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Officer Use of Force and the Failure of Oversight of New York City Jails

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OFFICER USE OF FORCE AND THE FAILURE OF OVERSIGHT OF NEW YORK CITY JAILS

*Jennifer Ferentz**

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INTRODUCTION

Violence runs through the entirety of the U.S. criminal justice system, and it is a part of daily life in prisons and jails. Two underlying reasons for this violence are that the modern U.S. carceral state is characterized by a “tough on crime” approach that prioritizes punishment over rehabilitation,¹ and that it is built on the legacy of slavery and racism.² In prisons and jails,³ it is an accepted fact that correction officers will use

1. See Michael Jacobson et al., *Beyond the Island: Changing the Culture of New York City Jails*, 45 FORDHAM URB. L.J. 373, 407–08 (2018).

2. See *Race and the Criminal Justice System*, EQUAL JUST. INITIATIVE (Oct. 1, 2014), <https://eji.org/news/history-racial-injustice-race-and-criminal-justice/> [<https://perma.cc/A3D8-V7PY>]; see also Morris E. Lasker, *Prison Reform Revisited: A Judge’s Perspective*, 24 PACE L. REV. 427, 430–31 (2004).

3. Prisons are facilities that house people convicted of felonies who must serve more than one year and are usually run by the state or federal government. See Ellen Belcher, *New York Prisons and Jails: Historical Research*, JOHN JAY COLL. CRIM. JUST., LLOYD SEALY LIBR. (Aug. 3, 2020), <https://guides.lib.jjay.cuny.edu/NYPrisons> [<https://perma.cc/9NXY-EUHH>]. Jails are facilities that house pre-trial detainees — as well as people sentenced to under one year, waiting to be transferred to a prison, or being held on parole violations — and are usually run at the city or county level. See *id.* New York City jails also hold a large number of people for parole violations only. See Christopher Robbins, *More and More People Winding up in NYC Jails for Technical Parole Violations*, GOTHAMIST (Aug. 27, 2019, 5:02 PM), <https://gothamist.com/news/more-and-more-people-winding-nyc-jails-technical-parole-violations> [<https://perma.cc/W4M7-HY49>]. The long-term effects of prisons and jails also vary widely. For example, in prison, long-term illness is the primary cause of death (88.3%); in contrast, in jail, 30.7% of deaths are by suicide. Compare E. ANN CARSON & MARY P. COWHIG, U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, MORTALITY IN STATE

some measure of physical force to control incarcerated people.⁴ Thus jurisdictions have different rules or policies that outline the bounds of what, when, and how much force is appropriate to use in various circumstances.⁵ However, our country is currently reckoning with the very idea of uniformed force;⁶ collectively, more people are beginning to understand that this force is synonymous with violence⁷ and that this violence is racialized.⁸

U.S. prisons and jails are a “massive social institution plagued by problems,” and these problems are exacerbated “by the vacuum that

AND FEDERAL PRISONS, 2001–2016 — STATISTICAL TABLES (2020), <https://www.bjs.gov/content/pub/pdf/msfp0116st.pdf> [<https://perma.cc/Z7WX-8SFZ>], with E. ANN CARSON & MARY P. COWHIG, U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, MORTALITY IN LOCAL JAILS, 2001–2016 — STATISTICAL TABLES (2020), <https://www.bjs.gov/content/pub/pdf/mlj0016st.pdf> [<https://perma.cc/Z57J-KTBK>].

4. See John Boston, *Excessive Force and New York City Jails: Litigation and Its Lessons*, 22 WASH. U. J.L. & POL’Y 155, 167 (2006) (stating “the use of force can never be eliminated entirely, but prisons and jails can be managed with a minimal amount of physical force”).

5. See, e.g., N.Y.C. DEP’T OF CORR., DIRECTIVE NO. 5006R-D: USE OF FORCE (2017), https://www1.nyc.gov/assets/doc/downloads/directives/Directive_5006R-D_Final.pdf [<https://perma.cc/H2NM-54FD>] (stating the “Use of Force is any instance where Staff use their hands or other parts of their body, objects, instruments, chemical agents, electronic devices, firearms, or any other physical method to restrain, subdue, or compel an Inmate to act or stop acting in a particular way. The term ‘Use of Force’ does not include moving, escorting, transporting, or applying restraints to a compliant Inmate”). The U.S. Constitution also sets boundaries for the amount and type of force officers may use in the corrections setting; however, this standard “[grants] wide latitude to . . . officers,” as a finding of malicious or sadistic intent is needed to violate the Eighth Amendment’s prohibition on cruel and unusual punishment. Boston, *supra* note 4, at 160.

6. See Derrick Johnson, *The George Floyd Uprising Has Brought Us Hope. Now We Must Turn Protest to Policy*, GUARDIAN (June 30, 2020, 6:27 AM), <https://www.theguardian.com/commentisfree/2020/jun/30/black-lives-matter-protests-voting-policy-change> [<https://perma.cc/DD7S-MYLY>].

7. See, e.g., Catherine E. Shoichet, *Protests Are Erupting over Police Brutality. And Some Officers Are Responding to the Outcry with Force*, CNN (June 5, 2020, 1:18 PM), <https://www.cnn.com/2020/06/02/us/police-protests-use-of-force/index.html> [<https://perma.cc/2PE8-PB82>].

8. See Bryan Stevenson, *Slavery Gave America a Fear of Black People and a Taste for Violent Punishment. Both Still Define Our Criminal Justice System*, N.Y. TIMES MAG. (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/prison-industrial-complex-slavery-racism.html> [<https://perma.cc/DYU5-EAKA>]; see also VERA INST. OF JUST., INCARCERATION TRENDS IN NEW YORK (2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-new-york.pdf> [<https://perma.cc/T866-JCY2>] (establishing that despite making up only 19% of the New York State population, Black people make up 43% of people in jail and 48% of people in prison).

exists when it comes to meaningful oversight and public accountability.”⁹ And this vacuum exists here in New York City. This Note asks the reader to consider: what is the point of government oversight if one of the most pressing issues incarcerated people face today — the intractable problem of unnecessary and excessive officer use of force — goes ignored by such oversight? This Note examines the larger structure of oversight of New York City jails¹⁰ to try to understand how the use of force rate continues to *increase* despite ongoing federal Monitorship, and the Department of Correction’s alleged commitment to change. Ultimately, this Note argues the actors responsible for changing the rules governing New York City jails and the practices carried out within them are abdicating that responsibility when it comes to this violence.

Part I traces the history of brutality in New York City jails and focuses on the work of prisoners’ rights advocates and judicial intervention on this issue, which culminated in the lawsuit *Nunez v. City of New York*.¹¹ Part II then seeks to identify and document the institutional actors’ legal authority that play a role in the functioning and oversight of New York City jails, focusing on how these entities can impact excessive use of force. Part III examines both the current state of correction officer use of force in City jails and oversight actors’ reaction to this issue within the past few years. This Part demonstrates both how the Department of Correction (DOC) is ill-equipped to change, and how oversight bodies with legal authority to make a difference have remained mostly silent. Finally, Part

9. Michele Deitch & Michael B. Mushlin, *Let the Sunshine In: The ABA and Prison Oversight*, STATE OF CRIM. JUST. 243, 244 (2011).

10. This Note does not include jails that hold people in federal pre-trial detention or custody. The facilities this Note refers to as “New York City jails” are Brooklyn Detention Complex (closed in January 2020), Manhattan Detention Complex, Vernon C. Bail Correctional Center, and facilities on Rikers Island (Anna M. Cross Center, Eric M. Taylor Center, George Motchan Detention Center, George R. Vierno Center, North Infirmary Command, Otis Bantum Correctional Center, Robert N. Davoren Complex, Rose M. Singer Center, and West Facility). This understanding excludes Bellevue Hospital Prison Ward and Elmhurst Hospital Prison Ward, which are under the shared jurisdiction of the Department of Correction and NYC Health and Hospitals Corporation, and come with their own set of challenges like unique barriers to access compassionate healthcare. The Manhattan Detention Complex is colloquially known as “the Tombs,” and Vernon C. Bail Correction Center is known as “the Boat.” See Kim Kelly, *At the Center of the Coronavirus Pandemic, People Inside NYC Jails Describe Fear, Confusion and a Lack of Supplies*, APPEAL (Apr. 8, 2020), <https://theappeal.org/new-york-city-jails-coronavirus-covid-19/> [<https://perma.cc/3G37-LSMP>].

11. See Complaint, *Nunez v. City of New York* (S.D.N.Y. 2012) (No. 11 Civ. 5845) [hereinafter *Nunez* Complaint], <https://www.legalaidnyc.org/wp-content/uploads/2019/09/Nunez-Complaint.pdf> [<https://perma.cc/JU24-DXTK>].

IV recommends several policy changes to strengthen oversight over New York City jails, and tackle the central and ubiquitous problem of excessive use of force.

I. EXCESSIVE USE OF FORCE AS AN INTRACTABLE PROBLEM

Section I.A traces the entrenched history of violence in New York City jails, with a particular emphasis on Rikers Island. Section I.B then outlines the efforts of prisoners' rights advocates to ensure the safety and well-being of incarcerated people through judicial intervention and Monitorship. Finally, Section I.C focuses on the lawsuit *Nunez v. City of New York*,¹² the ongoing reports the *Nunez* Federal Monitor publishes, and the current status of New York City jails, including the continued prevalence of correction officers' unnecessary and excessive use of force.

A. Jails and a History of Violence

New York City jails, in particular Rikers Island, have always been notorious for violence.¹³ Although gang-related conflict in jail is prevalent,¹⁴ brutality carried out by correction officers in City jails is also an intrinsic part of this violence.¹⁵ Correction officers have dragged an inmate by the neck, handcuffed, and punched the inmate in the face;¹⁶ in a gang of three, kicked and punched a man in the stomach;¹⁷ beaten inmates after forcing them to strip naked;¹⁸ forced inmates to eat cigarettes and flushed their heads in toilets;¹⁹ kept a man in a cell with no running water for two days, and then hit him in the face when he asked

12. *Id.*

13. See Jacobson et al., *supra* note 1, at 381 (citing U.S. DEP'T OF JUST., U.S. ATT'Y'S OFF. FOR THE S. DIST. OF N.Y., CRIPA INVESTIGATION OF THE NEW YORK CITY DEPARTMENT OF CORRECTION JAILS ON RIKERS ISLAND 3 (2014), https://www.clearinghouse.net/chDocs/not_public/JC-NY-0062-0001.pdf [<https://perma.cc/Q4Q5-BW8B>]).

14. See generally *This Is Rikers: From the People Who Live and Work There*, MARSHALL PROJECT (June 28, 2015, 9:00 PM) [hereinafter MARSHALL PROJECT], <https://www.themarshallproject.org/2015/06/28/this-is-rikers> [<https://perma.cc/H4J3-CUFG>].

15. See *Nunez* Complaint, *supra* note 11, at 5.

16. See *Fisher v. Koehler*, 692 F. Supp. 1519, 1533 (S.D.N.Y. 1988) (discussing plaintiff James Kenny).

17. See *id.* at 1534 (discussing plaintiff Keith Beattie).

18. See Stipulation of Settlement at 4, *Sheppard v. Phoenix* (S.D.N.Y. 1998) (No. 91 Civ. 4148).

19. See *id.* at 11.

for water;²⁰ and pepper-sprayed someone as he lay face down in the shower after another officer hit him in the back of the head so hard he lost consciousness.²¹ Formerly-incarcerated people have also spoken about the horrors they experienced in these jails beyond this brutality, which include no access to cold water or cold showers on scorching hot summer days,²² mice and cockroach infestations in cells, and a lack of access to necessary and life-saving medication.²³ Since facilities were first built on Rikers Island, DOC's actions have prompted lawsuits that allege organizational indifference to these problems and overwhelming mismanagement.²⁴

In 1884, New York City bought Rikers Island from the Riker family, with plans to expand its size and build a prison facility to relieve the overcrowding and squalid conditions present in the City's two operating jails.²⁵ Opened in the 1930s, the Rikers Island Penitentiary was accessible only by ferry, and the people incarcerated there lived next to garbage dumped by the Department of Sanitation,²⁶ despite the City's intention for it to be on the cutting edge of penitentiary design.²⁷ By 1939, a Bronx

20. See *Ingles v. City of New York*, 2003 WL 402565, at *2 (S.D.N.Y. 2003) (discussing plaintiff Ed Sykes).

21. See *Nunez Complaint*, *supra* note 11, at 42–45 (discussing Plaintiff Rodney Byre).

22. See Raven Rakia, *A Sinking Jail: The Environmental Disaster That Is Rikers Island*, GRIST (Mar. 15, 2016), <https://grist.org/justice/a-sinking-jail-the-environmental-disaster-that-is-rikers-island/> [https://perma.cc/MJX3-NACS].

23. See MARSHALL PROJECT, *supra* note 14.

24. See Section I.C; see also Jarrod Shanahan, *When Incarceration Kills*, JACOBIN (Aug. 8, 2019), <https://jacobinmag.com/2019/08/life-and-death-in-rikers-island-review-book-prison-jail-homer-venters> [https://perma.cc/BT9J-XD7U].

25. See John Surico, *How Rikers Island Became the Most Notorious Jail in America*, VICE (Jan. 11, 2016, 12:00 AM), https://www.vice.com/en_us/article/dp59yq/how-rikers-island-became-the-most-notorious-jail-in-america [https://perma.cc/7C9X-9GXM]. The patriarch of the family, Richard Riker, used his position as a criminal court municipal officer to label free African Americans as “fugitive slaves” to get kickbacks from kidnappers who sold them into slavery. See *id.*

26. In 1938, the State Commission of Correction commented on the “anomalous situation” of having a \$10 million penitentiary located in the middle of a municipal dump. See *Riker's Island Use as Dump Denounced*, N.Y. TIMES (Nov. 27, 1938), <https://timesmachine.nytimes.com/timesmachine/1938/11/27/99570997.html?pageNumber=13>.

27. See Jarrod Shanahan, *Captives of a New Alcatraz: The New York City Department of Correction from 1954 to 1990* (2019) (Ph.D. dissertation, City University of New York) (on file with author); see also *New Prison Ready on Riker's Island*, N.Y. TIMES (June 30, 1935),

court deemed it to be “nearly unlivable.”²⁸ Regardless, the City’s use of Rikers Island kept growing, leveling out the garbage piles,²⁹ and building new facilities in the 1960s and 1970s.³⁰ In 1974, in response to a class action brought by the Legal Aid Society, a court ordered the temporary shut-down of a jail near City Hall in Manhattan, known colloquially as the Tombs, for its poor living conditions;³¹ after this, DOC started to house increasingly more detainees on Rikers Island.³²

The prevalence of drug use and an increased reliance on policing in the 1980s meant that Rikers Island housed an ever-ballooning population of detainees; under Mayor Rudolph Giuliani, the Rikers population skyrocketed in the early 1990s.³³ For example, in 1991, around 22,000 people were held in DOC custody.³⁴ To handle the overflow, DOC set up tents and navy barges to house people³⁵ — one of which, nicknamed the Boat, still operates today.³⁶ Although the New York City jail population reached its peak around 30 years ago and crime rates have steadily fallen since then, City jail facilities’ problematic conditions, prevalence of violence, and correction staff’s persistent corruption have never gone away.³⁷

<https://timesmachine.nytimes.com/timesmachine/1935/06/30/95507721.html?pageNumber=21>.

28. Surico, *supra* note 25.

29. See Rakia, *supra* note 22.

30. See Surico, *supra* note 25.

31. See Jacobson et al., *supra* note 1, at 385–86.

32. See Janos Marton, #CloseRikers: The Campaign to Transform New York City’s Criminal Justice System, 45 *FORDHAM URB. L.J.* 499, 510 (2018).

33. See Surico, *supra* note 25.

34. See Marton, *supra* note 32, at 520.

35. See *id.* at 512.

36. See Matthew Haag, *A Floating Jail Was Supposed to Be Temporary. That Was 27 Years Ago.*, *N.Y. TIMES* (Oct. 10, 2019), <https://www.nytimes.com/2019/10/10/nyregion/nyc-jail-barge-rikers.html> [<https://perma.cc/5PGC-JYCW>].

37. See, e.g., Press Release, U.S. Dep’t of Just., U.S. Att’y’s Off. for the E. Dist. of N.Y., Six New York City Correction Officers and 15 Others Charged with Conspiring to Accept Bribes and Smuggle Contraband into Rikers Island Facilities (Jan. 14, 2020), <https://www.justice.gov/usao-edny/pr/six-new-york-city-correction-officers-and-15-others-charged-conspiring-accept-bribes> [<https://perma.cc/JM49-68FY>]; Brian Sonenstein, *New York City Inspectors Smuggle Contraband into Jail, Find Culture of Corruption Live and Well*, *SHADOWPROOF* (Feb. 14, 2018), <https://shadowproof.com/2018/02/14/nyc-doc-contraband-inspectors-undercover-corruption/> [<https://perma.cc/ZR68-CZ79>]; see also Surico, *supra* note 25 (discussing the entrenched culture of misogyny, cruelty, and illegality in correction officers taking foothold in the 1980s).

After years of activism concentrated into the #CloseRikers campaign,³⁸ in conjunction with the momentum built by allegations of pervasive brutality in the lawsuit *Nunez v. the City of New York*³⁹ — which was joined by the U.S. Attorney for the Southern District of New York⁴⁰ — Mayor Bill de Blasio announced that his Administration would officially close Rikers Island.⁴¹ His Administration eventually laid out an \$8 billion plan⁴² to construct a “smaller network of modern jails” in four boroughs.⁴³ The New York City Council officially endorsed this plan in October 2019 by voting to close Rikers Island by 2026.⁴⁴ Ultimately, this borough-based plan depends on shrinking the jail population substantially to around 3,300 from approximately 7,000 in 2019.⁴⁵ Bail

38. See generally Marton, *supra* note 32.

39. See discussion *infra* Section I.C.

40. See United States’ Proposed Complaint-in-Intervention, *Nunez v. City of New York* (S.D.N.Y. 2014) (No. 11 Civ. 5845). The Southern District of New York intervened in the underlying class action lawsuit after releasing a Civil Rights of Institutionalized Persons Act (CRIPA) investigation report, which found that there was an unconstitutional pattern and practice of violence on Rikers Island for incarcerated people under the age of 18. See Press Release, U.S. Dep’t of Just., U.S. Att’y’s Off. for the S. Dist. of N.Y., Department of Justice Takes Legal Action to Address Pattern and Practice of Excessive Force and Violence at Rikers Island Jails That Violates the Constitutional Rights of Young Male Inmates (Dec. 18, 2014), <https://www.justice.gov/usao-sdny/pr/departement-justice-takes-legal-action-address-pattern-and-practice-excessive-force-and> [<https://perma.cc/MC59-HAE7>].

41. See Joel Rose, *Rikers Island Could Be Closed and Replaced with Smaller Jails Around New York City*, NPR (Mar. 31, 2017, 7:36 PM), <https://www.npr.org/sections/thetwo-way/2017/03/31/522251063/rikers-island-could-be-closed-and-replaced-with-smaller-jails-around-new-york-ci> [<https://perma.cc/XXM6-ZJDM>].

42. See 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/59VP-C2CC>].

43. CITY OF N.Y., OFF. OF THE MAYOR, SMALLER SAFER FAIRER: A ROADMAP TO CLOSING RIKERS ISLAND 7 (2017), <https://rikers.cityofnewyork.us/wp-content/uploads/Smaller-Safer-Fairer-1.pdf> [<https://perma.cc/RAW7-X3LR>].

44. See *Rikers to Close*, N.Y. CITY COUNCIL, <https://council.nyc.gov/data/closerikers/> [<https://perma.cc/5JG3-X9UD>] (last visited Aug. 21, 2020). New York City Council’s vote included a set of reforms to the Minimum Standards for the treatment of incarcerated people and design outlines for any new jails built. See Ben Chapman, *New York City Council Proposes a Plan for Jails after Rikers*, WALL ST. J. (Oct. 2, 2019, 6:37 PM), <https://www.wsj.com/articles/new-york-city-council-proposes-a-plan-for-jails-after-rikers-11570055867>.

45. See Bobby Cuza, *City Hall: Jail Population Expected to Drop to 3,300 by 2026*, NY1 (Oct. 14, 2019, 9:19 PM), <https://www.ny1.com/nyc/all-boroughs/politics/2019/10/15/nyc-jail-population-expected-to-drop-to-3300-by-2026-city-hall-says> [<https://perma.cc/SC9X-6EJ9>].

reform laws that prohibit the use of cash-bail for the majority of arrests are critical to reducing the jail population; however, those that went into effect on January 1, 2020 — which had the potential to impact approximately 43% of all people held in pre-trial detention⁴⁶ — were amended by the state legislature only three months later.⁴⁷ The three-month impact of the original law led to a drop in pre-trial detainees across New York State,⁴⁸ and the effect of the revision may not actually be that substantive.⁴⁹ It is undeniable, though, that COVID-19 hit New York City particularly hard in March and April of 2020, leading activists and lawyers to demand the release of people in custody.⁵⁰ Further, the Board of Correction (BOC or the Board) urged the City to rapidly reduce its jail population.⁵¹ Releasing certain categories of people did become part of the City's public health response to the pandemic, and as of April 2020, DOC reduced its jail population to just under 4,000 people.⁵²

46. See MICHAEL REMPEL & KRISTAL RODRIGUEZ, CTR. FOR CT. INNOVATION, BAIL REFORM IN NEW YORK: LEGISLATIVE PROVISIONS AND IMPLICATIONS FOR NEW YORK CITY 8 (2019), https://www.courtinnovation.org/sites/default/files/media/document/2019/Bail_Reform_NY_full_0.pdf [<https://perma.cc/2HPT-V4EA>].

47. See Taryn A. Merkl, *New York's Latest Bail Law Changes Explained*, BRENNAN CTR. FOR JUST. (Apr. 16, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained> [<https://perma.cc/X4F3-7Q3B>].

48. See Jamiles Lartey, *New York Rolled Back Bail Reform. What Will the Rest of the Country Do?*, MARSHALL PROJECT (Apr. 23, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/04/23/in-new-york-s-bail-reform-backlash-a-cautionary-tale-for-other-states> [<https://perma.cc/BQA6-6YH3>].

49. See Merkl, *supra* note 47. See generally MICHAEL REMPEL & KRISTAL RODRIGUEZ, CTR. FOR CT. INNOVATION, BAIL REFORM REVISITED (2020), https://www.courtinnovation.org/sites/default/files/media/document/2020/bail_reform_revisited_05272020.pdf [<https://perma.cc/6JN2-MAVX>].

50. See Josiah Bates, *Campaigns, Fundraisers Work to Bail New York City Inmates Amid COVID-19 Outbreaks in Jails and Detention Centers*, TIME (Apr. 17, 2020, 5:23 PM), <https://time.com/5821512/bail-campaigns-new-york-inmates-coronavirus/> [<https://perma.cc/6WXN-2FKQ>].

51. See Press Release, N.Y.C. Bd. of Corr., New York City Board of Correction Calls for City to Begin Releasing People from Jail as Part of Public Health Response to COVID-19 (Mar. 17, 2020), <https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/2020.03.17%20-%20Board%20of%20Correction%20Statement%20re%20Release.pdf> [<https://perma.cc/XRC8-X3SS>]; see also Letter from Jacqueline Sherman, Interim Chair, N.Y.C. Bd. of Corr., to New York City's Crim. Just. Leaders (Mar. 21, 2020), <https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Letter-from-BOC-re-NY-C-Jails-and-COVID-19-2020-03-21.pdf> [<https://perma.cc/A3S6-2TL2>].

52. Press Release, Off. of the Mayor, City Jail Population Drops Below 4,000 for First Time Since 1946 (Apr. 21, 2020),

However, the overall effect of this historical moment on City jails — as with all aspects of City life — remains uncertain.

B. Judicial Intervention and Federal Monitorship

The history of institutional reform litigation and the legacy of the prisoners' rights movement are key to understanding the modern administration of jails and how the U.S. government has come to institutionally recognize the fundamental rights of incarcerated people. The era of this litigation began with *Brown v. Board of Education*, which opened the federal courts to a new type of injunctive relief and civil rights enforcement.⁵³ In the 1970s, incarcerated people led wide-spread uprisings, and the backlash in response rippled throughout the country.⁵⁴ In 1974, the Supreme Court declared “[t]here is no iron curtain drawn between the Constitution and the prisons of this country.”⁵⁵ That same year, in New York City, the District Court for the Southern District of New York ordered the Tombs to be closed, ending a class action litigation brought by the Legal Aid Society.⁵⁶ Litigation in the 1980s then boomed, brought by both prisoners' rights lawyers and incarcerated people themselves; by 1993, incarcerated people had filed 19% of the cases on the federal docket.⁵⁷

This momentum then faced two major hurdles. First, the Supreme Court took a turn in its jurisprudence by “radically enlarging the scope of deference accorded to prison administrators,” ultimately deeming “even objectively brutal treatment” constitutional.⁵⁸ Second, Congress and

<https://www1.nyc.gov/office-of-the-mayor/news/278-20/city-jail-population-drops-below-4-000-first-time-since-1946> [<https://perma.cc/U9DN-FSQG>].

53. See Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 552 (2006).

54. See Michael Mushlin & Naomi Roslyn Galtz, *Getting Real About Race and Prisoner Rights*, 36 FORDHAM URB. L.J. 27, 32 (2009); see also Michael Avery, *Book Review: Blood in the Water: The Attica Prison Uprising of 1971 and Its Legacy*, NAT'L LAWS.'S GUILD: REV.,

<https://www.nlg.org/nlg-review/article/book-review-blood-in-the-water-the-attica-prison-uprising-of-1971-and-its-legacy/> [<https://perma.cc/EDT3-ASKS>] (last visited Sept. 17, 2020) (discussing the Attica uprising and the abject cruelty of the government's response).

55. Deitch & Mushlin, *supra* note 9, at 243 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974)). Under traditional jurisprudence, incarcerated people were considered “slaves of the state.” Mushlin & Galtz, *supra* note 54, at 32.

56. See Jacobson et al., *supra* note 1, at 385–86.

57. See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1558 (2003).

58. See Mushlin & Galtz, *supra* note 54, at 32; see also, e.g., *Wilson v. Seiter*, 501 U.S. 294, 302–03 (1991) (stating that for conditions of confinement within the carceral setting to violate the Eighth Amendment's prohibition on cruel and unusual punishment, correction officers' intention — not the conditions — are key. Officers must be deliberately

President Bill Clinton passed the Prison Litigation Reform Act (PLRA),⁵⁹ which severely restricted incarcerated people’s access to federal courts.⁶⁰ The PLRA was designed “with the express purpose of reducing prison litigation,” and created procedural hurdles.⁶¹ For example, the PLRA contains a “three strikes” provision, which mandates that if an incarcerated person sues and loses in three separate federal suits, he or she is barred from bringing any suit *in forma pauperis*, even if an unsuccessful lawsuit was the result of a failure to state a viable claim.⁶² Also, the PLRA requires incarcerated people to exhaust all available administrative remedies, like the jail’s grievance system,⁶³ before seeking redress in a court, no matter how opaque or dysfunctional the administrative procedure may be.⁶⁴ Finally, PLRA provisions that “restrict the scope of consent decrees . . . and reduce the amount of attorneys’ fees that may be recovered when prisoner plaintiffs prevail,” along with the exhaustion requirement, make building class action lawsuits monumentally harder.⁶⁵ Still, prisoners’ rights litigation’s legacy has ensured there are uniform standards for staff behavior and conditions of confinement for incarcerated people.⁶⁶

Litigation in New York City is a part of this history, and despite the PLRA, four federally appointed Monitors remain active in overseeing New York City jails.⁶⁷ A Monitor is an independent person or

indifferent or wonton in their conduct); *Turner v. Safley*, 428 U.S. 78, 89 (1987) (holding regulations that impinge on incarcerated people’s constitutional rights need only be “reasonably related to legitimate penological interests”).

59. 42 U.S.C. § 1997.

60. See David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2048 (2018).

61. See Mushlin & Galtz, *supra* note 54, at 35.

62. See 28 U.S.C. § 1915(g). Being able to bring a suit *in forma pauperis* means a person can submit an affidavit stating they are unable to pay court-related fees in lieu of payment to the court. See 28 U.S.C. § 1915(a)(1).

63. See, e.g., N.Y.C. DEP’T OF CORR., DIRECTIVE NO. 3376R-A: INMATE GRIEVANCE PROCEDURES 11–20 (2018), https://www1.nyc.gov/assets/doc/downloads/directives/Directive_3376R-A.pdf [<https://perma.cc/FDY8-VSAL>].

64. See Rachel Poser, *Why It’s Nearly Impossible for Prisoners to Sue Prisons*, NEW YORKER (May 30, 2016), <https://www.newyorker.com/news/news-desk/why-its-nearly-impossible-for-prisoners-to-sue-prisons> [<https://perma.cc/5BZ3-CVQ2>].

65. See Mushlin & Galtz, *supra* note 54, at 35.

66. See Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications*, 24 PACE L. REV. 433, 442–43 (2004).

67. See Stephen Rex Brown & Reuven Blau, *Decades of Federal Oversight of City Correction Department Hasn’t Yet Fixed Myriad Jail Woes*, DAILY NEWS (Dec. 16, 2018),

organization that oversees the execution and compliance with a consent judgment, or consent decree, which is a court-approved settlement signed by all parties to a suit.⁶⁸ As the DOC is the defendant organization in lawsuits aimed at reforming City jails, Monitors actively engage with DOC through investigation and on-the-ground support, and will regularly make suggestions and publish reports to the court overseeing the litigation.⁶⁹ The longest Monitor over DOC, established under *Benjamin v. Fraser*, has been active since 1982.⁷⁰ Although the Consent Judgement was scaled back in 2003, DOC must still comply with ventilation, lighting, and temperature standards under the *Benjamin* Monitorship.⁷¹ Until recently, a second Monitor kept track of DOC's compliance with the Consent Judgement under *Handberry v. Thompson*,⁷² which stemmed from a class action filed in 1996 against the City, DOC, and the Department of Education. A third Monitor oversees discharging practices for people from jail with mental illnesses.⁷³ Finally, the fourth Monitorship, the *Nunez* Monitor, has been active since 2015 and addresses the subject of officer use of force.⁷⁴

<https://www.nydailynews.com/new-york/ny-metro-jail-Monitors-20181213-story.html>
[<https://perma.cc/CR78-EXSE>].

68. See Jim Wagstaffe, *Enforcing Settlement and Consent Decrees*, LEXISNEXIS (Sept. 12, 2018), <https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/posts/enforcing-settlements-and-consent-decrees> [<https://perma.cc/TU8M-8TVR>]; *Monitors Standards*, AM. BAR ASS'N, https://www.americanbar.org/groups/criminal_justice/standards/MonitorsStandards/ [<https://perma.cc/H6BK-CP3U>] (last visited Sept. 17, 2020).

69. See Loretta A. Johnson, Note, *Protecting the Constitutional Rights of Minority Youth on Rikers Island*, 6 COLUM. J. RACE & L. 48, 60 (2016).

70. 343 F.3d 35, 40 (2d Cir. 2003). The plaintiffs, represented by the Legal Aid Society, sued the City of New York and New York City jail officials in seven related class action lawsuits alleging unconstitutional confinement conditions.

71. See *id.* at 52.

72. 446 F.3d 335 (2d Cir. 2006); see also *Handberry v. Thompson*, 2016 WL 1268265 (S.D.N.Y. Mar. 31, 2016). This agreement ensures individuals have access to educational opportunities during their incarceration. See Derek Gilna, *Court Issues New Injunction Mandating Education for NYC Prisoners at Rikers Island*, PRISON LEGAL NEWS (July 6, 2016), <https://www.prisonlegalnews.org/news/2016/jul/6/court-issues-new-injunction-mandating-education-nyc-prisoners-rikers-island/> [<https://perma.cc/XD5T-WKGT>].

73. This Monitor was established under *Brad H. v. City of New York*, a class action brought in 1999 by the Urban Justice Center. See *Impact Litigation*, URB. JUST. CTR. (Nov. 25, 2019), <https://mhp.urbanjustice.org/2019/11/25/brad-h-v-city-of-new-york/> [<https://perma.cc/CM7W-SGSS>].

74. See *Nunez* Complaint, *supra* note 11.

C. *Nunez v. City of New York* and the *Nunez* Federal Monitorship

In 2012, after decades of bringing litigation against the City for correction officers' perpetrated brutality,⁷⁵ the Prisoners' Rights Project at the Legal Aid Society filed *Nunez v. City of New York*.⁷⁶ The lawsuit alleged a "pattern and practice of unnecessary and excessive force inflicted upon inmates of New York City jails by [DOC] uniformed staff . . . knowingly permitted and encouraged by Department supervisors," citing 11 incidents where DOC staff beat and abused incarcerated people (the plaintiffs) as examples.⁷⁷ The parties signed a Consent Judgment in 2015, which, in around 300 provisions, outlines how DOC is to train, report, investigate, and discipline use of force by correction officers.⁷⁸ The Consent Judgment also focuses on the particular issue of incarcerating minors on Rikers Island.⁷⁹ As stated in Section I.B, the decree also set up

75. See *The Prisoners' Rights Project*, LEGAL AID SOC'Y, <https://www.legalaidnyc.org/programs-projects-units/the-prisoners-rights-project/> [<https://perma.cc/EE5K-7FGQ>] (last visited Sept. 16, 2020) ("[T]he Prisoners' Rights Project [(PRP)] has been fighting to end the rampant brutality by staff against people incarcerated in New York City jails and mandate reforms to prevent abuse. Our successive class action litigations challenging staff brutality in individual jails lead to the landmark decision in *Sheppard v. Phoenix*, ended the reign of terror in New York City's Central Punitive Segregation Unit. When the City failed in its obligations, PRP brought system wide class action litigation in *Ingles v. Toro*, which revised the use of force policy and piloted camera surveillance in the jails."); see also Boston, *supra* note 4, at 161–68.

76. *Nunez* Complaint, *supra* note 11.

77. *Id.*

78. See generally *Nunez v. City of New York*, 11 Civ. 5845 (S.D.N.Y. Oct. 21, 2015) (consent judgment) [hereinafter *Nunez* Consent Judgment]. For example, under this agreement, DOC was required to implement a new Use of Force Directive, or policy, which is written according to the general principles that

- (i) the force used shall always be the minimum amount necessary, and must be proportional to the resistance or threat encountered; (ii) the use of excessive and unnecessary force is expressly prohibited; (iii) the Department has a zero tolerance policy for excessive and unnecessary force; and (iv) the best and safest way to manage potential Use of Force situations is to prevent or resolve them without physical force.

Id. at 5. The consent decree also ensured mandatory training and reporting requirements for staff, investigation procedure, staff discipline, special provisions for the supervision of people under the age of 19, discipline of incarcerated people, and the creation and implementation of a plan to move all people in custody under the age of 18 off Rikers Island. See *id.* at 10, 15, 25, 40, 44, 46.

79. See Ninth Report of the *Nunez* Independent Monitor at 1–2, *Nunez*, 11 Civ. 5845 (S.D.N.Y. May 29, 2020) [hereinafter Ninth *Nunez* Monitor's Report], <https://www1.nyc.gov/assets/doc/downloads/pdf/9thMonitorsReport052920AsFiled.pdf> [<https://perma.cc/6D83-2RSL>]. In 2018, Governor Andrew Cuomo signed the Raise the Age Law, which required New York City and DOC to move 16- and 17-year-olds off of

an independent Monitor, the *Nunez* Monitor, that tracks DOC's compliance with the Consent Judgement and has published detailed reports approximately every six months for the past five years.⁸⁰ By May 2020, the Monitor had issued nine reports.⁸¹

Today, there are record-low numbers of incarcerated people in the City jails.⁸² Furthermore, DOC's staff-to-inmate ratio is 1:1.3, making it the "largest staffing complement for jails in the United States."⁸³ This

Rikers Island and into facilities the DOC and the Administration of Children's Services jointly managed. See Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces Raise the Age Law Now in Effect [hereinafter *Raise the Age Law*], <https://www.governor.ny.gov/news/governor-cuomo-announces-raise-age-law-now-effect> [<https://perma.cc/725D-HDK3>] (last visited Sept. 17, 2020).

80. See *Nunez Monitor Reports*, N.Y.C. DEP'T CORRECTION, <https://www1.nyc.gov/site/doc/media/nunez-reports.page> [<https://perma.cc/9WAH-J2UH>] (last visited Sept. 18, 2020); see also Benjamin Weiser, *Lawsuit Accuses City's Jails of Condoning Inmate Abuse*, N.Y. TIMES (May 29, 2012), <https://www.nytimes.com/2012/05/30/nyregion/suit-says-new-york-citys-jails-condone-guard-beatings-of-inmates.html> [<https://perma.cc/E6UT-8GUD>]; Press Release, U.S. Dep't of Just., U.S. Att'y's Off. for the S. Dist. of N.Y., Department of Justice Takes Legal Action to Address Pattern and Practice of Excessive Force and Violence at Rikers Island Jails That Violates the Constitutional Rights of Young Male Inmates (Dec. 18, 2014), <https://www.justice.gov/usao-sdny/pr/department-justice-takes-legal-action-address-pattern-and-practice-excessive-force-and> [<https://perma.cc/GK2Q-UKUC>].

81. This Note focuses on the Eighth and Ninth Monitor Reports, dated October 28, 2019, and May 29, 2020, respectively. As of the time of this Note's publication, it is likely that another report will have been issued. Although some facts on the ground will change, it is the Author's opinion that DOC's non-compliance with the *Nunez* Consent Judgment will not be radically different.

82. At the end of the reporting period in Fiscal 2020, the average daily jail population in New York City was approximately just over 7,000. See Cynthia Brann, *What We Do*, N.Y.C. DEP'T OF CORR., PRELIMINARY MAYOR'S MGMT. REP. 61, 61 (2020) [hereinafter *PRELIMINARY MAYOR'S MGMT. REP.*], <https://www1.nyc.gov/assets/operations/downloads/pdf/pmmr2020/doc.pdf> [<https://perma.cc/Q7ZS-HJ2Z>]; see also *Average Daily Jail Population in NYC*, MAYOR'S OFF. CRIM. JUST., https://criminaljustice.cityofnewyork.us/individual_charts/average-daily-jail-population-in-nyc/ [<https://perma.cc/7WMV-U2XH>] (last visited Aug. 21, 2020) (showing a steady decrease in jail population since 1991). By May 2020, the jail population decreased to under 4,000 people, the lowest levels of people in DOC custody since 1946. See Ninth *Nunez* Monitor's Report, *supra* note 79, at 2. The decrease since 2019 is mostly due to the global COVID-19 pandemic. See *id.* at 11.

83. Eighth Report of the *Nunez* Independent Monitor at 7, *Nunez*, 11 Civ. 5845 (S.D.N.Y. Oct. 28, 2019) [hereinafter *Eighth Nunez Monitor's Report*], https://www1.nyc.gov/assets/doc/downloads/pdf/8th_Monitor_Report.pdf [<https://perma.cc/3REX-Y6RB>]. Michael Jacobson, the Executive Director of the CUNY Institute for State and Local Governance and a member of the Independent Commission on New York City Justice and Incarceration Reform, has observed that DOC staffing has stayed the same since the 1990s, even though the jail population has dropped by approximately three-quarters. See Ethan Geringer-Sameth, *Council to Examine Persistent*

staffing ratio and level of physical control should enable DOC to reduce the use of violence on incarcerated people; however, the Ninth *Nunez* Monitor's Report, published in May 2020, reveals that DOC officers have carried out the highest levels of use of force incidents since 2015.⁸⁴ The Report also announced that "the conditions that gave rise to the Consent Judgment have not abated . . . and the desired outcomes are simply not yet evident."⁸⁵ The parties filed with the court in August 2020 and signed a Remedial Order⁸⁶ in response to continued non-compliance with the original Consent Judgment.⁸⁷

II. MAPPING THE NEW YORK CITY JAIL SYSTEM

The *Nunez* Monitor is federally appointed oversight that has continuously reported DOC's inability to control officer use of force levels. However, jails in New York City already have internal mechanisms and external oversight that *should*, in theory, be able to tackle the pervasive correction officer use of force. Before analyzing the shortcomings of these internal investigations and external oversight bodies, Section II.A examines the structure of DOC itself, including the internal systems the

and Growing Violence Plaguing City Jails, GOTHAM GAZETTE (Jan. 28, 2020), <https://www.gothamgazette.com/city/9069-council-to-examine-growing-violence-plaguing-city-jails-rikers> [<https://perma.cc/3P85-9YQR>]; *Our Mission*, A MORE JUST NYC, <https://www.morejustnyc.org/about-us> [<https://perma.cc/W6Z6-BFK2>] (last visited Aug. 17, 2020). He stated, "it's probably the most richly-resourced correctional system on the planet." See Geringer-Sameth, *supra* note 83.

84. See Ninth *Nunez* Monitor's Report, *supra* note 79, at 3 (explaining that "use of force rates . . . [have] reached their highest level since the Consent Judgment went into effect"); see also Eighth *Nunez* Monitor's Report, *supra* note 83, at 3 (stating the exact same thing).

85. See Ninth *Nunez* Monitor's Report, *supra* note 79, at 3 (stating "the conditions that gave rise to the Consent Judgment have not abated since the Effective Date, and the desired outcomes are simply not yet evident").

86. See generally Remedial Consent Order Addressing Non-Compliance, *Nunez*, 11 Civ. 5845 (S.D.N.Y. Aug. 05, 2020) [hereinafter *Nunez* Remedial Consent Order], <https://www.justice.gov/usao-sdny/press-release/file/1301816/download> [<https://perma.cc/V5J9-K6PP>].

87. See Press Release, Legal Aid Soc'y, Statement on Agreement to Address City's Ongoing Non-Compliance Issues with Rikers Island Consent Judgment (Aug. 6, 2020), <https://legalaidnyc.org/wp-content/uploads/2020/08/08-06-20-1-Statement-On-Agreement-To-Address-City%E2%80%99s-Ongoing-Non-Compliance-Issues-with-Rikers-Island-Consent-Judgment.pdf> [<https://perma.cc/BX7E-83JC>]; Press Release, U.S. Dep't of Just., U.S. Att'y's Off. for the S. Dist. of N.Y., Acting Manhattan U.S. Attorney Announces Agreement to Address New York City's Ongoing Non-Compliance with Rikers Consent Judgment (Aug. 6, 2020), <https://www.justice.gov/usao-sdny/pr/acting-manhattan-us-attorney-announces-agreement-address-new-york-city-s-ongoing-non> [<https://perma.cc/RC47-KVAJ>].

Nunez Consent Judgment required DOC to implement. Then Section II.B explores oversight actors within New York City. Finally, Section II.C looks at oversight actors in New York State. Sections II.B and II.C consider what kind of authority these oversight actors have to either require DOC to confront the issue of officer use of force or to impact this crisis on their own.

A. The Department of Correction

The New York City DOC dates back to 1895,⁸⁸ and today controls 11 jail buildings (eight of which are on Rikers Island), two hospital prison wards, and court holding pens in all five boroughs.⁸⁹ As mandated by the New York City Charter, a Commissioner of Correction (the Commissioner), who has the authority to appoint two deputies,⁹⁰ heads DOC.⁹¹ The Mayor appoints and has discretionary power to remove the Commissioner.⁹² The Commissioner has “charge and management” of the City’s jails, hospital wards, and court pens.⁹³ As of 2020, DOC has a budget that supports a staff of 12,206: 10,063 are uniformed officers and 2,043 are civilians who serve various administrative functions.⁹⁴ Officers are collectively represented in a powerful union, the Correction Officers’ Benevolent Association (COBA).⁹⁵ DOC’s budget, passed by the New

88. *History of DOC*, N.Y.C. DEP’T CORRECTION, <https://www1.nyc.gov/site/doc/about/history-doc.page> [https://perma.cc/R4HX-L6L3] (last visited Aug. 17, 2020).

89. *See Facilities Overview*, N.Y.C. DEP’T CORRECTION, <https://www1.nyc.gov/site/doc/about/about-doc.page> [https://perma.cc/HM56-YG7M] (last visited Aug. 17, 2020).

90. *See* N.Y.C. CHARTER § 622.

91. *See id.* § 621.

92. *See id.* § 6.

93. *See id.* § 623.

94. N.Y. CITY COUNCIL, FINANCE DIVISION BRIEFING PAPER: DEPARTMENT OF CORRECTION 2 (2019) [hereinafter FINANCE DIVISION BRIEFING PAPER], <https://council.nyc.gov/budget/wp-content/uploads/sites/54/2019/03/072-DOC-2020.pdf> [https://perma.cc/7M3Y-SFXP].

95. The Correction Officers’ Benevolent Association (COBA), New York City’s correction officers’ union, is certified by the Office of Collective Bargaining (OCB). *See Bargaining Units*, OFF. COLLECTIVE BARGAINING, <https://www.ocb-nyc.org/guides/bargaining/> [https://perma.cc/8BGZ-XGTE] (last visited Sept. 16, 2020). The Board of Certification, one of two separate boards under OCB, “determines which union, if any, represents a majority of employees in a given unit and certifies that union as the exclusive collective bargaining representative of the bargaining unit.” *Board of Certification*, OFF. COLLECTIVE BARGAINING, <https://www.ocb-nyc.org/about/board-of-certification/> [https://perma.cc/P4P6-N9SL] (last visited Aug. 21, 2020). Representing around 9,000 DOC employees, COBA has an executive board and assigned delegates to each of the New York City jail facilities,

York City Council, is \$1.4 billion for 2020.⁹⁶ As the agency with direct control over the day-to-day operations of New York City jails, DOC — and by extension, the correction officers who work for it and its internal mechanisms that are in place for correction officers’ actions — is the focus of the *Nunez* Consent Judgment.

DOC publishes directives, or “Policy and Operating Procedures,” “that [govern] the methods of accomplishing [the] missions, objectives, and goals” of the Department and details the “full scope” of DOC’s activities.⁹⁷ DOC’s “Use of Force” directive was rewritten to conform with the *Nunez* Consent Judgment.⁹⁸ DOC also promulgated Title 39 of the Rules of the City of New York, which contains the “Inmate Rule Book.”⁹⁹ This rule book outlines the rights of incarcerated people, detailing general rights and privileges, required rules of conduct, hearing procedures, penalties, and appeals.¹⁰⁰ Directives and the Inmate Rule Book contain what DOC has officially sanctioned as appropriate staff behavior and the rights of incarcerated people within City jail facilities.

DOC has internal mechanisms to investigate instances when official procedures are not followed. The Investigation Division (ID) investigates misconduct DOC staff commit, including use of force and sexual assault allegations.¹⁰¹ The ID has civilian and officer staffers,¹⁰² and its staff has grown to 245 employees in the past few years in an effort to comply with the *Nunez* Consent Decree.¹⁰³ The *Nunez* Ninth Monitor’s report

including prison hospital wards and the Investigations Unit within DOC. *See About COBA, CORR. OFFICERS’ BENEVOLENT ASS’N, INC.*,

<https://www.cobanyc.org/correction-officers-benevolent-association-inc> [<https://perma.cc/BEX7-YD8X>] (last visited Sept. 17, 2020).

96. *See* FINANCE DIVISION BRIEFING PAPER, *supra* note 94, at 1.

97. N.Y.C. DEP’T OF CORR., DIRECTIVE NO. 0001: TABLE OF CONTENTS (1978). Different distribution rules apply to directives, 46 of which are approved for online publication. *See Directives*, N.Y.C. DEP’T CORRECTION, <https://www1.nyc.gov/site/doc/directives/directives.page> [<https://perma.cc/34G7-5FQ2>] (last visited Sept. 17, 2020).

98. *See* Heidi Grossman, Deputy Comm’r of Legal Matters, N.Y.C. Dep’t of Corr., Statement before the New York City Council (Nov. 14, 2016), <https://www1.nyc.gov/site/doc/media/nunez-settlement%20.page> [<https://perma.cc/G772-XHJW>].

99. 39 R.C.N.Y §§ 1-01–1-06.

100. *See id.* § 1-02.

101. *See Job Posting Notice for Investigator Position in Investigations Unit*, N.Y.C. DEP’T CORRECTION (July 28, 2017), https://www1.nyc.gov/assets/jointheboldest/downloads/pdf/job/DisciplineStaff_Conduct_%20II_072_2018_296183.pdf [<https://perma.cc/23CY-PZUX>].

102. *See id.*

103. *See* Ninth *Nunez* Monitor’s Report, *supra* note 79, at 171.

announced that DOC reorganized the units under ID, moving from a facility-based model to an “Intake Squad,” launched in February of 2020,¹⁰⁴ responsible for the preliminary evaluation of each use of force incident.¹⁰⁵ The Intake Squad investigator decides whether to close the investigation and recommend a disciplinary or administrative response against the officer involved, or refer the investigation for a “Full ID” investigation.¹⁰⁶ The DOC Deputy Commissioner who oversees the ID also oversees the Trials Division,¹⁰⁷ which is required to “negotiate plea dispositions and make recommendations to [the Office of Administrative Trials and Hearings]¹⁰⁸ judges” when the ID forwards a case of officer misconduct.¹⁰⁹ How quickly and objectively ID staff is able to process incidents and decide what follow up is necessary is an indicator of how well DOC, as an agency, can regulate its own behavior; the review process of use of force incidents has continually not met the standards laid out by the *Nunez* Consent Judgment.¹¹⁰

DOC must also operate in compliance with Minimum Standards BOC, the Department’s non-judicial oversight board, promulgates.¹¹¹ However, DOC can make an application to BOC to request a variance from these Minimum Standards.¹¹² BOC then holds public meetings,¹¹³ where it votes on DOC’s variance requests.¹¹⁴ A variance can be: (1) “limited,” to extend for a set period of time; (2) “continuing,” set for an indefinite amount of time; or (3) “emergency,” granted for a maximum of 30 days.¹¹⁵ A continuing variance can only be requested if, “despite . . .

104. *See id.* at 48.

105. *See id.* at 43–44.

106. *See id.* at 45–46. For a description of a “Full ID” investigation, see *Nunez* Consent Judgment, *supra* note 78, at 18–21.

107. *Leadership at DOC*, N.Y.C. DEP’T CORRECTION, <https://www1.nyc.gov/site/doc/about/leadership-at-doc.page> [<https://perma.cc/A2UK-MQ5W>] (last visited Aug. 19, 2020).

108. *See infra* Section II.B.iv.

109. *Nunez* Consent Judgment, *supra* note 78, at 27.

110. *See infra* Section III.A.

111. *See infra* Section II.B.i.

112. *See* 40 R.C.N.Y. § 1-15(a).

113. *See Meetings*, NYC BD. CORRECTION, <https://www1.nyc.gov/site/boc/meetings/meetings.page> [<https://perma.cc/G5FE-78SH>] (last visited Aug. 19, 2020).

114. *See* 40 R.C.N.Y. § 1-15(a); *see also, e.g., Record of Variance Action for July 9, 2019 Public Meeting*, NYC BD. CORRECTION, <https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2019/July/2019.7%20Record%20of%20Variance%20Action%20-%20Psychotropic%20medications%20FINAL.pdf> [<https://perma.cc/MQE3-2HKZ>].

115. 40 R.C.N.Y. § 1-15(b).

best efforts,” full compliance would “create extreme practical difficulties as a result of circumstances unique to a particular facility.”¹¹⁶ BOC can only grant an indefinite variance if it “would not create a danger or undue hardship to staff or prisoners,” or “an alternative” way of satisfying the “intent” of the minimum standard is available.¹¹⁷ Variance requests are a primary way that DOC and BOC formally interact, and require that the two agencies be in ongoing communication. Although BOC has the power to investigate DOC practices, whether BOC denied a variance request or not,¹¹⁸ it is unclear whether BOC would have the power to sue to enforce the Minimum Standards. Even though it is DOC’s staff that is on the ground carrying out the day-to-day operations in City jails, DOC, as an agency, sits in the middle of a web of oversight actors described in Sections II.B and II.C.

B. New York City Government Oversight Agencies and Officials

As Professors Michele Deitch and Michael Mushlin aptly put it, “independent, external oversight of conditions in correctional facilities is an essential tool for protecting human rights in a closed institutional environment” like New York City jails.¹¹⁹ As the Constitution of New York State cedes “home rule powers” to local governments within the state,¹²⁰ the New York City Charter outlines much of the legal authority over New York City jails to specific actors within the New York City government.¹²¹ This Section examines the authority of the BOC, the Mayor and the Mayor’s Office of Criminal Justice (MOCJ), the New York City Council and pertinent committees and commissions under its purview, the Office of Administrative Trials and Hearings (OATH), the Department of Investigation (DOI), and the Bronx District Attorney’s Office, as it pertains to DOC and DOC employees.

i. Board of Correction

The New York City BOC is a non-judicial oversight board that “regulates, monitors, and inspects the correctional facilities of the

116. *Id.* § 1-15(b)(2).

117. *Id.*

118. *See infra* Section II.B.i.

119. Deitch & Mushlin, *supra* note 9, at 248.

120. N.Y. CONST. art. IX, § 2.

121. *See generally* N.Y.C. CHARTER.

City.”¹²² Twenty years after its creation in 1957, New York City voters approved Charter Amendments that gave the Board a mandate to create Minimum Standards, or “binding and enforceable regulations,”¹²³ for the care of all people in DOC’s custody.¹²⁴ Nine people serve on the Board for six-year, staggered terms.¹²⁵ To scale back the Mayor’s dominance, the 1977 Charter Amendments diversified who selects BOC members¹²⁶ — now, the Mayor chooses three, the City Council chooses three, and the two departments of the New York State Appellate Court nominate the last three members.¹²⁷ The BOC members have “for-cause” removal protection, meaning they can only be removed for neglect of their duties.¹²⁸ In 2020, the Board’s budget was \$3.1 million,¹²⁹ which is only 0.22% of the amount of money allocated to DOC.

The BOC’s ability to publicize information is key to its oversight role. It has the authority to inspect or visit any facility under DOC’s jurisdiction at-will, read all agency records, and evaluate DOC’s performance.¹³⁰ Importantly, the Board also has subpoena power,¹³¹ entitling it to any piece of information or individual testimony by those in DOC. In addition, the Board must submit a report to the Mayor, the New York City Council, and the DOC Commissioner at least once per year with “findings and recommendations” for the better administration of jails.¹³² The power to compel DOC employees to appear publicly at Board

122. *About*, NYC BD. CORRECTION, <https://www1.nyc.gov/site/boc/about/about.page> [<https://perma.cc/9LDV-NB9K>] (last visited Aug. 19, 2020).

123. Richard Wolf, *Reflection on a Government Model of Correctional Oversight*, 30 PACE L. REV. 1610, 1612–13 (2010).

124. See John Brickman, *The Role of Civilian Organizations with Prison Access and Citizen Members: The New York Experience*, 30 PACE L. REV. 1562, 1564–65 (2010).

125. N.Y.C. CHARTER § 626(a).

126. See Brickman, *supra* note 124, at 1566.

127. N.Y.C. CHARTER § 626(a).

128. See *id.* In addition to the nine members, the Board has a staff that includes teams under the Executive Director, General Counsel, Monitoring, and Research. See *Board Staff*, NYC BD. CORRECTION, <https://www1.nyc.gov/site/boc/about/board-staff.page> [<https://perma.cc/R44P-4K9S>] (last visited Aug. 19, 2020). This staff consists of fewer than 30 people who work either from an office in New York City’s main municipal building or in an office trailer on Rikers Island. See *id.* Compare this figure to DOC staff, which is approximately 12,000. See FINANCE DIVISION BRIEFING PAPER, *supra* note 94, at 7.

129. See N.Y. CITY COUNCIL, FINANCE DIVISION BRIEFING PAPER: BOARD OF CORRECTION 2 (2019), <https://council.nyc.gov/budget/wp-content/uploads/sites/54/2019/03/073-BOC-2020.pdf> [<https://perma.cc/C92T-7CQZ>].

130. N.Y.C. CHARTER § 626(c).

131. See *id.* § 626(g).

132. *Id.* § 626(d).

meetings, and having the right to any DOC materials, enables BOC to direct public and press attention to the issues going on in New York City jails.

As mentioned above, the City Charter charges the Board with establishing Minimum Standards for the “care, custody, correction, treatment, supervision, and discipline” for the people incarcerated in New York City jails, codified as Title 40 in the Rules of the City of New York.¹³³ These Minimum Standards regulate a wide range of issues, from access to health and mental health care to the amount of time DOC can place an individual in punitive segregation or solitary confinement.¹³⁴ However, as Section III.B discusses, the Board has not promulgated Minimum Standards for officer use of force.¹³⁵ If the Department cannot comply with something dictated in these Minimum Standards, DOC must make a variance request, which is heard and decided on at the Board’s public meetings, where activists, experts, and elected officials usually comment publicly.¹³⁶ Again, these regular public meetings emphasize the Board’s ability to drive news coverage and put otherwise hidden issues in City jails on display.

ii. Office of the Mayor

As the chief executive officer of New York City,¹³⁷ the Mayor can impact the City’s policy priorities mainly through staffing decisions and budget priorities. The heads of mayoral agencies serve at the Mayor’s pleasure and he, therefore, has the power to hire and fire the Commissioner of Correction.¹³⁸ The Mayor also has the authority to appoint Deputy Mayors with whatever “duties and responsibilities” he assigns.¹³⁹ For example, the First Deputy Mayor “directly supervises and

133. *See About*, NYC BD. CORRECTION, *supra* note 122. The Mayor and DOC Commissioner have the opportunity to review and comment on Minimum Standards before the Board publishes them. *See* N.Y.C. CHARTER § 626(e).

134. *See generally* 40 R.C.N.Y. §§ 1-01–5-42.

135. *See infra* Section III.B.

136. *See, e.g., 2019 Meetings*, NYC BD. CORRECTION, <https://www1.nyc.gov/site/boc/meetings/2019-meetings.page> [<https://perma.cc/AB3L-5Q4Q>] (last visited Aug.19, 2020). The live recordings, agendas, and decisions made in these meetings are posted on the Board’s website. *See id.*

137. *See* N.Y.C. CHARTER § 3.

138. *See id.* § 6.

139. *Id.* § 7.

coordinates with the Department of Correction.”¹⁴⁰ The Mayor can also reorganize any agencies under his purview,¹⁴¹ which include the MOCJ,¹⁴² the Mayor’s Office of Management and Budget (OMB), and the Mayor’s Office of Labor Relations (OLR). Each of these three offices plays a different role in the operation, direction, and workforce of New York City jails.

The MOCJ has the duty to advise the Mayor regarding any “criminal justice programs and activities” within New York City.¹⁴³ Within the MOCJ, the Justice Implementation Task Force is dedicated to the “Smaller, Safer, Fairer” plan to close Rikers Island and build four borough-based jails facilities with a maximum capacity of 3,300 total.¹⁴⁴ The Justice Implementation Task Force has three working groups: Safely Reducing the Size of the Jail Population, Culture Change, and Design and Facilities.¹⁴⁵ OMB assists the Mayor with his duty to propose a preliminary and executive budget.¹⁴⁶ As dictated by the Charter, the Mayor plays a significant role in creating the City’s operating budget, coordinating the reported needs of every government agency in the City,¹⁴⁷ and negotiating with the New York City Council to pass a budget each year.¹⁴⁸ OLR represents the Mayor “in the conduct of all labor relations between the City of New York and labor unions representing employees of the City.”¹⁴⁹ Therefore, through collective bargaining

140. *First Deputy Mayor, OFF. MAYOR,* <https://www1.nyc.gov/office-of-the-mayor/dean-fuleihan.page> [https://perma.cc/HE89-QVHK] (last visited Aug. 19, 2020).

141. *See* N.Y.C. CHARTER § 11.

142. *Id.* § 13.

143. *Id.*

144. *See The Justice Implementation Task Force, MAYOR’S OFF. CRIM. JUST.,* <https://criminaljustice.cityofnewyork.us/programs/justice-implementation-task-force/> [https://perma.cc/6CAK-L5BU] (last visited Aug. 19, 2020).

145. *See* SMALLER SAFER FAIRER: A ROADMAP TO CLOSING RIKERS ISLAND, *supra* note 43, at 8–9.

146. *See* N.Y.C. CHARTER § 225(a)–(b). The New York City budget schedule is laid out in the New York City Charter. *See New York City Budget Cycle, MAYOR’S OFF. MGMT. & BUDGET,* <https://www1.nyc.gov/site/omb/about/new-york-city-budget-cycle.page> [https://perma.cc/ARP2-VF8Z] (last visited Aug. 19, 2020).

147. *See* N.Y.C. CHARTER § 103.

148. *See id.* § 254. The Mayor has veto power over changes to the budget, but this can be overridden by a two-thirds vote in the Council. *See id.* § 255. New York City Council’s Committee on Finance is tasked with reviewing and modifying the City’s budget. *See Committee on Finance, N.Y. CITY COUNCIL,* <https://council.nyc.gov/committees/finance/> [https://perma.cc/9E47-E86X] (last visited Aug. 19, 2020).

149. *About OLR, OFF. LAB. RELS.,* <https://www1.nyc.gov/site/olr/about/about-olr.page> [https://perma.cc/EHW9-MPWF] (last visited Aug. 19, 2020). The Executive Orders dictate the Mayor’s legal authority. *See id.*

agreements, COBA, the union that represents thousands of DOC employees, contracts with OLR.¹⁵⁰ It is the Mayor who dictates the administration's priorities when coordinating with mayoral agencies like DOC, when proposing and negotiating the content the City's operating budget, and when bargaining with city employees.

iii. New York City Council

The New York City Council (the Council) is the “legislative body of the city”¹⁵¹ and operates as an “equal partner” to the Mayor.¹⁵² The legal relationship between the Mayor and the Council is comparable to that of the President and Congress on the federal level.¹⁵³ The Council is composed of 51 Council Members, each elected from a district in New York City.¹⁵⁴ The Council also has a popularly elected public advocate,¹⁵⁵ who does not get a vote but acts as an ombudsman for the City government.¹⁵⁶ The Council currently includes 38 standing committees that have jurisdiction over different matters and city agencies.¹⁵⁷ For example, the Committee on Criminal Justice oversees DOC, BOC, and the

150. See, e.g., *Executed Contract: Correction Officers*, OFF. OF LAB. RELS. (Jan. 6, 2017) [hereinafter COBA Agreement], <https://www1.nyc.gov/assets/olr/downloads/pdf/collectivebargaining/coba-final-agreement-2011-2019.pdf> [https://perma.cc/TM75-EZ2K]. The last contract expired on February 28, 2019, and negotiations are still pending. See *President's Message*, COBA NEWS, Apr. 2019, at 3, https://www.cobanyc.org/sites/default/files/files/COBA_Newsletter_April_2019.pdf [https://perma.cc/X3U9-BXAU]. In addition to outlining requirements for salary, vacation, and health benefits, this expired contract also ensures the existence of a labor management committee to interface with OLR. See COBA Agreement, *supra* note 150, at 35. It also created the Rikers Island Central Arrest Unit in coordination with the Bronx District Attorney to “pursue re-arrest of aggravated harassment and assault on Correction Officers committed by [incarcerated persons] while [in jail].” *Id.* at 64.

151. N.Y.C. CHARTER § 21. The Council has the power to amend the New York City Charter. See *id.* § 40.

152. *What We Do*, N.Y. CITY COUNCIL, <https://council.nyc.gov/azbout/> [https://perma.cc/HA5M-ZP24] (last visited Aug. 19, 2020).

153. See *id.*

154. See *Council Members & Districts*, N.Y. CITY COUNCIL, <https://council.nyc.gov/districts/> [https://perma.cc/EX5L-F7LV] (last visited Aug. 19, 2020).

155. See N.Y.C. CHARTER § 24. The Council also elects a speaker who presides over Council meetings. See *id.* § 44.

156. See *Duties of the Public Advocate Office*, N.Y.C. PUB. ADVOC. JUMAANE D. WILLIAMS, <https://www.pubadvocate.nyc.gov/about#duties/> [https://perma.cc/Z9L3-3NAJ] (last visited Sept. 17, 2020) (“In the event of a vacancy or incapacity of the mayor, the public advocate is first in line to become mayor.”).

157. See *Committees*, N.Y. CITY COUNCIL, <https://council.nyc.gov/committees/> [https://perma.cc/X8BM-UCZA] (last visited Aug 24, 2020).

Department of Probation.¹⁵⁸ As DOC falls within its purview, the Committee on Criminal Justice has the power of “investigation and oversight” and must review DOC’s activities, efficiency, and appropriated budget.¹⁵⁹ Furthermore, the Committee is responsible for holding at least one hearing per year on the Department’s activities.¹⁶⁰ As with every committee in the Council, this committee can demand any government-employed person to appear under oath and compel the production of any document it deems necessary.¹⁶¹

The former Speaker of the City Council, Melissa Mark-Viverito, convened the Independent Commission on New York City Criminal Justice and Incarceration Reform, which issued a blueprint, *A More Just New York City*, for improving New York City’s criminal justice system in 2017.¹⁶² This proposal called for closing Rikers Island and building new, borough-based facilities, on top of other reforms.¹⁶³ As outlined above, the de Blasio Administration then issued its plan for closing Rikers and convened the Justice Implementation Task Force under the MOCJ.¹⁶⁴ In October 2019, the Council officially voted to close Rikers Island¹⁶⁵ and passed Local Law 2019/192, which requires the MOCJ to submit a report twice per year and BOC to submit a report once per year on the status of closing Rikers Island.¹⁶⁶

158. See *Committee on Criminal Justice*, N.Y. CITY COUNCIL, <https://council.nyc.gov/committees/criminal-justice/> [<https://perma.cc/QE2Z-F2J6>] (last visited Aug 24, 2020).

159. N.Y.C. CHARTER § 29(a)(1)–(2) (this section also gives each *individual* City Council member power of investigation and oversight, and, therefore, any Council member can visit City jails at any time); see, e.g., Samar Khursid, *Now Overseeing Closure, Council Member Makes First Visit to Rikers*, GOTHAM GAZETTE (Mar. 7, 2018), <https://www.gothamgazette.com/city/7516-now-overseeing-rikers-closure-council-member-makes-first-visit> [<https://perma.cc/4AG7-WTYK>].

160. See N.Y.C. CHARTER § 29(a)(1)–(2)

161. See *id.* § 29(b).

162. INDEP. COMM’N ON N.Y.C. CRIM. JUST. & INCARCERATION REFORM, A MORE JUST NEW YORK CITY 14 (2017) [hereinafter A MORE JUST NEW YORK CITY], <https://static1.squarespace.com/static/5b6de4731aef1de914f43628/t/5b96c6f81ae6cf5e9c5f186d/1536607993842/Lippman+Commission+Report+FINAL+Singles.pdf> [<https://perma.cc/6XBW-CYVX>].

163. See FINANCE DIVISION BRIEFING PAPER, *supra* note 94, at 12–14.

164. See *supra* Section II.B.ii.

165. See Richard Gonzalez, *City Council Votes to Close New York’s Notorious Rikers Island Jail Complex*, NPR (Oct. 17, 2019, 8:32 PM), <https://www.npr.org/2019/10/17/771167909/new-york-to-close-citys-notorious-rikers-island-jail-complex> [<https://perma.cc/YH57-REVX>]; see also SMALLER SAFER FAIRER: A ROADMAP TO CLOSING RIKERS ISLAND, *supra* note 43.

166. N.Y. CITY COUNCIL, LEGIS. RSCH. CTR., <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4146410&GUID=8E3F4ED>

iv. Office of Administrative Trials and Hearings

If DOC seeks to take disciplinary action against one of their employees, that employee has a right to a hearing in front of an administrative law judge (ALJ) in the Office of Administrative Trials and Hearings (OATH).¹⁶⁷ This is because both uniformed and non-uniformed DOC employees take an exam as part of the application process,¹⁶⁸ and are therefore designated as “competitive class” employees under the New York State Civil Service Law.¹⁶⁹ OATH’s mandate is to “conduct adjudicatory hearings for all agencies of the city unless otherwise provided for by executive order, rule, law or pursuant to collective bargaining agreements.”¹⁷⁰ OATH has also promulgated rules governing these disciplinary hearings¹⁷¹ that give ALJs particular privileges. For example, ALJs have the right to request that the “personnel file, abstract of a personnel file, driver record, owner record, or other similar or analogous file” be provided for his or her review if not previously entered into evidence.¹⁷² However, the DOC Commissioner ultimately still retains the “authority to accept the factual findings and penalty recommendation or to modify them, as appropriate” after an OATH hearing.¹⁷³

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[<https://perma.cc/8E3E-JJMQ>].

167. See N.Y. CIV. SERV. LAW § 75(1) (McKinney 2020).

168. See *Become a Correction Officer*, DEP’T CORRECTION, <https://www1.nyc.gov/site/jointheboldest/officer/apply-now.page> [<https://perma.cc/8HKW-22UV>] (last visited Sept. 17, 2020); *Join the Boldest: All Open Jobs*, DEP’T CORRECTION, <https://www1.nyc.gov/site/jointheboldest/civilian/open-roles.page> [<https://perma.cc/72GC-7SXF>] (last visited Aug. 17, 2020).

169. N.Y. CIV. SERV. LAW § 44 (McKinney 2020).

170. N.Y.C. CHARTER § 1048(1).

171. See 48 R.C.N.Y. § 1-03.

172. *Id.* § 1-47(b). COBA’s collective bargaining agreement states that “the past disciplinary or work record of an employee may not be revealed during a Section 75 . . . disciplinary proceeding until a determination as to guilt or innocence of the member has been determined.” COBA Agreement, *supra* note 150. However, Title 48, § 1-47(b) specifies that an ALJ may request such records “upon determining that the petition” or document requesting the administrative hearing, “will be sustained in whole or in part.” 48 R.C.N.Y. § 1-47(b). ALJs also maintain the right to obtain these records *ex parte*. See *id.* § 1-47(b).

173. Eighth Nunez Monitor’s Report, *supra* note 83, at 184.

v. Department of Investigation

The DOI is New York City's independent inspector general and is a law enforcement agency.¹⁷⁴ Originally created in 1873 to root out corruption in City government,¹⁷⁵ DOI's authority is broad. The Charter empowers the agency's commissioner to "make *any* study or investigation which in his opinion may be in the best interests of the city, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency."¹⁷⁶ DOI, therefore, has an incredible amount of discretion to look into an agency's affairs that is widely recognized as having internal challenges, such as DOC.

DOI has broad investigative and enforcement authority. First, DOI has Inspectors General Units at all New York City agencies called squads, that investigate and can choose to coordinate prosecution of City personnel for illegal behavior.¹⁷⁷ Squad 1 is specifically charged with conducting "system-wide" investigations and making recommendations to improve DOC, with a goal of "improving conditions in city jails."¹⁷⁸ DOI is authorized to take into consideration any civil litigation brought against individual DOC officers, DOC, or the City, notices of claim received by or settled by the City's comptroller about DOC, and any criminal charges brought against individual officers.¹⁷⁹ Second, DOI has the duty to have a complaint bureau within DOC to receive complaints.¹⁸⁰ Third, the DOC Commissioner must act in coordination with the specific Inspector General assigned to DOC, who may bring formal and informal disciplinary proceedings against any DOC employee.¹⁸¹ Finally, DOI can

174. *DOI's Mission and History*, DEP'T INVESTIGATION, <https://www1.nyc.gov/site/doi/about/mission.page> [<https://perma.cc/F7ZB-L8NH>] (last visited Aug. 17, 2020).

175. *See id.*

176. N.Y.C. CHARTER § 803(b) (emphasis added).

177. *Inspectors General*, DEP'T INVESTIGATION, <https://www1.nyc.gov/site/doi/offices/inspector-general.page> [<https://perma.cc/GXG9-CERD>] (last visited Aug. 17, 2020).

178. N.Y.C. CHARTER § 803(d)(1). The sub-section of DOI, or "squad," responsible for Monitoring DOC is Squad 1. *See Squad One*, DEP'T INVESTIGATION, <https://www1.nyc.gov/site/doi/offices/squad-one.page> [<https://perma.cc/9JFH-ZJCB>] (last visited Aug. 17, 2020).

179. *See* N.Y.C. CHARTER § 803(d)(1).

180. *See id.* § 804.

181. *See Legal and Executive Authority: Executive Order No. 105*, DEP'T INVESTIGATION, <https://www1.nyc.gov/site/doi/about/legal-executive-authority.page#eo105> [<https://perma.cc/L4ES-KGYM>] (last visited Sept. 17, 2020).

also refer cases against DOC employees to the appropriate District Attorney for criminal prosecution.¹⁸²

vi. Bronx District Attorney's Office

The Bronx District Attorney (Bronx DA) has a trailer office on Rikers Island, which, as of 2018, housed 12 prosecutors and two investigators.¹⁸³ Two bureaus within the investigations division of the Bronx DA's office are charged with handling subject matters that stem from crime within the jail system.¹⁸⁴ First, the Rikers Island Prosecution Bureau targets "criminal networks" within City jails and "prosecutes criminal offenses committed on Rikers."¹⁸⁵ As part of this bureau, the Rikers Island Central Arrest unit was created by the City's contract with COBA.¹⁸⁶ According to a memorandum of understanding between COBA and the City, the Arrest Unit pursues the "re-arrest for aggravated harassment and assault on Correction Officers committed by [incarcerated persons] while [in jail]."¹⁸⁷ Second, the Public Integrity Unit is "responsible for examining allegations of misconduct by correction officers,"¹⁸⁸ and specifically, "investigates allegations of excessive force by uniformed public servants."¹⁸⁹ There is also a Correction Intelligence Bureau, which has the general task of "[investigating] crime in the jails."¹⁹⁰ By setting

182. See Eighth Nunez Monitor's Report, *supra* note 83, at 160 ("The Department shall promptly refer any Use of Force Incident to DOI for further investigation when the conduct of Staff appears to be criminal in nature.").

183. See James C. McKinley Jr., *Seeking to Curb Jail Violence, Bronx Prosecutors Set up Shop on Rikers Island*, N.Y. TIMES (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/nyregion/rikers-bronx-prosecutor-violence.html> [<https://perma.cc/A2SS-T5NP>].

184. See *Investigations Division*, OFF. BRONX DIST. ATT'Y, <https://www.bronxda.nyc.gov/html/bureaus/investigations-division.shtml> [<https://perma.cc/6VWF-EZNY>] (last visited Sept. 17, 2020) (stating the Public Integrity Bureau and Rikers Island Prosecution Bureau handle crime originating in City jails).

185. *Id.*

186. See Press Release, Off. of the Mayor, Mayor de Blasio Announces Tentative Contract Agreement with Correction Officers' Benevolent Association (Dec. 31, 2015), <https://www1.nyc.gov/office-of-the-mayor/news/985-15/mayor-de-blasio-tentative-contract-agreement-correction-officers-benevolent> [<https://perma.cc/SEU9-TM88>].

187. COBA Agreement, *supra* note 150; see also Michael Schwartz, *New York City and Correction Officers Reach Tentative Contract Deal*, N.Y. TIMES (Dec. 31, 2015), <https://www.nytimes.com/2016/01/01/nyregion/new-york-city-correction-officers-reach-tentative-contract-deal.html> [<https://perma.cc/5M83-MFGU>] (finding this new contract provision allows the Central Arrest Unit to prosecute inmates more efficiently when they assault correction officers).

188. McKinley, *supra* note 183.

189. *Investigations Division*, *supra* note 184.

190. McKinley, *supra* note 183.

up an office directly on Rikers Island, this branch of the Bronx DA has a unique closeness to the day-to-day happening of City jails.

C. New York State Oversight

Both the governor's agenda and New York State Legislature's laws undoubtedly have an effect on criminal justice in New York City.¹⁹¹ Committees within the New York State Senate and Assembly also focus on issues affecting incarcerated people. Further, the Corrections Association of New York (CANY), which is one of only two independent organizations with authority to visit and report on State prisons,¹⁹² has existed since 1844, playing an important role in the history of advocating for prisoners' rights in all of New York State.¹⁹³ This Section, however, only examines the New York State Commission of Correction, as it is an oversight body that explicitly has authority over all of the jails and prisons in New York State.

i. The State Commission of Correction

The State's legislative branch¹⁹⁴ created the New York State's Commission of Correction (SCOC or the Commission), which sits within the State's executive branch.¹⁹⁵ The Commission has three "deliberative"

191. See *Raise the Age Law*, *supra* note 79.

192. See Jack Beck, *Role of the Correctional Association of New York in a New Paradigm of Prison Monitoring*, 30 PACE L. REV. 1572, 1573 (2010); see also *Who We Are*, CORR. ASS'N N.Y., <https://www.correctionalassociation.org/about-cany> [<https://perma.cc/WR7H-JAVN>] (last visited Aug. 20, 2020).

193. See *History and Impact*, CORR. ASS'N N.Y., <https://www.correctionalassociation.org/history-and-impact> [<https://perma.cc/C28J-RXDS>] (last visited Aug. 17, 2020).

194. The New York State Legislature consists of a senate and an assembly. N.Y. CONST. art. III, § 1. The senate has a standing committee on Crime Victims, Crime, and Correction that issues reports and holds public meetings. See *Crime Victims, Crime and Correction*, N.Y. STATE SENATE, <https://www.nysenate.gov/committees/crime-victims-crime-and-correction> [<https://perma.cc/85P9-7AN5>] (last visited Sept. 17, 2020). The Assembly's Standing Committee on Correction can hold hearings and issue reports on jails and prisons in the state. See *Standing Committee on Correction*, N.Y. STATE ASSEMBLY, <https://nyassembly.gov/comm/?id=10> [<https://perma.cc/EQ6W-GLYK>] (last visited Sept. 17, 2020). Given the lack of public material produced by these standing committees with respect to New York City jails, however, this Note will not address them beyond this footnote.

195. See N.Y. CONST. art. V, § 4 ("Except as otherwise provided in this constitution, the heads of all other departments and the members of all boards and commissions, excepting temporary commissions for special purposes, shall be appointed by the governor.").

members¹⁹⁶ appointed by the Governor and confirmed with the advice and consent of the Senate, with each member serving five-year terms.¹⁹⁷ The Governor chooses one of these members to be the chairman, or chief executive officer.¹⁹⁸ The two other deliberative members serve as the chairs of the Medical Review Board and Citizens' Policy and Complaint Review Council.¹⁹⁹ The Medical Review Board makes recommendations for "improving the delivery of health care to detainees and sentenced offenders."²⁰⁰ This duty exists because SCOC has the duty to "investigate and review the cause and circumstances surrounding the death of any inmate of a correctional facility."²⁰¹

SCOC writes "reports [for] the Governor . . . of New York,"²⁰² as the Commission is charged with "establishing minimum standards for the safe and proper operation of local jails and the inspection and enforcement of local facilities to ensure that facilities are meeting all legal requirements."²⁰³ SCOC can approve or reject construction plans for correctional facilities.²⁰⁴ Further, SCOC has the power to contract,²⁰⁵ issue subpoenas,²⁰⁶ and "[c]lose any correctional facility which is unsafe, unsanitary or inadequate."²⁰⁷ This makes the scope of SCOC's authority to affect the on-the-ground realities in New York State jails quite broad.

196. *Medical Review Board and Citizen's Policy and Complaint Review Council*, N.Y. STATE, COMM'N CORRECTION [hereinafter *Medical Review Board*], <https://scoc.ny.gov/mrbpcrc.htm> [<https://perma.cc/2Z3A-CMQK>] (last visited Aug. 17, 2020).

197. *See* N.Y. CORRECT. LAW § 41(1)–(2) (McKinney 2020).

198. *See id.* §§ 41(1), 44(1).

199. *See Medical Review Board*, *supra* note 196.

200. *Id.*

201. N.Y. CORRECT. LAW § 47.

202. N.Y. STATE, COMM'N OF CORR., THE WORST OFFENDERS, REPORT: THE MOST PROBLEMATIC CORRECTIONAL FACILITIES IN NEW YORK STATE 1–2 (2018) [hereinafter THE WORST OFFENDERS], <https://scoc.ny.gov/pdfdocs/Problematic-Jails-Report-2-2018.pdf> [<https://perma.cc/2KTN-Z2ZH>].

203. *Id.* at 1. As of January 2020, there is a bill pending in the New York State Legislature which would require SCOC to present these reports to both the Assembly and the Senate, as well as to the Governor. *See* N.Y. Assemb. 9062, 243rd Leg. Sess. (N.Y. 2019).

204. *See* N.Y. CORRECT. LAW § 45(10).

205. *See id.* § 45(14).

206. *Id.* § 46(2).

207. *Id.* § 45(8)(a).

III. OVERSIGHT'S ABDICATION OF RESPONSIBILITY

Part II outlined the systems within DOC and the non-DOC oversight actors responsible for setting the standards for how incarcerated people are treated and can potentially hold DOC accountable. Part III catalogs DOC's and oversight actors' responses to the statistics of violence within jails, with the aim to ultimately show that at every stage, DOC and its oversight have failed to meaningfully address "unnecessary and excessive"²⁰⁸ officer use of force. Instead, DOC prefers to focus on future goals and vague promises of a better system tomorrow. Part III argues that New York City's carceral system has met the crisis of violence in its jails with relative silence.

A. "The System Is Overwhelmed"²⁰⁹

DOC's own data demonstrates a steady increase in use of force by correction officers in recent years.²¹⁰ As stated above, the "use of force rates . . . reached their highest levels" since 2015, the year the *Nunez* Consent Judgment went into effect to address this exact issue.²¹¹ The Monitor has stated DOC's failure to bring staff to comply with the consent decree is "driven in large part by the overreliance on Probe Teams,"²¹² and alarms the use of unnecessarily painful escort techniques, unnecessary and improper use of [Chemical Agent or "OC"] spray,²¹³ and hyper-confrontational staff behaviors.²¹⁴ The Monitor also notes that these "problems are compounded by uniform leadership's inability to identify these aspects of Staff misconduct, thus failing to address them with their subordinates."²¹⁵ Another major hurdle regarding staff

208. Ninth *Nunez* Monitor's Report, *supra* note 79, at 3.

209. Eighth *Nunez* Monitor's Report, *supra* note 83, at 5.

210. See PRELIMINARY MAYOR'S MGMT. REP., *supra* note 82, at 62; see also Erin Durkin, *New Stats Show Surge in Violence at Rikers Island*, POLITICO (Sept. 17, 2019, 6:51 PM), [https://www.politico.com/states/new-york/albany/story/2019/09/17/new-stats-show-surge-in-violence-at-rikers-island-1193798#:~:text=Advertisement-\[https://perma.cc/REL8-5GNB\]](https://www.politico.com/states/new-york/albany/story/2019/09/17/new-stats-show-surge-in-violence-at-rikers-island-1193798#:~:text=Advertisement-[https://perma.cc/REL8-5GNB]).

211. See Ninth *Nunez* Monitor's Report, *supra* note 79, at 3.

212. Probe teams are when a "large numbers of Staff respond to a centralized location (generally in or near intake) to suit up in heavy riot gear (helmet, prison vest, baton, poly-carbon shield, MK-9, chemical agent and breathing apparatus)." *Id.* at 28. "Although by policy, a Probe Team should consist of four to seven Officers and a Captain, often significantly larger numbers of Staff (up to 30) respond." *Id.*

213. When someone is exposed to OC spray, that person must go through decontamination. See *id.* at 109 n.115.

214. See *id.* at 3.

215. *Id.* at 3-4.

discipline is the significant backlog of use of force incidents that require investigation.²¹⁶ The Monitor continues to report that ID is “overwhelmed.”²¹⁷ For example, between January 2019 and July 2019, approximately 2,000 instances of officer use of force against incarcerated individuals — many of which timed out of the administrative disciplinary hearing 18-month statute of limitations — went uninvestigated.²¹⁸ Further, by April 2020, a total of 8,400 preliminary and full investigations of use of force incidents remained pending.²¹⁹

In 2016, DOC issued a 14-point plan — an “Anti-Violence Reform Agenda.”²²⁰ Further, DOC’s internal policy, or directive, regarding use of force — that complies with the requirements of the *Nunez* Consent Judgment — went into effect in January of 2017.²²¹ Despite its staff-to-inmate ratio of 1:1.3,²²² in 2019, DOC embraced the reasoning that “as the . . . overall [incarcerated] population [in jail declines], [it] is managing a population made up of individuals with more serious offenses.”²²³ Most recently, in an appearance before the BOC at its January 2020 public meeting, DOC Commissioner Cynthia Brann and General Counsel Heidi Grossman responded to the troubling fact of ever-increasing rates of officer use of force, emphasizing that the Department was making progress and in partial or substantial compliance with 85% of the provisions outlined in the *Nunez* consent judgment.²²⁴ However, as the Ninth *Nunez* Monitor report observes, DOC remains non-compliant “with four of the most consequential provisions of the Consent Judgment: (1) implementation of the Use of Force Policy . . . ;

216. *See id.* at 174.

217. *Id.*

218. *See* Eighth *Nunez* Monitor’s Report, *supra* note 83, at 131–32 (“Pursuant to [New York] Civil Service Law . . . § 75 . . . ‘no removal or disciplinary proceeding shall be commenced more than eighteen months after the occurrence of the alleged incompetency or misconduct complained of and described in the charges . . . such limitations shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime.’”).

219. *See* Ninth *Nunez* Monitor’s Report, *supra* note 79, at 41.

220. *See* *DOC’s 14-Point Antiviolence Reform Agenda*, DEP’T CORRECTION, https://www1.nyc.gov/assets/doc/downloads/press-release/2016_Com_%20PontePresentation.pdf [<https://perma.cc/ZB2P-LDA8>] (last visited Aug. 23, 2020).

221. *See supra* Section II.A.

222. Eighth *Nunez* Monitor’s Report, *supra* note 83, at 7.

223. PRELIMINARY MAYOR’S MGMT. REP., *supra* note 82, at 72.

224. *See generally* *January 14, 2020 Public Meeting Minutes*, NYC BD. CORRECTION (Jan. 14, 2020), <https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2020/january/minutes-202001.pdf> [<https://perma.cc/4L2P-APDU>].

(2) timely and quality investigations . . . ; (3) meaningful and adequate discipline . . . and (4) reducing violence among Young Inmates.”²²⁵ Brann and Grossman offered several reasons for the increase in use of force: that the new definition of “use of force” adopted through the Consent Judgement captures more instances than previously understood to actually be “force” by DOC staff, and, therefore, there is ongoing confusion;²²⁶ that the increased number of cameras in DOC facilities lead to the counting of more instances;²²⁷ and that, even if use of force rates have gone up, the number of incidents resulting in serious injuries have gone down and allegations of use of force by incarcerated people have also gone down.²²⁸ DOC, in concert with the Monitor, devised a plan for the review of use of force called the “Intake Squad,” which aims to review all incidents within 25 days of their occurrence, complete preliminary investigations in a more streamlined process,²²⁹ and act in concert with attorneys in the Trials Division.²³⁰ After almost five years of Monitorship, the system remains overwhelmed.

B. No Minimum Standards

The BOC has not promulgated Minimum Standards regarding use of force, and even if the Board were to promulgate new Minimum Standards, it would not have the authority to fire DOC staff or shut down facilities for non-compliance.²³¹ However, following the Eighth *Nunez* Monitor Report, BOC did ask DOC to present on the report’s findings.²³² Members of the Board found DOC’s presentation insincere, as it was inconsistent with the overall negative Monitor’s report.²³³ The Board requested the DOC Commissioner herself speak to the Board to answer for the report’s

225. Ninth *Nunez* Monitor’s Report, *supra* note 79, at 4; *see also supra* note 79 and accompanying text (discussing the Southern District of New York’s intervention after finding an unconstitutional pattern and practice of excessive force against 16- and 17-year-olds).

226. *See January 14, 2020 Public Meeting Minutes, supra* note 224, at 37.

227. *See id.*

228. *See id.* at 38.

229. *See Ninth Nunez Monitor’s Report, supra* note 79, at 43–44.

230. *See id.* at 48.

231. *See supra* Section II.B.ii.

232. *See November 12, 2019 Public Meeting Minutes, NYC Bd. CORRECTION* (Nov. 12, 2019),

<https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2019/November/minutes-20191112.pdf> [<https://perma.cc/493H-HAPC>].

233. *See id.* at 12.

contents.²³⁴ Appearing in January 2020, Commissioner Brann and General Counsel Grossman contended that the Department was in compliance with 85% of the Consent Judgment’s requirements.²³⁵ Board member Dr. Robert Cohen, after pointing out that some of DOC leadership’s “logic [was] impossible to understand,”²³⁶ then asked whether DOC leadership actually “[has] the capacity” to meet the mandates of the *Nunez* Consent Decree, given rising use of force rates after four years of efforts and the apparent training of 10,000 DOC employees.²³⁷ Dr. Cohen also asked if BOC Board members, the Commissioner, and the independent Monitor’s team could view relevant video footage of correction officers engaging in use of force, so they could bridge the “real disconnect” between DOC staff and the Monitor’s understanding of what actually constitutes inappropriate use of force.²³⁸

In January of 2019, BOC issued a report that, among other metrics, found there was a 260% increase in the total number of injuries related to staff use of force in the last ten years; the numbers went from 1,981 injuries, in 2008, to 7,139 in 2018.²³⁹ This is all despite a 32% drop in the

234. *See id.*

235. *See January 14, 2020 Public Meeting Minutes*, *supra* note 224, at 30; *supra* note 225 and accompanying text.

236. *Id.* at 42. The City Council appointed Dr. Robert Cohen to the Board, for the first time in 2009, and to a second six-year term in 2017. *See* Eileen Grench & Rosa Goldensohn, *Mayor ‘Interfered’ with Jails Overseer on Solitary Confinement, Member Charges*, CITY (Oct. 22, 2019, 10:17 PM), <https://www.thecity.nyc/2019/10/22/21210740/mayor-interfered-with-jails-overseer-on-solitary-confinement-member-charges> [<https://perma.cc/LPA7-2V32>]. Dr. Cohen has experience working as a Director of the Montefiore Rikers Island Health Services on Rikers Island, among his leadership experience, and has served as a federal court Monitor to oversee medical care for incarcerated people in five states, including New York. *See Board Members, Robert L. Cohen, M.D.*, NYC BD. CORRECTION, <https://www1.nyc.gov/site/boc/about/robert-l-cohen-md.page> [<https://perma.cc/Q3QH-YXV3>] (last visited Aug. 24, 2020).

237. *See January 14, 2020 Public Meeting Minutes*, *supra* note 224, at 43–44.

238. *See id.* at 49. Earlier in the meeting, Brann and Grossman pointed to confusion among DOC staff about what constitutes use of force, given the Consent Judgment changed the definition to include a broader number of incidents. *See id.* at 37. During the public comments portion of the March 2020 BOC meeting, Sarita Daftary-Steel, community organizer with JustLeadership USA, asked the Board to update the community on whether this meeting happened. *See March 10, 2020 Public Meeting Minutes*, N.Y.C. DEP’T CORRECTION 137 (Mar. 10, 2020), https://www1.nyc.gov/assets/boc/downloads/pdf/2020_03_10_march_board_meeting_minutes_and_transcript_final.pdf [<https://perma.cc/2N6W-XFUE>]. It is unclear whether this meeting has occurred since then.

239. N.Y.C. BD. OF CORR., *SERIOUS INJURY REPORTS IN NYC JAILS: JANUARY 2019*, at 9 (2019),

jail population.²⁴⁰ The report also highlighted that DOC was underreporting serious injuries — DOC reported approximately 80% fewer serious injuries than Correctional Health Services.²⁴¹ In response to these findings, BOC promulgated new Minimum Standards to align DOC’s serious injury reporting with Correctional Health Services’ reporting.²⁴² Although these new regulations will make sure DOC adheres to a more thorough standard of reporting, BOC’s actions only begin to tackle the underlying problem of violence — and staff-perpetuated violence — that continues to plague New York City jails. The BOC’s response to its serious injury findings highlights the main problem with the Agency’s scope of authority and lack of capacity.

C. Oversight’s Silence on the Use of Force

i. The Mayor and the Mayor’s Office of Criminal Justice

In 2017, Mayor Bill de Blasio announced his Administration’s plan to close Rikers Island, unafraid to call out the violence in New York City jails as a major impetus.²⁴³ Since then, the focus of the de Blasio Administration has been on the future, backing a plan to build four new,

<https://www1.nyc.gov/assets/boc/downloads/pdf/Reports/BOC-Reports/2019.01.07-BOC-Serious-Injury-Report-Final.pdf> [<https://perma.cc/2YRG-TLWM>].

240. *Id.* at 3. In general, the report states that most injuries in the jails “were related to inmate on inmate fights, followed by use of force (excluding allegations), accidents, and ‘other.’” *Id.* at 9. BOC also points out that DOC “[lacked] a single metric from which to determine the actual number of serious injuries occurring to people in its custody.” *Id.* at 13.

241. *Id.* at 10. It is noteworthy that the health (and mental health) services within New York City jails are run independent of DOC. In June of 2015, Correctional Health Services, previously overseen by the Department of Health and Mental Hygiene (DOHMH), became a Division of NYC Health and Hospitals (NYC H+H). See *Health and Hospitals Corporation to Run City Correctional Health Service*, OFF. MAYOR (June 10, 2015), <https://www1.nyc.gov/office-of-the-mayor/news/383-15/health-hospitals-corporation-run-city-correctional-health-service> [<https://perma.cc/6GEZ-VYZ7>]; *Correctional Health Services, NYC HEALTH & HOSPS.*, <https://www.nychealthandhospitals.org/correctionalhealthservices/> [<https://perma.cc/W3HV-26LK>] (last visited Aug. 24, 2020)). NYC H+H is a “public benefit corporation” created in 1969. N.Y. UNCONSOL. LAW § 7384(1) (McKinney 2019). This public-private entity touts itself as the “largest public health care system in the United States.” *About, NYC HEALTH & HOSPS.*, <https://www.nychealthandhospitals.org/about-nyc-health-hospitals/> [<https://perma.cc/A5EL-GQ84>] (last visited Aug. 24, 2020).

242. See *Notice of Adoption of Rules*, N.Y.C. BD. CORRECTION 1–2 (2019), <https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2019/July/final-injury-reporting-rule-002.pdf> [<https://perma.cc/NK2W-ZVUD>].

243. See Rose, *supra* note 41.

borough-based jail facilities.²⁴⁴ Although two jail facilities have closed since 2018,²⁴⁵ at de Blasio’s direction, MOCJ has continued to focus on the future of incarceration, setting a goal to reduce the capacity for jail facilities to around 3,300 people,²⁴⁶ together with a “[change in] culture, purpose and location of city jails.”²⁴⁷ However, by only addressing the jails of the future, focusing most of their messaging on downward trends in jail population,²⁴⁸ and construction plans,²⁴⁹ the Mayor and his Administration are ignoring the present violence crisis. As of now, Rikers Island is on track to close in 2026;²⁵⁰ for six more years, people will be incarcerated in facilities that have been nearly uninhabitable since they first opened,²⁵¹ subject to unrelenting corrections officer brutality.²⁵² Further, the Justice Implementation Task Force reports that its Culture Change Working group is “conduct[ing] research and develop[ing] detailed recommendations” regarding “in-custody violence.”²⁵³ Not only is this vague, but also the entire *Nunez* Consent Judgement is a reaction

244. See MAYOR’S OFF. OF CRIM. JUST., STRATEGIC PLAN: FISCAL YEARS 2019–2021, at 9 (2019) [hereinafter STRATEGIC PLAN: FISCAL YEARS 2019–2021], <http://criminaljustice.cityofnewyork.us/wp-content/uploads/2018/11/Strategic-Plan-2019-2021.pdf> [<https://perma.cc/R9DZ-7WXL>].

245. See Sydney Pereira, *Brooklyn’s House of Detention Closes Under de Blasio’s New Jails Plan*, GOTHAMIST (Jan. 3, 2020, 4:51 PM), <https://gothamist.com/news/brooklyns-house-detention-closes-under-de-blasios-new-jails-plan> [<https://perma.cc/PC52-GEWH>]; *New York Is Leading a Historic Decarceration Plan. Our Plan Is to Close Rikers Island and Replace It with a Smaller Network of Modern Jails.*, A ROADMAP TO CLOSING RIKERS, <https://rikers.cityofnewyork.us/> [<https://perma.cc/RR38-479N>] (last visited Sept. 17, 2020). A facility slated to close in March 2020 had to reopen briefly to house people with COVID-19. See Chelsia Rose Marcus, *Coronavirus Prompts Reopening of Shuttered Jail on Rikers Island*, DAILY NEWS (Mar. 23, 2020, 2:08 PM), <https://www.nydailynews.com/coronavirus/ny-coronavirus-correction-department-reopen-jail-20200323-dq2bn3hap5g5bkjagjzsmkdxie-story.html> [<https://perma.cc/6R29-R9HB>].

246. As of March 2020, New York City jails had an average daily population of around 7,200 people. See *Facilities Overview*, DEP’T CORRECTION, <https://www1.nyc.gov/site/doc/about/facilities.page> [<https://perma.cc/Q3X8-ELQH>] (last visited Aug. 23, 2020).

247. See STRATEGIC PLAN: FISCAL YEARS 2019–2021, *supra* note 244.

248. See *Smaller Safer Fairer: The Jail Population in NYC: Under 6,000 in 2020; 3,300 by 2026*, MAYOR’S OFF. CRIM. JUST. 2 (2019) [hereinafter *The Jail Population in NYC*], https://rikers.cityofnewyork.us/wp-content/uploads/Rikers-scorecard__NovemberDecember-2019.pdf [<https://perma.cc/7NVF-4LKV>] (last visited Aug. 24, 2020).

249. See *id.*

250. See *id.*

251. See *supra* Section I.A.

252. See *supra* Section I.C.

253. See *The Jail Population in NYC*, *supra* note 248, at 3.

and an attempt to solve DOC's broken culture of excessive and unnecessary violence. As the City's chief executive, the Mayor has unfettered authority to tackle the issue of officer use of force in jails today — he can fire the DOC Commissioner,²⁵⁴ push for a reduction or redirection of funds for DOC's budget, and possesses the discretion to appoint more outspoken members to BOC. In fact, in October of 2019, Mayor de Blasio declined to reappoint BOC board member Bryanne Hamill — who was outspoken on the issue of solitary confinement — a move seen by advocates as silencing a progressive voice on the Board.²⁵⁵ By remaining silent on the use of force, however, the de Blasio Administration has decided that the everyday reality in the City jails is just not their problem.

ii. New York City Council

In October 2019, the New York City Council officially voted to close Rikers Island and adopted a plan, in concert with the Mayor, to revamp the City's approach to criminal justice and incarceration.²⁵⁶ Although the Independent Commission, *A More Just New York*, is an example of the City Council leading on addressing the City's problematic correctional system, the Independent Commission's report did not specify the ways in which DOC should tackle the issue of use of force.²⁵⁷ The Commission simply acknowledges systemic violence in City jails,²⁵⁸ and points to the ongoing *Nunez* litigation and 14-point plan on quality staff training as antidotes to excessive use of force.²⁵⁹ The Committee on Criminal Justice did hold a hearing in February 2020, where it compelled DOC Commissioner Brann to testify on the lack of compliance with the *Nunez* Consent Judgment.²⁶⁰ Unfortunately, legislation focused on the future of New York jails, and discussion with DOC's current leadership does not address the crisis of violence happening in the jails today. The Council's

254. See *supra* Section II.B.ii.

255. See Reuven Blau & Rosa Goldensohn, *De Blasio Ousts Key Solitary Confinement Foe as Reform Nears*, CITY (Oct. 17, 2019, 5:23 PM), <https://www.thecity.nyc/2019/10/17/21210752/de-blasio-ousts-key-solitary-confinement-foe-as-reform-nears> [https://perma.cc/GM6R-8TRP].

256. See *Rikers to Close*, *supra* note 44.

257. See generally A MORE JUST NEW YORK CITY, *supra* note 162.

258. See *id.* at 13–14.

259. See *id.* at 85–86.

260. See Mark Hallum, *City Council Presses Corrections Department to Explain Jail Violence Spike*, AMNY (Feb. 3, 2020), <https://www.amny.com/politics/doc-provides-nuance-for-uptick-in-violent-incidents-in-jail-facilities/> [https://perma.cc/5SVZ-PHAH].

own analysis of the DOC budget notes that, given DOC efforts and the monetary investments in tackling the issue of officer perpetrated violence, “it is alarming that [use of force] incidents have not been declining.”²⁶¹ Council members have the power to pass new legislation around use of force and actively seek the reduction or redirection of DOC’s funding.

iii. Department of Investigation and District Attorneys

By the end of 2019, only eight other cases were pending with the DOI or District Attorneys.²⁶² The Ninth *Nunez* Monitor writes the slow pace with which outside law enforcement considers the cases referred to it has repercussions for effective discipline; it is only after referred cases are declined that an administrative disciplinary proceeding can begin.²⁶³ Both of these entities have powerful enforcement tools specifically designed to hold people accountable for their actions, and yet, when it comes to officer use of force, using these tools is a non-priority.

D. New York State Would Rather Play Politics

New York State government’s involvement in the day-to-day operations of New York City jails can, at best, be described as arbitrary and, at worst, as politically motivated. For example, SCOC issued one report detailing the brutal death of an incarcerated person on Rikers Island in May of 2017.²⁶⁴ However, the ongoing nature of the systemic violence in New York City jails,²⁶⁵ and the number of deaths that have occurred in them,²⁶⁶ should warrant far more than only one report, given that SCOC has a duty to investigate the deaths of *all* incarcerated persons in New York State.²⁶⁷ Furthermore, the dynamic between Mayor de

261. FINANCE DIVISION BRIEFING PAPER, *supra* note 94, at 19.

262. See Ninth *Nunez* Monitor’s Report, *supra* note 79, at 160–61.

263. See *id.* at 161–62.

264. See Michael Schwartz & William K. Rashbaum, *Rikers Deemed Too Dangerous for Transferred Inmates*, N.Y. TIMES (May 5, 2017), <https://www.nytimes.com/2017/05/05/nyregion/rikers-island-transferred-inmates.html> [<https://perma.cc/AK6N-RCEA>].

265. See *supra* Section I.C.

266. See David Brand, *More Than 370 People Have Died in NYC Jails Since 2001*, BROOKLYN DAILY EAGLE (Oct. 23, 2019), <https://brooklyneagle.com/articles/2019/10/23/deaths-nyc-jails/> [<https://perma.cc/54T4-2UY3>]. Seven people committed suicide while incarcerated in New York City jails in 2019. See *Inmate Deaths*, OPEN DATA, <https://data.cityofnewyork.us/Public-Safety/Inmate-Deaths/f64t-5yiv> [<https://perma.cc/4GWF-KHTL>] (last visited Aug. 19, 2020).

267. See N.Y. CORRECT. LAW § 47-1(a).

Blasio and Governor Cuomo seems to be the reason why SCOC comments on officer use of force at all. For example, in February 2018, SCOC issued a report detailing, among other facility failures, how correction officers killed an incarcerated man in a Rikers' jail with use of force; the report specifically criticized the Rikers Island closure plan as envisioned by the de Blasio Administration.²⁶⁸ The report warned that because of the "City's inaction and protracted ten-year proposal," SCOC would "examine steps to expeditiously close Rikers . . . to ensure that the constitutional rights of inmates and staff are protected."²⁶⁹ Later that month, SCOC Chairman Thomas Beilein sent a letter to DOC Commissioner Brann specifying that housing areas in a facility on Rikers Island needed to be "vacated by close of business" due to failures in safety.²⁷⁰ The de Blasio Administration stated State action "smacks of politics, and not sound policy," and then sued to block the order.²⁷¹ The housing areas were not vacated and Rikers Island is still very much open.²⁷² Given that SCOC, as an oversight body, has the authority to close prisons and jails, it is unfortunate that it has not taken bolder action to better the conditions for people incarcerated in New York City.²⁷³

268. THE WORST OFFENDERS, *supra* note 203, at 37 (finding an inmate, referred to as "Individual 9," died by use of force by officers). The report also states that DOC officers falsified documentation in connection to this incident. *See id.*

269. *Id.* at 3.

270. Letter from Thomas A. Beilein, Chairman, N.Y. State Comm'n of Corr., to Cynthia Brann, Comm'r, N.Y.C. Dep't of Corr. 2 (Feb. 28, 2018), <https://www.politico.com/states/f/?id=00000161-f816-de1c-abff-f8bf5d7e0000> [<https://perma.cc/EVN3-XL38>].

271. Yoav Gonen, *De Blasio Sues to Block Cuomo from Closing Rikers Facility*, N.Y. POST (Mar. 5, 2018), <https://nypost.com/2018/03/05/de-blasio-sues-to-block-cuomo-from-closing-rikers-facility> [<https://perma.cc/PL4A-NVJJ>].

272. *See Ninth Nunez Monitor's Report*, *supra* note 79, at 281–82 (documenting the continuing security failures and safety concerns in RNDC, which houses the majority of all 18-year-old males on Rikers Island. The use of force rate against 18-year-olds is nine times higher than the average used against adults).

273. This is unsurprising, however, given that through a Freedom of Information Law request covering May 2017 to January 2020, journalists obtained SCOC death reports revealing that on average, it took SCOC two-and-a-half years per case to complete an investigation. *See* Reuven Blau & Carson Kessler, *Many Deaths at New York State Prisons Are Preventable, Review Finds*, CITY (Jul. 5, 2020, 6:15 PM), <https://www.thecity.nyc/2020/7/5/21312137/new-york-state-prisons-death-preventable> [<https://perma.cc/QR27-B6PP>].

E. Yet Another Oversight Hurdle: Office of Administrative Trials and Hearings' Precedent

OATH — where disciplinary proceedings for DOC officers occur — is an administrative court, and, thus, the ALJs who preside over the hearings consider precedent from previous administrative decisions when making decisions regarding staff discipline.²⁷⁴ The Ninth *Nunez* Monitor pointed out that OATH disciplinary proceedings' precedent for DOC officers actually runs counter to the goals of the Consent Judgment's requirements for timely and meaningful discipline.²⁷⁵ The *Nunez* Consent Judgment requires the imposition of certain disciplinary outcomes *regardless* of factors, such as the severity of injuries.²⁷⁶ ALJs, however, under OATH precedent, would consider factors such as “severity of the use of force” or “whether or not the inmate sustained a serious injury” when determining what penalty to impose on an officer.²⁷⁷ Thus, the Consent Judgment may proscribe certain disciplinary outcomes for a particular action that an ALJ at OATH ultimately has the discretion to not impose, putting DOC in an “untenable position” to conform to the Consent Judgment.²⁷⁸ Therefore, OATH's imposed penalties result in “disciplinary outcomes . . . [that] are not proportionate with Staff misconduct,” which “impacts DOC's ability to impose meaningful discipline,”²⁷⁹ a central tenet of the Consent Judgment. This very tension is addressed in the Remedial Order filed by the parties in August 2020.²⁸⁰

IV. STEPS TO STRENGTHEN OVERSIGHT

Part IV of this Note offers three proposals to meaningfully change oversight in New York to effectively address the problem of constant and excessive correction officer use of force: (1) increase BOC's funding,

274. See Ninth *Nunez* Monitor's Report, *supra* note 79, at 208.

275. See *id.*

276. See *Nunez* Consent Judgment, *supra* note 78, at 25–26 (noting that the misconduct of “[d]eliberately providing materially false information in a Use of Force Report or during an interview regarding a Use of Force Incident . . . [and] [d]eliberately failing to report Use of Force by a Staff Member” will result in penalties ranging from a minimum of a 30-day suspension without pay which may include a loss of accrued vacation days, or a 15-day suspension without pay plus a one-year probation period stipulating that any Use of Force Violation or policy violation will result in termination).

277. Seventh Report of the *Nunez* Independent Monitor at 157–58, *Nunez v. City of New York*, 11 Civ. 5845 (S.D.N.Y. 2012) (Apr. 18, 2019), <http://tillidgroup.com/wp-content/uploads/2019/04/7th-Monitors-Report-04-18-19-As-Filed.pdf> [<https://perma.cc/B7ZP-YDLN>].

278. *Id.* at 158.

279. See Eighth *Nunez* Monitor's Report, *supra* note 83, at 184.

280. See *supra* Section I.C.

change its composition, broaden its enforcement power, and demand it promulgates Minimum Standards with regards to use of force; (2) mandate communication between all already existing oversight bodies; and (3) move all use of force investigations from within DOC to DOI, and tackle the ineffectiveness of OATH precedent when it comes to disciplining correction officers. Although significant hurdles stand in the way of actually achieving these goals, like an amendment to the City Charter, if instituted, they would positively impact the daily lives of incarcerated people who desperately need someone to take impactful action now.

A. Board of Correction: Promulgate Minimum Standards, Make Funding Independent, Diversify Composition, and Broaden Enforcement Authority

BOC must issue Minimum Standards for correction officer use of force. These standards can build on the language DOC already agreed to in the *Nunez* Consent Judgment and incorporate language from DOC's use of force policy; for example, the minimum standard can state outright that "all Staff have a duty to protect incarcerated people from harm, and have a responsibility to intervene to de-escalate confrontations as soon as it is practicable and reasonably safe to do so."²⁸¹ As long as BOC is charged with issuing standards that govern the "care, custody, correction, treatment, supervision, and discipline" of people in DOC custody,²⁸² it is unclear how use of force can fall outside of its mandate. Not having these Minimum Standards demonstrates that the Agency is operating with blinders on and is unwilling to embrace its purpose.

For these new Minimum Standards to actually make a difference, three other changes to BOC are necessary. First, BOC's budget needs to be independent of the whims of New York City's budget process. Richard Wolf, former Executive Director of BOC, has argued that "funding has been the Board's Achilles heel."²⁸³ While the New York City budget has allocated \$1.4 billion to DOC for 2020, it allocated \$3.1 million to BOC. BOC's budget, therefore, represents only 0.22% of the total amount of money going to DOC. The City's investment into oversight outside DOC's structure has to be more significant. Therefore, much like the 2019

281. *Nunez* Consent Judgment, *supra* note 78, at 8. Further, the Minimum Standards should contain a provision that requires the DOC Commissioner to both submit a written report and appear in front of the Board to report on use of force issues within DOC facilities.

282. *About*, NYC BD. CORRECTION, *supra* note 122.

283. Wolf, *supra* note 123, at 1622.

amendments to the Civilian Complaint Review Board (CCRB),²⁸⁴ an amendment should be made to the City Charter to directly tie BOC's budget to a percentage — higher than .22% — to DOC's budget. With this expanded capacity, BOC could hire more staff and more effectively be the “eyes and ears” within the City jails.²⁸⁵ If one of the BOC's main purposes is to publicize the everyday reality of incarcerated people, this expanded staff could assist in collecting narratives of victims of correction officers' brutality and work to support the promulgation of use of force Minimum Standards.

Second, people who have personally experienced incarceration in New York City jails needs to serve on the Board. This would hopefully give the Board more courage to confront DOC and embrace a more adversarial approach. Before 1977, the Mayor appointed all nine members to BOC, whereas now, the Mayor appoints three, the City Council appoints three, and the Mayor appoints three through nomination from presiding justices of two city appellate courts.²⁸⁶ The legislature could make an amendment to the City Charter, similar again to the 2019 CCRB amendments,²⁸⁷ to change BOC's composition. Such an amendment could expand the Board by three members, or alternatively replace one of three members that are nominated by each branch of government to be selected by the Public Advocate with certain requirements attached. For example, a requirement could be that at least one member has spent time incarcerated in a DOC facility. This change would ensure the people most affected by incarceration have their voices represented on the Board. Then, hopefully, the issues of violence and excessive correction officer use of force, which people experience daily in jail, would be discussed more openly and frequently. These new members could inspire BOC to act with the urgency the problems require.

Third, the New York City Charter needs to be amended to give the Board explicit enforcement power, such as the unquestionable ability to sue DOC, impose penalties, fire key staff members, and close facilities for lack of compliance with Minimum Standards. Professor Michele Deitch, in her article “Distinguishing the Various Functions of Effective Prison

284. See *Ballot Questions*, CHARTER 2019 NYC (2019), https://static1.squarespace.com/static/5bfc4cecf7fde7d3719c06/t/5d83de07e707a67e06d1ad9e/1568923145884/BallotQuestions_English.pdf [https://perma.cc/JG4X-56DQ] (asking in Ballot Question 2 to raise CCRB's funds to increase employee headcount equal to 0.65% of the Police Department's).

285. See *id.*

286. N.Y.C. CHARTER § 626(a); *supra* Section II.B.i.

287. See *Ballot Questions*, *supra* note 284.

Oversight,” lays out seven core functions that must co-exist in various bodies to make for effective oversight: regulation, audit, accreditation, investigation, legal reporting, and inspection and monitoring.²⁸⁸ In Deitch’s framework, the Board serves a *regulatory* function when it sets Minimum Standards for the treatment of people in DOC custody. Deitch writes governmental entities that exercise the regulation function need to be able “to wield a hammer over the correctional agency.”²⁸⁹ Therefore, in addition to setting these standards, BOC needs to have “the power to enforce . . . standards and policies through . . . the imposition of fines, the ability to close an institution, or the ability to hire or fire directors.”²⁹⁰ Right now, BOC engages primarily in inspection and monitoring. If BOC were to promulgate Minimum Standards for the use of force, with expanded enforcement power, it would actually be able to close jail buildings where staff continue to violate these standards.

B. Oversight Actors Should Be Connected

Part II showed the varied authorities different agencies, institutions, and elected officials have over New York City jails — the web of jail oversight.²⁹¹ As Deitch points out, not one institution can “meaningfully serve every function” of oversight.²⁹² Thus, one way to improve the efficiency and scope of New York City jail oversight would simply be to connect all of the players. The problem of excessive and unnecessary officer use of force could become manageable if the powers of each oversight actor complemented each other, instead of existing in silos. For example, SCOC and the BOC do not engage in any ongoing communication and, therefore, do not act in concert with one another. The scope of SCOC’s legal authority is broad,²⁹³ but SCOC seems to wield this power sparingly. Further, much of the law that determines the SCOC’s power and duties focuses on cooperation with local correctional facilities. However, there is no law that compels SCOC to actively communicate with BOC. If SCOC were required to develop a working relationship with BOC, then this could expand the capacity of both agencies, provide more unified investigation, and publicize challenges

288. Michele Deitch, *Distinguishing the Various Functions of Effective Prison Oversight*, 30 PACE L. REV. 1438, 1439 (2010).

289. *Id.* at 1440.

290. *Id.*

291. *See supra* Sections II.A–C.

292. Deitch, *supra* note 289, at 1440.

293. *See supra* Section II.C.i.

more effectively. Ideally, SCOC could close a jail facility that BOC points out is particularly egregious when it comes to levels of violence.

**C. Move All Use of Force Investigations to Department of Investigation
and Address Problematic Office of Administrative Trials and Hearings’
Precedent**

Oversight must exist outside the closed system which it regulates. As shown consistently through the *Nunez* Monitor’s Reports, the ID within DOC has been unable to effectively investigate use of force incidents.²⁹⁴ Instead, all use of force investigations — and the necessary expansion of investigative staff — should be housed under DOI, an independent government agency that already has the authority to take on these investigations.²⁹⁵ DOI has the power to refer any investigation to the District Attorney for criminal prosecution.²⁹⁶ Once DOI is in charge of all use of force investigations, the Agency should also be able to refer cases to the non-criminal disciplinary process OATH oversees.

However, as discussed above,²⁹⁷ there is a discordance between the precedent in OATH’s case law and the *Nunez* Consent Judgment’s goals with regards to staff discipline, that the independent Monitor observes “is undermining [DOC’s] overall effort to impose meaningful and timely discipline.”²⁹⁸ At the same time, another problem is quickly approaching: superfluous DOC staff. The City’s plans to close Rikers Island by 2027 and replace all jail facilities with four borough-based buildings depends on drastically reducing the number of people in jail to an estimated 3,300 people.²⁹⁹ The hope is that changes to bail laws will accomplish the drastic reduction, as judges will no longer be able to set bail amounts for lower-level offenses.³⁰⁰ As the City and State’s public health response to

294. See *supra* Section III.A.

295. See *supra* Section II.B.v.

296. See *id.*

297. See *supra* Section III.E.

298. Eighth *Nunez* Monitor’s Report, *supra* note 83, at 184.

299. See Reuven Blau & Rachel Holiday Smith, *Delays on Rikers Replacement Jails Buoy Critics, Even as Planning Moves Ahead*, CITY (July 8, 2020, 2:13 PM), <https://www.thecity.nyc/2020/7/8/21317561/delays-on-rikers-island-replacement-jails-buoy-critics> [<https://perma.cc/WP48-L9JW>].

300. See *The Jail Population in NYC*, *supra* note 248; REMPEL & RODRIGUEZ, *supra* note 49; see also Kate Torgovnick May, *How the Bail System in the US Became Such a Mess — and How It Can Be Fixed*, TED (Aug. 31, 2018), <https://ideas.ted.com/how-the-bail-system-in-the-us-became-such-a-mess-and-how-it-can-be-fixed/> [<https://perma.cc/S7TM-BTV8>] (noting that “nearly 70 percent of the people held in local jails [in the U.S.] are there for one reason: they don’t have enough money to pay bail”).

COVID-19 came to include releasing people unnecessarily in jail and reducing the number of people taken into custody, the jail population in New York City has actually gone down to about 4,363.³⁰¹ DOC needs to get rid of an ever-increasing number of superfluous staff. At the same time, there remains an egregious lack of consequences for many officers who engage in unnecessary use of force. Therefore, bolstering the OATH process and putting resources into solving the tension between the Consent Judgment and OATH precedent serves the dual purpose of ensuring proportionate discipline and weeding out staff uncommitted to culture change. The *Nunez* Remedial Order, filed by the parties in August 2020, addressed the OATH precedent problem, and required the City to “advise all OATH [ALJs] who handle proceedings relating to [use of force] violations” of the particular disciplinary outcomes dictated by the Consent Judgment within 30 days from the Court’s endorsement.³⁰² Thus, resolving the issue of OATH precedent and moving all use of force investigations to DOI would lead to a more independent and streamlined process for disciplining, and potentially prosecuting, problematic DOC staff.

CONCLUSION

As civil rights attorney Bryan Stevenson stated, “the true measure of our character is how we treat the poor, the disfavored, the accused, the incarcerated, and the condemned.”³⁰³ Despite all of the achievements in hard-won court battles and protests that advocates have made,³⁰⁴ prisons and jails have always been and will continue to be inhumane places. With time and patient activism, one day, the majority of people in the United States may fall out of our collective “love affair with imprisonment.”³⁰⁵

Abhorrent conditions, brutality, and violence have been a part of New York City jails’ history from their inception.³⁰⁶ Prisoners’ rights advocates, attorneys, and incarcerated people have been responsible for ensuring fundamental rights for those within City facilities. The *Nunez* Consent Judgment is both a culmination and a necessary accountability

301. See *New York City Jail Population Reduction in the Time of COVID-19*, MAYOR’S OFF. CRIM. JUST. (2020), <http://criminaljustice.cityofnewyork.us/wp-content/uploads/2020/04/MOCJ-COVID-19-Jail-Reduction.pdf> [<https://perma.cc/97RM-JWTT>]; see also *supra* Section I.A.

302. *Nunez* Remedial Consent Order, *supra* note 86, at 7.

303. BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 18 (2015).

304. See Marton, *supra* note 32, at 534–53; *supra* Sections I.B–C.

305. Lasker, *supra* note 2, at 429.

306. See *supra* Section I.A.

measure for DOC and correction officers, but it can only go so far. To truly take a step forward, the oversight entities responsible for setting the rules in which the DOC can act must take ownership and responsibility for the failures of New York City's carceral system. Ultimately, the City has adopted a plan to shift the way people are held in detention in the City, albeit too slowly. However, for these plans to have any chance of success — plans that purport to do away with DOC's culture of excessive and unnecessary use of force — changes to the web of jail oversight in the City need to be made, and these oversight actors need to embrace their role in shaping the future.

Robin Campbell, a former director of media relations for DOC, wrote an article providing insight into the changing media narratives around what it is like to be incarcerated within New York City jails.³⁰⁷ He concludes his article, writing, “[b]laming those who walk a jail’s corridors for a ‘culture of brutality’ is too easy. Responsibility also lies with the leaders of these institutions, the politicians who fund and oversee them and . . . the citizens of the city, who set the expectations.”³⁰⁸ Although shifting the way New York City conducts jail oversight can only happen over time and with considerable effort, this Note aims to coalesce disparate information and add to the many voices calling out for an end to this violence.

307. Robin Campbell, *It Was My Job to Tell the Truth About Jails*, MARSHALL PROJECT (July 25, 2019, 10:00 PM), <https://www.themarshallproject.org/2019/07/25/it-was-my-job-to-tell-the-truth-about-jails> [<https://perma.cc/L5V2-DE2R>].

308. *Id.*