MASS INCARCERATION, MEET COVID-19

Sharon Dolovich[1]

From the earliest days of the pandemic, it was clear that the novel coronavirus posed an outsized danger to the more than two million people locked inside America's prisons and jails. Responding to the risk, many public officials nationwide took modest steps to reduce the incarcerated populations in their jurisdictions. But these efforts, though welcome, were too minimal to make an appreciable difference. By summer, infection rates in state and federal prisons dwarfed national rates by a ratio of 5.5 to 1, and, accounting for age, people in prison were dying at three times the rate of society as a whole.[2] And by October 2020, jail populations had begun to creep back up, prison releases had largely ceased, and few signs remained of a more robust decarceral strategy.

With the crisis still unfolding, we are only beginning to make sense of the overall impact of COVID-19 on the people who live and work inside American prisons and jails, and of what effect, if any, the pandemic will have on the nation's continued commitment to mass incarceration under unduly harsh conditions. In this Essay, I take stock of where things now stand. I also consider how we got to this point, and how penal policy would need to change if we are to prevent another round of needless suffering and death when the next pandemic hits. For those who have followed the law, policy, and politics of the American carceral system over the past 40 years, there are no surprises here. Our COVID response reflects callous indifference to the fate of people in custody, an attitude that has shaped the U.S. carceral

---

[1] Professor of Law, UCLA School of Law; Director, UCLA Law COVID-19 Behind Bars Data Project. I thank Sasha Natapoff and Brendan Saloner for helpful comments; John Boston, David Fathi, Aaron Littman, and Alan Mills for their generous willingness to field my many questions; Liz DeWolf for her editorial advice; and Kaitlyn Fryzek for excellent research assistance. I also thank the entire UCLA Law COVID-19 Behind Bars Data Project team—staff, leadership team, and volunteers—who have worked tirelessly since the start of the pandemic to collect and analyze data of all kinds bearing on the impact of COVID on people in custody. Your commitment to the enterprise has been inspiring beyond measure. Thanks are due as well to the Vital Projects Fund, Arnold Ventures, and the United States Centers for Disease Control, for their generous support of our work. All views presented in this Essay are solely my own.

[2] *See* Brendan Saloner, Kalind Parish, Julie A. Ward, Grace DiLaura & Sharon Dolovich, *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 J. AM. MED. ASSOC. 602 (2020).

experience since at least the Civil War and well into the "tough on crime" era of the late twentieth century.[3] This normative foundation is impossible to disentangle from the structural racism that has driven the glaring overincarceration of African Americans and other people of color and helped shaped the brutality of the American carceral experience. These ideological forces, long productive of a national propensity to dehumanize the people we lock away, have collectively generated a persistent regulatory refusal across all branches of government to ensure meaningful protections for the incarcerated.[4]

Like any long-lasting system, mass incarceration under inhumane conditions successfully entrenched itself in part by creating structural obstacles to doing things differently. When COVID appeared, we saw the power of this strategy manifest in real time, as even those individual officials motivated to mitigate the threat found themselves

---

[3] Although in the 1950s and 1960s, prison systems in some regions displayed a brief commitment to humanism. *See* Sharon Dolovich, *Creating the Permanent Prisoner, in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? (Charles Ogletree & Austin Sarat eds., 2012). But when viewed over the broad sweep of American penal history, that period was anomalous, with dehumanization the more typical orientation. There is, it bears noting, an unmistakable connection between the callous indifference toward the incarcerated persistently displayed by officials in all branches of government, see Sharon Dolovich, *The Regulation and Oversight of American Prisons*, ANNUAL R. CRIMINOL. (forthcoming 2021), and the role played by carceral institutions in the aftermath of slavery and even during slavery itself. In the Southern states after Emancipation, brutality against the enslaved readily became brutality against prisoners, the vast majority of whom were Black. *See* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008); DAVID M. OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1997). And important new research is excavating the sordid history of prisons and jails as institutions of American chattel slavery, offering a new and chilling perspective on the endemic inhumanity and thoroughly racialized character of present-day American carceral practice. *See* Taja-Nia Henderson, *Property, Penality and (Racial) Profiling*, 12 STAN. J. C.R. & C.L. 177 (2016) (describing the role local jails played in supporting enslavers and the institution of chattel slavery in the antebellum South); John Bardes, *The Problem of Incarceration in the Age of Slavery* 5, 43–47 (draft copy on file with the author) (describing a network of carceral institutions forming a "statewide penal system for enslaved convicts" in Louisiana, Mississippi, Tennessee, and elsewhere in the antebellum South; and describing the brutal methods of torture employed to humiliate and "discipline" the enslaved people held in those facilities).

[4] *See* Dolovich, *supra* note 3.

hampered by political dynamics and legal regimes constructed over decades to prioritize continued incarceration regardless of harm.

The picture, however, is not all bleak. Over the past few years, despite a seeming bipartisan consensus on the need for prison reform, the incarceration rate in most jurisdictions has remained stubbornly immovable.[5] Yet since the pandemic hit in March 2020, at least 120,000 people have been released from custody.[6] True, these reductions amount to only 5.6 percent of the roughly 2.15 million people behind bars nationwide as of March 2020, and are insufficient to allow corrections officials to get the virus under control, much less to definitively shift the United States away from its decades-long practice of mass incarceration. Still, the speed with which these releases were undertaken—the overwhelming majority took place between March and May—strongly suggests that, under the right conditions, significant decarceration is indeed possible.

COVID also offers an opening to reframe the political conversation around American carceral practice. Since at least the 1980s, the dominant political narrative around crime and punishment has been radically individualist,[7] focused exclusively on the need to punish people who commit crimes and to protect society against further criminality. Not only has this orientation left us collectively unable to reckon with the socioeconomic drivers of criminal activity, but we have remained blind to the community costs of a default carceral response. Prison sentences cause harm not only to the individuals serving time, but also to their families and to the broader community. The same is true of pretrial detention. This pandemic has forced a collective recognition that what happens inside jails and prisons has serious

---

[5] *See* Wendy Sawyer & Pete Wagner, *Mass Incarceration: The Whole Pie 2020* (2020) (reporting that during the years 2017–2020, the number of people incarcerated in state and federal prisons and jails held steady at between 2.140 and 2.157 million).

[6] According to the UCLA Law COVID-19 Behind Bars Data Projects releases tracker, at least 43,000 people have been released from prison and 77,000 from jail since the start of the pandemic. *See COVID-19-Related Jail Releases & COVID-19-Related Prison Releases*, UCLA LAW COVID-19 BEHIND BARS DATA PROJECT. These numbers are undercounts, since they reflect only reported releases of classes of incarcerated people and do not include individuals released through habeas corpus or compassionate release petitions. This latter category includes 1,700 people granted compassionate release from federal prison since March 2020. *See* Personal Communication from Mary Price, General Counsel for Families Against Mandatory Minimums, to Sharon Dolovich (Oct. 27, 2020) (on file with author).

[7] *See* Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 288–92 (2012).

repercussions for the health of the broader community. In this way, it has laid bare the folly of a penal model that measures public safety benefits solely in terms of crime reduction. What is required instead is a public health model that takes serious account, not only of traditional penological objectives, but also of the harm imprisonment inflicts on the incarcerated, on their families and communities, and on the nation as a whole.

This Essay has two primary aims: to describe the impact of COVID behind bars in the United States and the steps taken since March 2020 to mitigate the threat it poses, and to begin excavating the dynamics driving the failure of the official response. Part I explains why the incarcerated face an elevated risk of infection and potentially fatal complications from COVID-19. Part II describes the measures various corrections administrators took at the start of the pandemic to try to limit viral spread inside jails and prisons, and why, however well-intentioned, these measures were insufficient to bring the virus under control. Part III addresses the steps taken by public officials at all levels to reduce the number of people in custody and offers initial thoughts as to why, after a concerted push for releases on the part of many public actors in the first months of the pandemic, these efforts had already considerably slowed by the latter part of May 2020. (Here, the focus is primarily, though not exclusively, on the federal courts' nonresponse to urgent petitions from incarcerated plaintiffs.) Part IV draws on the work of the UCLA Law COVID-19 Behind Bars Data Project.[8] It explores what the data shows regarding infection rates and COVID deaths in custody, describes the limits of the available data, and explains why the impact on people in jails and prisons is likely even greater than the official numbers suggest. Part V zeroes in on the culture of secrecy that American corrections administrators have long been empowered to cultivate regarding what goes on behind bars. It argues that this culture has exacerbated the threat COVID poses to the incarcerated as well as to staff, that such secrecy is at odds with the imperatives of a public institution, and that we need to replace the reigning default posture of concealment with an ethos of transparency.

---

[8] Since the outbreak of the pandemic, the UCLA Law COVID-19 Behind Bars Data Project has been tracking the impact of COVID in American prisons and jails. It also tracks the impact of COVID in immigration detention and youth facilities, along with jail and prison releases and grassroots organizing campaigns on behalf of incarcerated people during COVID. In addition, the Data Project, in collaboration with Columbia Law School, Bronx Defenders, and Zealous, maintains a database of judicial filings and court orders relating to COVID in custody.

Part VI concludes with a call for a broad normative reorientation toward assessing carceral policy through a public health lens.

I. CONDITIONS OF CONFINEMENT AND THE READY SPREAD OF COVID-19

From the early days of the pandemic, public health experts have been clear about the measures necessary to guard against infection: social distancing, interacting with others out of doors as much as possible, washing hands frequently, disinfecting surfaces, wearing a clean mask, and so on. Yet for the incarcerated, taking these measures has proved close to impossible. For one thing, social distancing is unavailable to people in prisons and jails, most of whom live in close proximity to others, crowded into dorms or small cells where they eat, sleep, and live within feet and often inches of one another. Even absent overcrowding, there will be insufficient space to allow people to remain six feet apart. By design, American penal institutions generally fail to provide even the minimum living space corrections experts have long regarded as necessary to avoid "physical, mental and emotional deterioration."[9] Compounding the problem, many American carceral facilities continue to operate well above their rated capacity,[10] with double celling—housing two people in cells designed for one person—a standard practice. These rooms are often so small—they can be as little as 55 square feet—that, once the bunk, commode, and storage space are factored in, a cell's inhabitants are generally unable to move about at the same time without touching. As for dorm living, it is not unusual for prison or jail dorms to hold 100 people or more. This population density may require double or even triple bunks, often placed so close together that a bed's occupant can reach out and touch the adjacent bunk. This setup means that, while people sleep, they may be within six feet of as many as five or eight other people. During the day, with people constantly moving around, it is generally impossible to keep one's distance.

People doubled up in small cells or crowded into dorms share sinks, toilets, and showers, which provide another vector for transmission. In many facilities, cleaning supplies for disinfecting purposes are in short supply; in some places, people who want bleach or other cleansers must bargain for them on the black market. As for hand hygiene, many

---

[9] *Rhodes v. Chapman*, 452 U.S. 337, 371 (1981) (Marshall, J., dissenting).

[10] According to the Bureau of Justice Statistics, between 12 to 25 state prison systems and the BOP are currently overcrowded, accounting for between 26 percent and 49 percent of all people in prison. NAT'L ACADEMIES OF SCIENCES, ENGINEERING & MEDICINE, DECARCERATING CORRECTIONAL FACILITIES DURING COVID-19: ADVANCING HEALTH, EQUITY, AND SAFETY 2–5 (Emily A. Wang et al. eds., 2020).

people in custody lack access to sufficient soap, warm water, and clean towels. Hand sanitizer, which must be at least 92 percent alcohol to be effective, has long been contraband in prisons and jails (although to their credit, since the pandemic began, many state Departments of Corrections (DOCs) have relaxed this prohibition). Ventilation, too, is generally poor. As a result, people in custody are constantly breathing recirculated air. And as Americans in general are being cautioned to avoid gathering indoors and exhorted to do their socializing outside, lockdowns are forcing people in custody to spend ever more time inside.[11]

Then there are the problems on the medical side. Prisons in particular are full of people at disproportionately high risk of complications should they contract the virus. Because the incarcerated population is on average younger than the overall national population,[12] one might expect the risk of complications from COVID to be lower than in the broader society. But this is not the case. Prison takes a physical toll, and prison health care is often grossly inadequate, with preventative care in particular minimal at best. As a result, people age faster when incarcerated.[13] People in custody are also disproportionately likely "to have experienced profound stress and/or trauma over their lifetime, to have a history of substance use disorder and/or homelessness, and to have had limited access to quality health-care and education."[14] For this combination of reasons, people in prison are generally physiologically older than their

---

[11] Assuming they have any outdoor access at all: depending on their facility and classification, some people in prison are only rarely allowed yard time, and in jails, there is often no outdoor space available to detainees at the best of times.

[12] *See* Jeffery T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship: Social Variation, Social Explanations, in* THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY: ON THE ORIGINS OF CRIMINAL BEHAVIOR AND CRIMINALITY 377, 377–78 (2014); Matt Vogel & Lauren C. Porter, *Toward a Demographic Understanding of Incarceration Disparities: Race, Ethnicity, and Age Structure*, 32 J. QUANT. CRIMINOL. 516, 517 (2016).

[13] *See* Brie A. Williams et al., *Addressing the Aging Crisis in U.S. Criminal Justice Health Care*, 60 J. AM. GERIATRIC SOC'Y 1150, 1151 (2012) ("The age that a prisoner is considered to have reached the 'older' or 'geriatric' threshold varies by jurisdiction. In general the age cutoff is lower than for non-prisoners because of the common perception that many incarcerated persons experience 'accelerated aging'. . . [A]t least 20 state departments of correction and the National Commission on Correctional Health Care now set the age cutoff for 'older' prisoners at 50 or 55.").

[14] Rachael Bedard, et al., *Ageing Prisoners: An Introduction to Geriatric Health-Care Challenges in Correctional Facilities*, INT'L REV. RED CROSS 917, 919 (2016).

chronological age would suggest, and are consequently more likely than other members of society to have a host of medical issues known to exacerbate complications from COVID, including heart disease, asthma, hypertension, and diabetes.[15]

At the start of the pandemic, corrections administrators attempted to avoid viral spread in their facilities by canceling visits, closing their facilities to volunteers, and instituting lockdowns that required people to remain in their cells or dorms almost all the time. But there is no getting around the fact that, multiple times a day, someone still has to pass through every corner of a facility to deliver meals and to check on the people stuck inside their cell or dorm. Being human, people in custody have basic needs that must be met daily if they are to survive: food, medication, medical and mental health care, and so on. And the imperative to attend regularly to the needs of the incarcerated is especially acute during COVID. Some people may have contracted the virus and urgently need medical attention. Others may be experiencing serious anxiety, suicidal ideations, or other mental health complications due to the stress of being locked down for extended periods during a time of unprecedented uncertainty[16]—especially in facilities that have experienced COVID-related fatalities.[17] Still others may be suffering medical complications unrelated to COVID yet find themselves unable to get to the infirmary due to restrictions on movement. Some daily circulation of custody officers and medical and mental health staff is therefore unavoidable. And whatever their purpose, every person who circulates through a facility may spread the virus or be at risk of infection themselves.

---

[15] *See* Peter Wagner & Emily Widra, *No Need to Wait for Pandemics: The Public Health Case for Criminal Justice Reform* (2020) (reporting disproportionate rates of asthma, high blood pressure/hypertension, diabetes, heart problems, tuberculosis, and HIV in American jails and prisons as compared with the American population as a whole); Brie A. Williams et al., *Addressing the Aging Crisis in U.S. Criminal Justice Health Care*, 60 J. AM. GERIATRIC SOC'Y 1150, 1151 (2012) ("On average, older prisoners nationwide have three chronic medical conditions and a substantially higher burden of chronic conditions like hypertension, diabetes and pulmonary disease than both younger prisoners and older non-prisoners.").

[16] *See, e.g.,* Hannah Riley, *SCHR Calls on U.S. Department of Justice to Intervene as Georgia Prisons Descend into COVID-19-Related Chaos*, SOUTHERN CTR. FOR HUMAN RIGHTS (Sept. 15, 2020) (reporting that the suicide rate in Georgia prisons in 2020 is double that of previous years).

[17] See also this viral video, recorded on a contraband cellphone by a resident of FCI Elkton on April 5, 2020, which powerfully conveys the desperation experienced by people locked inside prisons that have had multiple COVID fatalities.

This last point bears emphasizing: staff too face an elevated risk of contracting the virus. They also spend hours every day inside carceral institutions, where they cannot socially distance and must breathe recirculated air for many hours together. And every day, at the end of their shifts, staff leave their facilities, potentially bringing the virus with them into their homes and communities.

II. Mitigation Strategy I: Managing the Risk Inside

The danger COVID poses to people in congregate settings was evident from the earliest days of the pandemic. In March 2020, the U.S. Centers for Disease Control (CDC) issued a guidance document enumerating best practices for "correctional and detention facilities." Among other issues, the recommendations covered "cleaning/disinfecting and hygiene practices"; "social distancing strategies to increase space between individuals in the facilities"; screening protocols for staff, visitors, and "incoming incarcerated/detained individuals"; and the quarantining of people with confirmed infections or exposure to someone with COVID.[18]

For their part, corrections administrators around the country began implementing measures to address the threat. Family visits were canceled, programs were suspended, and lockdowns were instituted for all residents not performing essential labor. A flurry of additional policies were also adopted, including those establishing enhanced cleaning protocols; providing for the distribution of masks, gloves, and cleaning supplies; requiring isolation of the infected; limiting movement and transfers between facilities; and ordering residents to socially distance as much as possible.

As policies, these responses largely reflected the best early understanding of how to reduce COVID transmission. But policies are only effective if they are followed.[19] With over 1,800 prisons and almost 3,200 jails across the United States, it is impossible to offer a fully comprehensive account of how scrupulously the new policies were implemented in all facilities. There is, however, already considerable evidence that in countless institutions, a yawning gap quickly emerged

---

[18] Centers for Disease Control and Prevention, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (Mar. 23, 2020) (on file with author). In July 2020, the CDC issued a revised guidance document, which included recommended protocols for testing and contact tracing.

[19] *See Ahlman v. Barnes*, 445 F. Supp. 671, 660 (C.D. Cal. 2020) ("[A]lthough defendants may have a policy to comply with CDC guidelines, actual compliance has been piecemeal and inadequate.").

between announced policies and the daily experience of incarcerated people on the ground.

Some examples: In *Valentine v. Collier*, the district court heard "undisputed testimony" that in the Wallace Pack Unit in Texas, "despite the prison's claim of enhanced cleaning measures, its cleaning protocol and practice remained virtually [unchanged]," with prison officials neither increasing the number of janitors nor providing them with the means to ensure the facility was kept properly clean. One janitor "received only one pair of gloves to share with his co-janitor, an arrangement medical experts described as tantamount to no gloves at all." In *Ahlman v. Barnes*, officials at the Santa Ana Jail in Orange County "claimed that [the jail] had already achieved proper social distancing, provided [residents] enough soap for frequent handwashing, and isolated and tested all symptomatic individuals." Yet the detainees told a different story, filing sworn affidavits that described "being transported back and forth to the jail in crammed buses, socializing in dayrooms with no space to distance physically, lining up next to each other to wait for the phone, sleeping in bunk beds two to three feet apart, and even being ordered to stand closer than six feet apart when [they] tried to socially distance." In addition, the district court in *Ahlman* found that detainees did "not receive sufficient cleaning supplies to keep their living areas clean and disinfected," and heard testimony that "the cloth masks provided" were "not replaced for weeks" or were "made from blood- and feces-stained sheets."

In *Marlow v. LeBlanc*, the district court found "credible testimony" out of Rayburn Correctional Center that the Louisiana Department of Corrections was not following its own COVID response guidelines. As a consequence, "no procedures have been implemented to avoid chokepoints in the walkways" of the dorms, so that "foot traffic often results in [residents] and staff 'almost touching' each other."[20] At mealtimes, residents were standing "in a heel to toe fashion" while awaiting their trays and eating while sitting "directly next to one another." Kitchen workers "only occasionally wear masks . . . while serving food," and those waiting to be seen at the medical clinic stand "shoulder-to-shoulder." In Ohio's Pickaway Prison—an early COVID hotspot—residents living in crowded dorms reported resorting to "hanging bed sheets from the top rack of their bunks to protect themselves from others' coughing, sneezing, and breathing." In federal

[20] *Marlowe v. LeBlanc*, No. 18-63-BAJ-EWD, 2020 U.S. Dist. LEXIS 72146, at *12 (M.D. La. Apr. 23, 2020), *but see Marlowe v. LeBlanc*, 810 F. App'x 302, 303-04 (5th Cir. 2020) (granting defendant's request for a stay of injunctive relief ordered by district court).

Bureau of Prisons (BOP) facilities, correctional officers (COs) and other staff reported feeling "pressure to work even after being exposed to sick prisoners." A resident of FCI Elkton in Ohio posted a YouTube video made on a contraband cell phone showing "men packed together in their cubicles, sleeping and wheezing."

Some of this institutional failure may be a product of bad faith on the part of corrections officials. But even prison administrators and staff motivated to try to mitigate the COVID risk face impossible odds. Carceral institutions are simply not conducive to limiting the spread of a highly contagious airborne virus. At the best of times, typical staffing ratios generally allow correctional officers to do only the bare minimum in terms of providing food, medications, access to showers, visits, and other basics. The physical design and layout of the institutions themselves are not conducive to healthy living; sanitation and hygiene are perennial challenges, and people have little personal space or access to fresh air. Nor is there generally much trust between staff and residents, which makes it difficult to get the buy-in necessary to effectively implement even well-conceived policies. To be sure, this absence of trust is well earned; to take just one example, after years of COs responding to internal disorder by imposing solitary confinement—an experience condemned by the UN Special Rapporteur on Torture as "cruel, inhuman, or degrading"[21]—many people in custody have reported being hesitant to admit to being COVID-symptomatic out of fear of being sent to "the hole." During a pandemic, when the margin of error is small, all these dynamics only exacerbate matters, making it even less likely that institutions will operate in ways necessary to ensure the health and safety of everyone involved.

In short, it did not take long to see that, however well-intentioned the staff and however well-conceived the policies, prisons and jails would be unable to effectively contain the spread of COVID without considerable reductions in population density. Some corrections officials sought to achieve this end without releases, but these efforts were largely ill-conceived. For example, in some jurisdictions, administrators tried to achieve lower density by reopening and transferring people into individual units or entire facilities that had previously been decommissioned. But, unless preceded by a strict fourteen-day quarantine, transfers create their own risk of transmission, as the residents and staff of California's San Quentin prison found when transfers from the California Institute for Men in Chino, effected in late May 2020 with insufficient precautions against COVID spread, sparked a viral explosion in San Quentin.

---

[21] The phrasing used is taken directly from the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Since then, over 2,200 residents of San Quentin have tested positive for COVID and at least 28 people have died.

Furthermore, if carceral facilities are standing empty, it is generally for good reason. This became clear in the Cook County jail, when in April 2020 the sheriff sought to spread out the jail's population by reopening tiers "that had been closed for some time."[22] In the ensuing lawsuit, plaintiffs reported finding conditions in these units to be "filthy, [to] lack heat, and [to] lack running or potable water." Similar events played out in Alabama, where the Department of Corrections, seeking space for COVID quarantine, reopened Draper Correctional Center, which had been closed in 2018 after federal investigators "found the facility plagued by rats, maggots, open sewage and toxic fumes." Those transferred into Draper for quarantine reported finding the conditions "unsanitary and inhumane," lacking even working toilets.[23]

These experiences in Cook County and Alabama are reminders that the state's obligation to ensure decent living conditions for the incarcerated is not suspended during a pandemic.[24] Strategies to reduce viral spread must instead be undertaken with an ongoing recognition of the humanity of the incarcerated and the constitutional imperative that they be treated humanely. Among those taking this imperative seriously, it was obvious from the first that, if there was to be a reduction in the population density of prisons and jails, there was only one fit method: people needed to be released from custody in numbers sufficient to enable social distancing by those who remained inside.

---

[22] Reply in Support of Plaintiff's Renewed Motion for Preliminary Injunction at 6, Mays v. Dart, No. 1:20-CV- 02134 (N.D. Ill. Apr. 19, 2020), ECF No. 64.

[23] Given the conditions that led the Alabama DOC to close the facility, this situation should not be surprising. Had the facility been habitable, it would not have been closed. On the state of the Alabama prisons pre-COVID, *see* U.S. DEPT. OF JUSTICE CIVIL RIGHTS DIVISION, INVESTIGATION OF ALABAMA'S STATE PRISONS FOR MEN 5 (2019).

[24] On this obligation more generally, *see* Sharon Dolovich, *Canons of Evasion in Constitutional Criminal Law, in* THE NEW CRIMINAL JUSTICE THINKING 111, 130–32 (Sharon Dolovich & Alexandra Natapoff eds., 2017); Sharon Dolovich, *Evading the Eighth Amendment: Prison Conditions and the Courts, in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 133, 137–40 (Meghan J. Ryan & William W. Berry III eds., 2020).

III. Mitigation Strategy II: Reducing Population Density through Releases

The need for significant releases to reduce the danger of widespread infection and COVID-related fatalities in custody was clear to many observers and stakeholders from the earliest days of the pandemic. Nationwide, numerous public officials with the authority to order releases quickly mobilized. On the jail side, the effect was considerable, with the median jail population dropping 31 percent between early March and mid-May. In the prisons, the drop was less pronounced, though still substantial—roughly 8 percent between March and June. These efforts, however, did not last. By the end of May, the rate of releases had fallen considerably. Jail populations began to creep back up, and have continued a steady upward climb. As for prisons, temporary population reduction efforts—several of which consisted of suspending transfers from local jails to state prisons—have been halted, driving a subsequent increase in population. Some minimal prison releases continue to occur, but eight months on, with a few notable exceptions, they have slowed to a trickle. In what follows, I provide a brief snapshot of the ways public officials have sought to combat COVID through releases. I then speculate as to why, after an initial push from March to May 2020, these efforts largely ceased.

The range of available population reduction strategies varied by context, with jail officials having more levers to drive down numbers than did prison officials. This disparity is a consequence of the different populations these institutions house. Prisons are places where people go to stay: they hold people serving sentences for felonies, i.e., crimes that carry penalties of more than one year. Jails, by contrast, are mostly temporary waystations[25]: in the main, they house people who are awaiting trial, awaiting sentencing, on probation violations or immigration holds, or serving short sentences for misdemeanors. The fact that jails hold people who are pretrial or who have committed relatively minor transgressions, coupled with the sheer volume of people moving in and out of jail every year—more than 10 million people churn annually through the nation's roughly 3,200 jails—means that, apart from a few high-profile detainees, the public pays little attention to who is in jail. Those officials who take steps to shrink jail populations consequently face relatively little political risk

[25] The average jail term is less than 30 days. But some people may spend years fighting their cases. And in California, as a consequence of Realignment (AB 109), people convicted of non-serious, non-violent, non-sex-related offenses will serve their full sentences in county jails, which can mean years in custody in facilities designed to hold people only temporarily.

of the sort that has largely thwarted meaningful decarceration efforts since the "tough on crime" era began.[26]

When COVID-19 hit, there were thus several available mechanisms for reducing jail populations that were unlikely to draw much political blowback. Some involved diverting people from jail altogether.[27] In East Baton Rouge, the local sheriff ordered his officers to stop arresting people for most misdemeanors. In Fort Worth, law enforcement officials were directed to issue citations for low-level offenses instead of arresting suspects and booking them into the jail. In Racine County, Wisconsin, the Sheriff's Office restricted jail admission solely to those individuals suspected of violent crimes. In Maine, the chiefs of the state's superior and district courts issued an order vacating over 12,000 outstanding warrants for failure to appear or for any unpaid fines or fees. In South Carolina, the state Supreme Court directed courts not to issue bench warrants for failure to appear, and to release on their own recognizance, without bond, anyone charged with a non-capital crime, unless found to pose "an unreasonable danger to the community" or "an extreme flight risk."[28]

In other instances, steps were taken to release from the jails people already in custody. In San Francisco, the district attorney ordered prosecutors not to oppose motions to release people facing misdemeanor charges or felony drug charges unless they were found to pose a public safety threat. In Los Angeles, the sheriff ordered the release of 1,700 people who had been sentenced to jail time for non-violent offenses and had less than 30 days left to serve. In New York City, the mayor ordered the release of three hundred elderly, medically compromised individuals from Rikers Island. In several cases, releases from county jails were the product of collaborative efforts among various stakeholders. In Washington County, Arkansas, local jail officials worked with local prosecutors and circuit judges to release approximately 150 people on home monitoring, and sought (and received) state approval to release 33 people serving 90-day sentences

---

[26] *See* Dolovich, *supra* note 3 (examining the political dynamics that have driven the forces of mass incarceration over the past five decades).

[27] During this same period, some state prison systems also halted or limited intake. But because the people affected were bound for state prison, these efforts only created a backlog in county jails. It is therefore only diversionary efforts at the local level, which prevent the intake of new arrivals into the jail, that would reduce population density in carceral facilities as a whole.

[28] All examples in this and the following paragraph are taken from the UCLA Law COVID-19 Behind Bars Data Project jail releases tracker. *See COVID-19-Related Jail Releases*, UCLA LAW COVID-19 BEHIND BARS DATA PROJECT. I thank Maddy DeLone and her team for their commitment to this enterprise.

for parole violations. In New Jersey, following mediation involving the Attorney General, the County Prosecutors' Association, the Office of the Public Defender, and the ACLU of New Jersey, the state's Supreme Court ordered the release of anyone serving time in jail as a condition of probation, on a probation violation, pursuant to a municipal court conviction,[29] or for a misdemeanor.

These combined efforts had a notable effect. By mid-May 2020, the median national jail population had dropped by 31 percent from the start of the pandemic. Unfortunately, rather than continuing on this path, officials across the board began to pull back on their efforts to reduce jail populations. Starting in mid-May, the jail numbers began to creep back up, and as of October 1, at least 50 percent of the reductions had been erased by new admissions, with all signs indicating that this upward trend will continue.

Early in the pandemic, some decarcerative efforts were also seen on the prison side, although without the low-hanging fruit available in the jails, their impact was more modest. Some examples: In California, the governor accelerated by up to 60 days the releases of 3,500 people who had already been found suitable for parole but still awaited expiration of the statutory waiting period. In Kentucky, the governor commuted the sentences of over 900 people serving prison sentences for "non-violent, non-sexual" crimes. Pennsylvania's governor used his reprieve power to accelerate the releases of over four hundred people with medical conditions that put them at high risk of complications from the virus. In North Dakota, the state's parole board held a special session and granted early parole release to 120 individuals. The Nebraska parole board, likewise in a special session, approved early release for 56 people.[30]

These efforts continued as 2020 progressed. In early June, the Arkansas Board of Corrections certified more than 1,200 people as eligible for parole consideration. As of early July, 730 people had been released, leaving the Arkansas prison system roughly at capacity for the first time since 2007. More recently, federal judges in Connecticut and California ordered the federal Bureau of Prisons (BOP) to compile

---

[29] *See* Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. (forthcoming 2020).

[30] All examples in this paragraph are taken from the UCLA Law COVID-19 Behind Bars Data Project prison releases tracker. *See COVID-19-Related Prison Releases*, UCLA LAW COVID-19 BEHIND BARS DATA PROJECT. I again thank Maddy DeLone and her team for their important work.

a list of all medically vulnerable residents at FCI Danbury[31] and FCI Lompoc,[32] and to review each person on that list for their suitability for home confinement. Following completion of that process, 119 people were released from Danbury, and to date, 165 people have been released from Lompoc (44 to home confinement and 121 to halfway houses), with an additional 81 granted compassionate release after the process was kickstarted by the federal litigation.[33] In addition, federal courts have been exercising their authority under the First Step Act to consider compassionate release petitions from people in BOP custody. Although the vast majority of these petitions are denied, to date, roughly 1,700 people[34] have been granted compassionate release from federal custody via the courts. In addition, since the pandemic began, at least one legislature has pursued a statutory response. In late September 2020, the New Jersey legislature passed a law that, with some stipulated exclusions, awards "public health emergency credits" of six months' remission from prison sentences "for each month or portion of each month, served during the declared [COVID] emergency." The impact of this bold legislative move serves as a reminder that legislatures hold broad decarcerative power; in early November 2020, pursuant to the new law, 2,258 people who were within a year of completing their sentences were released from New Jersey prisons, with another 1,167 to be freed in the coming months.[35]

Given the threat of viral spread in crowded facilities, all these steps were welcome ones. They were not, however, enough to contain the risk. What is required is a reduction in population density sufficient to allow those who remain to socially distance. As we have seen, even facilities that are not officially overcrowded but are simply operating at capacity are too crowded to adequately address the COVID threat. Although the precise target is unclear, a June 2020 study of a large urban jail found that an increase from 26 percent to 54 percent in the number of people in single cells, along with a suite of other protective measures (screening, testing, paid sick leave for staff, etc.), produced

---

[31] *See Martinez-Brooks v. Easter*, No. 3:20-cv-00569, 2020 U.S. Dist. LEXIS 83300, at *102 (D. Conn. May 12, 2020).
[32] *See Torres v. Milusnic*, No. CV 20-4450-CBM-PVC, 2020 U.S. Dist. LEXIS 131446, at *67 (C.D. Cal. July 14, 2020).
[33] Personal Communication from Naeun Rim, Principal Attorney at Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhow, P.C., to Sharon Dolovich (Oct. 19, 2020) (on file with author).
[34] Personal Communication from Mary Price, General Counsel for Families Against Mandatory Minimums, to Sharon Dolovich (Oct. 27, 2020) (on file with author).
[35] *See* Tracey Tully, *2,258 New Jersey Prisoners to be Released in a Single Day*, N.Y. Times (Nov. 6, 2020).

an estimated "83% reduction in predicted symptomatic cases and hospitalizations and an 89% reduction in predicted deaths." Double celling has long been standard practice in most state prison systems, and the 8-percent drop in the national prison population is far from enough to enable prisons to single-cell half their occupants. Even in California, which has reduced its prison population by 30 percent since early March 2020, these efforts have only been sufficient to reduce prison overcrowding to 109 percent of capacity.

Prior to COVID, such a rapid reduction in the number of people incarcerated would have been nothing short of remarkable. Over the past decade, although public condemnation of mass incarceration had become commonplace and policymakers across the political spectrum joined the call for change, the number of people in custody has remained stubbornly high. The ability of public officials to so rapidly shrink the American carceral footprint in just two months (mid-March to mid-May) has demonstrated that, with sufficient political will, meaningful reductions are possible. And yet, despite the ongoing danger COVID-19 poses to the health and safety of the incarcerated, most of the efforts by public officials to reduce the number of people in their facilities slowed almost to a halt two months into the pandemic.

The question is why in the main these early efforts were so precipitously abandoned. It is too soon for definitive assessments, but having closely watched these events unfold, I see at least four possible explanations.[36] First, there was simple COVID fatigue. After a strong initial national response to the virus, including the extraordinary step of self-quarantine adopted by millions of people across the country, the problem did not go away, but continued to grow and spread. As the public, feeling exhausted and overwhelmed, watched this progression, people seemed to stop expecting a robust and effective governmental response. Among the ill effects of this fatigue and the consequent resetting of expectations appears to have been an easing of pressure on state and local officials to address the looming crisis in the prisons and jails.

Second, after the murder of George Floyd on May 25, 2020 and the explosion of political protests that quickly followed, many of the journalists who had been covering the impact of COVID on incarcerated people shifted their attentions to the Black Lives Matter movement and the urgent issue of police violence against Black Americans and other people of color. For those committed to the cause of racial justice and to a radical rethinking of the American criminal system, this media focus was vital. It also, however, seems that,

[36] This list is not intended to be exhaustive.

although some BLM leaders centered in their advocacy both mass incarceration and the treatment of the incarcerated, the danger COVID continued to pose to people in custody largely fell off the radar. Again, the waning of attention seemed to have eased the pressure public officials felt to continue their efforts to decarcerate.

Third, there is the problem of inadequate data. I return to this issue in more detail below, but for now, the key point is that many of the prisons that have been reporting COVID infections and death rates lack adequate testing, which has kept official numbers artificially low. The effect has been to propagate an unduly rosy picture that allows officials to claim—and perhaps even to believe—that whatever mitigation efforts they have undertaken must have staved off the worst, making further releases unnecessary. On the jail side, with most facilities nationwide failing even to track infections, officials have been able to remain oblivious to the real possibility of wide viral spread in their jails. Whether these actors are knowingly dissembling or whether, by failing to investigate, they have convinced themselves that no problem exists, officials in many jurisdictions have, for lack of contradictory evidence, felt able to publicly state that COVID no longer poses a threat in their facilities and thus that no further releases are necessary.

Fourth, and likely most consequentially, by mid-May, it was clear that the federal courts were not going to be an effective channel for release, thus negating any pressure correctional officials may have felt to take ameliorative steps to avoid possible legal liability. In the early days of the pandemic, advocates around the country began filing petitions in the federal courts, seeking orders requiring the adoption of measures to mitigate viral spread and the release of people whose age or medical condition made them especially vulnerable. These efforts had some initial success, with several courts granting preliminary injunctions or temporary restraining orders directing correctional officials to improve conditions inside or to identify facility residents at highest risk from COVID in preparation for their release.[37] But

---

[37] *See, e.g., Wilson v. Williams*, No. 4:20-cv-00794, 2020 U.S. Dist. LEXIS 70674, at *25 (N.D. Ohio Apr. 22, 2020), *see also Wilson v. Williams*, No. 4:20-cv-00794, 2020 U.S. Dist. LEXIS 87607, at *6 (N.D. Ohio May 19, 2020) (FCI Elkton); *Valentine v. Collier*, No. 4:20-CV-1115, 2020 U.S. Dist. LEXIS 68644, at *33 (S.D. Tex. Apr. 20, 2020) (Texas Wallace Pack Unit Prison); *Mays v. Dart*, No. 20 C 2134, 2020 U.S. Dist. LEXIS 62326, at *51 (N.D. Ill. Apr. 9, 2020) (Cook County jail); *Swain v. Junior*, No. 1:20-cv-21457-KMW, 2020 U.S. Dist. LEXIS 60878, at *3 (S.D. Fla. Apr. 7, 2020) (Miami-Dade jail).

plaintiffs did not prevail at trial everywhere.[38] And even when they did, in most instances, it did not take long for the appellate courts to step in on the side of defendants.[39] In case after case, appeals courts granted stays of district court orders on grounds strongly suggesting a general lack of sympathy with plaintiffs' arguments.

Not every appeals court issued a stay. *Wilson v. Williams* was a case out of FCI Elkton, a low-security federal facility in Ohio that emerged as an early COVID hotspot, with six people dead by April 22. In that case, the Sixth Circuit twice declined to stay the preliminary injunction issued by the district court. But this victory proved short-lived. Having lost in the Sixth Circuit, BOP officials took their case to the Supreme Court, and in the process elicited an unmistakable sign that corrections officials need not fear legal liability should they fail to protect people in custody from the threat of COVID.

It is worth spending a moment on the details of *Wilson*. Perhaps more than any other litigation, this case supports the conclusion that, even on the most compelling facts and even during a state of emergency, the federal courts, guided by the Supreme Court, will be putting no pressure on corrections administrators to do anything more than the bare minimum to protect the incarcerated from COVID—despite the constitutional duty of care that jail and prison officials plainly bear towards the people in their custody.

The case was brought in mid-April on behalf of all current and future residents of FCI Elkton, requesting that prison administrators create a list of all medically vulnerable residents and find some way to remove them from the facility. Judge James Gwin of the Northern District of Ohio certified the class and issued a preliminary injunction directing BOP officials to create the list and, within two weeks, to find alternative housing arrangements for the people on it, whether through release to home confinement or transfers to other facilities.[40] In reaching this result, the district court acknowledged that BOP

---

[38] *See, e.g., Money v. Pritzker*, No. 20-cv-2093, 2020 U.S. Dist. LEXIS 63599 (N.D. Ill. Apr. 10, 2020) (Illinois state prisons).

[39] *See, e.g.*, *Swain v. Junior*, 958 F.3d 1081, 1092 (11th Cir. 2020) (staying preliminary injunction); *Valentine v. Collier*, 956 F.3d 797 (5th Cir. 2020) (same).

[40] *Wilson v. Williams*, No. 4:20-cv-00794, 2020 U.S. Dist. LEXIS 70674, at *2 (N.D. Ohio Apr. 22, 2020). Given what is now known about the risk of COVID spread via transfers, it is clear that releases to home confinement represent the safest option. At a minimum, any inter-prison transfers would need to be preceded by a strict fourteen-day quarantine (as would release to home confinement, to prevent people from spreading the virus to their families and communities once they have been released from custody).

officials had taken some steps "to lessen the Covid-19 threat." They had been segregating new arrivals for fourteen days. They had developed a protocol for evaluating and responding to symptomatic individuals. They had established a system for regular temperature checks. But Judge Gwin found that officials were "fight[ing] a losing battle." People in Elkton lived in dorms. There was no testing protocol and seemingly minimal testing. Six Elkton residents had already died of COVID, yet the prison at the time was reporting only 59 positive test results among its residents. As the district court pointed out, by that time, officials at Marion Correctional Institution, an Ohio state prison with a population comparable to Elkton's, had already conducted mass testing, with at least 1,950 Marion residents testing positive. This finding at Marion, coupled with the number of fatalities already recorded at Elkton by mid-April, strongly suggested a more widespread outbreak in Elkton than official data acknowledged. Although Elkton officials had restricted movement through the prison, residents remained in units of 150 people, which, as Judge Gwin noted, were nothing like "family units," as Elkton officials sought to characterize them. Some incarcerated workers continued to circulate through the facility, as did the staff, who were also daily exposed to the risk of viral spread. On the basis of these facts, Judge Gwin issued the preliminary injunction plaintiffs sought. In turn, BOP officials sought a stay pending appeal, which the Sixth Circuit denied.[41]

Meanwhile, at Elkton, the virus continued to rage. Although, as of early May, testing in Elkton still lagged, of those people who were tested, 24 percent were found to be infected (a number the district court later labeled "unacceptable").[42] Of 2,417 people then housed in the facility, Elkton officials had identified 837 individuals as being over 65 "or as having significant pre[-existing] health conditions making them especially vulnerable to COVID-19." Yet by May 8, they had judged only five people on that list as appropriate for home confinement and a further six as "maybe qualifying." At this point, plaintiffs went back to the district court with an "Emergency Motion to Enforce the Preliminary Injunction." In his subsequent order, Judge Gwin found the BOP response to that point to have been beyond inadequate, emphasizing that the BOP had statutory authority to release to home confinement people who were elderly or terminally ill—authority that had been expanded by the CARES Act passed by Congress in late March in response to COVID. What's more, U.S.

---

[41] *Wilson v. Williams*, No. 20-3447, 2020 U.S. App. LEXIS 14291, at *6 (6th Cir. May 4, 2020).

[42] *Wilson v. Williams*, No. 4:20-cv-00794, 2020 U.S. Dist. LEXIS 87607, at *4 (N.D. Ohio May 19, 2020).

Attorney General William Barr had in an April 3 memo directed BOP officials to "prioritize the use of [their] various statutory authorities to grant home confinement" to people in BOP custody "seeking transfer in connection with the ongoing COVID-19 pandemic." By "thumbing their nose at their authority to authorize home confinement," Judge Gwin found, Elkton's administrators "threaten[ed] staff and . . . low security [residents]." On May 19, therefore, the district court ordered defendants "to make full use of the[ir] home confinement authority beyond the paltry grants . . . it has already issued"; to respond in short order, on terms consistent with statutory directives, to all the petitions for compassionate release filed by Elkton residents; and to transfer as many Elkton residents as possible to other facilities "where social distancing is possible."

What happened next set the stage, not only for the trajectory of *Wilson v. Williams*, but for virtually all cases brought on behalf of incarcerated plaintiffs seeking relief in the wake of COVID. On May 21, the *Wilson* defendants appealed to the U.S. Supreme Court for a stay of the preliminary injunction, an effort that received vehement support from the Solicitor General, who strongly asserted the inappropriateness of the federal courts directing the BOP's COVID response. Although the Supreme Court denied the request, it emphasized in its brief order that the issue was procedural: defendants had not yet appealed to the Sixth Circuit for a stay of the May 19 order. And despite this procedural infelicity, the Court's order noted that three Justices—Clarence Thomas, Samuel Alito, and Neil Gorsuch—were already prepared even then to grant the BOP relief. The defendants duly returned to the Sixth Circuit, which ordered expedited briefing but denied their request for a stay. Procedural infelicity resolved, the BOP went back to the Supreme Court, which on June 4, to no one's surprise, gave the government the relief it sought. Days later, the Sixth Circuit issued an opinion on the merits vacating the preliminary injunction.[43]

I leave for another day an account of the legal grounds on which the federal courts have rejected claims for relief from the COVID threat brought by incarcerated plaintiffs.[44] For present purposes, what

---

[43] *See Wilson v. Williams*, 961 F.3d 829, 845 (6th Cir. 2020) (vacating April 22, 2020 preliminary injunction); *Wilson v. Williams*, No. 20-3547, 2020 U.S. App. LEXIS 29862, at *2 (6th Cir. Sep. 17, 2020) (vacating May 19, 2020 Order).

[44] The main issues have been a mix of procedure (e.g., whether habeas corpus is the appropriate vehicle for the relief sought, or whether the requirements of 18 U.S.C. § 3626 have been satisfied) and substance (e.g., whether

matters is this: In *Wilson*, the district court found that plaintiffs—residents of a low-security facility, many close to their release dates—faced a substantial risk of serious harm and even premature death, and that, despite having over 800 medically vulnerable people in their custody and the legal authority to provide for their protection, prison officials had failed to take readily available steps to keep them safe. If ever there was a strong imperative for judicial action in the face of regulatory failure on the part of the political branches, it was here. And yet, in literal short order, with no substantive analysis, the Supreme Court strongly signaled its opposition to judicial intervention, a move raising the obvious question of which cases *would* merit judicial enforcement of constitutional protections for the incarcerated.

Supreme Court orders in later cases,[45] along with a slew of subsequent circuit court opinions, have confirmed that the federal courts have largely maintained a hands-off posture in the face of the COVID threat.[46] But even by the third week of May, by which time a number of appellate decisions had already been entered and the first Supreme Court order issued in *Wilson*, corrections officials would have seen enough to know which way the wind was blowing. Although it is hard to say by how much, it is certain that, to some extent, the fear of future liability drove prison officials early in the pandemic to try to

---

plaintiffs can demonstrate the deliberate indifference required to succeed on their Eighth Amendment claims), with several opinions generally invoking the familiar theme of the need for judicial deference to corrections officials. On the centrality of judicial deference in prison law doctrine more generally, *see* Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENTENCING REP. 245 (2012).

[45] *See Barnes v. Ahlman*, 140 S. Ct. 2620, 2621-22 (2020) (Sotomayor, J., dissenting); *Valentine v. Collier*, 140 S. Ct. 1598, 1599 (2020) (Sotomayor, J., concurring).

[46] Since the start of the pandemic, an as-yet unknown number of people have been released from custody on individual habeas petitions. Yet to date, of the innumerable class actions that have been brought by incarcerated plaintiffs since March, only two—*Martinez-Brooks v. Easter* and *Torres v. Milusnic*—have yielded releases. Each involved a single federal facility—FCI Danbury in Connecticut (*Martinez-Brooks*) and FCI Lompoc in California (*Torres*). And in each case, the number of people released has thus far been relatively small, 119 from Danbury and 165 from Lompoc. The grounds for relief in those cases also bear noting: in each, as in *Wilson*, the judge found that BOP officials had not exercised the authority to expand the use of home confinement granted them in the April 3 Barr memo, and ordered them to do so. The ability of the district courts in this suite of cases to rely on such executive direction suggests that, given the current state of the governing legal doctrine, the possibility of judicial action may depend on meaningful engagement in the decarcerative enterprise by the political branches.

reduce the size of their incarcerated populations. The evident unwillingness of the federal courts to intervene on behalf of plaintiffs even at the height of the emergency and even under the most compelling circumstances almost certainly contributed to the waning of these efforts.

IV. The Impact of Institutional Failure: What the Data Show

By the end of March 2020, most state Departments of Corrections and some of the larger jails had begun to track the virus in their facilities and to post their findings on online dashboards. The metrics reported were not uniform and included a range of variables, such as COVID tests conducted, positive infections, active cases, recovered cases, and deaths from COVID. Some DOCs reported this data only for prison residents, while others included data concerning staff. Despite the variation, by persistently tracking the posted data, it was possible to get a rough picture of the officially reported numbers of COVID infections and deaths in state and federal prisons. And by comparing this data with the number of reported COVID infections and COVID-related deaths in the country as a whole, one could determine the relative reported impact of COVID-19 in American prisons.

The first such analysis (on which I was a co-author) was published in mid-July 2020 and confirmed the dire predictions as to the spread and impact of COVID behind bars.[47] Relying on data gathered through June 6, 2020 from BOP and state DOC dashboards by the UCLA Law COVID-19 Behind Bars Data Project[48] (which I direct), we found that the COVID-19 infection rate was 5.5 times higher in prisons than in the U.S. population. Even given our expectation of some disparity, this number was eye-popping. As for COVID deaths, making sense of the relative rate was not as straightforward. In terms of the broad numbers, we found an elevated risk among people in custody, with a crude death rate in prisons of 39 deaths per 100,000 prison residents, as opposed to 29 deaths per 100,000 people in the United States more broadly. On these numbers, people in prison had a 34 percent higher risk of dying from COVID than did people in society at large. But

---

[47] *See* Brendan Saloner, Kalind Parish, Julie A. Ward, Grace DiLaura & Sharon Dolovich, *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 J. Am. Med. Assoc. 602 (2020).

[48] From the end of March until mid-June, the daily work of gathering this data was conducted by Grace DiLaura and Kalind Parish, who served as Co-Leads of the UCLA Law COVID-19 Behind Bars Data Project's data team. From late June to the present, the work has been a collective effort by Michael Everett, Chase Hommeyer, Hope Johnson, Neal Marquez, and Kalind Parish. I thank them all for their dedication and their consistently excellent work.

compared with the size of the disparity on infections, with prison residents facing a risk of infection 550 percent greater than the general public, this death rate at first seemed puzzlingly low, and perhaps to suggest that predictions of disproportionate risk of death from COVID in prison were off the mark.

However, the puzzle clarified once age disparities were taken into account. In American society as a whole, people over age 65 have died from COVID at much higher rates than people in younger age brackets. And because most people who commit serious crimes do so when they are young, people in prison are on average much younger than the general public. Given this age disparity, the fact that, on the raw numbers alone, the death rate among people in prison was 34 percent greater than in society as a whole is striking in itself. But to make the comparison meaningful, it is necessary to calculate relative death rates assuming a comparable age distribution between the two populations. And once we adjusted for age and sex —meaning we calculated what the COVID death rate in prison would be if the incarcerated population had the same age and sex distribution as the U.S. population—we found that people were dying of COVID-19 in prison at 3.0 times the rate seen in the country as a whole.

Even taken alone, these findings are enough to demonstrate a public health disaster. But if anything, they very likely understate the disparities. Take infection rates. Our findings were based on the number of officially reported positive tests. But the data indicates that many prison systems are not systematically testing, if they are testing at all. Even now, almost nine months into the pandemic, the most commonly reported number of cumulative confirmed cases among the 1,406 unique facilities being tracked daily by the UCLA Law COVID-19 Behind Bars Data Project—the cumulative number of COVID infections reported by 363 separate facilities—is *zero*. An additional 265 prisons are reporting fewer than 10 infections since March, with another 114 facilities reporting fewer than twenty.[49] There may well be prisons into which COVID-19 has not yet penetrated, as well as those in which, despite some confirmed cases, the virus has not widely spread. But these numbers strongly suggest that in many facilities, prison officials are testing only the most highly symptomatic individuals, if they are testing at all, and that they are consequently underreporting the extent of viral proliferation.

To be sure, testing is also highly variable in American society in general, which means that the number of reported positive COVID tests in the nation as a whole that we used for comparison purposes

---

[49] I thank Kalind Parish and Hope Johnson for running these numbers.

may also represent a considerable undercount. There is, however, strong evidence that the lack of mass testing is cloaking far higher numbers in the prisons than in society as a whole.[50] The first signs came in April, from two Ohio prisons, Marion CI and Pickaway CI, when the state's governor, Mike DeWine, ordered mass testing in those facilities. At Marion, population 2,500, 2,300 tests were administered, and 2,028 residents tested positive.[51] At Pickaway, at least 77 percent of the prison population was found to be infected. The same pattern emerged at other prisons around the country, with expanded testing protocols in select institutions revealing extremely high infection rates inside. In North Carolina's Neuse CI, 60 percent of prison residents have tested positive. In Arkansas' Cummins Unit Prison, capacity 1,876, 956 prison residents were found to have the virus. At Butner Low FCI, there were 638 infections out of a population of 1,197. At FCI Elkton—the facility at issue in *Wilson*—933 out of 2,004 prison residents have now tested positive. In Michigan's Lakeland prison, out of 1,440 tests administered, 813 came back positive. And in California, mass outbreaks have been recorded at prisons across the state, including CSP Chuckawalla (1,397 positive tests of 2,822 residents), ASP Avenal (2,938 of 3,887), and San Quentin (2,239 of 3,989). Given the relative uniformity of conditions across prisons, the same forces that produced these infection rates at the prisons listed are likely producing similar infection rates at other facilities, which remain unreported only because testing has not been done. There is unlikely to be any county in the United States in which mass testing in the population as a whole would reveal infection rates this stratospheric.[52]

As COVID infections and deaths have spiked nationally, the disparity between the impact on the incarcerated and on society as a whole has narrowed somewhat, but it remains considerable. As of September 22, 2020, the disparity in infection rates in federal and

---

[50] "Mass testing" occurs when a critical mass of a prison's population is tested. Universal testing would mean that every person in a facility, staff as well as residents, is regularly tested on an ongoing basis. To my knowledge, there is no prison in the country that has yet instituted universal testing.

[51] Unless otherwise specified, all data on infection rates listed in this paragraph reflect cumulative cases as of October 27, 2020 and are drawn from the UCLA Law COVID-19 Behind Bars Data Project. All population data cited in this paragraph are taken from the most recent data reported in the HIFLD. I thank Michael Everett for pulling these data together.

[52] In mid-November 2020, 19 percent of people tested in Newark, New Jersey, were found to have the virus. This finding, regarded by local officials as the alarming figure it is, prompted sweeping containment measures across the city aimed at minimizing social interaction and enabling effective social distancing.

state prisons as compared with the broader population had dropped from 5.5 to 1 to 4.8 to 1.[53] Likewise, as of October 10, 2020, the adjusted death rate had dropped from 3.0 to 2.7. [54] We should not let the fact of these reductions obscure the bottom line: these disparities remain extremely high and confirm that COVID-19 continues to have a disproportionate effect on people in custody, with many suffering from preventable illness and premature death. Moreover, given what we now know about the possible long-term effects of the virus, some number of those in custody who were symptomatic but did not die will likely be left with serious chronic health problems and even cognitive impairment.

Yet there remains much we do not know. As noted, testing in many facilities continues to be minimal or nonexistent. There is still no uniformity in what data are being reported. Anecdotal evidence suggests that not even all COVID deaths are reported as such: in some jurisdictions, a death is not officially attributed to COVID unless the decedent had received a positive COVID test before they died. Such tests may be administered postmortem,[55] a practice that would allow a more complete accounting of the COVID death rate behind bars. But at present, this step does not appear to be standard practice among medical examiners. And although the biggest jail systems now publish their data on dashboards of the sort found on DOC websites, most jails around the country post no data at all. Indeed, it appears that many jails do not even collect such data, leaving not only the public but jail officials themselves in the dark as to the impact of the virus in their facilities.

V. THE TOXICITY OF SECRECY IN THE TIME OF COVID

It has become commonplace to observe that, as the novel coronavirus moves through society, it exposes deep pathologies that have long been hiding in plain sight. This effect is certainly true here. We have already seen that a host of longstanding conditions, from overcrowding to grossly inadequate medical care, has provided COVID-19 an environment perfectly adapted for viral spread. But as in society in general, the pathologies the virus exposes in the carceral environment are not only the physically tangible. In addition, several normative dynamics that have long shaped the American penal system

---

[53] Personal Communication from Kalind Parish to Sharon Dolovich (Sept. 28, 2020) (on file with author).
[54] Personal Communication from Kalind Parish to Sharon Dolovich (Oct. 19, 2020) (on file with author).
[55] *See* Michelle Andrews, *With Postmortem Testing, 'Last Responders' Shed Light on Pandemic's Spread*, NPR (May 19, 2020).

have impaired the carceral response to COVID. These include the "us versus them" attitude that often pits prison administrators against those in custody; the callous indifference to the health and safety of the incarcerated, which has led some officials to choose not to order the mass testing that would provide an accurate picture of viral proliferation in their facilities; and the longstanding ideological commitment to being "tough on crime," which, having been vociferously endorsed by lawmakers for more than four decades, now poses a political obstacle to releasing from custody anyone originally convicted of a serious crime, no matter how medically compromised they may be, how much time they have already served, or how great their risk of exposure.

But perhaps the most damaging carceral norm in this moment is the official culture of secrecy that has long kept the public from having a full and accurate picture of what goes on inside prisons and jails. The power of prison officials to control the outflow of information from their facilities has been a standard feature of American carceral practice from the earliest days of the Northeastern penitentiaries and the Southern plantation prisons.[56] With state legislatures historically performing virtually no oversight and the federal courts—the only plausible venue for enforcement of prisoners' constitutional rights—committing to a "hands-off" posture with respect to prisoner suits, prison officials long enjoyed virtually unimpeded authority over what took place inside the walls.[57] With this authority came the power to exclude. Although there is no valid reason why carceral institutions must be hidden from public scrutiny, strict limits on access became a standard feature of carceral life.

This broad regime reigned virtually unchecked through much of the twentieth century, until the 1960s and 1970s, when for a brief period the federal courts displayed a new willingness to enforce constitutional protections for people in custody. During this period, the Supreme Court repeatedly affirmed the status of the incarcerated as rights-bearing subjects and, in case after case, expanded the scope of the

---

[56] *See* Sharon Dolovich, *The Regulation and Oversight of American Prisons*, ANNUAL R. CRIMINOL. (forthcoming 2021).

[57] *See, e.g.*, Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications*, 24 PACE L. REV. 433, 438 (2004) (describing the "feudal-like" character of the plantation prisons that, with the demise of convict leasing, emerged across the American South in the early twentieth century).

rights they could claim.[58] Yet at the same time, the Court still made sure to enshrine in modern constitutional law the power of corrections officials to restrict access to their facilities. In two cases from 1974, *Pell v. Procunier* and *Saxbe v. Washington Post*, the Court held that journalists have no First Amendment right of access to prisons and jails beyond that enjoyed by members of the general public. And in 1978, in *Houchins v. KQED*, the Court established that corrections administrators have total discretion to set the terms of public access to their facilities. Thanks to this trio of cases, jail and prison administrators may without fear of constitutional liability deny access to any parts of their institutions they wish to keep hidden—even from members of the media, through whose work citizens "receive that free flow of information and ideas essential to intelligent self-government."

Lost in this legal regime—and in the culture of secrecy it has engendered—is the fact that prisons and jails are public institutions, operated on behalf of society as a whole. Corrections officials are not sovereign over the people in their custody. They are public servants whose sole job is to administer carceral facilities in ways consistent with the public interest. Yet instead of operating as if they are accountable to the public for what happens to the people in their custody, corrections officials, with the imprimatur of the courts, generally treat information as to goings-on in the prisons and jails as proprietary, theirs to withhold or share as they see fit.

This attitude, and the overall culture of secrecy it engenders, impedes efforts to assess the conditions in which the incarcerated are held and the treatment they receive. It also requires that advocates expend their limited resources on efforts to secure discovery and on public records requests, exercises that often seem to inspire further evasive maneuvers by corrections officials, eating up even more of advocates' resources. As the parties tussle over information, the harms suffered by people in custody, whether from affirmative abuse or failures of care, remain unremedied.

If there is to be meaningful oversight over prisons and jails, there is a strong need for transparency, and for free access to information

---

[58] During this period, incarcerated plaintiffs prevailed in the Supreme Court on a host of claims. *See, e.g., Procunier v. Martinez*, 416 U.S. 396 (1974) (First Amendment expression); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (Fourteenth Amendment procedural due process); *Johnson v. Avery*, 393 U.S. 483 (1969) (Fourteenth Amendment due process right of access to the courts); *Bounds v. Smith*, 430 U.S. 817 (1977) (same). In 1976, the Court also made clear for the first time that the Eighth Amendment prohibition on "cruel and unusual punishment" applies to prison conditions. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

concerning what happens inside and what those happenings mean for the health and safety of the incarcerated. This has always been true, but it is especially so during COVID. We have already seen the insufficiency of the available data concerning the impact of the virus on the incarcerated. Testing data is incomplete, and even those institutions reporting deaths among residents generally include only cases where COVID was the confirmed cause, although it is very likely that many people are dying inside both from COVID and because of it.[59] As a matter of course, corrections administrators should be conducting mass testing in their facilities. They should also, at a minimum and as a matter of course, be publishing:

- cumulative infection counts;
- data on all deaths in custody during this period, including official cause of death;[60]
- the number of people in their custody who are at high risk of complications from the virus;
- the locations where those at high risk are being housed; and

---

[59] In addition to people dying due to complications from COVID, it is certain that many people will also die in custody during this period, not from the virus, but from conditions that, were it not for constraints on prison medical care, could have been treated and death prevented. Although COVID may not have been the direct cause of death, these fatalities should still be classified as "because of Covid." There are also sure to be people who die from untreated mental health issues during this period. There has been little attention paid to suicides in carceral facilities since the start of the pandemic, but my strong hunch is that, when the dust settles and a more complete picture can be assembled, we will find that the suicide rate during this period will have exceeded that of previous years, perhaps considerably. *See, e.g.*, Maxine Bernstein, *Federal Inmates in Sheridan Are Finding Coronavirus Lockdown 'Overwhelming,' Public Defender Says*, OREGONIAN (Apr. 15, 2020) ("Oregon's federal public defender said Wednesday she fears an inmate's suicide and other reports she's received of inmates harming themselves stem in part from the continued coronavirus lockdown at the federal prison in Sheridan").

[60] Prison officials will often cite HIPAA restrictions, which require that state actors preserve the confidentiality of medical information, as grounds for withholding this information. But this is a red herring. Under HIPAA, next of kin have the power to waive confidentiality. And when family members lose a loved one who dies while incarcerated, they are typically willing and even eager to waive HIPAA protections to the extent necessary to publicize the circumstances of their loved one's death. Prison officials committed to transparency around the impact of COVID in prison would assist advocates or journalists in securing family members' consent to disclosure—or would seek to do so themselves.

- the steps that are being taken to prevent the spread of COVID throughout their facilities.

Nor should publishing this data be the extent of the transparency. Innumerable media reports during this period feature first-person testimonials from incarcerated individuals directly contradicting official claims regarding conditions inside their facilities. It is not enough that corrections officials describe what is happening on the ground and what steps they are taking to keep people safe. In addition, every facility should be open to ensuring that neutral observers with a commitment to wide dissemination of information concerning the functioning of public institutions are able to see with their own eyes, and to broadcast, what is going on inside carceral institutions. Reasonable time, place, and manner restrictions would of course be warranted: facilities could not operate effectively if every reporter who wanted to get inside could enter at will, especially when the need to limit viral spread is paramount. At the same time, steps should be taken to ensure that some neutral parties get an accurate picture of what is happening throughout an institution, even—and perhaps especially—when staff think they are not being observed. To restrict outside access to the carceral equivalent of a Potemkin village would defeat the purpose.

Senator Elizabeth Warren has introduced legislation mandating standardized reporting on COVID-19 "in federal, state and local correctional facilities." This is an important step. The challenge is to establish sufficiently compelling mechanisms to secure compliance. In its early iteration, Senator Warren's bill set as the penalty for noncompliance a 10-percent reduction in Byrne Grants, which are federal funds available to state and local jurisdictions to support law enforcement and other criminal legal policies. Unfortunately, this move seems unlikely to provide an adequate incentive for compliance. Byrne grants vary in size according to jurisdiction, but they are typically quite modest. According to the U.S. Department of Justice Bureau of Justice Assistance, in 2015, the total amount distributed under the Byrne program was $255.7 million, with 1,143 jurisdictions eligible for receipt. The size of grants generally tracks the size of counties. But even assuming a roughly equal distribution, Byrne grants would average $223,710, which means a 10-percent penalty for failing to comply with federal COVID reporting requirements would cost a jurisdiction just $22,371. Especially given the size of corrections budgets, corrections officials who perceive information relating to their facilities as proprietary, and who might therefore resent federal efforts

to force transparency, are unlikely to be moved to release requested data by the threatened loss of such a small amount.[61]

The challenge of identifying a sufficiently effective compliance mechanism makes vivid just how deeply entrenched is the culture of secrecy in American prisons and jails. COVID forcefully reminds us of the high health and safety costs of such a regime. In the short term, we need effective legal mechanisms for ensuring broad public access to the relevant data. More broadly, we need to normatively recast our collective understanding of the professional obligations of corrections officials. The authority they enjoy is not theirs by right. It has been granted to them only in order that they may fulfill their delegated responsibility, which is to run the prisons and jails in a way that ensures the health and safety of the people we incarcerate while they serve their time. When, as now, the fulfillment of those responsibilities requires information as to what is happening inside to be broadly disseminated, prison officials should not only stop trying to keep the relevant data from getting out, but they should be actively publicizing it.

VI. Conclusion: Public Health as Public Safety

The carceral conditions that have made the pandemic dangerous for people in custody have been in place for decades. Long before anyone had heard of the novel coronavirus, American prisons and jails were overcrowded, unhygienic, and full of aging people with chronic illnesses poorly managed by medical and mental health staff, if they were managed at all. A thick veil of secrecy has consistently made it hard for advocates, lawmakers, journalists, or private citizens to get an accurate sense of what goes on inside. And in this sphere, deep regulatory failure has been normalized, as the various institutional actors with the legal authority, and thus a duty, to ensure basic protections for the incarcerated have routinely failed to fulfill their

---

[61] It can be hard to know what measures would more effectively prompt compliance, especially given the limited levers available to Congress to require action by state and local officials. One obvious move would be to threaten forfeiture of 100 percent of Byrne funds for noncompliance. Or perhaps Congress might establish a tripling of attorneys' fees for any case where litigation is required to shake loose information that would have been openly reported had the legislative requirements been followed, a possibility proposed by Aaron Littman. In any case, it seems clear that a 10-percent reduction in Byrne funds is unlikely to elicit the desired compliance.

charge, instead displaying a callous indifference to the fate of the human beings we have locked away.[62]

If COVID has taught us anything, it is that our collective failure to recognize the embeddedness of carceral institutions in the broader community and to ensure humane conditions for those individuals living inside is not only cruel but also self-defeating. When people are incarcerated, they do not disappear. Despite high walls, the facilities to which they are removed are still very much within society itself. Every day, residents cycle through Receiving and Release,[63] family and friends of the incarcerated come inside to visit their loved ones, and staff and volunteers leave at the end of their shifts to return to their families and communities.[64] Through these and other channels, what happens in prisons and jails cannot help but have a direct and often immediate impact on society as a whole. My own view is that, even were this not the case, we would still have a strong moral and constitutional obligation to ensure the safety and well-being of the people we choose to incarcerate. But one need not share this view to recognize the imperative of humane treatment. COVID makes clear what advocates for the incarcerated have long emphasized: mass incarceration under inhumane conditions harms everyone. Until we collectively recognize that carceral policy is a central determinant of public health, the American carceral system—and thus American society as a whole—will be as unprepared to address the next pandemic as it was to effectively manage this one.

---

[62] Sharon Dolovich, *The Regulation and Oversight of American Prisons*, ANNUAL R. CRIMINOL. (forthcoming 2021).

[63] *See* Danielle Kaeble, *Time Served in State Prison, 2016*, Bureau of Justice Statistics, at 1 (2018) (reporting that the average stay in state prison among those released in 2016 was 2.6 years). Every year, more than 10 million people churn through local jails. ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, JAIL INMATES IN 2018 1 (2020) ("In 2018, jails reported 10.7 million admissions"). On the prison side, close to 600,000 people are admitted to prison annually and around 600,000 are released. *See* E. Ann Carson, *Prisoners in 2019*, Bureau of Justice Statistics, 13 at Table 8 (2020) (noting a U.S. total of 596,407 prison admissions in 2018 and 576,956 admissions in 2019; a total of 614,860 prisoners were released in 2018 and 608,026 released in 2019).

[64] The most recent data indicate that 658,055 people work in American prisons and jails. *See* James J. Stephan, *Census Of State And Federal Correctional Facilities, 2005*, Bureau of Justice Statistics at Appendix Tables 12, 13 (2008) (as of 2005, federal and state prisons employed 445,055 people); *see also* Zhen Zeng, *Jail Inmates in 2016*, Bureau of Justice Statistics, at 6, Table 8 (2018) (as of 2015, there were 213,000 total employees in city and county jails).