

Decarceration

David Rangaviz

“I’m actually very frightened right now and the mental environment is declining rapidly.”

– Man incarcerated in the Massachusetts Treatment Center in the middle of its outbreak of COVID-19, March 23, 2020.¹

“The COVID-19 pandemic has highlighted how interdependent we are. If individuals in our correctional institutions face a significant health risk like COVID-19, that impacts the general population outside of correctional institutions as well. From a public health perspective, we need to decrease the population in high density areas, including jails and prisons, to help flatten the curve, preserve our hospital capacity and save lives.”

– Dr. Karthik Sivashanker.²

The Pandemic’s Onset

Prisons and jails are ripe for the transmission of infectious disease. Outbreaks of the flu regularly occur in jails, and during the H1N1 epidemic in 2009, many jails and prisons dealt with a high number of cases. In 2018, five cases of mumps in immigration detention centers ballooned to nearly 900 cases among staff and detainees.³ “Washing hands, sanitizing communal spaces and social distancing are among the main ways experts say people can help limit the spread of the virus. But behind bars, some of the most basic disease prevention measures are against the rules or simply impossible. Separating sick people to prevent the disease from spreading can be nearly impossible in prison, since prisoners are already grouped according to security and other logistical considerations. Even so-called social distancing can prove impossible. People in prisons and jails live every minute of the day in close proximity to each other.”⁴ And the danger to those in custody affects the broader community—staff cycle in and out of correctional facilities every day, potentially taking any prison outbreak home with them, and every hospital or ICU bed occupied by an incarcerated person is one less bed for someone on the outside.⁵

The first case of COVID-19 in Massachusetts was confirmed on February 1, 2020.⁶ The pandemic soon spiraled out of control. Governor Charlie Baker declared a state of emergency on March 20, 2020.⁷ President Trump did the same three days later.⁸ As the virus began to spread, the effect that COVID-19 would have on incarcerated people

¹ See *CPCS v. Chief Justice of the Trial Court*, Affidavit of David Rangaviz Appended to Reply Brief (SJC-12926).

² See *CPCS v. Chief Justice of the Trial Court*, Affidavit of Karthik Sivashanker Appended to Reply Brief (SJC-12926).

³ *Mumps outbreak causing illness in U.S. migrant detention facilities*, Texas Medical Center (Sept. 26, 2019).

⁴ The Justice Collaborative, *Explainer: Prisons and Jails are Particularly Vulnerable to COVID-19 Outbreaks*.

⁵ See Escobar Taheri, *Incarceration Weakens a Community’s Immune System: Mass Incarceration and COVID-19 Cases in Milwaukee* (June 2, 2020) (concluding that “[t]he number of incarcerations [in a community] is a strong predictor of the number of COVID-19 cases above and beyond the effect of other predictors in the model”).

⁶ Massachusetts Department of Public Health, *Man returning from Wuhan, China is first case of 2019 Novel Coronavirus confirmed in Massachusetts* (February 1, 2020), available at <https://www.mass.gov/news/man-returning-from-wuhan-china-is-first-case-of-2019-novel-coronavirus-confirmed-in>.

⁷ See Mass. Exec. Order No. 591 (Mar. 20, 2020), <https://www.mass.gov/executive-orders/no-591-declaration-of-a-state-of-emergency-to-respond-to-covid-19> (Declaration of a State of Emergency to Respond to COVID-19).

⁸ Donald J. Trump, Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak>.

was predictable. Every guideline for those outside of custody—avoiding indoor spaces, social distancing, vigilant hygiene—is nearly impossible for people in custody. Simply put, “[i]f the coronavirus were to design its ideal home, it would build a prison.”⁹ And once a case was confirmed in a facility, it would be too late to prevent a spread due to the likelihood of asymptomatic transmission long before the diagnosis.

Given this reality, incarceration is *itself* a significant risk factor for contracting COVID-19 and dying from it. According to a July 8th study from the Journal of the American Medical Association, people in prison are 5.5 times more likely to contract the virus and 3 times more likely to die from it compared to Americans who are not incarcerated.¹⁰ Indeed, all of the top 14 national hotspots for COVID-19 are correctional facilities.¹¹ The rate of infections in prisons far surpasses the national rate.¹² COVID-19 poses a grave risk to everyone in custody in every carceral facility across the country.

At the outset of the pandemic, those in custody knew what was coming. According to Oren Nimni, Staff Attorney at Lawyers for Civil Rights in Boston: “As soon as the pandemic started we were hearing from their loved ones and from them about the understandable terror and fear they were experiencing, that they were going to get sick because of the unsanitary conditions, because there was no discernible testing or contact tracing, because they were crammed in close quarters.” Jessie Rossman, staff attorney at the ACLU of Massachusetts (“ACLUM”), cited that same fear: “One thing I think that’s important to keep in mind is that people are terrified on the inside. Especially during a period of time while they’re on lockdown and their access to family and anyone on the outside is so limited. The lack of transparency is extraordinarily terrifying.

Their fear was well-founded: COVID-19 has entered Massachusetts prisons and spread rapidly. At the outset of the crisis, there were approximately 17,000 people in state custody, including both state prisons and county jails.¹³ The outbreaks first started at the Massachusetts Treatment Center in Bridgewater. On March 21, the first case in a Massachusetts Correctional Facility was reported out of the Massachusetts Treatment Center in Bridgewater.¹⁴ The next day, the Treatment Center reported three more cases.¹⁵ Three days later, there were 11 confirmed cases in the facility.¹⁶ In total, as of November 24th, at least ten incarcerated people have died,¹⁷ and there is ample reason to think that number may undercount the impact of COVID-19.¹⁸

To date, there have been massive, facility-wide outbreaks at MCI-Concord, MASAC, MCI-Norfolk, MCI-Shirley,

9 Barbara Bradley Hagerty, *Releasing People From Prison Is Easier Said Than Done*, The Atlantic (July 8, 2020).

10 See Saloner, et al., *COVID-19 Cases and Deaths in Federal and State Prisons*, JAMA Research Letter (July 8, 2020), available at: <https://jamanetwork.com/journals/jama/fullarticle/2768249>.

11 See The New York Times, *Coronavirus in the U.S.: Latest Map and Case Count* (last visited August 15, 2020), available at <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

12 See *BOP-Reported Positive Tests for COVID-19 Nationwide*, Federal Defenders of New York, available at <https://federal-defendersny.org/> (noting that about 36 people in the Federal Bureau of Prisons are positive for COVID-19 per 1,000 inmates, compared to 5.4 people in the United States generally).

13 See Weekly Count Sheet, March 16, 2020, available at: <https://www.mass.gov/doc/weekly-inmate-count-3162020/download>.

14 See *Coronavirus and prisons: Inmate serving life sentence tests positive for COVID-19 at Massachusetts Treatment Center in Bridgewater*, MassLive (March 21, 2020); *Inmate tests positive for coronavirus in Massachusetts prison*, CBS Boston (March 21, 2020); *First Mass. Prisoner Diagnosed with COVID-19*, WBUR (March 21, 2020).

15 *3 inmates, 1 officer at Mass. prison test positive for coronavirus*, 7 News Boston (March 22, 2020).

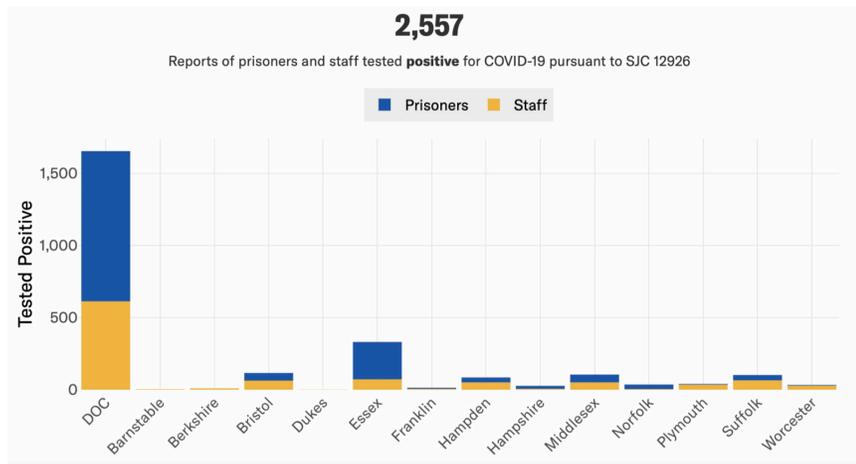
16 *13 People in Mass. Prisons and Jails Diagnosed With COVID-19*, WBUR (Updated March 25, 2020).

17 See ACLUM, *Tracking COVID-19 in Massachusetts Prisons and Jails*, “Deaths” (last visited August 15, 2020), available at: <https://data.aclum.org/sjc-12926-tracker/>.

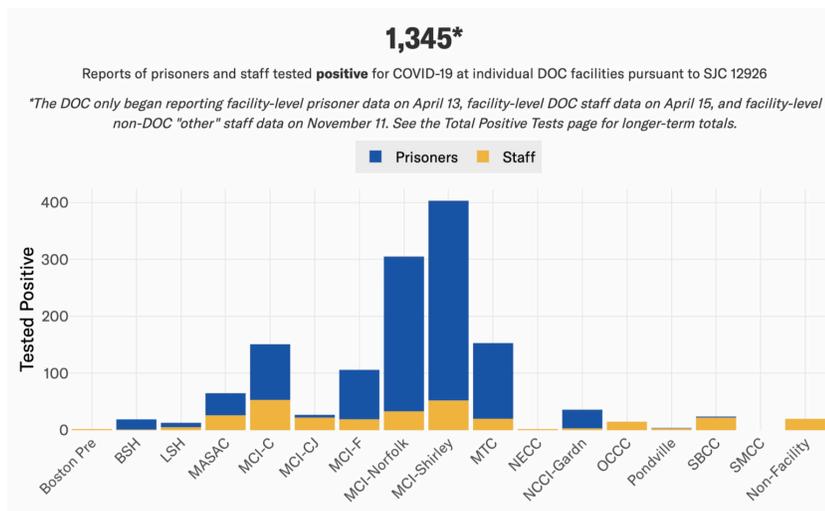
18 See Bridget Conley, *Why did so many incarcerated people die in Massachusetts prisons in April 2020?*, World Peace Foundation (originally published Sept. 1, 2020, updated Sept. 8, 2020) (explaining that 14 incarcerated people died in April 2020, far more than the five-year monthly average of 3.1, and citing COVID-19’s broader impact than previously known as a likely explanation).

MCI-Framingham, the Massachusetts Treatment Center, the Essex County House of Correction, and (as of this writing, it appears) NCCI-Gardner. The infection rate in Massachusetts correctional settings is three times higher than the rate in the community.¹⁹ And even this, again, may be a substantial undercount.²⁰ Overall, including both incarcerated people and staff, 2,557 people have tested positive for COVID-19 in Massachusetts state prisons, county jails, and houses of correction. Those confirmed cases are broken down in the following charts created by ACLUM,²¹ based on the most recent reports (as of November 26th) from the Department of Correction and county sheriffs in the decarceration litigation.

In the system as a whole:



In the Department of Correction—which in total has 1,653 incarcerated people and staff who have tested positive—the 1,345 cases diagnosed after April 13th are broken down by facility as follows:



19 Jimenez, et al., *Epidemiology of COVID-19 Among Incarcerated Individuals and Staff in Massachusetts Jails and Prisons*, Journal of the American Medical Association Research Letter (Aug. 21, 2020).

20 Deborah Becker, *Medical Experts Raise Questions About COVID-19 Data From Mass. Jails And Prisons*, WBUR (Aug. 31, 2020).

21 All of the graphs in this piece are courtesy of the extraordinary data tracking website from the ACLUM, which is available at: <https://data.aclum.org/sjc-12926-tracker/>.

Incredibly, even with such high numbers of confirmed cases, many of the facilities without (and with) confirmed outbreaks have done little testing. The Department of Correction did one round of facility-wide mass testing of incarcerated people in the late spring. Since then, its testing of incarcerated people has been far more limited, and it has never tested all of its staff.²² The county jails have done even less—Barnstable County Jail, for example, houses 191 incarcerated people and has conducted just 14 tests total since the pandemic began.²³ In other words, it has tested 7% of its population a single time. Unsurprisingly, Barnstable has zero confirmed cases among its incarcerated population. By way of comparison, Tufts University tests its entire student population twice every week.²⁴ Students living in on-campus dorms at Harvard University are tested three times per week.²⁵ Given the limited nature of testing in the state and county correctional systems, facilities with few confirmed cases may have had many cases that just went undetected.

Initial Efforts

The fear of such outbreaks, coupled with the litany of calls from incarcerated people and their loved ones, spurred a push to decarcerate Massachusetts prison and jails. On March 12th, Prisoners' Legal Services of Massachusetts ("PLS") sent a letter to Governor Baker, EOPSS Secretary Thomas Turco, DOC Commissioner Carol Mici, and the county sheriffs, urging each of them to do everything in their power to reduce the incarcerated population.²⁶ The letter asked the Governor to take a number of steps: provision of hygiene supplies, education of staff and custodial population, screening and testing, and the provision of adequate medical treatment. But it also argued that "[a]ny incarcerated individuals who can safely live in the community—even if only temporarily—should be given that option as a measure to further minimize the number of people who will likely be infected in our prisons and jails."²⁷ It urged the Parole Board to speed releases and the Governor to issue commutations where appropriate.

ACLU did the same thing. According to Dan McFadden, Staff Attorney at ACLU: "When things first started, we sent letters to state and federal officials regarding both criminal justice and ICE detainees. Unlike the steps toward decarceration that occurred in many other states without need for litigation, nothing happened in response to those letters. ACLU and the Massachusetts Public Health Association sent another letter to the Governor on April 14th, again urging him to take steps to decarcerate."²⁸ And, again, according to Jessie Rossman of ACLU: "The Governor did not respond to our letter."

But some executives did start to answer the call. Suffolk County District Attorney Rachael Rollins immediately began a review of cases, noting that her office was "committed to working with the criminal defense bar in identifying those individuals whose release we deem urgent and necessary for public health reasons."²⁹ Several

22 Deborah Becker, *Front-Line Prison Staff Will Be Tested For Coronavirus, As 74 Men Test Positive At Norfolk Facility*, WBUR (Nov. 4, 2020).

23 Since the pandemic began, Berkshire County has tested 56 of 136 inmates; Bristol County has tested 213 of 605 inmates (and Ash Street Jail 11 of 78 inmates); Middlesex County has tested 363 of its 539 inmates; Norfolk County has tested 154 of its 371 inmates; Plymouth County has tested 138 of its 623 inmates; Suffolk County has tested 105 of the 466 inmates at Nashua Street Jail and 120 of the 533 inmates at South Bay House of Correction; and Worcester County has tested 82 of its 634 inmates. See *CPCS v. Chief Justice of the Trial Court* (SJC-12926), November 25, 2020 Special Master's Report.

24 See Testing at Tufts, available at: <https://coronavirus.tufts.edu/testing-at-tufts>.

25 See Harvard Testing and Tracing, available at: <https://www.harvard.edu/coronavirus/testing-tracing>.

26 See Letter from PLS to Governor Baker & others (March 12, 2020), available at: <https://docs.google.com/viewer?url=http%3A%2F%2Fplsma.org%2Fwp-content%2Fuploads%2F2020%2F03%2FMarch-12.PLS-letter-to-Gov-and-public-safety.coronavirus.pdf>.

27 *Id.*

28 See Letter at https://www.aclum.org/sites/default/files/aclum_and_mpha_letter_to_gov_baker_4.14.20.pdf.

29 Suffolk County District Attorney Rachael Rollins, *Statement Regarding Decarceration Amid COVID-19 Crisis* (March 19, 2020), available at: <https://www.suffolkdistrictattorney.com/press-releases/items/2020/3/19/statement-regarding-decarceration-amid-covid-19-crisis>.

other sheriffs and prosecutors moved to release sick and elderly people from their custody.³⁰ On the other hand, other sheriffs actually brought people back into custody at the outset of the pandemic.³¹ That was part of the problem, from the DA's perspective. According to Donna Patalano, General Counsel for the Suffolk County District Attorney's Office, one of the most significant challenges her office faced was that all of the DA's offices were not necessarily united on the need for decarceration. Many offices were strongly opposed to the idea that any releases were necessary at all.³² Voluntary executive action did not happen at the state level, and there was mixed success at the county level, largely dependent on the political leanings of the District Attorney in each jurisdiction.

Likewise, the legislative push to decarcerate quickly stalled. According to McFadden and Rossman, ACLUM worked with grassroots organizations to advocate for the release of people from prisons and jails, and to support a bill that addressed decarceration. That legislation—"An Act Regarding Decarceration and COVID-19," H.4652—was sponsored by Representative Lindsay Sabadosa and filed on March 20th.³³ The bill was expansive in its call for decarceration. Under H.4652, unless the District Attorney or County Sheriff could prove that the individual would pose an immediate risk to public safety if released, they would be required to release:

- All persons charged with or serving time for simple possession of controlled substances;
- All persons detained because they cannot afford bail under \$10,000;
- All persons over the age of 50;
- All persons who are medically vulnerable, as classified by the Centers for Disease Control and Prevention;
- All persons incarcerated as the result of "technical" parole or probation violations;
- All persons who qualify for medical parole;
- All persons incarcerated due to warrants for failure to pay fines and fees;
- And all persons who are within six months of their release date.

Thus far, this legislation has gone nowhere.

In the absence of action by either the statewide executive or the legislature, the push to decarcerate moved into the courts. According to Nimni, the litigation strategy boiled down to a choice: push for the release of only medically vulnerable people most at risk from COVID-19, or bring a systemic challenge on behalf of everyone in a particular facility. "We opted for the latter." On March 27, Nimni, along with other attorneys at Lawyers for Civil Rights and clinical students at Yale Law School, filed a petition in federal court for a writ of habeas corpus on behalf of a class of civil immigration detainees at the Bristol House of Correction.³⁴ On May 12, Federal District Judge William Young issued an order concluding that the plaintiff class had established the "deliberate indifference" necessary to succeed on an Eighth Amendment claim, and ordered injunctive relief in the form of testing, releases, and a pause on all new admissions.³⁵ Through that litigation, according to Nimni, about 50 incarcerated immigration detainees were able to secure their release. The litigation at the Bristol County HOC

30 Jennifer McKim, *As Coronavirus Cases Climb, At Least 6 Mass DAs Move To Release Sick, Elderly Inmates From Prison*, WGBH (March 19, 2020).

31 Deborah Becker, *Essex County Brings People Back to Jail Amid COVID-19*, WBUR (March 16, 2020).

32 See *CPCS v. Chief Justice of the Trial Court* (SJC-12926), Opposition of the District Attorneys for the Bristol, Cape & Islands, Essex, Hampden, Middle, Norfolk, & Plymouth Districts, available at: <https://www.mass.gov/doc/sjc-1296-response-of-the-bristol-district-attorney-others/download>.

33 Available at: <https://malegislature.gov/Bills/191/HD4963>.

34 See *Savino v. Hodgson* (1:20-cv-10617), complaint available at <http://lawyersforcivilrights.org/wp-content/uploads/2020/05/Savino-v-Hodgson-20-10617-WGY.pdf>.

35 *Savino v. Hodgson*, decision available at: <https://www.latinorebels.com/2020/05/12/bristolcountyvictory/>.

spawned similar challenges at Plymouth HOC, Franklin HOC, and FMC Devens, which were met with mixed success.

The litigation at FMC Devens, for example, was ultimately dismissed.³⁶ But that does not mean that it failed. According to Rossman, when the case was filed there were over 1,000 people held in that facility in total, and after the litigation, that number had dropped to 920.³⁷ Thus, even though the court did not order a single release, there has been a drop in the custodial population of over 100 people. To the attorneys who worked on these cases, the public attention and pressure brought to bear by virtue of the litigation can be successful, even when the cases themselves are dismissed. Joel Thompson, a supervising attorney at Harvard Law School's Prison Legal Assistance Project (PLAP), recognized that same dynamic. "As soon as people brought litigation, a lot more action has been taken, and a lot of that action is working."

Like Lawyers for Civil Rights, ACLUM also litigated for the release of immigration detainees. But—unlike the broader strategy explained by Nimni from LGR—they started their advocacy by focusing on the medically vulnerable. According to McFadden, ACLUM "brought an individual habeas petition for two medically vulnerable immigration detainees at the Plymouth County House of Correction. Both were released by ICE voluntarily shortly after we filed the litigation."³⁸ ACLUM then argued for the release on bond for two vulnerable Bristol County detainees, one of whom was released. Thereafter, ACLUM broadened its approach. It went back to Plymouth County House of Correction and volunteered as class counsel to represent 65 detainees who had filed a pro se habeas action. The class has been certified, the Respondents' motion to dismiss was denied, and the case is ongoing. As seen in other cases, the litigation itself has spurred releases: of the original 65 detainees, more than half have been released from incarceration since the litigation began. According to McFadden, "that is the result of at least 18 voluntary releases by ICE since the litigation began, plus some people receiving immigration bond hearings, and a small number of deportations."

Systemic Decarceration Petition

Simultaneously, on the state side, lawyers from ACLUM, the Committee for Public Counsel Services ("CPCS"), and the Massachusetts Association of Criminal Defense Lawyers were litigating a petition to the Supreme Judicial Court ("SJC") for systemic decarceration in the Commonwealth's prisons and jails. On March 24th, a team of lawyers from those organizations filed an emergency petition in the single justice session of the SJC under G.L. c. 211, § 3.

The petition sought three broad remedial steps to mitigate the risk from COVID-19 for those in custody in every facility in Massachusetts:

1. reduce the volume of those entering Massachusetts jails and prisons by, among other steps, requiring trial courts to account for the threat of COVID-19 in jails and prisons when assessing the need for pretrial detention;
2. order the release of those held prior to the disposition of their case who are not detained because they pose a danger to public safety; and
3. deem served the sentences of incarcerated individuals who are vulnerable to COVID-19, near the end of their sentence, or who do not pose a threat to the public, and release on parole those eligible for parole, including medical parole.

³⁶ See *Grinis v. Spaulding*, 1: 20-cv-10738, decision available at: https://www.aclum.org/sites/default/files/field_documents/45_order.pdf.

³⁷ See <https://www.bop.gov/locations/institutions/dev/> (last visited July 22, 2020).

³⁸ See *Rodas-Mazariegos v. Moniz*, No. 1:20-cv-10597 (D. Mass. March 25, 2020), Petition available at: https://www.aclum.org/sites/default/files/field_documents/1_petition_2.pdf. See also *After ACLU Sues, ICE Releases 2 Detainees With Medical Conditions At Plymouth*, WBUR (March 25, 2020).

To that end, the petition sought the immediate release of all people held pretrial who were being held on an unaffordable bail or a bail revocation for a “technical” violation of probation,³⁹ who were over age 60, or who had medical conditions that would place them at increased risk from COVID-19. With regard to sentenced individuals, the petition sought the release of those: eligible for parole, who would have completed their sentence within six months, who were incarcerated due to a “technical” violation of probation or parole, who were over the age of 60 and did not commit a crime against a person, who were medically vulnerable to COVID-19, who qualified for medical parole, or who were serving a sentence in a House of Correction and did not commit a crime against a person.

The filing of this petition sparked a flurry of litigation. The single justice of the SJC immediately reserved and reported the case to the full bench, and the Court appointed a Special Master—Brien T. O’Connor of Ropes & Gray LLP—to try to negotiate a resolution of the case between the parties. The case was simultaneously litigated and negotiated over a period of just *one week*. It was filed on March 24th and argued before the SJC on March 31st. In the end, the SJC issued a decision, *Committee for Public Counsel Services v. Chief Justice of the Trial Court (No. 1)*, 484 Mass. 431 (2020), on April 3rd—an unprecedented 10 days from filing to decision—that was a mixed success for the litigants pushing for decarceration.

In *Committee for Public Counsel Services v. Chief Justice of the Trial Court (No. 1)*, the SJC established a robust remedial mechanism for the release of people held in pretrial detention, but it denied all relief for people who have been convicted and are serving a sentence. The Court accepted the factual premise of the litigation—that people held in custody are at greater risk from COVID-19: “confined, enclosed environments increase transmissibility,” “proper sanitation is also a challenge,” and “[t]hose in prisons and jails have an increased prevalence, relative to the general population, of underlying conditions that can make the virus more deadly.”⁴⁰ And the Court acknowledged and accepted the need to decarcerate. Given the danger to people in custody, the Court “agree[d] that the situation is urgent and unprecedented, and that a reduction in the number of people who are held in custody is necessary.”⁴¹

To speed releases, the Court established a “presumption of release” for all people held pretrial, except for those held pursuant to more serious charges listed in an appendix to the decision. But, as noted, the Court denied all relief for people serving sentences. As before the decision, sentenced people could only seek a “stay”—or pause—of their sentence if they had a pending appeal or motion for new trial.⁴² But the Court held that there is no inherent right to seek a pause of one’s sentence during an emergency.⁴³ And, as before, defendants also could not seek to revise or revoke their sentences under Rule 29 of the Massachusetts Rules of Criminal Procedure unless they were within 60 days of its imposition.⁴⁴ The Court also did not order the Parole Board to do anything at all, even though the Board represented at oral argument that 300 people had at that time been granted parole but still not received the permit authorizing their release—in other words, 300 people granted parole were still in custody during a pandemic. But the Court “urge[d]” the Board to expedite their release and to expedite hearings for others.⁴⁵ The decision did, however, require the county sheriffs and the Department of Correction to provide daily

39 A “technical” violation of probation is one that does not involve an allegation of a new criminal offense, such as a missed meeting with a probation officer or a failed drug test.

40 *CPCS (No. 1)*, 484 Mass. at 436-437.

41 *Id.* at 445.

42 In *Christie v. Commonwealth*, 484 Mass. 397 (2020)—decided two days prior to *CPCS (No. 1)*—the SJC also held that judges were required to account for the risk posed by the COVID-19 when deciding whether to grant defendants a stay of their sentences during the pandemic.

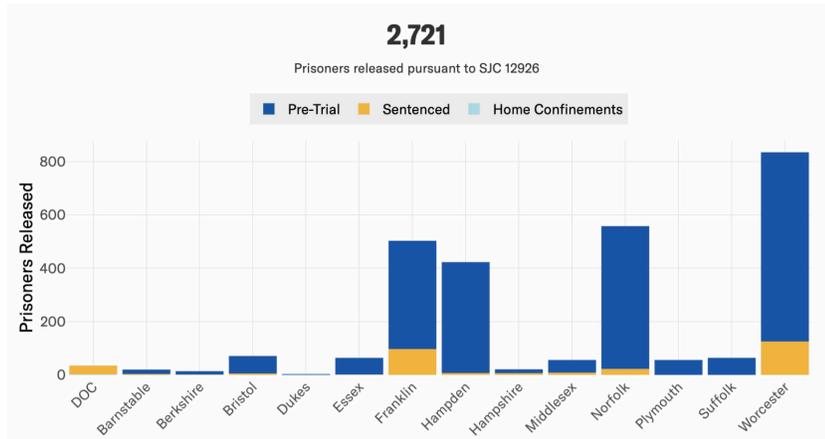
43 *CPCS (No. 1)*, 484 Mass. at 436. See also *CPCS v. Chief Justice of the Trial Court (No. 2)*, 484 Mass. 1029, 1031-32 (2020) (holding, in response to motion to reconsider filed by Petitioners, that there is no inherent authority to issue a stay of sentence in the absence of a pending challenge to the underlying conviction).

44 *Id.* at 450.

45 *Id.* at 453.

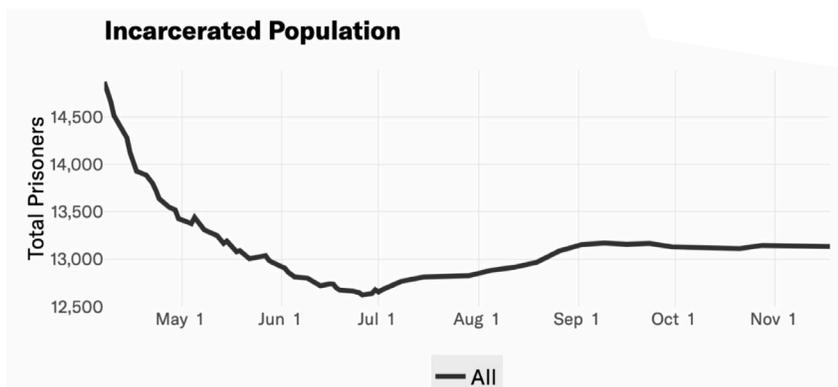
reports of their COVID-19 testing and release numbers to the attorneys for the Petitioners, so they could monitor the situation in the Commonwealth’s prisons and jails going forward.

The effect of the decision, given its holding, was predictable: many people held pretrial were released while few sentenced people received the same relief. According to the data reported by the Respondents and compiled by ACLUM, 2,721 people were released pursuant to the decision as of November 24th, 2020:



As this graph shows, the overwhelming number of people released were held pretrial rather than serving a sentence. Some counties have released far more people than others, and the Department of Correction (given that it houses primarily sentenced people) has released exceedingly few people from its custody during the pandemic—33 in total—even though it houses roughly the same number of people as all county facilities combined.

The population of people incarcerated fell at the outset of the pandemic, but has since risen slightly and plateaued since the fall:



After the decision was issued, the SJC’s “urgings” to the Parole Board largely fell on deaf ears. In fact, shortly thereafter, the Parole Board issued a new policy memorandum that actually *narrowed* eligibility for early parole after the SJC issued its decision encouraging the exact opposite, foreclosing the potential for early release for the vast majority of people who would have otherwise been eligible for it. But, after attorneys at CPCS filed suit to

overturn that restrictive early parole policy, the Board immediately rescinded it and promised to consider early parole petitions that it had previously denied under its restrictive policy.⁴⁶

Prisoner's Legal Services Litigation

Because the CPCS decision offered no relief to sentenced people, PLS filed litigation at the Supreme Judicial Court to raise the constitutional claims that the CPCS petitioners had expressly disavowed. At least thus far, the PLS case has not led to any additional releases.⁴⁷ In *Foster v. Commissioner of Correction*, 484 Mass. 698, 718 (2020), the SJC held that the risk from COVID-19 to those in custody was actually so grave that “the incarcerated plaintiffs almost certainly will succeed in establishing the objective component of their claims under the Eighth Amendment.” In other words, COVID-19 posed a “substantial risk of serious harm” that would amount to a “serious deprivation of basic human needs.”⁴⁸ But they lost on the subjective prong of so-called “deliberate indifference” because the DOC had, by the SJC’s description below, taken sufficient steps to try to mitigate the spread of the virus inside of their facilities:

These measures included lockdowns of the facilities; prohibiting all outside visitors; restrictions and self-examination on entry to any facility; isolation of symptomatic inmates and those who have tested positive; requiring staff to stay home for 14 days if they have any symptoms; mandating that staff wear masks when in contact with inmates; distribution of additional cleaning supplies to all inmates; increased cleaning of frequently touched surfaces; making alcohol-based hand sanitizer available to inmates in numerous facilities; having inmates eat in their cells or housing units rather than at tables in larger groups; and instructions, posters, and information on COVID-19 and its spread in both Spanish and English. To reduce inmates congregating in close contact with each other, the DOC has eliminated most group programming, work release, and academic and job skills classes, as well as outdoor recreation time and access to gyms and libraries, i.e., any activities where groups of inmates would be together.

Over the course of this litigation, the DOC has obtained and distributed PPE [personal protective equipment] to staff and, recently, all inmates. It has required that staff in contact with inmates, and all inmates who leave their cells or dormitories, wear masks at all times. The DOC also recently has instituted some limited amount of outdoor time for all inmates, in small groups approximately every four days, so that physical distancing can be maintained.⁴⁹

In short, the DOC had done enough to satisfy its constitutional obligations.⁵⁰ No more sentenced individuals would be eligible for release. And although the decision made crystal clear that the DOC had the power to release any sentenced person into home confinement,⁵¹ the DOC thereafter decided not to use that mechanism for the release of a single person in its custody. PLS has recently filed a motion in the case to force the DOC to establish a home confinement program, which is still pending.⁵²

Overview and Lessons

Overall, the feeling of those who litigated these decarceration cases is one of mixed success. As the numbers show—from the 50 people released from Bristol HOC, to the 100+ person reduction in the population at Devens, to the 2,721 released from the state system—they have much to be proud of in their work, especially under such difficult personal and professional circumstances. Nimni voiced particular pride in how the affirmative litigation focused on broad, systemic decarceration rather than asking for narrower relief for a smaller class of plaintiffs.

46 See *Ronjan Johnson & Others v. Gloriann Moroney*, SJ-2020-0470 (filed June 10, 2020). The Board rescinded its policy on June 15, five days after the litigation was filed. Because the policy was rescinded, the suit was dismissed as moot by the single justice (Lowy, J.).

47 To be precise, the *Foster* decision denied a preliminary injunction that would have ordered releases from DOC facilities. As of August 15, 2020, the litigation is still ongoing and proceeding through discovery on the merits.

48 *Foster*, 484 Mass. at 717.

49 *Id.* at 721-722.

50 Both the majority decision, as well as the concurrence by Chief Justice Gants, noted that additional constitutional concerns may arise if the pandemic remained the same for several more months, as it has.

51 See *id.* at 733.

52 See Deborah Becker, *Lawsuit Asks DOC To Release More Prisoners Amid COVID Spikes*, WBUR (Oct. 30, 2020).

And Rossman expressed pride in how the various groups collaborated around a pressing public health goal. They “actively engaged with public health experts, and that had a pretty broad impact in terms of educating the bench and bar. Through this collaboration, we’ve seen increased vocalization by public health experts to explain to the public exactly why jails and prisons are so dangerous during this pandemic, and exactly which steps the government needs to take to protect those in their custody.” Attorneys at CPCS conducted numerous trainings to teach defense attorneys across the Commonwealth how to litigate their client’s release motions and established a hotline for attorneys to contact to get advice and tips for their cases. Many attorneys availed themselves of that advice and successfully advocated for their clients’ releases.

Rossman expressed appreciation for the work of the broader Boston legal community in this effort. “Much like the response to the travel ban, the bar rose to the occasion and used its expertise really effectively. It was a very quick response during a time when everyone was juggling the fallout of the pandemic in their own lives. There was a cohesive and collaborative response from the bar that included working with folks outside of the legal community, especially with public health experts who themselves went above and beyond to educate us while they were simultaneously fighting on the front lines against this virus.” Thompson at PLAP expressed the same sentiment, citing a plan by public health students to try to house released incarcerated people in college dormitories. “The students knew that shelters were closed and could not take people from Houses of Correction, so they advocated with the universities.”

Despite all of the people released due to this litigation, it is hard to not feel that this was a significant opportunity missed right at the outset of the pandemic, most especially in the case of those serving a sentence. Releases save lives and protect public health, and there have not been nearly enough. For example, since the *Foster* decision was issued on June 2nd and the SJC concluded that the DOC was doing enough to protect those in its custody from COVID-19, 612 incarcerated people have tested positive for the virus—nearly 10% of the total DOC population.⁵³ Thompson expressed frustration that the SJC had done so much for people pretrial but nothing for those on the very back end of their sentence, perhaps a few months away from completion. To Thompson, those two groups—people on their way in and their way out of the criminal justice system—should have been treated exactly the same way. The experience in Massachusetts was consistent with that seen across the country. According to a study by the ACLU and Prison Policy Initiative, among 49 states the median jail population has decreased by 20% during the pandemic, whereas the prison population has dropped by only about 5%.⁵⁴ Globally, the prison population has fallen by less than 6%.⁵⁵

The frustration for litigators was that the disaster was foreseeable. At least ten incarcerated people have already died and hundreds more were infected with the coronavirus. But proceeding via litigation, rather than a systemic strategy coordinated by statewide executive branch officials, created a disjointed response. “What we ended up with was pieces of the solution being ordered by different actors, but not necessarily a coordinated effort that would’ve had the most efficient impact, and effective protection for people.” The various Houses of Correction, for example, seem to be running independently in terms of developing testing protocols and solutions for the crisis. The DOC developed a mass voluntary testing program six months ago, but has done little testing since then, and the Houses of Correction are not close to anything resembling mass testing. There has been little state oversight, even though these facilities house the lowest level offenders.

53 Compare *CPCS v. Chief Justice of the Trial Court* (SJC-12926), June 1, 2020 Special Master’s Report, with *CPCS v. Chief Justice of the Trial Court* (SJC-12926), November 25, 2020 Special Master’s Report.

54 See Emily Widra & Dylan Hayre, *Failing Grades: States’ Responses to COVID-19 in Jails & Prisons*, Prison Policy Initiative (June 25, 2020), available at: https://www.prisonpolicy.org/reports/failing_grades.html. Notably, the reduction in jail populations was found to be “functionally unrelated to crime trends in the following months.” Thus, “[t]he release of incarcerated people from jails has saved lives both in jails and in the community, all while monthly crime trends were within or below average ranges in every city.” *Decarceration and Crime During COVID-19*, ACLU Analytics (July 27, 2020), available at: <https://www.aclu.org/news/smart-justice/decarceration-and-crime-during-covid-19/>.

55 *COVID-19, Prisons and Drug Policy, Global Scan – March-June 2020*, Harm Reduction International, available at: <https://www.hri.global/covid-19-prison-diversion-measures> (last visited July 28, 2020).

Almost universal was a sense that empty legal formalisms had triumphed over justice. As Thompson put it: “Virtually all of the legal mechanisms we were trying to use to get people out were, in some way, procedurally improper. But if we can somehow find the resolve to allow restaurants to sell take-home beer and wine—which is a huge deal—magically when it needed to happen it happened. If we can do *that*, are you seriously saying we can’t give a prisoner another 180 days of ‘good time’ credit if it means getting them out the door?” The obsession with formalities showed how hard it is to step outside of conventional thinking when it comes to incarceration. “We got unconventional in so many aspects of society, but we couldn’t do it for sentenced prisoners.” Nimni noted that “it’s an odd time to be formalist—to act like legal formalities are set in stone. Where nothing like this has happened in recent memory, you might think judicial flexibility is necessary.” As Thompson compellingly argued, “if you refuse to let somebody out, what you’re essentially saying is that the criminal legal system is *perfect*. The sentence is perfect.” Someone with three months left on a 10-year sentence, for instance, must finish those last three months because the original sentence was perfectly designed to meet the purpose of punishment. That simply cannot be so.

None of these litigators felt that this judicial mindset had shifted at all during the pandemic. Indeed, the process of litigation itself—grounded, as it is, in building upon precedent and past cases—is not especially well suited to dealing with truly novel circumstances like those presented by an unprecedented pandemic. There was a compelling need for coordinated and systemic executive action, which is why these groups started their advocacy by reaching out to the Governor and DOC rather than litigation. Unfortunately, the executive branch took no voluntary steps at all to decarcerate Massachusetts state prisons.

Personal and Professional Challenges

The attorneys working on these cases reported numerous challenges in their work, both practical and legal.

On the practical side, the COVID-19 pandemic is unlike anything else we have seen before because it deeply impacts both the plaintiffs and defendants who are represented in these cases, as well as the lawyers representing them. As Thompson explained: “Our first order of business was to get our office up and running.” Attorneys were forced to work from home, under considerable personal pressure, on extremely time-sensitive litigation. The District Attorneys felt the same pressures. According to Patalano: “Practically the biggest challenge was moving from March 13 to March 16 to a remote work situation and feeling the pressure of wanting to address these petitions for release quickly, but also feeling hamstrung that we didn’t have all the information we needed, and victim outreach was really challenging for us working remotely.” In particular, much of the information the prosecutors needed was on paper, back in their offices. “We didn’t want anyone to die in prison from COVID-19, but we also have obligations to reach out to victims that we could not satisfy, and everything was doubly hard because we were working for the first time in the Commonwealth’s history remotely as prosecutors.”

For the same reasons, the unprecedented disruption caused by the pandemic made client access a serious problem. For PLAP, clients could not reach the people working on their behalf via the clinic’s phone system because all of the attorneys and students were no longer in the office. Soon, though, the prison hotline was forwarding to students and the office manager, and the clinic was back up and running. Lawyers for Civil Rights had the same problem—during his litigation, Nimni represented everyone in immigration detention at the Bristol County House of Correction, but he was never able to meet his clients in person. “So that means we have to do personal discussions over the phone, and we’re dependent on the local sheriff to tell people to call us. That’s very costly because of the way the phone system works.” And that dependency also heightens the power imbalance between the jailer and the jailed. “There’s always a power imbalance, but now it’s starker because there is even less access to information and accountability when the facilities—even for legitimate public health reasons—are being less transparent and less open to information sharing. As a result, the power the facility has to dictate what information gets to the public, attorneys, and courts is even more in their hands than ever before.”

ACLU had the same problems with client access. According to McFadden, “having conversations with clients was not very easy at the outset of the pandemic.” In-person visits were terminated, and a phone appointment system was “not very well organized.” And the custodians did not always cooperate.

In the ICE context, there is always a concern about them moving your client, because ICE claims it has the authority to house him or her anywhere in the United States and move them at any time. By way of example, in our class action the class was certified on a Monday morning at 8:30AM. By 1PM we were getting reports that our class members were being told that they were being moved the next day to Alabama. So we had to file an emergency motion to order them to stay. So that was concerning. And ICE detainees in other units who were not part of our class were sent to Alabama, and the Immigration Impact Unit at CPCS got a declaration of what that transfer process and facility looks like and it is just a COVID factory. So that's a real challenge—the fear that by pursuing litigation on behalf of your client you may actually expose them to some risk of transfer in a way that puts them at greater risk. It is pretty clear that ICE created a very dramatic risk of infection by sending people to this facility in Alabama.⁵⁶

At least in the ICE context, defense-side litigators were actually concerned that the push for decarceration could trigger a backlash by the authorities that might ultimately be detrimental to their clients' best interests.

One of the other challenges that Patalano cited was how the burden of the pandemic had fallen disproportionately on the District Court line prosecutors in her office. “As is usual with prosecutors, the pandemic left the least experienced people on the front lines. So the District Court ADAs have to come in, and now they're being exposed every day. They always get the messiest cases, they're on the front lines, and COVID-19 has been no different for them either.”

Other litigation challenges were less practical and more atmospheric. Nimni, of Lawyers for Civil Rights, cited a sense of “chaos fatigue” that led to successes early in the pandemic and losses later on. This dynamic is reflected in the rapid early drop in the prison population, followed by a brief rise and recent plateau. “When you think something is an emergency fix, and then the emergency just keeps going on, it seems like the evaluation of that as an emergency has to lessen. There is a fatigue of this, judges and attorneys get inoculated to the horror of it. You start to need something very extreme to get someone to pay attention. Litigation at the beginning was more successful, and the litigation that came halfway through had more mixed success.”

Those who litigated these decarceration cases had a number of recommendations for how to respond in the future, both in the short term (as the pandemic goes on) and in the long term (should similarly disruptive events occur again). Some of those recommendations, again, were deeply practical for a world of remote work: things like ensuring a way for meaningful client access from a remote location, as well as speedy remote access to client medical records.

Beyond the practical, these advocates coalesced many of their recommendations around one thing: *not* thinking of prisons and jails as distinct from the rest of society. As McFadden put it: “Prisoners have the same health risks as everyone else, often more. So we see what turns out to be good enough for society—the Red Sox are playing again and they're doing biweekly testing. Kids are going back to college and doing once per week testing. There's nothing that inherently puts prisoners in a different situation. They need the same medical treatment as everyone else. There can't be a disparity there.” Nimni cited a similar lack of empathy for people in government custody. “In each of these cases, the Government argues that people have subjected themselves to this risk as a result of their own actions. Even if that is not strictly relevant as a legal matter, it affects the atmospherics of the case. It seems like there's a real reticence from the judiciary to release people even though the dangers are extremely clear. The balance of the danger to people inside seems to always be outweighed by the reasons not to release someone. And that's odd in a context where we know there's no treatment for COVID, it's deadly, and it's very transmissible.”

This notion—that people on the inside are no different than people on the outside—leads to another insight from this group of litigators: always grounding civil rights litigation in the best practices from public health and science. According to McFadden, “that's both so we get it right and so we have credibility with the courts.” To do this, litigators have to build connections with people in the scientific and medical community so they can provide the expert guidance that is key to this litigation. “As a profession, this is an area where we could enhance the nature of those connections and ensure that we have all of the scientific guidance we need to make the right arguments and requests for our clients.” As we go forward, McFadden said, “it will be more important than ever to cultivate connections between the legal community and the medical community in Boston, so each can get the benefit of the

⁵⁶ Dan McFadden, ACLUM.

other’s expertise, and so we can get practical solutions that actually help people.”

Rossman expressed a related sentiment: “This has really underscored the importance of the legal community not being siloed, both within the community (connecting with other attorneys) and making sure we have pre-existing relationships with other professionals working in the Commonwealth—whether it’s public health, social services, housing, what have you. We all were reaching out to folks who were so gracious and generous with their time to answer questions on a really tight time frame, but those conversations are easier when you already have those networks.” Thompson cited the same need for collaboration. Anyone working in the civil rights space should deepen their networks with the sorts of public health experts who are essential to such litigation. As noted, the *CPCS* litigation went from filing to decision in just 10 days. In that time, the litigators compiled numerous affidavits from public health experts, both to establish an evidentiary foundation for their claims and to inform their requests for relief. Being able to call upon existing relationships on such a timeframe is far easier than reaching out to people for the first time in the middle of the litigation (and in the middle of a pandemic).

Another lesson is to consider decarceration *outside* of the context of a pandemic, when the rushed pace of litigation makes it virtually impossible to get it right. “If and when there is another pandemic, it would behoove all of us to reduce the level of incarceration a long time before that happens. Even in the most ideal world where we win all of our cases, we’re still scrambling on the back end of a crisis.” As Rossman said, “[w]aiting until the outbreaks get to a higher level will not be the most efficient way to save lives. By the time you reach that point, it’s often too late from a public health perspective.” Pandemic or no pandemic, incarceration should always be a last resort. And this pandemic has shown that we can release over 2,700 people from our prisons and jails without imperiling public safety. We do not need a public health emergency to decarcerate our prisons and jails and to reassess our use of incarceration going forward. If we truly reserved incarceration only for those who absolutely needed to be there, as a clear last resort, then there would be little need for any of this litigation in the first place.

Indeed, a systemic risk would seem to *require* a systemic response. The decarceration litigation bore less fruit than the moment called for because the judiciary is inherently loathe to structure discharge remedies to permit the sort of wholesale releases, at scale, that the pandemic required. “COVID exposed a mismatch between pandemic risks that were systemic and remedies that were not.”⁵⁷ Litigators sought releases of broad categories of offenders, including (for example) all of those with six months left on their sentences, who committed certain non-violent crimes, or who had particular vulnerability to the virus. The SJC ordered zero such categorical releases. Instead, the court did what courts do: crafted a procedure for the adjudication of *individual* requests for release, on a case-by-case basis. Perhaps by their very nature, courts are not up to the decarceration task during a time-sensitive, systemic emergency like this pandemic. One-by-one litigation simply takes too long, the legal burden on the defendants is too great, and any court-ordered remedy would be far too weak to address the looming crisis.⁵⁸ Outside of the context of a pandemic, Massachusetts must conduct a wholesale, systemic review of its criminal justice system and whether it is serving its putative purposes. And it should close the remedial gap by, among other things, “concentrating discharge powers in fewer decision-makers” and devolving those powers to local officials who are “closer to the site of systemic risk.”⁵⁹ Local prosecutors should have the power to immediately discharge whole categories of offenders from custody.

Of course, to exercise that power, prosecutors must have the data they need to identify the defendants who fall into any specified category. Thus, from the prosecution side, the recommendation for the future was data sharing. As Patalano said: “I just can’t fathom how we can have a criminal justice system where you don’t know what the outcomes are. That has been very frustrating. The trial court has a bucket of information, EOPSS has a bucket of information, CJIS has something, we have something, and it’s been frustrating that we can’t collaborate in a

57 Kovarsky, *Pandemics, Risks, and Remedies*, 106 Va. L. Rev. Online 71 (2020), available at: <https://www.virginialawreview.org/volumes/content/pandemics-risks-and-remedies>.

58 *Id.*

59 *Id.*

meaningful way. This is something we desperately need.”⁶⁰ She suggested, for example, that a “great solution” would have been to release everyone who was within three months of their release date when the pandemic started. But, because of the limits of data sharing, her office “couldn’t find out” who those people were.

What Patalano experienced as a lack of “data sharing” those on the defense side viewed as a lack of transparency. As Rossman said, “specifically with respect to the DOC and the Houses of Correction, we don’t know all of their policies and procedures for testing. Until the SJC issued an updated order at the end of June, there was no reporting mechanism for inmate deaths—there were instances where news outlets had more information from the DOC than litigators working on these cases. And we still don’t have data for what the DOC and the Houses of Correction have determined are ‘non-COVID related’ deaths.”

Patalano expressed deep concern for the future as the pandemic drags on. “What happens to these cases? What about speedy trial rights? Can and should we have Zoom hearings? Should we object as prosecutors? This is all uncharted territory. And I’m worried that three or four years from now we’ll be shoulder deep in litigation over the mistakes we make this fall when judges try to force things to happen that just can’t. For example, I was on a Zoom meeting where one judge kept hammering home that we should try to resolve as many cases as possible. But the defendant has a right to go to trial. How long can you keep him in jail pending a trial that won’t happen?” The SJC will wade into some of these questions in a case to be argued next month.⁶¹ And as courts remain closed and jury trials get continued, the right to a speedy trial has turned into indefinite detention. For now, the SJC has expressed little concern for the plight of those trapped in indefinite pretrial custody in a world without trials, holding that that all periods of delay caused by the pandemic are excluded from the computation of the time limits on pretrial detention. Notably, that decision—*Commonwealth v. Lougee*, 485 Mass. 70 (2020)—decided on June 22nd, seemed to turn on the summer’s promise of imminent fall trials. As another viral wave has come and that promise has not been fulfilled, and people continue to be held awaiting trials that never come, by the SJC’s own acknowledgment it will “certainly need to address the due process implications of such an extension.”⁶²

Of course, throughout the pandemic, none of the myriad other problems plaguing the criminal justice system have gone away. As Thompson was working around the clock on COVID-related advocacy, the murder of George Floyd by a police officer in Minneapolis was a “gut punch” because it was a reminder that those deeper, systemic problems had not taken a break while activists were fighting to decarcerate during the pandemic. As Thompson said, “it almost felt like we took our eye off the ball. Now we’re struggling and the students are struggling with a lot of changes in their own lives, and then we were changing our work and modifying what we do and now we’re sort of coming back to this. And now these issues are in the foreground and what are we going to do about it? Is there a window opening up here that we need to try to take advantage of?” In this context, the pandemic’s impact is doubly disparate: the virus itself disproportionately affects Black and brown people, and its outsized impact in prisons and jails has a disparate impact on the Black and brown people who are disproportionately incarcerated there. A public health crisis layered upon a systemic racism crisis.

The lesson, to Thompson, is to “stay nimble.” Even with something as big as the COVID-19 pandemic happening, “we need to keep working on the underlying systemic problems that we need to address. That is what makes this so difficult: we were all working so hard and not even touching those systemic problems.” Nimni expressed the same sentiment: “I think it’s important that the litigation we’re doing now is not just limited to the pandemic. We should be raising endemic issues and undermining the logic of incarceration.”

Ultimately, the guiding principle is to always focus on client-centered advocacy. “Take your cues from your clients. This isn’t folks coming down from on high with a bright idea. Our clients face all kinds of challenges. When

⁶⁰ She offered an example: “If someone gets bailed, we are not notified of their release. So you get a bail order of \$100, we don’t know if you make that bail, we aren’t notified. So we couldn’t say definitively what happened to that person.”

⁶¹ See *Vazquez Diaz v. Commonwealth* (SJC-13009) (argument pending December 7, 2020).

⁶² *Id.* at 84.

COVID-19 came along, that was their biggest challenge, and that was what they were telling us. That was priority one for them, so it seemed wrong to ignore that.”⁶³ As the pandemic goes on and these systemic problems continue to fester, litigators and activists will have to seek guidance from incarcerated people and their families on what their priorities are, so they know which cases to bring in a system that—even in the best of times—has far too many fights that need fighting.

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63 Joel Thompson, Harvard PLAP.