/doi/pdfplus/10.1257/pol.20150150 [https://perma.cc/3PKQ-KML2].

98. *Id.*

99. Daniel C.K. Chow, *A New and Controversial Approach to Dispute Resolution Under the U.S.-China Trade Agreement of 2020*, 26 HARV. NEGOT. L. REV. 31, 34, 49–50 (2020), https://journals.law.harvard.edu/hnlr/wp-content/uploads/sites/91/31-chow.pdf [https://perma.cc/6D85-6KK2]; James Bacchus, *Echoing Trump, Biden Embraces International Trade Lawlessness*, CATO INST.: CATO LIBERTY (Dec. 12, 2022, 4:49 PM), https://www.cato.org/blog/echoing-trump-biden-embraces-international-trade-lawlessness [https://perma.cc/59G9-SG8Y].

quorum to hear cases, effectively disabling its enforcement mechanism.[100, 101] In the death penalty context, the unavailability of doctors and nurses willing to participate in executions has stalled or prevented executions in jurisdictions that require medical personnel to perform them.[102, 103]

Finally, other human infrastructure-focused interventions could restrict the availability of the criminal system's day-to-day workforce by imposing hiring freezes or caps on headcount.[104] Restrictions could also make it more difficult for personnel to complete their work: shortening business hours, adding court holidays, or increasing paperwork and procedural burdens.[105]

2. Increasing Resources Needed

A resource constraint occurs when the resources available to a criminal system institution fall below what it needs to continue status quo operations. The resource reducing interventions discussed in the last subsection unbalance the equation by decreasing the resources available to a targeted criminal system institution. Another way to unbalance the equation is to increase the resources needed by the institution while leaving the resources available to it unchanged.

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100. Chow, *supra* note 99, at 49–50; Bacchus, *supra* note 99. Similarly, under the Trump Administration, the Federal Election Commission frequently lacked enough commissioners to make a quorum. Critics allege that this was a strategic maneuver to prevent action against President Trump and his presidential campaign. Eleanor Eagen, *Trump's Hidden Attention to Detail in Avoiding Accountability*, REVOLVING DOOR PROJECT (Oct. 23, 2019), https://therevolvingdoorproject.org/trump-s-hidden-attention-to-detail-in-avoiding-accountability/ [https://perma.cc/KV3A-5UGL].

101. The success of this resource attack relies on interaction with the pre-existing and independent quorum requirement. Resource attacks often leverage such legal requirements to maximize their impact potential. *See infra* notes 251–252 and accompanying text.

102. California has not conducted an execution since the Ninth Circuit ruled that the state must hire a licensed anesthesiologist to supervise the execution of Michael Angelo Morales. Morales v. Hickman, 438 F.3d 926 (9th Cir. 2006) (upholding the district court's order that an anesthesiologist participate in a California execution by lethal injection); *Inmates Executed 1978 to Present*, CAL. DEP'T OF CORR. & REHAB., https://www.cdcr.ca.gov/capital-punishment/inmates-executed-1978-to-present/ [https://perma.cc/4J2H-6QS5] (last visited Aug. 27, 2023); *see also* Denno, *supra* note 92, at 79–91; Gawande, *supra* note 92 at 1222.

103. The unavailability of medical personnel to conduct executions also provides a twofold example of a resource attack backfire. First, Ty Alper argues movements to restrict physician involvement in lethal injections lead to courts taking arguments about the comparative suffering associated with one lethal injection protocol over another less seriously because they are perceived as a "back door" to death penalty abolition. Alper, *supra* note 94, at 63–67. Second, non-medical personnel have increasingly been conducting executions, with horrifying consequences. *See infra* note 161 and accompanying text.

104. Such interventions, however, come with a high risk of backfire. *See infra* notes 164–165 and accompanying text.

105. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), provides an illustrative example. In *Melendez-Diaz*, the court ruled that the Sixth Amendment's confrontation clause requires that a lab technician who conducted a chemical test be subject to cross examination in a trial concerning drug possession. *Id.* at 310–11. This ruling imposed new costs and burdens on lab technicians and prosecutors.

Plea bargaining is fundamental to the contemporary criminal legal system's massive scope.[106] While every defendant charged with a serious crime has the right to a jury trial, a small fraction of them exercise this right. The pressures to plead guilty are simply too great.[107] Guilty pleas consume far fewer resources than jury trials, which require substantial preparation by attorneys and the full workdays of judges and court personnel.[108] Accordingly, if guilty plea rates dropped and forced more cases to trial while available resources remained constant, there would be an immediate and severe resource constraint.

Scholars and advocates have proposed various policy interventions to curtail plea bargaining, including capping the allowable "trial penalty" and eliminating guilty pleas outright.[109] These are typically proposed as direct reforms to relieve the pressure on innocent people to plead guilty.[110] A likely side effect of these proposals would be to create a disruptive resource constraint.

However, in a recent article, Andrew Crespo proposes a plan to reduce plea bargaining specifically designed to be a resource attack. The article starts from the seed of an idea by organizer Susan Burton, and brought to prominence by Michele Alexander:

> The system of mass incarceration depends almost entirely on the cooperation of those it seeks to control. If everyone charged with crimes suddenly exercised his constitutional rights, there would not be enough judges, lawyers or prison cells to deal with the ensuing tsunami of litigation. . . . [T]he system would crash—it

106. *See* Brown, *supra* note 35, at 183.

107. Prosecutors may impose an unlimited "trial penalty," promising to endorse a lenient sentence in exchange for a guilty plea, while threatening that if the defendant took her case to trial, they would seek the maximum penalty upon conviction. Donald A. Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining*, 57 WM. & MARY L. REV. 1343, 1351–56 (2016), https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3640&context=wmlr [https://perma.cc/MT9J-AH3P]. Many people would have to wait months or years in pre-trial detention if they want to take their case to trial. NATAPOFF, *supra* note 19, at 63; *see also* Crespo, *supra* note 43, at 2001 ("[P]lea bargaining is a series of threats used to coerce people facing prosecution into waiving their rights.").

108. Stuntz, *supra* note 69, at 536–37 ("Guilty pleas are not simply cheaper than trials; they are enormously cheaper.").

109. James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1561 (1981) (proposing that guilty pleas uniformly result in a sentencing discount of 10% or 20%); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1180 (1975), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1981&context=journal_articles [https://perma.cc/2LWC-ANCM] ("[N]othing short of the abolition of plea bargaining promises a satisfactory resolution of the problems that this article will discuss."); Peter A. Joy & Rodney J. Uphoff, *Sentencing Reform: Fixing Root Problems*, 87 UMKC L. REV. 97, 106–08 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3259278 [https://perma.cc/7JGU-S262] (summarizing proposals for mitigating trial penalties, including giving trial judges the authority to dismiss criminal cases).

110. Dripps, *supra* note 107, at 1363–74 (discussing "plea bargaining's innocence problem"); Vorenberg, *supra* note 109, at 1523 (plea bargaining should be limited in order to prevent false convictions and protect the rights and dignity of the accused).

> could no longer function as it had before. Mass protest would force a public conversation that, to date, we have been content to avoid.[111]

Crespo proposes coordinated plea strikes to bring about this "crash." If defendants coordinated their efforts and refused to plea, the demand on prosecutors, defense attorneys, judges, and court staff's time and energy, not to mention physical building space, would be overwhelming. The flow of convictions would plummet to a fraction of its current rate.[112]

A variety of collective action campaigns could, similarly, increase the costs of maintaining arrests and convictions at status quo levels, and, in doing so, create triage-inducing resource constraints. Mass arrests by civil rights protesters in Birmingham, Alabama overwhelmed police and jails. As Dr. Martin Luther King explained in his 1963 *Letter from Birmingham Jail*, "The purpose of our direct-action program is to create a situation so crisis-packed that it will inevitably open the door to negotiation."[113] The Birmingham campaign was followed by movements to refuse to bail out of jail, further forestalling convictions and bloating jails' populations.[114] In the decades after Birmingham, protesters have deployed "jail solidarity" techniques such as refusing to give names and pedigree information and choosing to remain in jail rather than bail out as a means to disrupt police operations.[115]

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111. Crespo, *supra* note 43, at 2202 (quoting Alexander, *supra* note 45); *see also* Jenny Roberts, *Crash the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1099–1100 (2013), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=4329&context=wlulr [https://perma.cc/7B5X-MRSP] (developing a similar idea directed at crashing the misdemeanor criminal system).

112. Crespo, *supra* note 43, at 2007.

113. KING, *supra* note 31, at 68; *id.* at 16 ("There were no more powerful moments in the Birmingham episode than during the closing days of the campaign, when the Negro youngsters ran after white policemen, asking to be locked up. There was an element of unmalicious mischief in this. The Negro youngsters, although perfectly willing to submit to imprisonment, knew that we had already filled up the jails, and that the police had no place left to take them."); *see also id.* at 87–89; David Benjamin Oppenheimer, *Kennedy*, *King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 666–68 (1995), https://lawcat.berkeley.edu/record/1115085/files/fulltext.pdf [https://perma.cc/W4XS-JZKR].

114. Christopher W. Schmidt, *Divided by Law: The Sit-Ins and the Role of the Courts in the Civil Rights Movement*, 33 L. & HIST. REV. 93, 127 (2015), https://doi.org/10.1017/S0738248014000509 [https://perma.cc/ZS5E-3KP9].

115. Lesley J. Wood, *Breaking the Wave: Repression, Identity, and the Seattle Tactics*, 12 MOBILIZATION: INT'L Q. 377, 378 (2007), https://meridian.allenpress.com/mobilization/article-abstract/12/4/377/82133/Breaking-the-Wave-Repression-Identity-and-Seattle [https://perma.cc/PPE9-XX6V] (describing jail solidarity tactics designed to "disrupt the usual functioning of the court and police system"); *see also* Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 636 (2017), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1613&context=mlr [https://perma.cc/HZE5-FU4F] (discussing "jail solidarity" in 2014 Ferguson, Missouri protests).

A different variety of cost-increasing resource attacks involves expanding the procedural hurdles required for arrest or conviction.[116, 117] New York's overhaul of its discovery laws, discussed in Part III, is a salient recent example.[118] The new discovery law requires that prosecutors affirmatively seek out and disclose a long list of materials.[119] This obligation is enforced through a speedy trial clock that stops running only when the prosecution meets its discovery obligations.[120] In addition to expanding defendants' access to information about their cases, the new requirements overwhelmed prosecutors, causing them to triage: after the law's implementation, thousands of cases, mostly misdemeanors, were dismissed each month at the speedy trial deadline.[121] States' criminal procedure laws are full of procedural requirements, each of which adds costs to processing a case. In Massachusetts, many misdemeanor defendants are entitled to challenge the criminal complaint against them at a pre-arraignment "show cause" hearing.[122] In North Carolina, misdemeanor defendants are entitled to a de novo trial in superior court if they are found guilty at a bench trial before a district court magistrate.[123] In Connecticut, many individuals incarcerated pre-trial who have not posted bail are entitled to a bail review hearing every 30 days.[124] Supreme Court jurisprudence and states' criminal procedure laws have created constitutional and statutory rights to pre-trial hearings.[125] Plea colloquies add time to the resolution

116. *See* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303 (2018), https://columbialawreview.org/wp-content/uploads/2018/06/Crespo_The-Hidden-Law-Of-Plea-Bargaining.pdf [https://perma.cc/6CFD-2TQ6] (discussing procedural changes that, if implemented, could function as resource attacks); *id.* at 1321–22 (restricting circumstances in which multiple charges and defendants may be joined in a single prosecution); *id.* at 1344 (robust pre-trial probable cause hearings).

117. Scholars have also argued that resource constraints created by expanding due process protections exacerbate, rather than alleviate, the criminal system's ills. *See infra* note 169 and accompanying text.

118. New York's discovery law changes were designed as a direct reform to reduce the pressure on defendants to plead guilty without reviewing discovery, especially when they are incarcerated pre-trial. *See infra* Section III.A. However, these changes had the effect of a resource attack and could be used as a template for other, future initiatives for which a resource constraint was a primary or secondary objective.

119. N.Y. CRIM. PROC. LAW § 245.20 (McKinney 2022).

120. N.Y. CRIM. PROC. LAW § 245.50(1), (3) (McKinney 2022).

121. *Infra* section III.C.

122. MASS. GEN. LAWS ch. 218, § 35A (2022).

123. N.C. GEN. STAT. § 7A-290 (2023).

124. CONN. GEN. STAT. § 54-53a(b) (2023).

125. *E.g.*, N.Y. CRIM. PROC. LAW § 710.60(1),(4) (McKinney 2022); N.C. GEN. STAT. § 15A-977 (2023); Illinois v. Gates, 462 U.S. 213, 258 (1983) (White, J., concurring) (discussing the extensive number of hearings necessitated by the Supreme Court's exclusionary rule); *see also* Mapp v. Ohio, 367 U.S. 643 (1961); Jackson v. Denno, 378 U. S. 368 (1964).

of each case by guilty plea.[126] In some instances, progressive prosecutors have adopted policies imposing time costs on themselves. Examples include Philadelphia District Attorney Larry Krasner's instruction that his line prosecutors research and announce, on the record, the cost to taxpayers of a proposed carceral sentence.[127] The adoption of any of these procedural requirements has the potential to create a disruptive resource constraint should it increase the resource demands on prosecutors and courts beyond the resources available to those institutions.

II.
ADVANTAGES, RISKS, AND DISADVANTAGES

The previous Part explored the features and mechanics of resource attacks. This Part is evaluative: it examines their benefits and shortcomings as a strategy for reducing criminal system harm. The first subsection analyzes the potential advantages of resource attacks—why advocates would want to use them. Resource attacks can materialize quickly, have tremendous impact potential, and offer unique political advantages. The second subsection analyzes the risks associated with resource attacks—why advocates would want to avoid them. Resource shortages frequently give discretion to harmful institutions as they scramble to reallocate the resources that remain. The effects of resource attacks are reversible by simply adding more resources. And, because resource attacks are indirect, they are often incomplete in comparison to direct reforms.

126. *See*, *e.g.*, N.Y. STATE UNIFIED CT. SYS., GUILTY PLEA COLLOQUY (2016), https://www.nycourts.gov/judges/cji/8-Colloquies/Plea%20of%20Guilty.pdf [https://perma.cc/33DP-HHGD] (a 32 page collection of standardized plea colloquies given in New York); JAMES P. JONES, U.S. DIST. JUDGE, GUILTY PLEA COLLOQUY (2017), http://www.vawd.uscourts.gov/media/1966/guiltypleacolloquy.pdf [https://perma.cc/29XB-YXQV]; Danielle M. Lang, Padilla v. Kentucky*: The Effect of Plea Colloquy Warnings on Defendants' Ability To Bring Successful* Padilla *Claims*, 121 YALE L.J. 944, 962–64 (2012), https://openyls.law.yale.edu/bitstream/handle/20.500.13051/9993/27_121YaleLJ944_January2012_.pdf [https://perma.cc/CR69-MA3Z] (describing the requirement of a colloquy focused on the immigration consequences of a criminal conviction imposed in many states following the Supreme Court's decision in *Padilla*).

127. Bobby Allyn, *Philadelphia's New DA Wants Prosecutors to Talk Cost of Incarceration While in Court,* NPR (Mar. 31, 2018), https://www.npr.org/2018/03/31/598318897/philadephias-new-da-wants-prosecutors-to-talk-cost-of-incarceration-while-in-cou [https://perma.cc/C9EK-RA5U].

A. Advantages

1. Speed and Scope

Resource attacks have the potential to reduce harm quickly. Many components of the criminal legal system presently operate at or above capacity.[128] When their available resources decrease, or when the resources demanded of them increase, and especially when that change is sudden and unexpected, the affected institution will be immediately pressed into a state of triage. The case studies discussed in this article include several examples of resource attacks with near-immediate effects. When jails are full, incarceration must slow. Collective actions resulting in mass arrests have had this effect—preventing incarceration because police lacked spaces to place arrestees.[129] COVID-19 forced changes to prison crowding standards, causing a sharp and immediate drop in incarceration nationwide.[130] In other instances, criminal system institutions quickly became overburdened and could not continue operations at status quo levels. New York's discovery reform overwhelmed prosecutors who were not prepared for the law's new burdens.[131] Rates of misdemeanor dismissals increased rapidly after the law took effect as prosecutors failed to meet speedy trial deadlines.[132] Finally, removing a legally necessary component of an operation hamstrings its ability to function at all. The United States' actions to prevent a quorum on the World Trade Organization's Appellate Body illustrate this concept, albeit outside the criminal legal system.[133, 134]

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128. *See, e.g.*, Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 266 (2011), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1184&context=nulr [https://perma.cc/9LRX-C2M2]; NATAPOFF, *supra* note 19 at 80–86; Yang, *supra* note 97, at 289–91; Keri Blakinger, Jamiles Lartey, Beth Schwartzapfel, Mike Sisak & Christie Thompson, *As Corrections Officers Quit in Droves, Prisons Get Even More Dangerous*, MARSHALL PROJECT (Nov. 1, 2021, 6:00 AM), https://www.themarshallproject.org/2021/11/01/as-corrections-officers-quit-in-droves-prisons-get-even-more-dangerous [https://perma.cc/8SQP-3T7N].

129. KING, *supra* note 31, at 16.

130. *See supra* notes 82–83 and accompanying text.

131. *See infra* Section III.B.

132. *See infra* Section III.B.

133. Chow, *supra* note 99, at 49–50.

134. The effects of resource attacks are not always immediate. Some rely on deadlines set far in the future, such as New York City's decreased capacity to incarcerate once Rikers Island closes in 2027. Matthew Haag, *N.Y.C. Votes to Close Rikers. Now Comes the Hard Part,* N.Y. TIMES (Oct 17, 2019), https://www.nytimes.com/2019/10/17/nyregion/rikers-island-closing-vote.html [https://perma.cc/LN8J-RJ7H]. In others, the effects of the resource constraint do not force immediate triage, but compel action over time. For example, the exorbitant cost of executions encouraged state legislatures to abandon the death penalty. Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization—Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 MINN. J. L. & INEQ. 211, 240 (2012), https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1180&context=lawineq [https://perma.cc/2DLL-MQJJ].

The scope of harm reductions resulting from resource constraints can be enormous. California alone accounted for half of the nation's considerable decline in incarceration between 2010 and 2015 following the *Plata* Court's affirmance of the order to depopulate state prisons.[135] Carol Steiker and Jordan Steiker attribute several states' abandonment of the death penalty to the immense cost of executions.[136] And New York's discovery reform appears to have precipitated misdemeanor dismissals at rates far greater than other, direct efforts to reduce the footprint of the misdemeanor criminal system.[137]

With enough participation, collective actions such as plea strikes and mass arrest campaigns can slow the rate of arrests and convictions to a trickle. The criminal legal system is vulnerable because many of its components are already running near their capacities.[138] Accordingly, the number of participants needed to affect a highly disruptive campaign is often not terribly large in comparison to the size of the community as a whole. The author's experience as a practitioner in Queens, the second-largest borough in New York City, illustrates the potential disruptiveness of a mass arrest campaign. Queens Criminal Court has a single arraignment courtroom that typically conducts 80 to 120 arraignments per day. Two consecutive days requiring substantially more than 120 arraignments per day creates chaos in both the criminal courts and police stations.[139] In a county of 2.4 million people, if organizers facilitated 80 more arrests per day than normal, the effects on police and criminal court operations would become catastrophic after just a few days. The same is true when only a limited slice, rather than a jurisdiction's population as a whole, can participate in the collective action. A mere five percent increase in the number of cases that go to trial would double demands on criminal courts that are already overburdened.[140] If organizers could rally 15% participation in a plea strike, its effects would be astronomical.

2. *Low or No Political Cost*

Resource attacks may originate from both "top-down" and "bottom-up" interventions. Changes to state and municipal budgets, revisions to statutes, and executive orders are top-down changes. They are passed by a legislature or

135. John F. Pfaff, *Why the Policy Failures of Mass Incarceration Are Really Political Failures*, 104 MINN. L. REV. 2673, 2677 (2020), https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=4319&context=mlr [https://perma.cc/Q9LF-S3E6].

136. Steiker & Steiker, *supra* note 134, at 240.

137. *See infra* Section III.C.ii.

138. *See, e.g.*, Gershowitz & Killinger, *supra* note 128, at 266; NATAPOFF, *supra* note 19, at 80–86; Yang, *supra* note 97, at 289–91; *infra* note 139 and accompanying text.

139. Typically, if a single day requires more than 120 arraignments, dozens of cases are "held over" into the next day. Two days of high arrest volume in a row begins to disrupt police operations: "the pens" below the courthouse reach capacity and police must hold arrestees at the police station. On rare occasions, in order to relieve backlog, the court opens a second arraignments courtroom, but this requires diverting a judge and court staff from their scheduled duties, derailing that court part's ordinary operations for the day.

140. Crespo, *supra* note 43, at 2007.

promulgated by an executive, court administrator, or head prosecutor. Grassroots interventions—collective actions organized by individuals or communities affected by the criminal system—are bottom-up interventions. Examples include efforts to counteract court efficiency, such as coordinated plea strikes,[141] initiatives to obstruct or overwhelm police operations, such as coordinated civil disobedience resulting in mass arrests,[142] and "jail solidarity" tactics, such as refusing to produce identification, answer pedigree questions, or bail out of jail after arrest.[143] Communities may also apply pressure to corporations that supply infrastructure necessary for the criminal system to impose harm.[144]

Critically, bottom-up initiatives sidestep issues of political viability: the threshold obstacle for a bottom-up intervention is organizers' ability to motivate community action, rather than legislative or executive action. Organizers must convince a critical number of people to take on personal risks and burdens in service of a mission bigger than themselves.[145] This is no easy task. However, in a moment when political appetite for progressive criminal legal reform appears to be waning,[146] enthusiasm for action may be more concentrated in the communities most affected by the criminal legal system. This concentration may also enhance the intervention's effectiveness: Organizers working in tight-knit communities

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141. *Id.* at 2003.

142. *See* KING, *supra* note 31, at 16, 68, 87–89; Oppenheimer, *supra* note 113, at 668; Schmidt, *supra* note 114, at 127.

143. *See* Wood, *supra* note 115, at 378; Simonson *supra* note 115, at 656.

144. *See* Caplan, *supra* note 95 (pharmaceutical companies exit market for lethal injection drugs in light of concerns about public perception and branding); Carl Takei, *From Mass Incarceration to Mass Control, and Back Again,* 20 U. PA. J.L. & SOC. CHANGE 125, 158–59 (2017), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1208&context=jlasc [https://perma.cc/2RH6-HGQX] (student protests prompted universities' divestment from private prison corporations); Samuel Ludington, *Publicly Traded Justice*, 29 U. MIAMI BUS. L. REV. 93, 113 (2021), https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1380&context=umblr [https://perma.cc/8XNZ-KH84] (describing popular pressure to reduce investment in publicly traded prison companies as an "existential threat" to corporations invested in them). These are "bottom up" interventions in the sense that they do not rely on government actors, but diverge from pure grassroots reforms because they rely on powerful institutions, albeit corporate, rather than government institutions.

145. KING, *supra* note 31, at 31 (describing the experience of participating in civil rights protests as "harrowing psychological experiences for which law-abiding people are not routinely prepared"); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Towards a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014), https://www.yalelawjournal.org/pdf/2740.GuinierTorres.2804_v3k3a8v6.pdf [https://perma.cc/5APK-G384] (describing the struggles and sacrifices required of participants of collective action campaigns including the Montgomery Bus Boycotts and 1960s United Farmworkers protests). However, it is worth noting that the costs and risks associated with community participation decrease as more people get involved and the effects become more pronounced. Dr. King's reflections on the Birmingham protests encapsulate this principle: "The Negro youngsters, although perfectly willing to submit to imprisonment, knew that we had already filled up the jails, and that the police had no place left to take them." KING, *supra* note 31, at 16.

146. *See, e.g.*, David A. Graham, *How Criminal Justice Reform Fell Apart*, ATLANTIC (May 26, 2022), https://www.theatlantic.com/ideas/archive/2022/05/george-floyd-anniversary-police-reform-violent-crime/630174/ [https://perma.cc/B9SJ-25FE].

may shield their action from the institution until it is executed. Unexpected resource constraints can be especially disruptive because the target institution cannot preemptively revise systems and procedures, reallocate resources, or lobby for increased resources and relaxed deadlines.

Sidestepping the political process is especially useful in jurisdictions where government and lawmakers are intractable and closed to democratic participation. In many localities, elected representatives, prosecutors, and law enforcement are not representative of, and, consequently, tend to ignore, the needs and interests of the communities most affected by the criminal system.[147] Gerrymandering and democratic suppression inhibit changes in leadership at the ballot box.[148] Financial and political conflicts of interest create further inertia against scaling back the criminal system's scope and destructiveness.[149] The opportunity to make meaningful change through bottom-up interventions, completely avoiding the formal political process, presents great value under these circumstances.

Top-down resource attacks also offer some political advantages over direct reforms. Resource attacks may capitalize on shifting areas of political consensus. Decarceration, decriminalization, and reimagined policing do not enjoy the same popularity that they did several years ago.[150] Advocates for a less destructive criminal legal system may find more success targeting the system's enormous monetary footprint and ineffectiveness at promoting public safety. Scaling back the costly bureaucracy and infrastructure required to maintain mass incarceration

147. *See*, *e.g.*, Beth A. Colgan, *Revenue, Race, and the Potential Unintended Consequences of Traffic Enforcement Reform*, 101 N.C. L. REV. 889, 928–31 (2023), https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=6925&context=nclr [https://perma.cc/5X9M-GU2P]; Michael W. Sances & Hye Young You, *Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources*, 79 J. POL. 1090, 1090–91 (2017), https://www.journals.uchicago.edu/doi/abs/10.1086/691354?journalCode=jop [https://perma.cc/83QV-2TLH] (finding that cities with larger Black populations are more likely to rely on fines and court fees as a major source of revenue, but that this relationship is significantly reduced by Black representation on the city council); Robert J. Smith, Justin D. Levinson & Zoe Robinson, *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 903 (2015), https://www.law.ua.edu/pubs/lrarticles/Volume%2066/Issue%204/Smith%20Online.pdf [https://perma.cc/3P6W-DK98] (explaining that the psychological phenomenon of in-group favoritism is "particularly concerning" for the criminal legal system); Eli Hagar & Weihua Li, *A Major Obstacle to Police Reform: The Whiteness of Their Union Bosses*, MARSHALL PROJECT (June 10, 2020, 6:00 AM), https://www.themarshallproject.org/2020/06/10/a-major-obstacle-to-police-reform-the-whiteness-of-their-union-bosses [https://perma.cc/4GVX-87SQ].

148. John F. Pfaff, *Criminal Punishment and the Politics of Place*, 45 FORDHAM URB. L.J. 571, 581, 588–89 (2018), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2730&context=ulj [https://perma.cc/E7PV-WYEK].

149. Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 969, 1027 (2021), https://harvardlawreview.org/wp-content/uploads/2021/01/134-Harv.-L.-Rev.-964.pdf [https://perma.cc/FR3D-QTZS]; Page & Soss, *supra* note 22, at 292.

150. Graham, *supra* note 146.

and supervision may form the foundation for political consensus.[151] Alternatively, resource attacks may stem from procedural changes that attract little attention outside of practitioners in the criminal courts.[152] Advancing these procedural changes may require less political capital than reforms that capture headlines and fierce public debate.

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151. *See* Maggie Astor, *Left and Right Agree on Criminal Justice: They Were Both Wrong Before*, N.Y. TIMES (May 16, 2019), https://www.nytimes.com/2019/05/16/us/politics/criminal-justice-system.html [https://perma.cc/X6ZY-ANM6]; Steven M. Teles & David Dagan, *Conservatives and Criminal Justice*, NAT'L AFFS., Spring 2023, at 118, 118–19, https://www.nationalaffairs.com/publications/detail/conservatives-and-criminal-justice [https://perma.cc/486T-UD73] ("[T]he fiscal savings of prison reform were likely to resonate with state officials, even though their own motivations were ideological, moral, and personal."); Arthur L. Rizer, *Can Conservative Criminal Justice Reform Survive a Rise in Crime?*, 6 ANN. REV. CRIMINOLOGY, 65, 68–70 (2023), https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-030920-090259 [https://perma.cc/EG4B-H5JU].

152. New York's 2020 criminal justice reforms provide an illustration. The reform package included changes to discovery procedure, described in Part III, as well as changes to the laws governing pre-trial release and securing orders, known colloquially as "bail reform." The bail reform aspects of the law have attracted voluminous debate and media coverage. *See* Daniel Chasin, *Two Steps Forward, One Step Back: How New York's Bail Reform Saga Tiptoes Around Addressing Economic Inequality*, 43 CARDOZO L. REV. 273, 291 (2021); LAURA BENNETT & JAMIL HAMILTON, FREEDOM THEN PRESS: NEW YORK MEDIA AND BAIL REFORM, FWD.US (2021), https://www.fwd.us/wp-content/uploads/2021/06/Bail_Reform_Report_052421-1.pdf [https://perma.cc/9GWT-SYHH]. Bail reform remains in the headlines years after its passage. It is frequently derided by New York City's Mayor Eric Adams, and was a primary focus of 2022 Republican nominee for Governor, Lee Zelden. Dana Rubenstein, Emma G. Fitzsimmons & Grace Ashford, *Adams Won't Let Up on Bail Reform, Putting Pressure on Hochul*, N.Y. TIMES (Aug. 3, 2022), https://www.nytimes.com/2022/08/03/nyregion/bail-reform-adams-hochul.html [https://perma.cc/A3NY-RH5X]. In response to this continued criticism, the initial bail reforms have been scaled back three times since their passage. *Id.*; Jesse McKinley, Grace Ashford & Hurubie Meko, *New York Will Toughen Contentious Bail Law to Give Judges More Discretion*, N.Y. TIMES (Apr. 28, 2023), https://www.nytimes.com/2023/04/28/nyregion/bail-reform-ny.html [https://perma.cc/V4K8-VRXV].

In comparison, while enormously consequential, the discovery law changes have received far less public attention—generally ignored or referenced as an afterthought in speeches and articles primarily focused on bail reform. *E.g.*, Samar Khurshid, *Bail Reform Remains at Center of New York Political Debate But State Legislature has Never Held a Hearing On It*, GOTHAM GAZETTE (Oct. 19, 2022), https://www.gothamgazette.com/state/11626-bail-reform-new-york-political-debate-no-legislative-hearing [https://perma.cc/XTY7-MG8H]. Early 2023 saw an uptick in media attention to discovery reform, beginning with a series of articles and opinion pieces in conservative-leaning publications drawing a connection between discovery reform and an increase in case dismissals, and concluding with speculation that the law may be changed in the spring 2023 legislative session. *See, e.g.*, Hannah E. Meyers, *Opinion: How Many Ways Can New York Lawmakers Help Criminals?*, WALL ST. J. (Jan 18, 2023, 6:11 PM), https://www.wsj.com/articles/new-york-lawmakers-help-criminals-discovery-prosecutors-speedy-trial-dismissal-hochul-budget-crime-11674079612 [https://perma.cc/H36G-VFA3]; Rich Calder & Matthew Sedacca, *Half of Manhattan's Drunk-Driving Cases Got Dismissed in 2022 Due to Albany Reforms*, N.Y. POST (Apr. 1, 2023), https://nypost.com/2023/04/01/half-of-manhattans-drunk-driving-cases-are-being-dismissed/ [https://perma.cc/B5J2-Q4Q9]. *See also* Jonah E. Bromwich, Hurubie Meko and Grace Ashford, *Why 3 Liberal New York D.A.s Want to Change a Law Backed by Progressives*, N.Y. TIMES (Apr. 25, 2023), https://www.nytimes.com/2023/04/25/nyregion/discovery-laws-ny.html [https://perma.cc/65YJ-5DAV]. However, even including this recent coverage, the media and political attention devoted to discovery reform remains small compared to that devoted to the bail reform component of the 2020 criminal justice reform package.

B. Risks and Disadvantages

1. Discretion in the Hands of Harmful Actors

A resource attack may succeed in creating a resource constraint for police, prosecutors, or criminal courts, but nonetheless fail to reduce the harm caused by those institutions. The resource attack may even backfire, causing a net *increase* in harm. Resource constraints necessitate resource reallocation, which can put discretion in the hands of the very actors whose conduct was objectionable in the first place. They may reallocate resources in a way that increases, rather than decreases, the harm the institution causes relative to the pre-constraint status quo.

First, in a resource crunch, institutions may redirect resources away from programs and practices that are helpful, or, at the very least, not the most harmful, and concentrate them in those that are more harmful.[153] In order to keep the number of arrests and prosecutions flowing at status quo rates, police and prosecutors could cut programs such as victims' services and compensation, community outreach, community violence interrupters, mentorships, trainings in cultural sensitivity or mental health crisis response, or efforts to promote diversity in hiring. Courts could cut programs that promote accessibility, such as night and weekend hours, or navigators who help defendants and family members understand the bewildering process in which they find themselves.[154]

Second, a resource shortage could amplify the use of especially harmful practices. In *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom,* L. Song Richardson describes how racist implicit biases influence every actor in the criminal system, and, critically, how the effects of these implicit biases are

153. W. David Ball, *Defunding State Prisons*, 50 CRIM. L. BULL. 1060, 1077 (2014). Police and prison abolitionists may reject this premise out of hand, viewing all conduct by the criminal system as inherently harmful, and seemingly less harmful programs as lipstick on a pig. *See supra* note 60 and accompanying text.

154. Daniel Bernal, *Taking the Court to the People: Real-World Solutions for Nonappearance*, 59 ARIZ. L. REV. 547, 566 (2017), https://arizonalawreview.org/pdf/59-2/59arizlrev547.pdf [https://perma.cc/4J8J-SJ4Q]; David S. Udell & Rebekah Diller, *Access to the Courts: An Essay for the Georgetown University Law Center Conference on the Independence of the Courts*, 95 GEO. L.J. 1127, 1139–42, 1154 (2007), https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1326&context=faculty-articles [https://perma.cc/8NKM-7ZPW] (discussing barriers to equitable access to courts including architecture, language, and scheduling); *see also* Wright, *supra* note 25, at 426 (describing prosecutors' community outreach programs); Dina E. Fein, *Access to Justice: A Call for Progress*, 39 W. NEW ENG. L. REV. 211, 220 (2017), https://core.ac.uk/download/pdf/267161687.pdf [https://perma.cc/ZH8U-B98K] (describing programs that provide "limited assistance" to low income litigants struggling to navigate the legal system).

exacerbated by resource constraints.[155] Evidence indicates that law enforcement officers lean into racist heuristics and stereotypes to save time and maintain arrest volume.[156] Law enforcement and prosecutors draw on implicit perceptions that Black defendants are more deserving of punishment[157] and race-correlated criteria such as history of prior convictions[158] to decide which cases to prioritize and which to let go. Resource shortages may reduce upfront investigation and could even result in the prosecution of meritless cases.[159] Reduced investigative capacity could also exacerbate racial disparities by shifting police and prosecutors' focus away from cases requiring lengthy and complex investigations such as financial crimes, and into easier-to-prosecute "street crime."[160]

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155. L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 Yale L.J. 864, 881–85 (2017), https://www.yalelawjournal.org/pdf/h.862.Richardson.893_jqvsvjxq.pdf [https://perma.cc/ZF27-VG5E] ("[R]acialized justice is the foreseeable consequence of systemic triage, regardless of the conscious racial motives of judges, prosecutors, and criminal defense lawyers, and even in the absence of overtly racist practices."); *see also* Elayne E. Greenberg, *Unshackling Plea Bargaining from Racial Bias*, 111 J. CRIM. L. & CRIMINOLOGY 93, 128 (2021), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7692&context=jclc [https://perma.cc/AV3U-RHM6].

156. Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043, 1063–1066 (2013), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2491&context=ulj [https://perma.cc/XH8V-78B9] (describing how racist heuristics inform policing activity).

157. Kristin N. Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 420 (2013), https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=3262&context=clr [https://perma.cc/S24G-XSWX]; Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L.J. 765, 825–26 (2017), https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1093&context=elj [https://perma.cc/P88R-QAEB] (finding racial bias in rates of student surveillance and punishment).

158. Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 559–578 (2009), https://ilj.law.indiana.edu/articles/84/84_2_Carodine.pdf [https://perma.cc/8YPC-XEDP] (surveying numerous ways that structural racism contributes to higher rates of convictions among Black Americans); Greenberg, *supra* note 155, at 128–30.

159. *See* Richardson, *supra* note 155, at 882 ("[P]rosecutors may offer plea bargains and pressure defense lawyers into convincing their clients to accept them despite the fact that neither actor had the time to thoroughly investigate the case and interview all the potential witnesses.") (citing NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT 83–87, 122 (2016)).

160. Phillip J. Cook, Anthony A. Braga, Brandon S. Turchan & Lisa M. Barao, *Why Do Gun Murders Have a Higher Clearance Rate than Gunshot Assaults?*, 18 CRIMINOLOGY & PUB. POL'Y 525, 543 (2019), https://onlinelibrary.wiley.com/doi/10.1111/1745-9133.12451 [https://perma.cc/TU8V-AU9J] (establishing a strong relationship between the investment of investigatory resources and ultimate investigatory success); *see also* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 27–31 (1997), https://openyls.law.yale.edu/bitstream/handle/20.500.13051/9047/11_107YaleLJ1_October1997_.pdf [https://perma.cc/N9TS-JN9F] ("[T]he opportunity cost of charging one high-profile well-to-do defendant may be dozens of burglaries, robberies, and assaults."); Stuntz, *supra* note 69, at 539 ("Such crimes make policing cheaper, because they permit searches and arrests with less investigative work.").

Resource constraints can increase harm outside of criminal court as well. Medical professionals' refusal to participate in lethal injections may lead to more suffering, as executions proceed nonetheless, but under the watch of vastly underqualified individuals.[161] Similarly, shortages of lethal injection drugs through regulated pharmacies have led states to rely on "compounding pharmacies,"[162] entities subject to far less regulatory oversight than traditional commercial pharmacies.[163] Visitation and recreation time have been cut when prisons and jails experienced staff shortages.[164] Ultimately, the costs of dysfunction, delays, and errors in the criminal system are far too often borne by criminal defendants, incarcerated people, and their families.[165]

2. Resource Constraints Are Reversible

The effects of resource constraints are inherently reversible. Police, courts, and prosecutors are powerful lobbies: they may successfully appeal for more funds, undoing the harm reduction created by a resource constraint, or, worse, undoing these effects while expanding the monetary footprint of the criminal system.[166] Most, if not every, police department whose funding was cut following

161. *See* Alper, *supra* note 94, at 42–43 ("It is the doctor who turns his or her back on a dying inmate, and refuses to do what he or she can to relieve suffering, who truly violates the ethical code of the profession.") (internal quotations omitted); Gawande, *supra* note 92, at 1223 ("[T]he warden prepared the chemicals. When he tried to push the syringe, however, it did not work. He had mixed all the drugs together, and they had precipitated into a clot of white sludge."); SARAT, *supra* note 94, at 110 (estimating that more than seven percent of lethal injection executions are botched).

162. Deborah W. Denno, *Lethal Injection Chaos Post*-Baze, 102 GEO. L.J. 1331, 1336, 1366–71 (2014), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1505&context=faculty_scholarship [https://perma.cc/B2FD-XHJW].

163. *Id.*

164. Nazish Dholakia, *Prisons and Jails Keep Making It Harder for Incarcerated People to Communicate with Loved Ones*, VERA (Dec. 13, 2022), https://www.vera.org/news/prisons-and-jails-keep-making-it-harder-for-incarcerated-people-to-communicate-with-loved-ones [https://perma.cc/9ZTK-W36B]; Vincent Schiraldi, *I Spent Over 40 Years Working in Corrections. I Wasn't Ready for Rikers* (Oct. 28, 2022, 6:00 AM), MARSHALL PROJECT, https://www.themarshallproject.org/2022/10/28/i-spent-over-40-years-working-in-corrections-i-wasn-t-ready-for-rikers [https://perma.cc/BW84-294J]; Blakinger, Lartey, Schwartzapfel, Sisak & Thompson, *supra* note 128.

165. *See supra* notes 161–164 and accompanying text; *see also*, *e.g.*, Walter Pavlo, *Bureau of Prisons Holding Inmates for Longer than Law Allows*, FORBES (July 6, 2022, 12:58 PM), https://www.forbes.com/sites/walterpavlo/2022/07/06/bureau-of-prisons-holding-inmates-for-longer-than-law-allows/?sh=f672ce936e62 [https://perma.cc/5SER-HKE5].

166. *See, e.g.*, Benjamin Levin, *What's Wrong with Police Unions*, 120 COLUM. L. REV. 1333, 1372 (2020); Wright, *supra* note 25, at 397 (prosecutors' budgets and staffs grew more than any other component of the criminal legal system over the past 50 years in response to lobbying efforts); *see also* Zohra Ahmed & Rachel Foran, *No More Courts*, INQUEST (Aug. 2, 2022), https://inquest.org/no-more-courts/ [https://perma.cc/R7PV-QW3R] ("[Procedural reforms] can also necessitate new funding streams to system stakeholders in order to ensure they can be exercised. More processes often mean more technology, more staff, and therefore more capacity for criminalization").

the summer of 2020 ultimately had it restored.[167] In response to outcry from prosecutors about their expanded discovery obligations, New York allocated $75 million in funding when the discovery changes were rolled out, another $25 million in 2022, and $65 million and $170 million in the budgets for fiscal years 2023 and 2024 respectively.[168] Prominent scholars have argued that resource constraints laid the foundation for our enormous criminal legal system: the right to counsel and expanded procedural protections inflated the cost of adjudication, ultimately exacerbating, rather than resolving, the problems they targeted.[169]

Constrained institutions may also adapt to their post-reform resource levels in ways that restore pre-constraint operations even without an influx of cash.[170] Holding "virtual court" over video conference reduces the need for courtroom headcount and resources devoted to transporting incarcerated individuals to and

167. Zusha Elinson, Dan Frost & Joshua Jamerson, *Cities Reverse Defunding the Police amid Rising Crime*, WALL ST. J. (May 26, 2021, 5:58 PM), https://www.wsj.com/articles/cities-reverse-defunding-the-police-amid-rising-crime-11622066307 [https://perma.cc/9PXL-H8K2]; Sara Cline, *Portland Among US Cities Adding Funds to Police Departments*, ASSOCIATED PRESS (Nov. 17, 2021, 6:48 PM), https://apnews.com/article/business-police-oregon-george-floyd-race-and-ethnicity-7f6bc5b96ebb4dfb69eb910a2e9e9e56 [https://perma.cc/D4CP-FQ5Z]; J. David Goodman, *A Year After 'Defund,' Police Departments Get Their Money Back*, N.Y. TIMES (Oct. 10, 2021), https://www.nytimes.com/2021/10/10/us/dallas-police-defund.html [https://perma.cc/B4ZB-A2JS].

168. Brian Lee, *Eight New York DAs Haven't Applied for Payment of Discovery Reform Costs, as 2nd Round of Earmarks Approach* (July 28, 2022, 12:27 PM), N.Y.L.J., https://www.law.com/newyorklawjournal/2022/07/28/8-new-york-das-havent-applied-for-payment-of-discovery-reform-costs-as-2nd-round-of-earmarks-approach/ [https://perma.cc/2TKM-EK2H] (of the $75 million, $40 million was allocated outside of New York City and $35 million for New York City); Press Release, Kathy Hochul, Governor, New York State, *Governor Hochul Announces FY 2023 Budget Investments to Create a Safer and More Just New York State* (Apr. 9, 2022), https://www.governor.ny.gov/news/governor-hochul-announces-fy-2023-budget-investments-create-safer-and-more-just-new-york-state [https://perma.cc/9QQJ-FT3K]; Press Release, Kathy Hochul, Governor, New York State, *Governor Hochul Announces Highlights of Historic FY 2024 New York State Budget* (May 3, 2023), https://www.governor.ny.gov/news/governor-hochul-announces-highlights-historic-fy-2024-new-york-state-budget [https://perma.cc/8A7D-ZT8Z].

169. *See, e.g.*, Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 972–76 (2012); Stuntz, *supra* note 160, at 47.

170. *See* Ahmed & Foran, *supra* note 166.

from court.[171] Technology can reduce costs associated with printing, moving, and storing papers, as well as organizing and sharing discovery materials.[172]

Constrained institutions may also redesign the target of a resource attack so that it requires fewer resources. For example, allowing only virtual visits for incarcerated people and prohibiting physical mail avoids the resource intensive process of screening visitors and mail.[173]

Finally, the laws that give many resource attacks their bite may be suspended, revised, or repealed. Legislatures may revise speedy trial provisions, prison crowding standards, quorums, or staffing requirements when their effects become politically unpopular. Judges, far from immune to the "pathological politics of criminal law,"[174] may interpret the law in ways that relieve resource constraints or forestall their decarceral consequences. This may be done explicitly: in *Plata*, the Supreme Court invited California to request extensions to, or even complete relief from, its mandate to reduce prison populations.[175] Or it may be done more subtly: criminal court judges in New York routinely excuse prosecutors from the consequences of discovery non-compliance because they perceive the law's burden to be excessive.[176]

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171. In Philadelphia, for example, initial bail hearings are conducted by video, saving the costs of transporting someone to the courthouse, but at the expense of in person contact and communication. Aurélie Ouss & Megan Stevenson, *Does Cash Bail Deter Misconduct?*, 15 AMER. ECON. J.: APPLIED ECON. 150, 155, https://www.aeaweb.org/articles?id=10.1257/app.20210349 [https://perma.cc/W3KS-PB6Z]; *see also* CAMILLE GOURDET, AMANDA R. WITWER, LYNN LANGTON, DUREN BANKS, MICHAEL G. PLANTY, DULANI WOODS & BRIAN A. JACKSON, RAND CORP., COURT APPEARANCES IN CRIMINAL PROCEEDINGS THROUGH TELEPRESENCE 11–12 (2020), https://www.rand.org/content/dam/rand/pubs/research_reports/RR3200/RR3222/RAND_RR3222.pdf [https://perma.cc/S96K-83KR]; Shari Seidman Diamond, Locke E. Bowman, Manyee Wong & Matthew M. Patton, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 877 (2010), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7365&context=jclc [https://perma.cc/HC3K-STWT]; Jenia I. Turner, *Remote Criminal Justice*, 53 TEX. TECH L. REV. 197, 212–13 (2021), http://texastechlawreview.org/wp-content/uploads/53-Book-2_Turner.PUBLISHED.pdf [https://perma.cc/AG8N-QA5S].

172. *See, e.g.*, Andrew J. Peck, John M. Facciola & Steven W. Teppler, *E-Discovery: Where We've Been, Where We Are, Where We're Going*, 12 AVE MARIA L. REV. 1, 61–63 (2014).

173. *See supra* note 164 and accompanying text.

174. Stuntz, *supra* note 69, at 540 (noting that judges are "free to respond to their own ideological leanings, or to the pull of the legal culture in which they find themselves").

175. Brown v. Plata, 563 U.S. 493, 543–46 (2011) ("The State may wish to move for modification of the three-judge court's order to extend the deadline for the required reduction [from two years] to five years from the entry of the judgment of this Court . . . . As the State makes further progress, the three-judge court should evaluate whether its order remains appropriate. If significant progress is made toward remedying the underlying constitutional violations, that progress may demonstrate that further population reductions are not necessary or are less urgent than previously believed.").

176. *See, e.g.*, People v. Erby, 68 Misc. 3d 625, 633 (N.Y. Sup. Ct. 2020) ("[T]he new discovery law . . . should not be construed as an inescapable trap for the diligent prosecutor who . . . is unable to comply with every aspect of the automatic discovery rules specified in CPL § 245.20."). The *Erby* opinion, published shortly after the law took effect and well before the arrival of any applicable appellate opinions, all but acknowledges that its interpretation of the law belies its statutory text: "While other trial and appellate [courts] may conclude otherwise, this Court will not countenance such an interpretation of Article 245." *Id*. at 632.

Because of resource restoration or adaptation, resource attacks may cause a momentary shock, but over time, see their effects fade and the status quo return.

3. Resource Attacks Are Incomplete

Resource attacks are prone to incompleteness—they do not prohibit harmful actions, but merely make them more difficult or costly for the state to perform them. Consequently, resource attacks may only partially address the problem they aim to resolve or may even create new problems.

Plea strikes and New York's discovery reform illustrate the drawbacks associated with resource attacks' incompleteness. A successful plea strike aims to create an overwhelming trial docket for courts and prosecutors. This would, at minimum, stave off post-conviction harms for those who participated: because they would not plead guilty, and because the system would not have the capacity to try them, they would not be convicted and sentenced. As Crespo puts it, "resource constraints can forestall incarceration."[177] Forestall is the key. Forcing every case to trial would delay convictions, but not, alone, eliminate them.[178] Meanwhile, pending criminal cases carry their own harms: pending cases show up on background checks just like convictions and can be used as a basis for discrimination.[179] Collateral consequences related to employment, child custody, and housing often flow from a criminal arrest and pending case.[180] Most problematic, many people awaiting trial do so in jail, often because they cannot afford cash bail to secure their liberty. Plea strikes, on their own, are an incomplete reform. Even if they are successful, it is possible that the people who benefit from their success still suffer harms associated with a pending criminal case for months or years before their case is ultimately dismissed or goes to trial.[181]

New York's discovery reform, assessed as a resource attack, has a similar incompleteness problem. The beneficiaries of the resource constraint had their

177. Crespo, *supra* note 43, at 2007.

178. Professor Crespo addresses this critique by describing scenarios in which plea strikes would not just delay or marginally reduce convictions, but engender "mass decarceration." *Id.* at 2012 n.61. First, prosecutors faced with mounting caseloads and trial pressures may begin "dismissing cases and declining to pursue new ones." *Id.* at 2007. Alternatively, the immense increase in public resources needed to handle a sharp increase in trials could invite a popular reckoning around the size of the criminal legal system. "[P]erhaps this will put pressure on criminal justice system decision makers to rethink the policing practices and criminal justice policies that create the conditions of systemic triage in the first place." *Id.* at 2012 n.61 (quoting Richardson, *supra* note 155, at 889–90). Additionally, the architects of a plea strike could target jurisdictions with particularly robust speedy trial laws. This would compel dismissal of cases that lingered for too long. *See infra* Part IV (discussing factors advocates may consider when crafting a prospective resource attack).

179. *See* Logan & Ferguson, *supra* note 20, at 566.

180. *See infra* notes 182–183 and accompanying text.

181. Plea strikes have far greater harm-reducing potential where they interact with legal mechanisms such as speedy trial clocks compelling a case's dismissal or defendant's release if they are not brought to trial within a certain period of time. The legal setting into which a resource attack deploys is often determinative of the results it delivers.

cases dismissed, avoiding the direct and collateral consequences of conviction. However, these individuals were still arrested and charged. Every arrestee spent hours at the police station and a day or more in the courthouse jail waiting for their case to be arraigned. This arrest and single day of incarceration has been shown to have long-lasting negative effects, traumatizing the arrestee and his or her family, and sometimes resulting in a lost job because of the mere allegation of a crime or missed work from the time in custody.[182] Further, the criminal proceeding may launch administrative proceedings that affect parental rights, government benefits, housing, professional licenses, and driving privileges; these outcomes are wholly independent of the criminal process that ended in their favor.[183] These may persist for months, or indefinitely, after the criminal case was dismissed—records that are supposed to be sealed frequently are not, due to administrative errors and unregulated conduct of private background check providers.[184]

III.
CASE STUDY: 2020 CHANGES TO NEW YORK'S DISCOVERY LAW

This Part moves from the theoretical to the concrete, using a case study of a recent resource attack to illustrate the features, advantages, and disadvantages described in the previous Parts.

A. Changes to New York's Discovery Law

In the spring of 2019, New York passed a comprehensive criminal justice reform package. These legislative changes limited the circumstances in which judges could set monetary bail and issue bench warrants, updated civil forfeiture

182. Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 839–841 (2015), https://www.stanfordlawreview.org/wp-content/uploads/sites/3/2015/04/67_Stan_L_Rev_809_Jain.pdf [https://perma.cc/H3QM-U3T8] (explaining that some employers are automatically notified when their employees are arrested and suspend or terminate employment on that basis); *see also* Horn, *supra* note 20 at 320, 339–40 (noting that "TSA rejects any port worker whose background check shows a disqualifying *arrest*, without noting the disposition"); Harmon, *supra* note 21, at 314 n.18 (citing studies finding that individuals who have been arrested but not convicted earn less and are more likely to experience poverty than individuals who have never been arrested).

183. Jain, *supra* note 182 at 826–44; Roberts, *supra* note 111, at 1098; Harmon, *supra* note 21, at 314 n.17; *see also* Robin Steinberg, *Heeding Gideon's Call*, 70 WASH. & LEE L. REV. 961, 990 (2013), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=4326&context=wlulr [https://perma.cc/CHD5-XBFC] (family proceedings); *id.* at 991 (food assistance); McGregor Smyth, *"Collateral" No More: The Practical Imperative for Holistic Defense in a Post*-Padilla *World . . . or, How to Achieve Consistently Better Results for Clients*, 31 ST. LOUIS U. PUB. L. REV. 139, 149 (2011), https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=1134&context=plr [https://perma.cc/4VRU-QZS7] (housing and licensing); NATAPOFF, *supra* note 19, at 19–38.

184. Logan & Ferguson, *supra* note 20, at 561–62; Horn, *supra* note 20, at 330–31, 340.

procedures, limited public access to arrest information and mugshots, and, central to this article, rewrote the state's discovery law.[185]

At the stroke of midnight on January 1, 2020, C.P.L. Article 240, the portion of New York's Criminal Procedure Law that had previously governed discovery, was repealed and replaced by the new C.P.L. Article 245.[186] Though the old Article 240 enumerated an expansive list of materials subject to discovery, defendants had little power to actually obtain these materials.[187] Defendants were required to "demand" discovery from prosecutors, and it was common for defendants' demands to be ignored until the eve of trial.[188] When prosecutors handed over reams of discovery in the hallway outside the courtroom, defense attorneys could request an adjournment, further delaying their client's day in court, or scramble through what they could and revise their trial strategy on the fly.

Article 245 reversed the parties' burdens. Section 245.20, titled "Automatic Discovery," contains a list of materials that prosecutors must affirmatively collect and disclose to defendants.[189] The enumerated list is expansive and begins with an unambiguously broad command:

> [T]he prosecution shall disclose to the defendant and permit the defendant to discover inspect, copy, photograph and test, all items and information that relate to the subject matter of the case and are in the possession, custody or control of the prosecution or persons under the prosecution's direction or control[.] . . .[190]

The statute further defines the prosecutor's "custody and control" to include items "in the possession of any New York state or local police or law enforcement agency."[191] And it not only requires prosecutors to "ascertain the existence of material or information discoverable under . . . this section" but to "*cause* such

185. 2019 N.Y. LAWS 59; *see also* N.Y. STATE ASS'N OF CNTYS., CRIMINAL JUSTICE REFORMS (2019), https://www.nysac.org/files/Criminal%20Justice%20Reforms%20Whitepaper%2012_20_19.pdf [https://perma.cc/435Y-CFBW] (summarizing New York's 2019 criminal law and procedure reforms).

186. 2019 N.Y. LAWS 59 pt. LLL.

187. N.Y. CRIM. PROC. LAW § 240.20 (McKinney 2019).

188. *Id.*; *see also* People v. Smith, No. CR 2781-21, slip op. at 4–5 (N.Y. City Ct. April 28, 2022), https://nycourts.gov/reporter/pdfs/2022/2022_31224.pdf [https://perma.cc/6SBW-GZLG] (describing the pre-reform discovery regime and concluding "[f]or all practical purposes, defendants were kept blind of the evidence against them until the trial."); Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1124–40 (2004), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1898&context=ulj [https://perma.cc/DK5B-BU55] (describing pre-reform discovery practice in New York City).

189. N.Y. CRIM. PROC. LAW § 245.20 (McKinney 2022).

190. *Id.* § 245.20(1). The section continues with a 2200 word "included but not limited to" list of automatically discoverable materials. *Id.* § 245.20(1)(a)–(u).

191. *Id.* § 245.20(2).

material or information to be made available for discovery where it exists but is not within the prosecutor's possession, custody or control."[192]

Crucially, the new law paired these broad discovery obligations with a robust enforcement mechanism. Under Article 245, prosecutors may declare that they are "ready for trial" only after they have submitted a "certificate of compliance . . . [stating that] the prosecutor has disclosed and made available all known material and information subject to discovery."[193] The prosecutor's "ready for trial" declaration is a term of art in New York criminal practice. Speedy trial time accrues from the commencement of a criminal action, usually the defendant's arraignment, until the prosecutor announces "ready for trial."[194] If the speedy trial clock ticks past statutory limits—six months for felonies, 90 days for most misdemeanors—the case will be dismissed on defendant's motion.[195] Accordingly, in any given case, if the prosecution fails to timely satisfy its discovery obligations, the case will be dismissed as a speedy trial violation. This linkage between discovery and speedy trial is known as "Kalief's Law," after Kalief Browder, who died by suicide after spending three years at the city's Riker's Island jail complex litigating a case that the prosecution ultimately dismissed for lack of evidence.[196]

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192. *Id.* (emphasis added). This provision makes New York's discovery law more than an "open file" regime—often cheered as the gold standard for procedural fairness. *E.g.*, Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 CONN. L. REV. 771, 773 (2017), https://digitalcommons.lib.uconn.edu/cgi/viewcontent.cgi?article=1359&context=law_review [https://perma.cc/498S-6KYM]. The weakness of open file discovery is that it creates a perverse incentive for prosecutors *not* to investigate their cases. *Id.* at 797. Indeed, critics of discovery reform now advocate for an open file regime as an alternative to Article 245. HANNAH E. MEYERS, MANHATTAN INST., DESTROYED BY DISCOVERY: HOW NEW YORK STATE'S DISCOVERY LAW DESTABILIZES THE CRIMINAL JUSTICE SYSTEM 34 (2023), https://manhattan-institute.org/sites/default/files/how-new-york-discovery-law-destabilizes-criminal-justice-system.pdf [https://perma.cc/JE5V-ZR72].

193. N.Y. CRIM. PROC. LAW § 245.50(1), (3) (McKinney 2022).

194. N.Y. CRIM. PROC. LAW § 30.30(1) (McKinney 2022) ("[A] motion [to dismiss the action] must be granted where the people are not ready for trial within: (a) six months of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a felony; (b) ninety days of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a misdemeanor punishable by a sentence of imprisonment of more than three months and none of which is a felony[.]").

195. *Id.*

196. Jennifer Gonnerman, *Before the Law*, NEW YORKER (Sept. 29, 2014), https://www.newyorker.com/magazine/2014/10/06/before-the-law [https://perma.cc/NT2X-6VFY] (describing Mr. Browder's life and criminal case and providing a vivid illustration of pre-reform criminal practice in New York City); Michael Schwirtz & Michael Winerip, *Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide*, N.Y. TIMES (June 8, 2015), https://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html [https://perma.cc/WA8L-HQ4Z]; Press Release, Carl E. Hastie, Speaker, New York State Assembly, Assembly Majority Introduces Comprehensive Criminal Justice Reform Package (Feb. 12, 2018), https://nyassembly.gov/Press/files/20180212.php [https://perma.cc/2RD3-BUTM]. The statutory speedy trial deadlines, N.Y. CRIM. PROC. LAW § 30.30(1) (McKinney 2022), pre-dated New York's 2019 reforms. However, trial readiness was previously unconnected to discovery obligations.

B. Creation of a Resource Constraint

Article 245 placed a new and substantial burden on New York's prosecutors. Overnight, assistant district attorneys accustomed to compiling and sharing discovery only for the rare case that went to trial were compelled to find and share mountains of materials. These include all police notes, written statements, and documentation made about a given case,[197] along with all relevant body camera footage,[198] scientific tests such as breathalyzers and drug analyses,[199] recordings of 911 calls,[200] and information about the officers involved, including their disciplinary histories.[201] They are also required to acquire and share the names and contact information for all civilian witnesses.[202]

The largest block of discovery material comes from the police, who have been slow to adapt to the new law's demands. The New York Police Department ("NYPD") does not appear to have a streamlined, automated system for generating the materials needed for the prosecutor to proceed with a case, even though the documents required are largely consistent from one case to the next. Part of the problem may be technological—many of the required documents, such as police officers' notes and on-scene complaint reports, are handwritten. Others are strewn across unconnected digital systems. The documentary record of a case frequently includes emails from assistant district attorneys to police officers haranguing them to send materials in time.

The demands of the new discovery law strain prosecutors' resources. They must devote substantial time to locating, requesting, collating, redacting, and transferring materials. The demands also seem to take an emotional toll. Prosecutors complain in private and public about the law's effects on their job. The New York Post cites an unnamed New York City prosecutor who lamented that "[discovery reform] has turned assistant district attorneys into 'basically paralegals . . . They don't have time to think about the case,' the source said, accusing the law of 'destroying the profession. They're just chasing papers.'"[203] A 2022 article in The New York Times, "Why Hundreds of New York City Prosecutors Are Leaving Their Jobs," attributed a greater-than-usual departure

197. N.Y. CRIM. PROC. LAW § 245.20(1)(c) (McKinney 2022).

198. *See id.* § 245.20(1)(g).

199. *See id.* § 245.20(1)(j). Months' worth of calibration reports for certain instruments are also required in some cases. *Id.* § 245.20(1)(s).

200. *Id.* § 245.20(1)(g).

201. *See id.* § 245.20(1)(d), (k); People v. Hamizane, 194 N.Y.S.3d 666, 668–69 (App. Term. 2023) (citing *In re* Jayson C., 159 N.Y.S.3d 40, 42 (App. Div. 2021)).

202. N.Y. CRIM. PROC. LAW § 245.20(1)(c) (McKinney 2022). To protect the privacy of civilian witnesses, it is common for prosecutors to redact all but the statutorily required information for civilian witnesses from documents and body camera footage. This adds hours of tedious work to an already resource intensive process. Meyers, *supra* note 192, at 4, 8.

203. Tamar Lapin, Joe Marino & Jorge Fitz-Gibbon, *NY's 'Speedy Trial' Reforms Are Costing DAs Cases and Staffers*, N.Y. POST (Mar. 22, 2022, 6:52 PM), https://nypost.com/2022/03/22/nys-speedy-trial-reforms-are-costing-das-cases-and-staffers/ [https://perma.cc/FG7J-HVHS].

rate to the stress and tedium of complying with the discovery requirements.[204] A Manhattan Institute report criticizing New York's discovery law concluded, "Given the vast increase in workload and inefficiencies, it is not surprising that prosecutors' offices have universally experienced staffing calamities, with exiting ADAs citing [Article] 245 for their burnout."[205]

Unable to gather the materials they needed to comply with the discovery requirements in every case, prosecutors have prioritized and triaged: they meet their discovery requirements in some cases and let the others fall by the wayside. In the author's experience, in the vast majority of these discarded cases, prosecutors do not make a single discovery filing and do not contest the case's dismissal.[206]

C. Reduction in Harm

1. The Scope of the Consequences

The footprint of the criminal legal system shrank dramatically following implementation of New York's new discovery law. In New York City, the dismissal rate for misdemeanor cases rose from 32.6% shortly before the law took

204. Jonah E. Bromwich, *Why Hundreds of New York City Prosecutors Are Leaving Their Jobs*, N.Y. TIMES (Apr. 3, 2022), https://www.nytimes.com/2022/04/03/nyregion/nyc-prosecutors-jobs.html [https://perma.cc/7UTQ-D5M9].

205. Meyers, *supra* note 192, at 32.

206. *People's Compliance Filed for Cases Pending More than 20 Days*, N.Y. STATE UNIFIED CT. SYS., https://ww2.nycourts.gov/discovery-implementation (follow "Court Activity Dashboard" hyperlink; then navigate to page 6 of 6; then select only "NYC" from Region dropdown; then select only "Misdemeanor" from Case Type dropdown) [https://perma.cc/88KC-X5Y9] (last visited October 7, 2023) (showing certificates of discovery compliance were filed in only ten percent of New York City misdemeanor cases). Note, however, that the Division of Technology & Court Research provided extremely limited methodology to support this analysis and, thus, it should be interpreted with caution. *See id.* The analysis does not indicate a time period—it is unclear the dates of the data included in the analysis. *See id.* Additionally, the analysis considers only cases pending more than 20 days without indicating what portion of cases this excludes, or providing any analyses to help identify systematic differences between those included and excluded. *See id.*

effect, to 55.2% after—an increase of thousands of dismissals annually.[207, 208] Appendix 1 shows pre- and post-reform misdemeanor dismissal rates for each of

207. *Infra* Appendix 1. The pre-reform period referenced above comprises all cases arraigned from July 2018 through June 2019 and closed before January 1, 2020. This period was chosen because New York's revised discovery law took effect on January 1, 2020. Beginning the pre-reform period in July 2018 allows for a full year of case data as close as possible to the effective date of the reforms (January 1, 2020) with minimal exclusions for cases that were not resolved by then. (All cases not yet resolved as of January 1, 2020 must be excluded from the analysis because they became subject to the new discovery laws on that date). Sensitivities and robustness checks ensure that this decision did not meaningfully affect the results, as relevant for this paper. The pre-reform dismissal rate referenced in the body of the paper, 32.6%, was selected because it is the highest pre-reform dismissal rate—and therefore the most conservative—of several that could have been chosen. For example, the dismissal rate using a pre-reform period of January 2018 to December 2018 is 28.2%. Using a pre-reform period of January 2018 to December 2019, the dismissal rate is 30.9%. (In both sensitivities, as in the primary analysis, cases not resolved by January 2020 are excluded). Finally, the dismissal rate of cases excluded from the paper's primary analysis (cases arraigned between July 2018 and June 2019 but not closed by January 2020) was 25.5%, suggesting that there was not a systematic difference in dismissal patterns between the included and excluded cases.

The post-reform period comprises all cases arraigned from January 2021 through December 2021. *Infra* Appendix 1. 2020 is excluded from the analysis because data from this period is too heavily distorted by the COVID-19 pandemic. New York's speedy trial law was suspended for misdemeanor cases by Executive Order from March 20, 2020, Exec. Order No. 202.8, N.Y. COMP. CODES R. & REGS. tit. 9, § 8.202 (2023), https://www.governor.ny.gov/sites/default/files/atoms/files/EO_202.8.pdf [https://perma.cc/S4ZD-Q8JL], to October 4, 2020, Exec. Order No. 202.67, N.Y. COMP. CODES R. & REGS. tit. 9, § 8.202 (2023), https://www.law.buffalo.edu/content/dam/law/content/cle/210324-2-materials/eo-202-67.pdf [https://perma.cc/2V4J-J532]. Accordingly, there were virtually no discovery-related speedy trial dismissals during that period. In addition, case volume dropped dramatically in this period and courts were closed for all but emergency proceedings.

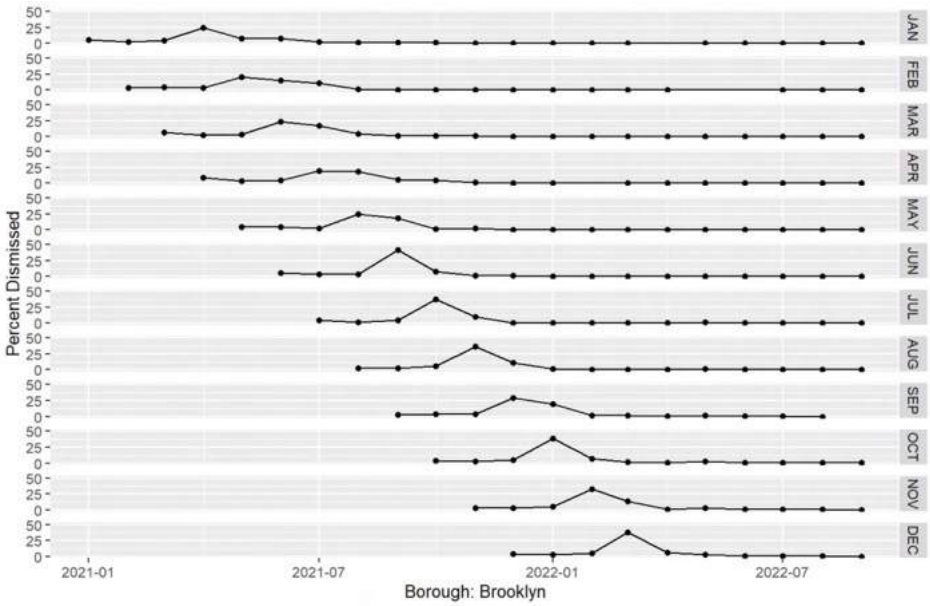
208. Freedom of Information Law Request Response from New York Div. of Crim. Just. Servs. to the author (Aug. 17, 2023) (on file with author). All data and code used in the analysis are available upon request to the author.

the counties (also referred to as "boroughs") comprising New York City, as well as New York City as a whole.[209]

A signature pattern in the timing of post-reform misdemeanor dismissals provides a strong indication that they were affected by the discovery law. Figure 2a (below) shows the percentage of cases dismissed in Brooklyn, by month, for each month of 2021.[210] Figures 2a-e in Appendix 2 show similar patterns in each of the five boroughs.

209. The paper's quantitative analyses focus on New York City and misdemeanor offenses for several reasons. First, the effects of discovery reform appear to be most pronounced in New York City. It is intuitive that the resource constraints caused by discovery reform would be most acute in the highest volume offices and with the highest volume of offenses. The intuition is supported by a survey of the state's judges: outside of New York City, well over half (65%) of judges surveyed said that discovery reform *did not* increase the number of speedy trial dismissals (in contrast to only 22% in New York City). TAMIKO A. AMAKER, N.Y. STATE UNIFIED CT. SYS., 2022 JUDICIARY ANNUAL REPORT ON THE IMPLEMENTATION AND IMPACT OF CPL ARTICLE 245, at 11 (2022), https://www.nycourts.gov/legacypdfs/court-research/Judicial_Discovery_Report_12_2022.pdf [https://perma.cc/8H9E-Q8DC]. In addition, misdemeanors are more likely to be dismissed because their speedy trial clock is shorter, 90 days as opposed to six months for felonies. N.Y. CRIM. PROC. LAW § 30.30(1) (McKinney 2022). And, intuitively, in a state of triage, prosecutors would be more inclined to let lower-level misdemeanor offenses fall by the wayside than cases involving acts of serious violence such as shootings and sexual assaults. News reporting provides further support that the resource crunch catalyzed by discovery reform was felt most acutely in New York City. *See* Lapin, Marino & Fitz-Gibbon, *supra* note 203; Bromwich, *supra* note 204. Second, the focus on New York City and misdemeanors is motivated by data availability and practicality. There are 62 counties in New York state, a substantial number of which have entire populations less than 80,000, the number of misdemeanor *cases* processed in New York City in a year. *Table 2: Population, Land Area, and Population Density by County - 2018*, N.Y. STATE DEP'T OF HEALTH, https://www.health.ny.gov/statistics/vital_statistics/2018/table02.htm [https://perma.cc/7U3P-Z8MS] (Oct. 2020). Analyzing data from each of these counties individually would be unfeasible, and more importantly, incomparable to an analysis of a large urban criminal legal system. Data from New York City is rich and complete, with tens of thousands of cases annually and reliable data reporting and consistency. Finally, criminal court practice in New York City is most familiar to the author.

210. Each row of the table plots dismissal rates by month for cases arraigned in a given month of 2021: the first row plots all cases arraigned in January, the second row February, etc. Read left to right, each point in a row represents cases resolved in a particular month beginning with the month of arraignment. Accordingly, the leftmost point in any given row is the month of arraignment—for the first row, which depicts cases arraigned in January, the leftmost dot is January, the second dot is February, etc. In the second row, the first dot is February, the second dot is March, etc. Read together, each dot in a row indicates the percentage of misdemeanor cases dismissed in that month as a percentage of all cases arraigned in that month. For example, the first dot in the first row represents the percentage of cases arraigned in January 2021 and dismissed in January 2021 as a percentage of all cases arraigned in January 2021. The second dot in the first row represents the percentage of all cases arraigned in January 2021 and dismissed in February 2021 as a percentage of all cases arraigned in January 2021. The fifth dot in the third row represents the percentage of all cases arraigned in March 2021 and dismissed in July 2021, as a percentage of all cases arraigned in March 2021.



In all months of 2021 and in all New York City boroughs, there is a clear spike in dismissals in the period three to four months after the case's arraignment.[211] Recall that pursuant to New York's revised discovery law, prosecutors must submit a certificate of discovery compliance in order to stop the statutory speedy trial clock. For most misdemeanors, the speedy trial clock expires 90 days after a case's arraignment. When the prosecutor fails to submit their certificate of compliance before the end of the 90th day, the case will be dismissed at the defendant's next scheduled court date, which ordinarily falls in the third or fourth month after arraignment.[212] Accordingly, dismissal in month three or four after a defendant's arraignment is a telltale indication that the prosecutor did not meet their discovery obligations in the case.[213] An astonishing 34.5% (28,136 cases) of all misdemeanor prosecutions in New York City in 2021 were dismissed following this pattern.

211. There is some variation by month and borough, but the pattern showing that dismissals peak in months three and four after arraignment is consistent throughout New York City. *Infra* Appendix 2. Data supporting the figure is available upon request to the author.

212. The data used for this analysis contain only the months and years of cases' arraignment and disposition.

213. Note that the estimates in this subsection should not be interpreted as scientifically exact calculations. Criminal case outcomes are influenced by countless observed and unobserved factors: prosecutors have political priorities which necessitate focusing on some cases at the expense of others. Individual prosecutors have discretion to dismiss cases they view as unjust or impossible to prove. The analysis estimates the aggregate number of cases whose dismissal resulted from increased discovery burdens, but does not, nor could it, determine the reason for dismissal in any given case.

Anecdotal and survey data bolster these statistics. A survey administered by the state's Office of Court Administration found that 78% of New York City judges observed the new discovery law to have "greatly increased" or "moderately increased" the number of speedy trial dismissal motions granted.[214] Prosecutors' public statements connect the demands related to discovery to an increase in dismissals.[215] Analysis from the New York State Court System's Division of Technology and Court Research indicates that certificates of discovery compliance have been filed in only ten percent of New York City misdemeanor cases.[216] Consistent with the findings in this article, numerous analyses have identified a sharp increase in rates of case dismissals in New York City between 2019—pre-reform—and 2021 and 2022—the years following implementation of New York's criminal justice reforms.[217] Also consistent with this article's conclusions, news articles and opinion pieces have attributed increased rates of misdemeanor dismissals to the discovery law's newly imposed burdens on prosecutors.[218]

Finally, the interaction between the COVID-19 pandemic and New York's discovery law changes merits special attention. It is possible, even likely, that the magnitude of dismissals resulting from discovery compliance related resource constraints was amplified by the effects of the pandemic, which made it harder for prosecutors to develop and implement processes to manage their new discovery responsibilities. This is a feature, not a flaw, of using New York's discovery law

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214. AMAKER, *supra* note 209, at 11. For comparison, only 35% of judges outside of New York City answered that the discovery law resulted in an increase in 30.30 dismissal motions being granted. *Id.*

215. *Supra* notes 203–204 and accompanying text; *see also* Olivia Proia, *Almost 150 Court Cases Dismissed in Buffalo City Court, More To Come*, WKBW Buffalo, https://www.wkbw.com/news/local-news/almost-150-court-cases-dismissed-in-buffalo-city-court-more-to-come [https://perma.cc/XG3W-75R8] (Feb. 18, 2021, 8:12 PM).

216. *People's Compliance Filed for Cases Pending More than 20 Days*, *supra* note 206.

217. *See, e.g.*, *Proportion of Dismissals out of Total Dispositions*, N.Y. STATE UNIFIED CT. SYS., https://ww2.nycourts.gov/discovery-implementation (follow "Court Activity Dashboard" hyperlink; then navigate to page 5 of 6; then select only "NYC" from Region dropdown; then select only "Misdemeanor" from Case Type dropdown) [https://perma.cc/FDH7-TLCX] (last visited October 7, 2023) (finding that misdemeanor dismissal rates in New York City increased from 49.1% for cases disposed in 2019 to 81.3% and 73.4% of those disposed in 2021 and 2022, respectively); Jonah E. Bromwich, Hurubie Meko & Grace Ashford, *Why 3 Liberal New York D.A.s Want to Change a Law Backed by Progressives*, N.Y. TIMES (Apr. 25, 2023) [https://perma.cc/6MZC-W39W] ("There were 27,108 such dismissals [for speedy trial violations] in the city in the first 10 months of 2022, compared with 9,481 in 2019, a 186% increase."); Calder & Sedacca, *supra* note 152 ("Nearly half of all drinking-and-driving offenses in Manhattan were tossed out of court last year—as dismissal rates soared over five times higher than they were before state lawmakers enacted a controversial evidence reform law in 2020, records show."); Meyers, *supra* note 192 at 12–18 ("Especially in case-heavy downstate, the toll of this triage was extreme. In the five counties of NYC . . . dismissals rose from 44% of dispositions in 2019 to 69% in 2021, according to court data.")

218. Bromwich, Meko & Ashford, *supra* note 152; Calder & Sedacca, *supra* note 152; Meyers, *supra* note 192, at 12–18. These analyses reach the same conclusion as that in this article—that the burdens of the discovery law compelled prosecutors to triage and dismiss cases at the speedy trial deadline. However, because these analyses do not provide access to their data, provide or detail their methodology, or identify their sources, their numerical conclusions should be relied upon with caution.

as a resource attack case study. One of the article's primary takeaways is that the effects of a resource attack are highly context dependent. The pandemic's amplification of the disruptiveness of New York's discovery law highlights the importance of one such contextual factor—the nimbleness and adaptability of a targeted institution. The disruption caused by a resource constraint is likely to be greater when the target institution is ill-equipped to adapt and evolve, and vice versa.[219]

2. Comparable Direct Reforms

The increase in dismissals following revisions to New York's discovery law is massive. To put its scale into perspective, consider the 22.6 percentage point increase in misdemeanor dismissals following the discovery reform's implementation in comparison to the changes following other, direct reforms aimed at reducing the footprint of the misdemeanor criminal system.

In January 2019, Rachel Rollins was sworn in as District Attorney for Suffolk County, Massachusetts (Suffolk County encompasses the cities of Boston, Chelsea, Revere, and Winthrop).[220] Rollins ran as a progressive prosecutor. One of her signature policies was a list of 15 "presumptive non-prosecution" offenses.[221] Under the policy, her staff were instructed to refuse to prosecute these charges entirely, ending the cases after arrest but before arraignment in criminal court. The presumption of non-prosecution could be overcome on a case-by-case basis if a prosecutor assessed aggravating factors (including a pattern of similar prior conduct by the defendant, if the defendant posed an "identifiable threat" to another individual, or if the defendant's conduct was determined not to be the consequence of mental illness, addiction, or necessity).[222]

In spite of the policy's all-encompassing headline,[223] the increase in non-prosecutions following its implementation was relatively modest. Prior to Rollins's term in office, prosecutors declined to prosecute nonviolent

219. While in this case study, prosecutors' lack of nimbleness was, at least in part, the consequence of an unpredictable pandemic, other institutional adaptability factors are more predictable. These include the institution's integration of technology, familiarity with change versus stability in practice, and strength of leadership.

220. Amanda Agan, Jennifer L. Doleac & Anna Harvey, *Misdemeanor Prosecution*, 138 Q.J. ECON. 1453, 1493 (2023), https://academic.oup.com/qje/article-abstract/138/3/1453/6998589 [https://perma.cc/626K-LBCZ].

221. *Id.* These offenses were all non-violent misdemeanor and infraction offenses, including trespassing and breaking and entering, theft and possession of stolen property, disorderly conduct, threats, and drug possession. SUFFOLK CNTY. DIST. ATT'Y, THE RACHEL ROLLINS POLICY MEMO app. C at C-2 to C-9 (2019), http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf [https://perma.cc/KZ4H-2BAL].

222. SUFFOLK CNTY. DIST. ATT'Y, *supra* note 221, app. C at C-1 to C-2.

223. *Id.* app. C at C-1 ("Charges on the list of 15 should be declined or dismissed pre-arraignment without conditions. The presumption is that charges that fall into this category should always be declined, even when attached to another charge.").

misdemeanor offenses approximately 36% of the time.[224] Researchers estimate that, as a result of Rollins's policy, this figure increased to approximately 42% (a six percentage point, or 17%, increase).[225]

That reduction is considerable and meaningful to the individuals who benefitted from it. However, it is notable that Rollins's policy, despite directly *demanding* non-prosecution, saw a six percentage point increase in non-prosecution. New York's discovery law change, an incidental or even accidental resource attack, was followed by an increase in dismissals nearly four times greater.[226] Moreover, Rollins's policy speaks only to non-violent misdemeanor dismissal rates.[227] New York's reduction in misdemeanor prosecutions encompassed all misdemeanors—meaning that a percent decrease in prosecutions affected a far greater volume of cases.

Philadelphia District Attorney Larry Krasner also implemented a decline-to-prosecute policy upon taking office in 2018. His was narrower in scope than Rollins's, encompassing only marijuana, small retail theft, and prostitution offenses.[228] It appears to have been implemented more robustly than D.A. Rollins's—affecting a near complete discontinuation in prosecution of these offenses.[229] However, these charges comprise a relatively limited subset of misdemeanor prosecutions in Philadelphia—roughly ten percent combined.[230] Accordingly, the footprint of the program could have reduced misdemeanor prosecutions by ten percentage points at most, assuming perfect implementation. Again, this is substantially lower than the increase in dismissals following New York's discovery law changes.

Legislatures also have the power to reduce misdemeanor prosecutions by changing the states' penal codes. Over the past two decades, many states have legalized or decriminalized possession of marijuana.[231] This has resulted in a

224. Agan, Doleac & Harvey, *supra* note 220, at 1498.

225. *Id. See also* FELIX OWUSU, HARVARD KENNEDY SCH., RAPPAPORT INST. FOR GREATER BOS., PRESUMPTIVE DECLINATION AND DIVERSION IN SUFFOLK COUNTY, MA 2, 9 fig.4 (2022), https://www.hks.harvard.edu/sites/default/files/Taubman/RIGB/Presumptive%20Declination%20and%20Diversion%20in%20Suffolk%20County%2C%20MA.pdf [https://perma.cc/9FDW-ZVYQ] (conducting a similar study of the effects of Rollins's policies and finding an effect size in the range of eight to ten percentage points, slightly higher than that observed by Agan, Doleac & Harvey).

226. I estimate the increase in dismissals to be 22.6 percentage points, a 69.3% increase over the baseline. *Supra* Section III.C.i. However, note that the dismissals in Suffolk County, MA were different in kind from those in New York City because they were dismissed pre-arraignment rather than at the expiration of a 90 day speedy trial clock. For discussions of the benefits of nonprosecution in contrast to prosecution and dismissal, see Agan, Doleac & Harvey, *supra* note 220, at 1484–88; NATAPOFF, *supra* note 19, at 68.

227. Agan, Doleac & Harvey, *supra* note 220, at 1493; Owusu, *supra* note 225, at 9 fig.4.

228. *Philadelphia DAO New Policies*, PHILA. DIST. ATT'Y'S OFF. (Feb. 15, 2018), https://phillyda.org/wp-content/uploads/2022/04/DAO-New-Policies-2.15.2018-UPDATED.pdf [https://perma.cc/TS9J-W79Q].

229. Ouss & Stevenson, *supra* note 171, at app. A.1.

230. *Id.* at 157 n.15.

231. NAT'L CONF. OF STATE LEGISLATURES, STATE MEDICAL CANNABIS LAWS tbl.1 (2023), https://www.ncsl.org/health/state-medical-cannabis-laws [https://perma.cc/9QK2-3B5T].

dramatic decrease in marijuana-related arrests, prosecutions, and convictions. In most states that legalized or decriminalized marijuana, marijuana-related arrests dropped 50% or more in the year following the law's implementation.[232] This effect size is enormous, and it affects an entire state. However, while these policies had dramatic effects on marijuana-related involvement in the criminal legal system, their impact on shrinking the criminal system overall was relatively limited. Even at their height, marijuana cases represented a relatively small portion of criminal system interactions. According to FBI crime data, in 2011, before Colorado became the first state to decriminalize recreational marijuana, five percent of arrests nationwide were for marijuana-related offenses.[233]

These examples help put the scope of the effects of New York's discovery reform into perspective. Progressive prosecutors' non-prosecution policies reduced the rate of misdemeanor prosecutions on the order of six to ten percentage points. Marijuana legalization and decriminalization has the potential to decrease arrests nationwide by up to five percentage points. By comparison, following implementation of New York's discovery reform, the rate of misdemeanor dismissals increased 22.6 percentage points.

The comparatively massive effect size of discovery reform shows the impact potential of a successful resource attack. However, as discussed in the following subsection, it is worth noting that the gap between this and the direct reforms discussed above is likely to shrink over time as police and prosecutors receive more funding and adapt to the law's demands.

D. Long-Term Net Effects

Though it is too soon to conduct a complete analysis of the long-term net effects of New York's discovery law as a resource attack, many benefits and drawbacks are already apparent.[234]

Case dismissals are an unambiguous win for advocates who seek to shrink the footprint of the criminal legal system. Defendants in cases that are dismissed avoid

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232. ACLU, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 25–27 (2020), https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf [https://perma.cc/VGB5-WJAM].

233. *Documents & Downloads*, FEDERAL BUREAU OF INVESTIGATION: CRIME DATA EXPLORER, https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/downloads [https://perma.cc/M7C9-RB4C] (under "Additional Datasets" download data for "Arrest Data - Reported Number of Arrests by Crime" and "Arrest Data - Reported Number of Drug Arrests") (showing 577,612 marijuana related arrests out of 12,408,899 total arrests in 2011). Decriminalizing marijuana would, potentially, eliminate more arrests and prosecutions because marijuana stops would no longer provide a legal basis for searches uncovering other contraband, or database lookups revealing infractions such as driving with a suspended license.

234. This evaluation considers only the effects of discovery reform as a resource attack—it does not attempt to incorporate the benefits to defendants from receiving more discovery and receiving it earlier on in a case's life cycle. These benefits are tremendous and should not be ignored or discounted.

many of the harms that flow from prosecution.[235] Every case that is dismissed is one in which the defendant does not endure a jail sentence, spend money on fines and fees, receive the permanent brand of a criminal record,[236] or have their DNA entered into a state database.[237] Furthermore, data indicate that these dismissals did not simply substitute for other favorable outcomes—the resource attack acted as a rising tide that lifted all boats.[238]

Additionally, some may view havoc within prosecutors' offices as a positive end in itself. Prosecutors working on discovery and spending less time litigating their cases gives the defense an advantage investigating, drafting motions, and preparing hearings and trials—leveling the traditionally resource-imbalanced playing field between prosecution and defense.[239]

However, several factors are already beginning to emerge that challenge the presentation of discovery reform as an unmitigated resource attack success. These are consistent with the risks and disadvantages discussed above in section II.B—in particular, resource attacks' vulnerability to reversal.

First, the positive effects of discovery reform as a resource attack will likely decline from their peak. Data show that misdemeanor dismissal rates in 2022 were lower than in 2021 even as total case volume increased year over year.[240] In other words, after just one year of adaptation to the demands of discovery reform, prosecutors were able to pursue more cases and dismiss them at lower rates. It is

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235. Statutory speedy trial dismissals are not dismissals with prejudice under New York law. *See* N.Y. CRIM. PROC. LAW § 40.30 (McKinney 2022). Prosecutors could, theoretically, re-file dismissed cases.

236. New York law requires that following a case's dismissal, the arrest and prosecution not in any way prejudice the defendant. N.Y. CRIM. PROC. LAW §§ 170.30(1)(e), 160.50(3)(b) (McKinney 2022). Police departments and prosecutors are also obligated to seal or destroy all records related to the case. N.Y. CRIM. PROC. LAW § 160.50(1) (McKinney 2022). But in practice, they do not. *See, e.g.*, Matt Katz, *Legal Filing: NYPD Illegally Used Sealed Arrest Records in Adams Bail Reform 'Publicity Stunt'*, GOTHAMIST (Dec. 20, 2022), https://gothamist.com/news/legal-filing-nypd-illegally-used-sealed-arrest-records-in-adams-bail-reform-publicity-stunt [https://perma.cc/KX8X-6WRF].

237. NATAPOFF, *supra* note 19, at 30.

238. Short of outright dismissal, an Adjournment in Contemplation of Dismissal ("ACD") is the most favorable disposition in a New York criminal case. Cases adjourned in contemplation of dismissal are automatically dismissed and sealed after a period of time (usually six months or a year) so long as the recipient abides by any interim conditions (which may include classes, orders of protection, or no new arrests). N.Y. CRIM. PROC. LAW § 170.55 (McKinney 2022). ACD rates remained almost exactly the same pre- and post-implementation of New York's discovery reforms—19.3% pre-reform and 20.6% post-reform (using the same pre- and post-reform periods described above, *supra* note 207). *Infra* Appendix 3.

239. *See* Stuntz, *supra* note 160, at 8–10 (noting that, whereas "prosecutorial budgets . . . outstripped the rise in crime during the 1970s and 1980s," "spending on indigent defendants in constant dollars per case appears to have declined significantly" during the same period).

240. The rate of misdemeanor dismissals in 2022 was 53.6%, compared to 55.2% in 2021. The number of cases arraigned in 2022 was 86,285, compared to 79,161 in 2021, a 9.0% increase year over year. *Infra* Appendix 1. In addition, rates of adjournments in contemplation of dismissal, another favorable resolution for defendants, fell slightly in 2022 compared to 2021 from 20.6% to 18.6% respectively. *Infra* Appendix 3; *see also supra* note 238 (describing adjournments in contemplation of dismissal).

unclear whether dismissal rates will recede all the way back to pre-reform levels or settle at an equilibrium in between.[241] But it appears that 2021 may have been a high water mark.

Second, the effects of the discovery law as a resource attack face existential threats. While funding increases and adaptation have already mitigated some of the benefits of the resource constraint, legal changes may fully quash what remains. In the spring 2022 legislative session, responding to prosecutors' laments, Governor Hochul, a Democrat, proposed legislation that would have severely eroded the law's enforcement mechanism.[242] New York's legislature declined to adopt Hochul's proposal.[243] Once again in the spring 2023 legislative session, at prosecutors' urging, Governor Hochul pushed for substantive revisions to the discovery law.[244] The law survived unchanged after a group of New York City District Attorneys argued that Hochul's proposal would not "have a meaningful public safety impact" and instead advocated for further funding increases to meet the current law's demands for the time being.[245] Prosecutors and Governor Hochul, clearly committed to diluting or repealing the reforms, may well try again in future legislative sessions.

The law also faces threats from the bench. Trial-level judges have varied interpretations of Article 245's requirements and the consequences when prosecutors partially, but not fully, meet them.[246] Three years after its implementation, appellate caselaw interpreting Article 245 remains limited, with

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241. At the time of publication data is unavailable for 2023. However, anecdotally and based on the author's experience, rates of misdemeanor dismissals continued to decline year over year.

242. Jon Campbell, *Gov. Kathy Hochul's 10-Point Public Safety Plan, Explained*, GOTHAMIST (Mar. 25, 2022), https://gothamist.com/news/gov-kathy-hochuls-10-point-public-safety-plan-explained [https://perma.cc/YBX2-QG49] (describing Hochul's proposal to allow prosecutors to declare ready for trial following "substantial" rather than full discovery compliance); *see also* Leaked Document From Kathy Hochul, Governor, New York State, on Public Safety Package, https://www.scribd.com/document/565309809/Hochul-Public-Safety-Plan [https://perma.cc/HV7M-VZP2].

243. Barry Kamins, *Bail and Discovery Reform: The Third Round*, N.Y.L.J. (June 6, 2022, 12:00 PM), https://www.law.com/newyorklawjournal/2022/06/06/bail-and-discovery-reform-the-third-round/ [https://perma.cc/WDM8-6ZZE].

244. Zach Williams, *Kathy Hochul Expands Bail Budget Battle Against NY Legislature with Proposed Discovery Changes*, N.Y. POST, https://nypost.com/2023/04/12/kathy-hochul-expands-bail-budget-battle-against-ny-legislature-with-proposed-discovery-changes/ [https://perma.cc/6L8W-W3VA] (Apr. 12, 2023, 8:02 PM).

245. Jonah E. Bromwich & Grace Ashford, *New York City Prosecutors Suddenly Flip on Change to Evidence Law*, N.Y. TIMES (Apr. 27, 2023), https://www.nytimes.com/2023/04/27/nyregion/discovery-prosecutors-evidence-ny.html [https://perma.cc/EJ5Z-S6VT].

246. *Compare* People v. Erby, 68 Misc. 3d 625, 633 (N.Y. Sup. Ct. 2020) ("[T]he new discovery law . . . should not be construed as an inescapable trap for the diligent prosecutor who . . . is unable to comply with every aspect of the automatic discovery rules specified in CPL § 245.20."), *with* People v. Francis, 75 Misc. 3d 1224(A), slip op. at 5 (N.Y. Crim. Ct. 2022) ("C.P.L. § 245.20[1] relieves the People of having to define what is or is not discoverable. The People's most basic duty is to disclose all discoverable material on that list in their possession or in the possession of law enforcement.") (internal quotation marks and citations omitted).

the Court of Appeals, New York's highest court, having decided only one relatively straightforward case.[247] However, that will change. Appellate decisions in cases with more challenging facts will substantially affect the law's future—should the Court of Appeals develop a prosecution-favoring interpretation of the law, that could dramatically reduce the rate of dismissals.

Third, discovery reform appears to be directly responsible for a considerable expansion in public resources devoted to police, prosecutors, and criminal courts. In less than five years, over $300 million has been allocated for assistance with discovery compliance.[248] Prosecutors continue to demand more, and lawmakers seem receptive to their calls.[249] Accordingly, the rise in dismissals associated with this resource attack may not only prove temporary, but also come at the cost of a considerable increase in funding for New York's criminal legal system.

IV.
GUIDANCE FOR PROSPECTIVE RESOURCE ATTACKS

Proponents of resource attacks must take a cautious, even paranoid, approach to ensuring that any harm their intervention prevents is not, on net, outweighed by new harm their intervention catalyzes. Resource attacks are particularly vulnerable to this sort of backfire because the alleviation of a resource constraint not only ends a resource attack's harm reduction, but is often itself harm-creating: increasing funding to the criminal legal system or boosting the efficiency with which it arrests, convicts, incarcerates, and executes.

Resource attacks should be crafted to maximize the size and duration of their impact so that if or when a backslide occurs, their net effects remain positive. Several factors can be taken into account at the intervention's design stage. Resource attacks are most likely to force harm-reducing triage when the resource constraint materializes rapidly and unexpectedly and the targeted institution is ill-equipped to adapt.[250] Resource constraints are especially likely to deliver harm-reducing results when they leverage pre-existing legal restrictions such as speedy

247. People v. Bay, 232 N.E.3d 168, at 177 (N.Y. Dec. 14, 2023) (explaining that "CPL 245.50(3) and CPL 30.30(5), taken together, plainly require that the People file a proper [certificate of discovery compliance] reflecting that they have complied with their disclosure obligations before they may be deemed ready for trial" and holding that, as applied in the instant case, "[b]ecause the People did not establish that they exercised due diligence prior to filing the initial [certificate of discovery compliance] the trial court should have determined that the [certificate of discovery compliance] was improper and accordingly stricken the statement of readiness as illusory . . .).

248. *Supra* note 168 and accompanying text. For advocates of a smaller and less destructive criminal legal system, this increase in funding is doubly problematic: it both expands public resources devoted to police, prosecutors, and criminal courts, and may do so at the expense of funding for communities and populations negatively affected by the criminal system. New York's fiscal 2024 budget allocates $170 million for discovery-related initiatives, in contrast to $31.4 million and $11.5 million for "alternative to incarceration programs" and "reentry services," respectively. *Governor Hochul Announces Highlights of Historic FY 2024 New York State Budget*, *supra* note 168.

249. Press Release, Kathy Hochul, *supra* note 168; Bromwich & Ashford, *supra* note 245.

250. *Supra* notes 111, 139, 219 and accompanying text.

trial clocks, quorums, and prison-crowding limits.[251, 252] Advocates may also target institutions that have limited ability to reallocate their resources.[253] Additionally, they should account for the political forces that drive resource restoration and expansion: narratives of dangerous criminals being released are especially likely to rally public support for more funding.[254] Some institutions, such as the police, are powerful lobbies—adept at preserving their resources and stature when they are threatened.[255] Targeting institutions with comparatively less political influence and creating effects that are unlikely to raise popular alarm could maximize the longevity of a resource attack's effects.

The most sophisticated resource attacks could integrate new restrictions on resource reallocation or obstacles to increasing funding as part of, or alongside, the underlying intervention.[256] An especially creative approach involves policies that force criminal system institutions to internalize the costs of their most harmful practices.[257] Examples of internalization include charging municipalities for the state prison beds they require or compensating people who were incarcerated pre-trial and ultimately not found guilty.[258] Internalization dovetails nicely with resource attacks, whose positive effects are often lessened by problematic resource reallocation. Together, resource attacks and internalization shore up each other's vulnerabilities.[259] Resource attacks restrict the pool of available resources while

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251. *Supra* notes 70, 101, 196 and accompanying text.

252. Those organizing at the local level should craft resource attacks to take advantage of their jurisdictions' most robustly enforced legal restrictions. Conversely, national organizations could target jurisdictions for a prospective resource attack based on their legal restrictions. For example, the effects of a plea strike may be more pronounced in New York because of its robustly enforced speedy trial laws. *Supra,* Part III.A. Resource constraints targeting prisons and jails in Minnesota may lead to more decarceration because of that state's strict crowding rules. *See supra* note 70 and accompanying text.

253. These restrictions may be legal restrictions: for example, a statutory requirement that a local sheriff's office maintain two patrol cars to respond to emergency calls would restrict the office's ability to reallocate away from emergency response in a resource crunch. They may also be de facto restrictions. In a resource crunch, prosecutors are likely to prioritize cases perceived as more serious or violent. *See, e.g.*, Meyers, *supra* note 192, at 12.

254. *See, e.g.*, Barkow, *supra* note 50, at 287–88 (describing the inevitability of political backlash to the narrative of dangerous people being released).

255. Levin, *supra* note 166, at 1372; *see also* Wright, *supra* note 25, at 397.

256. In a similar vein, they could incorporate new legal restrictions such as speedy trial clocks and prison crowding requirements that enhance the resource attack's impact.

257. Credit to Bierschbach & Bibas, *supra* note 10, whose article on internalization consolidates many of these ideas.

258. Ball, *supra* note 153, at 1073–75 (municipalities pay for the state prison beds they utilize); Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1999–2001 (2005), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1853&context=faculty_publications [https://perma.cc/2KVR-4T95] (compensation for individuals detained pre-trial).

259. The core weakness of internalization is that it attaches a cost but no limits on spending. Should a jurisdiction and its constituents decide they want to spend exorbitantly on prison beds and pre-trial incarceration, they may do so.

internalization makes it costlier for a jurisdiction to devote what remains to harmful practices.

Looking past the design stage, proponents of a resource attack should prepare to remain active after the materialization of their intervention and its first signs of success.[260] Specifically, they must be ready to fight increases to criminal system resources and weakening of the legal mechanisms that translate resource constraints into harm reduction.

Perhaps most important, advocates should prepare to promote direct reforms that lock in the benefits of a resource attack that might otherwise recede. The period of harm reduction following a resource constraint, even if short-lived, is a powerful proof of concept. It can demonstrate how scaling back an aspect of the criminal legal system does not damage, or even improves, society. Direct reforms can build on this demonstration and make the harm reductions permanent even while an affected institution adapts to its new resource constraints.

Using resource attacks as a proof of concept for direct reforms echoes the familiar concept of states as laboratories of democracy. States frequently adopt policies that were successful in other states. The legalization of marijuana is a recent example. Over a decade ago, legalization in a handful of states such as Colorado, Washington, and Oregon—first for medical use, later for recreational use—facilitated legalization in others by developing tax schemes, alleviating concerns over clashes with federal law enforcement, and boosting public opinion.[261] Now, 37 states have legalized marijuana for medical use and 21 for recreational use.[262]

There are numerous examples of resource attacks facilitating the adoption of direct reforms. In California, the state released people held on parole violations in order to ease prison crowding following the Supreme Court's decision in *Plata*. In the years that followed, in order to maintain lower statewide levels of incarceration, California dramatically decreased the use of incarceration as the consequence for technical parole violations and developed new, non-carceral

260. It is extraordinarily difficult to maintain momentum behind a social movement, especially after the movement is perceived to have been successful. *See* Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85, 113–14 (2001) (noting that "successful social movements can be co-opted by their own success" and citing RICHARD M. VALELLY, RADICALISM IN THE STATES: THE MINNESOTA FARMER-LABOR PARTY AND THE AMERICAN POLITICAL ECONOMY 139–73 (1989), for the same proposition in the context of the New-Deal era farm labor movement).

261. Beau Kilmer & Robert J. MacCoun, *How Medical Marijuana Smoothed the Transition to Marijuana Legalization in the United States*, 13 ANN. REV. L. & SOC. SCI. 181, 188, 192–97 (2017), https://www.annualreviews.org/doi/pdf/10.1146/annurev-lawsocsci-110615-084851 [https://perma.cc/5L5Y-A8LD] ("When the authors first began analyzing drug prohibition and its alternatives, the topic was barely more respectable among academics than, say, JFK assassination conspiracies or the search for Bigfoot").

262. NAT'L CONF. OF STATE LEGISLATURES, *supra* note 231.

alternatives.[263, 264] California's parole reform was a direct reform that solidified a harm-reducing consequence of a resource attack. In the context of the death penalty, Carol Steiker and Jordan Steiker suggest that resource constraints prompted many states to abandon the practice altogether.[265] In the 1990s and 2000s, "exorbitant capital costs . . . constitute[d] institutional pressures" that underlay successful campaigns for state legislation abolishing the death penalty.[266]

Many of the resource attack case studies and proposals discussed in this article have natural direct reform follow ups. Startlingly low levels of recidivism among people released from prison during the COVID-19 pandemic make a strong case for permanently expanding compassionate and early release programs.[267] Similarly, a plea strike that delayed adjudication for people who went on to live problem-free lives for years awaiting trial would suggest that they would have been good candidates for diversion in the first place. In New York City, the fact that more than half of all misdemeanor cases are being dismissed invites an inquiry into whether an institution other than the criminal system would be more appropriate to address the conduct underlying these cases. More appropriate interventions could include robust public treatment programs for people with substance abuse problems, community restorative justice programs for acts of violence and vandalism, and expanded social safety nets to decrease crimes of poverty.

The potential symbiosis between direct reforms and resource attacks highlights three imperatives for architects of prospective resource attacks: first, it is another reason why advocates should expect to stay active, funded, and energized well beyond the initial creation of a resource constraint. Second, maximizing the effectiveness of a resource attack involves observing, measuring, and publicizing its short-term positive effects. Advocates behind a successful resource attack should make the public aware of its harm-reducing effects using both qualitative information—stories of family reunification—and quantitative information—how many individuals were released without further incident. Third, as discussed above, advocates should craft and advance direct reforms that capitalize on the benefits that follow a resource constraint.

Ultimately, the criminal system's immense status quo bias and seemingly unlimited appetite for growth mean that most of the effects of resource attacks will

263. Petersilia, *supra* note 75, at 337, 345.

264. Similarly, public concern about prison overcrowding during the COVID-19 pandemic brought new attention to policies concerning compassionate release and release of older incarcerated individuals. *See*, *e.g.*, Eda Katharine Tinto & Jenny Roberts, *Expanding Compassion Beyond the COVID-19 Pandemic*, 18 OHIO ST. J. CRIM. L. 575, 575–76 (2021), https://moritzlaw.osu.edu/sites/default/files/2021-10/expandin%20compassion.pdf [https://perma.cc/67UX-6LVE].

265. Steiker & Steiker, *supra* note 134, at 240–41.

266. *Id.* (emphasis omitted); *see also* Caplan, supra note 95.

267. Gill, *supra* note 18; *supra* notes 82–83 and accompanying text.

be undone over time. Certain preparations and precautions can maximize the impact and duration of these effects. But, by and large, advocates should expect that they will be temporary. The best opportunity for a resource attack to affect long-term change will often be as a part of a two-step maneuver: orchestrate a resource shortage to expose the unnecessary expanse of the criminal legal system and capitalize on that exposure to make the effects permanent.

CONCLUSION

I formed the idea for this paper practicing as a public defender in New York City in fall 2021. At that time, prosecutors started most days in misdemeanor court with an application to dismiss over half of the cases on the calendar. It was a vivid demonstration of the disruptiveness that an acute resource constraint could have on the criminal legal system.

Resource attacks like New York's discovery reform can be extraordinarily impactful. At the same time, virtually without exception, they come with concerning drawbacks. The effects of a resource attack typically fade over time. The underlying intervention may be reversed. Affected institutions adapt, sometimes in ways that make them more harmful than they were pre-intervention. Most concerning, additional public resources may be redirected to fill the resource shortfall, ultimately expanding the footprint of the criminal legal system.

Under what circumstances do resource attacks reduce harm? When and how do they backfire? When can the initial positive effects of a resource attack justify some long-term negative effects?

The academic literature is, by and large, devoid of answers to these questions. Consequently, ripe opportunities for meaningful change are underutilized. Meanwhile, the interventions that are presently being deployed as resource attacks likely take unnecessary risks.

It is my hope that this article starts a fruitful academic conversation: defining a category that has long existed without its own identity, drawing connections among interventions whose similarities had gone undetected, and highlighting the features of these interventions and the contexts in which they were applied that affected their outcomes. It is meant to be a beginning—to provide a definition that will be refined, a list of case studies and proposals that will be extended, and an evaluation of advantages and disadvantages that is open for debate. I look forward to what is to come.

ADDITIONAL TABLES AND FIGURES

NOTE: All data and code are available upon request to the author.

Appendix 1[268]

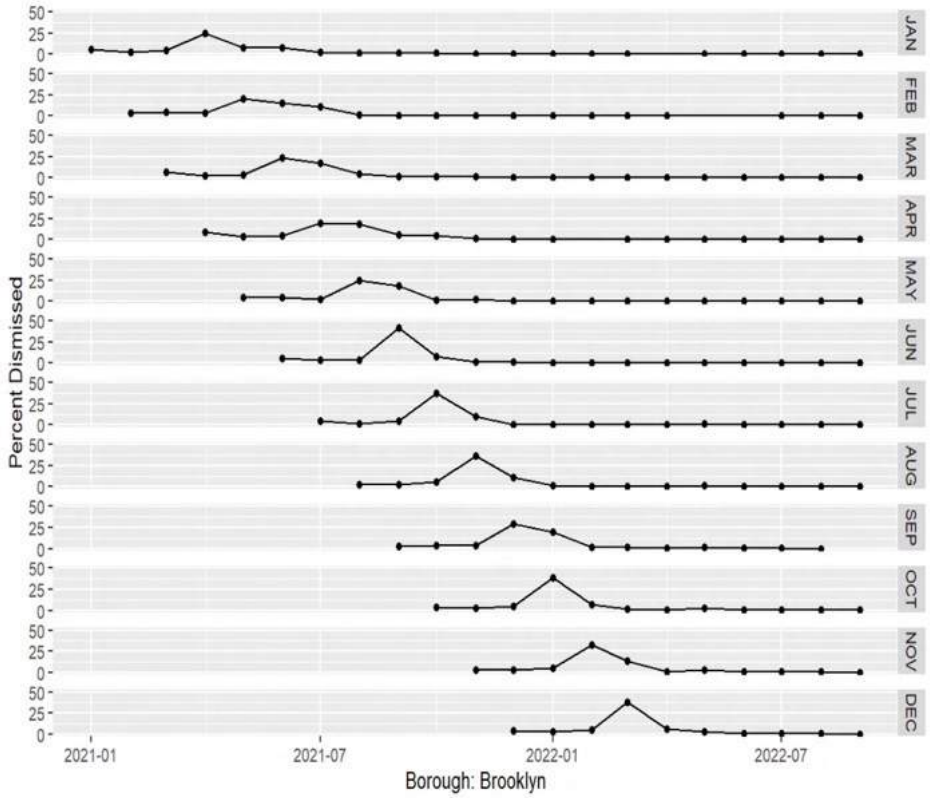
Misdemeanor Dismissals

	Pre-Reform			Post-Reform (2021)			Post-Reform (2022)		
County	Cases	Dismissals	Percent	Cases	Dismissals	Percent	Cases	Dismissals	Percent
Bronx	23,758	8,075	34.0%	13,616	7,359	54.0%	15,547	8,156	52.5%
Kings	30,135	11,932	39.6%	21,115	13,857	65.6%	23,838	15,831	66.4%
New York	26,961	7,967	29.6%	21,578	9,045	41.9%	23,605	10,183	43.1%
Queens	24,510	6,681	27.3%	19,180	12,175	63.5%	19,698	10,682	54.2%
Richmond	4,179	1,014	24.3%	3,672	1,262	34.4%	3,597	1,361	37.8%
NYC	109,543	35,669	32.6%	79,161	43,698	55.2%	86,285	46,213	53.6%

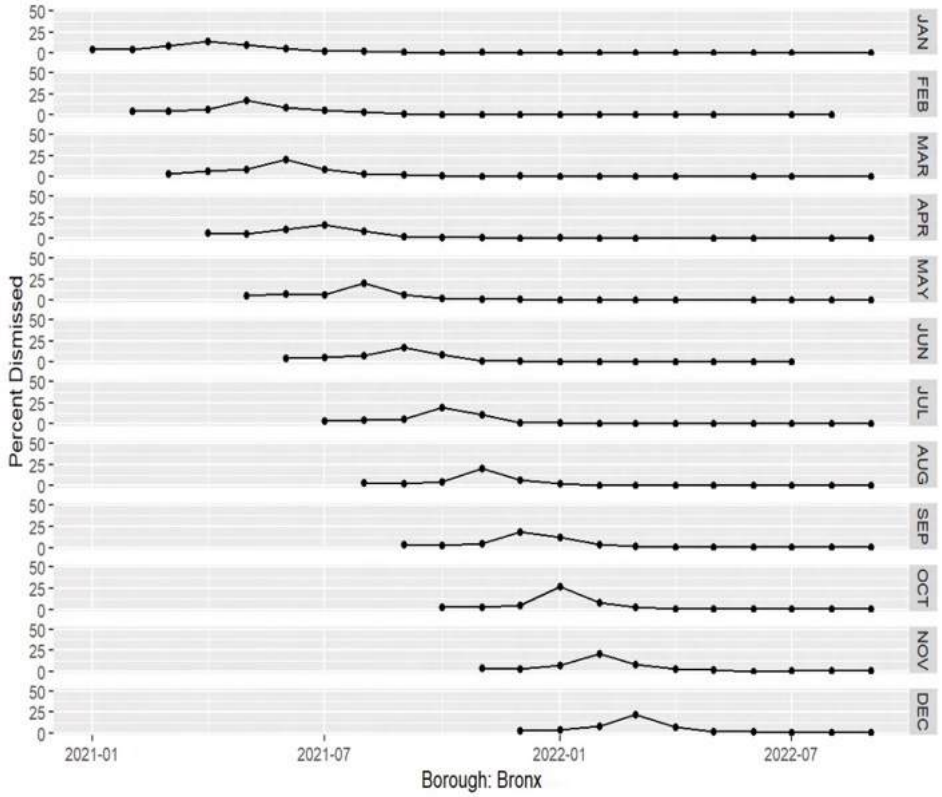
268. For an explanation of the underlying analyses, see *supra* notes 207-208.

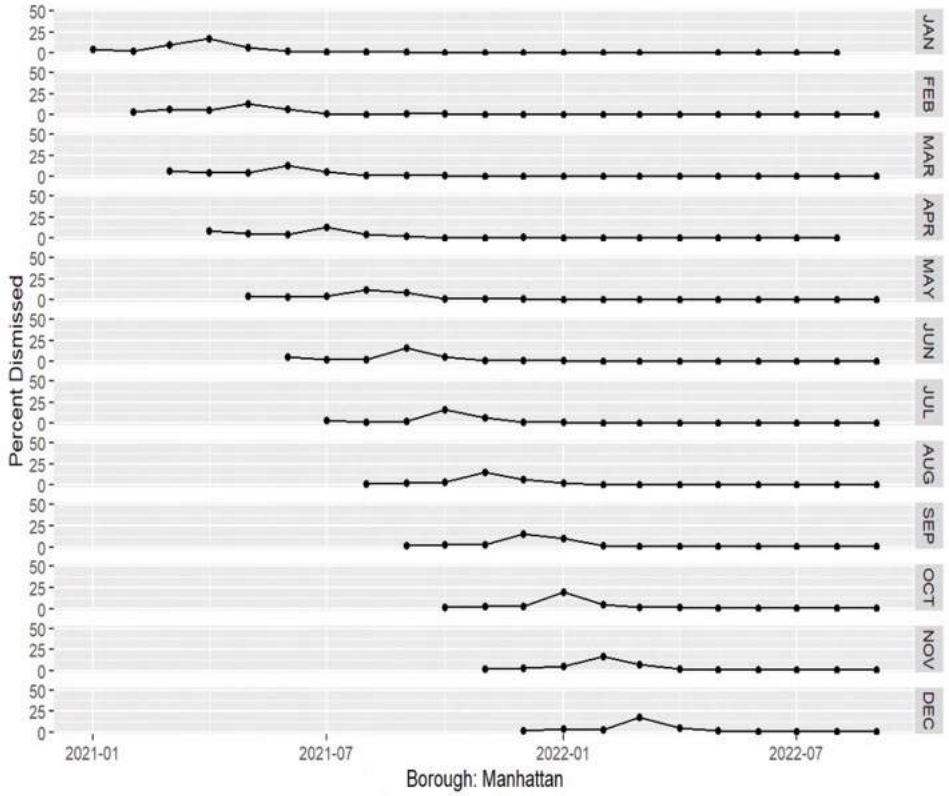
Appendix 2[269]

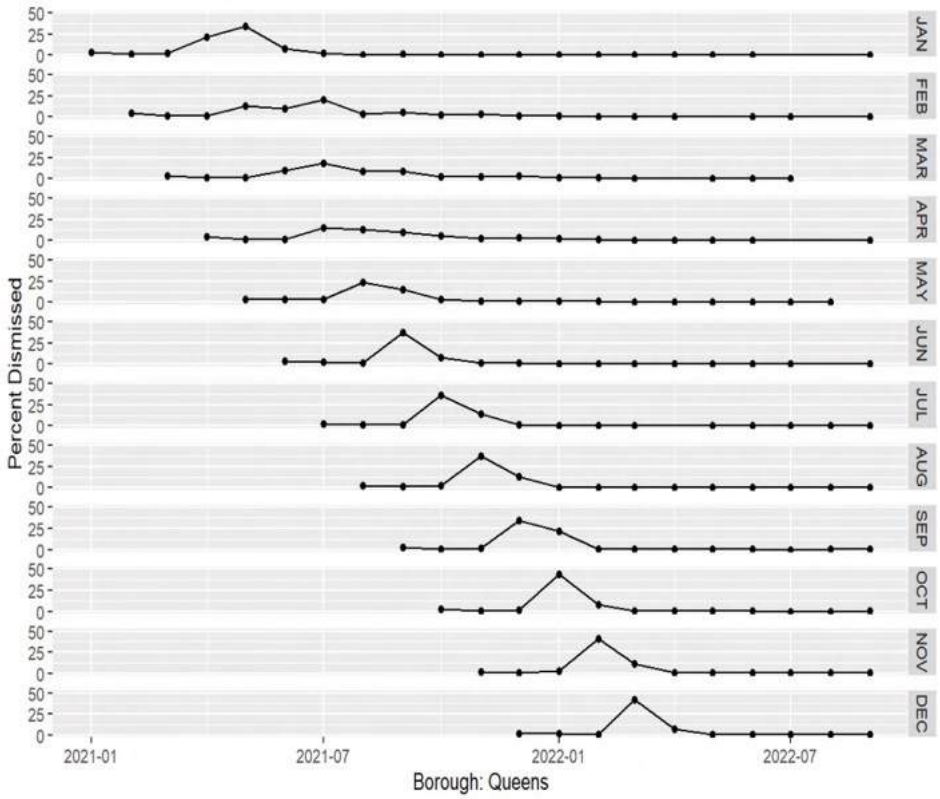
Plot of Misdemeanor Dismissals as a Percentage of All Cases Resolved, by Month of Arraignment, 2021

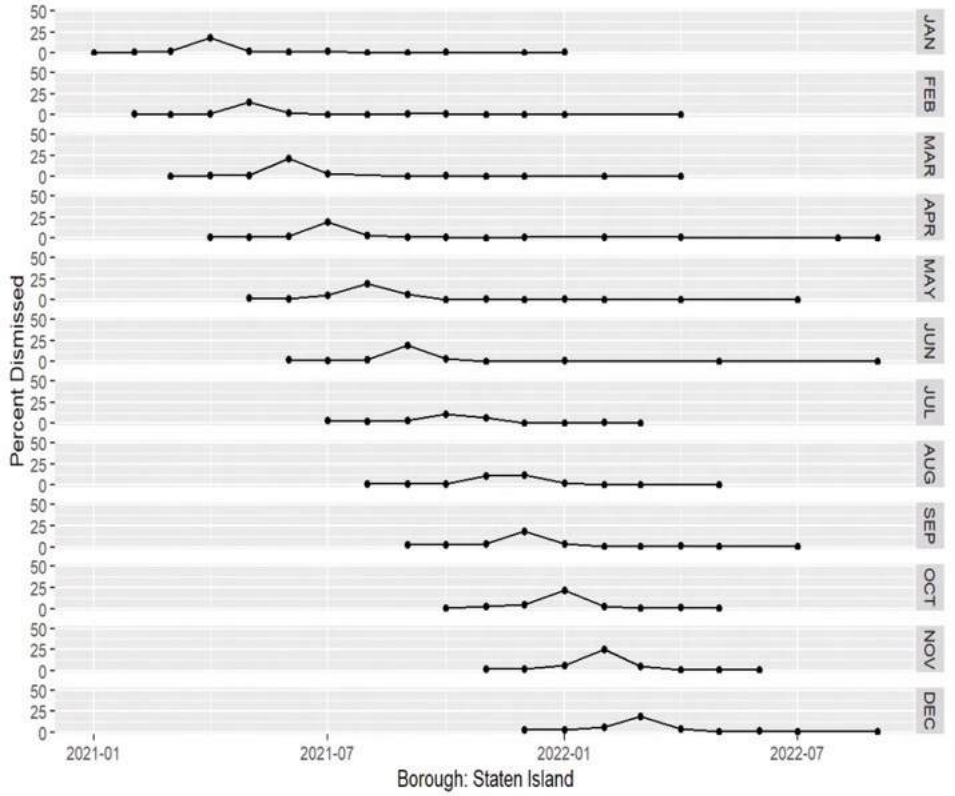


269. For an explanation of the underlying analyses, see *supra* notes 207-212.


Percent Dismissed
50
25
0
JAN
FEB
MAR
APR
MAY
JUN
JUL
AUG
SEP
OCT
NOV
DEC
2021-01
2021-07
2022-01
2022-07
Borough: Bronx


Percent Dismissed
50
25
0
JAN
FEB
MAR
APR
MAY
JUN
JUL
AUG
SEP
OCT
NOV
DEC
2021-01
2021-07
2022-01
2022-07
Borough: Manhattan


Percent Dismissed
50
25
0
JAN
FEB
MAR
APR
MAY
JUN
JUL
AUG
SEP
OCT
NOV
DEC
2021-01
2021-07
2022-01
2022-07
Borough: Queens



Appendix 3[270]

Misdemeanor Adjournments in Contemplation of Dismissal

	Pre-Reform			Post-Reform (2021)			Post-Reform (2022)		
County	Cases	ACDs	Percent	Cases	ACDs	Percent	Cases	ACDs	Percent
Bronx	23,758	5,737	24.1%	13,616	2,943	21.6%	15,547	2,779	17.9%
Kings	30,135	6,435	21.4%	21,115	4,043	19.1%	23,838	4,006	16.8%
New York	26,961	4,047	15.0%	21,578	4,927	22.8%	23,605	4,580	19.4%
Queens	24,510	4,553	18.6%	19,180	3,549	18.5%	19,698	4,164	21.1%
Richmond	4,179	368	8.8%	3,672	872	23.7%	3,597	555	15.4%
NYC	109,543	21,140	19.3%	79,161	16,334	20.6%	86,285	16,084	18.6%

270. For an explanation of the underlying analyses, see *supra* notes 207-208, 238, 240.