

## PRISONS AND PANDEMICS

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### ABSTRACT

This Article examines the public health response to COVID-19 within federal and state prisons and local jails. Prisons and jails are often a hotbed of airborne infections like COVID-19 as a result of chronic overcrowding, unavoidably close living quarters, and incarcerated people's underlying health risk factors. Proposals for handling coronavirus vary but tend to include the incorporation of prevention measures within congregate settings as well as the return of individuals to their local communities in order to facilitate physical distancing. This Article identifies ethical tradeoffs and sets priorities for incarcerated people's return to communities. In Parts I and II, we provide background on why the COVID-19 pandemic is especially dangerous within correctional facilities and lay out the various enacted and proposed public health responses. In Part III, we provide moral, practical, and legal arguments for supporting the early release of incarcerated individuals that stand independently of specific views about criminal detention and theories of legal punishment. In the last part, we set priorities for which individuals to release first. These are individuals who (1) have low risk of recidivism for a violent offense, (2) are being held pretrial, (3) have high risk of mortality from COVID-19, (4) are nearing the end of their sentences, and (5) have custodial responsibilities to third parties.

### INTRODUCTION

Since the first case of the novel coronavirus disease 2019 (COVID-19) was confirmed in the U.S. on January 21, 2020, the largest clusters of infection have occurred within prisons and jails, distantly followed by meatpacking plants and nursing homes.<sup>1</sup> All five of the top five clusters of COVID-19 infections around the country are in carceral facilities, and incarcerated people are at least two-and-a-half times more likely than the general population to acquire COVID-19.<sup>2</sup> To cite an especially glaring case, over seventy percent of those incarcerated at an Ohio state prison have tested positive.<sup>3</sup>

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<sup>1</sup> Zeke Emanuel & Jonathan Moreno, Making the Call Prison Outbreak: How Do We Stop COVID-19 From Spreading in Prisons and Jails? (2020) (last visited May 13, 2020); Coronavirus in the U.S.: Latest Map and Case Count, *in* N.Y. TIMES (2020) (last visited June 23, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

<sup>2</sup> The precise likelihood of acquiring COVID-19 inside and outside of carceral facilities is unknown because of a lack of universal testing. *Id.*; Equal Justice Initiative, Covid-19's Impact on People in Prison, May 21, 2020, <https://eji.org/news/covid-19s-impact-on-people-in-prison/>.

<sup>3</sup> Bill Chappell & Paige Pflieger, 73% Of Inmates At An Ohio Prison Test Positive for Coronavirus, *in* NPR, April 20, 2020, <https://www.npr.org/sections/coronavirus-live-updates/2020/04/20/838943211/73-of-inmates-at-an-ohio-prison-test-positive-for-coronavirus>.

Heightened fears surrounding COVID-19 have led to mass prison releases and protests,<sup>4</sup> reflecting a growing sentiment among those incarcerated—“we’re all on death row now.”<sup>5</sup>

This has resulted in a flurry of journal commentaries and op-eds recommending the release of incarcerated people to slow the pandemic and arguing, “[t]he unmet needs of incarcerated people have long been ignored,” “[e]ach person needlessly infected in a correctional setting who develops severe illness will be one too many,” and “whatever they have done to get [locked up], they haven’t been sentenced to death by virus.”<sup>6</sup> Calls to flatten the curve for carceral populations are mostly based on:

- (1) epidemiological evidence which suggests that mass incarceration increases contagion rates for infectious diseases,<sup>7</sup> and
- (2) an ethical argument that the government has distinctive responsibilities to incarcerated people because their welfare is entrusted to the government.

Yet there is resistance to releasing incarcerated people because of a fear that they will go on to commit new crimes.<sup>8</sup> In part, these fears are politically motivated and grounded in the assumption that “it is

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<sup>4</sup> In response to the coronavirus, Iran has released 70,000 incarcerated people; Italy has had protests in at least two dozen prisons, leading to at least six detainee deaths; a demonstration at a Washington state prison has prompted officers to fire nonlethal rounds and pepper spray; and incarcerated people at a Pennsylvania prison have launched hunger strikes. See Amanda Holpuch, Calls Mount to Free Low-Risk US Inmates to Curb Coronavirus Impact on Prisons, in THE GUARDIAN, March 13, 2020, <https://www.theguardian.com/us-news/2020/mar/13/coronavirus-us-prisons-jails>; see also Zusha Elinson & Sadie Gurman, Incarcerated people Riot as Coronavirus Tensions Rise, in WALL STREET JOURNAL, April 9, 2020, <https://www.wsj.com/articles/incarcerated-people-riot-as-coronavirus-tensions-rise-11586469284>; Kenya Evelyn, Prison Uprising Put Down as US Inmates Demand Protection for Coronavirus, in THE GUARDIAN, April 10, 2020, <https://www.theguardian.com/us-news/2020/apr/10/us-prisons-coronavirus-uprising-riot>; Jeremy Roebuck & Chris Palmer, What It’s Like to be Locked in Prison During the Coronavirus Pandemic, in PHILADELPHIA INQUIRER, April 1, 2020, <https://www.inquirer.com/news/coronavirus-covid-19-pennsylvania-prisons-jails-inmates-guards-20200401.html>.

<sup>5</sup> Clavel Rangel, Joe Parkin Daniels & Tom Phillips, ‘We’re all on death row now’: Latin America’s Prisons Reel from COVID-19, in THE GUARDIAN, May 16, 2020, <https://www.theguardian.com/world/2020/may/16/latin-america-prisons-covid-19-riots>.

<sup>6</sup> Oluwadamilola T. Olander et al., What COVID-19 Means for America’s Incarcerated Population—And How to Ensure it’s Not Left Behind, in HEALTH AFF. Blog, March 10, 2020, <https://www.healthaffairs.org/doi/10.1377/hblog.20200310.290180/full/>; Matthew J. Akiyama et al., *Flattening the Curve for Incarcerated Populations—Covid-19 in Jails and Prisons*, N. ENGL. J. MED. 2075, 2076 (2020); Zeke Emanuel & Jonathan Moreno, *supra* note XX.

<sup>7</sup> Sandhya Kajeepeta & Seth J. Prins, Why Coronavirus in Jails Should Concern All of Us, in THE APPEAL, March 24, 2020, <https://theappeal.org/coronavirus-jails-public-health/> (suggesting “increases in a county’s jail incarceration rate were associated with significant increases in county rates of infectious disease deaths”). See also Sandhya Kajeepeta et al., *County Jail Incarceration Rates and County Mortality Rates in the United States, 1987-2016*, 110 AM. J. PUBLIC HEALTH S109 (2020) (concluding “within-county increases in jail incarceration rates are associated with increases in subsequent mortality rates after adjusting for important confounders”).

<sup>8</sup> This fear, while at times reasonable, can also be rooted in stereotypes. Our reference to the public’s fear of incarcerated people is not intended to be a tacit statement that these fears are always founded. To cite a high-profile example, President Trump has publicly objected to early release: “We don’t like it...The people don’t like it, and we’re looking to see if I have the right to stop it in some cases...Some people are getting out that are very serious criminals in some states, and I don’t like that. I don’t like it.” County sheriffs have also voiced the concern that inmates are “going to use the word COVID-19 to get out of jail.” See Rick Sobey, Donald Trump: ‘I don’t like’ State Releasing Prisoners Amid Coronavirus Outbreak, in BOSTON HERALD, April 2, 2020, <https://www.bostonherald.com/2020/04/02/donald-trump-i-dont-like-states-releasing-prisoners-amid-coronavirus-outbreak/>; Coronavirus COVID-19: Corrections Update Webinar from March 23, 2020, [http://www.aca.org/ACA\\_Prod\\_IMIS/ACA\\_Member/Healthcare\\_Professional\\_Interest\\_Section/Copy\\_of\\_Coronavir\\_us\\_COVID.aspx](http://www.aca.org/ACA_Prod_IMIS/ACA_Member/Healthcare_Professional_Interest_Section/Copy_of_Coronavir_us_COVID.aspx).

better [for Governors] to have 20 coronavirus deaths in prison than to have one furloughed inmate commit a crime.”<sup>9</sup> This debate has been framed as one of “public health versus public safety.”<sup>10</sup> Several victims and law enforcement officers have complained that some incarcerated people are too dangerous to reintroduce to communities and that early release would burden officers who are already struggling to manage changes to policing practices as a result of COVID-19.<sup>11</sup> On the other hand, jail and prison staff have been uneasy about the added risk to their own health from regular contact with high numbers of incarcerated people. At the time this Article was written, too few incarcerated people in the U.S. had been released or diverted from correctional facilities to meaningfully reduce rates of infection among those incarcerated.

This Article focuses on how to balance public health, public safety, and incarcerated people’s legal rights when implementing a program for early release from confinement.<sup>12</sup> Ethical, epidemiological, and legal arguments all point to a need for an immediate reduction in the incarcerated population. However, this leaves open several points of reasonable disagreement about how to manage early release. These include how to set priorities for processing and releasing individuals across the country—for example, officials could prioritize screening individuals who are housed in facilities that have been hit hard by infection; or by screening individuals who have a safe place to quarantine post-release; or individuals who are being held for violations of parole, lower level and non-violent crimes, or prior to their trials; or individuals who are most vulnerable to coronavirus; or individuals who have already served most of their sentences; and so on. This Article discusses how to set priorities for safely and quickly returning incarcerated individuals to their communities during a life-threatening outbreak.

In the first Part, we establish why incarcerated people are especially vulnerable during a public health emergency. For a variety of reasons, incarcerated people are more likely than the general public to acquire and to experience negative outcomes from infectious diseases, putting their health and the health of surrounding communities at risk.

In the second Part, we discuss the pandemic response taken by federal and state prisons and local jails and explain why it has had little success. For the most part, releases have been slow and discretionary, meaning that whether an individual is released is “like the luck of the draw” because there are “wardens

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<sup>9</sup> Sandra E. Garcia, U.S. Prison Population Remained Stable as Pandemic Grew, *in* N.Y. TIMES, May 14, 2020, <https://www.nytimes.com/2020/05/14/us/prison-populations-covid.html>.

<sup>10</sup> Sadie Gurman & Zusha Elinson, Coronavirus-Driven Prisoner Releases Spur Debate Over Public Health Versus Public Safety, *in* WALL STREET JOURNAL, April 14, 2020, <https://www.wsj.com/articles/prisoner-release-orders-spur-debate-pitting-public-health-against-public-safety-11586862003>.

<sup>11</sup> *Id.* One victim stated in an interview with the New York Times, “It’s a slap in the face...Just the fact that he’s out there living, doing whatever he wants to do, and yet my daughter is never going to be able to do that again.” The top prosecutor in St. Louis countered, “They are not throwaways. They also have families...We have to protect everybody...This is a broken criminal justice system that intersects with our broken health care system.” John Eligon, ‘It’s a Slap in the Face’: Victims Are Angered as Jails Free Inmates, *in* N.Y. TIMES, April 24, 2020, <https://www.nytimes.com/2020/04/24/us/coronavirus-jail-inmates-released.html>. Some victims’-rights groups do not oppose release but instead ask for precautionary measures, such as alerting victims if a defendant is seeking release, giving victims an opportunity to be heard at any release hearing, and using GPS monitoring. Letter from Network for Victim Recovery of DC to Muriel Bowser, Mayor of the District of Columbia (April 3, 2020).

<sup>12</sup> In this Article, we assume that keeping individuals incarcerated will prevent violence, at least in certain cases, at least temporarily. In response, some activists will deny that prisons really work to prevent the spread of violence, whereas other activists will maintain that prisons do prevent violence but that risks of violence are vastly overstated in the public imagination. We return to this point in Part IV(b).

in certain prisons that will get right on it, and some that won't release a soul."<sup>13</sup> We also outline some of the recommendations proposed by bodies like the ACLU and members of Congress. Careful consideration of these different plans for releasing incarcerated people from confinement is important in order to prepare for COVID-19 in the coming months and to look toward future pandemics.

In the third Part, we summarize the moral, practical, and legal arguments for making the health of incarcerated people a priority during a pandemic. These arguments rely on: the ethical principle that we are morally required to protect individuals who have been deprived of the liberty to protect themselves; empirical evidence indicating that high infection rates within correctional facilities have serious public health consequences for surrounding communities; and legal precedent which suggests that incarcerated people have a right to protection from infectious diseases. Taking these arguments together, it is reasonable to support a substantial reduction in jail and prison populations, irrespective of one's general views about the ethics and purpose of mass incarceration.

In the last Part, we delve into the details of how to release incarcerated people. There have been several general recommendations for how to do it. However, the ethical priorities that underlie these different recommendations have not been made explicit and have not been considered together. In this Part, we identify the various ethical considerations relevant to early release, and we argue that five factors should be given special priority. These are (1) risk of recidivism for a violent offense, (2) presumption of innocence for the accused, (3) risk of mortality from coronavirus, (4) proportion of sentence served, and (5) responsibilities to third parties.

## **I. WHY OUTBREAKS ARE PARTICULARLY CONCERNING IN U.S. PRISONS AND JAILS**

U.S. prisons and jails have long been a hotbed of infectious disease outbreaks. Historically, one of the primary foci of the 1918 influenza pandemic was San Quentin Prison.<sup>14</sup> Detained populations in the U.S. have shown increased rates of bloodborne infections, sexually transmitted infections, and airborne infections, including HIV, hepatitis B, and hepatitis C, syphilis, gonorrhea, chlamydia, influenza, varicella-zoster, MRSA, and tuberculosis.<sup>15</sup> Despite the fact that incarcerated Americans only comprise approximately 0.8% of the population, those with a history of incarceration represent approximately 20-26% of Americans with HIV, 12-15% of Americans with chronic hepatitis B, and 39% of Americans with chronic hepatitis C.<sup>16</sup> In recent years, correctional systems in California, Georgia, Illinois, Mississippi, Missouri, and Texas have had serious MRSA outbreaks—for instance, the prevalence of MRSA at Chicago's Cook County Jail was a staggering 78%.<sup>17</sup> And, jails show both the largest number and highest incidence of tuberculosis in the U.S.<sup>18</sup> In short, the risk of acquiring an infectious disease in U.S. prisons and jails is tragically high.

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<sup>13</sup> *Id.*

<sup>14</sup> L.L. Stanley, *Influenza at San Quentin Prison, California*, 34 PUBLIC HEALTH REP. 996, 996-1008 (1919); Niyi Awofeso, *Prisons Show Prophylaxis for Close Contacts May Indeed Help in Next Flu Pandemic* 329 BR. MED. J. 173, 173 (2004).

<sup>15</sup> Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 CLIN. INFECT. DIS. 1047, 1047-55 (2007).

<sup>16</sup> Cindy M. Weinbaum et al., *Hepatitis B, Hepatitis C, and HIV in Correctional Populations: A Review of Epidemiology and Prevention* 19 AIDS S41, S41-46 (2005).

<sup>17</sup> Bianca Malcom, *The Rise of Methicillin-Resistant Staphylococcus aureus in U.S. Correctional Populations*, 17 J. CORRECT. HEALTH CARE 254, 254-65 (2011); Michael Z. David, *Predominance of Methicillin-Resistant Staphylococcus aureus Among Pathogens Causing Skin and Soft Tissue Infections in Large Urban Jail: Risk Factors and Recurrence Rates*, 46 J. CLIN. MICROBIOL. 3223, 3222-7 (2008).

<sup>18</sup> Lauren A. Lambert, *Tuberculosis in Jails and Prisons: United States, 2002-2013*, AM. J. PUBLIC HEALTH 2234, 2231-7 (2016).

Not only are detained individuals especially vulnerable to acquiring infections, but they are also vulnerable to morbidity and mortality from those infections due to aging, the presence of underlying medical conditions, smoking, and other risk factors.<sup>19</sup> In the last several decades, there has been a surge in the elderly prison population; for instance, the number of state prison inmates over the age of 55 has increased by 400% since 1993.<sup>20</sup> Plus, an estimated 44% of state detainees and 39% of federal detainees have an underlying health condition, with the most commonly reported being arthritis (state 15%; federal 12%), hypertension (state 14%; federal 13%), asthma (state 9%; federal 7%), heart problems (state 6%; federal 6%), diabetes (state 4%; federal 5%), and kidney problems (state 3%; federal 3%).<sup>21</sup> Finally, an estimated 64.7% of state detainees and 45.2% of federal detainees smoke compared to only 21.2% of the general population.<sup>22</sup> Incarcerated populations are also structurally marginalized and disproportionately likely to comprise people of color, people who are undocumented, people with disabilities, people who have experienced homelessness, people who have received government assistance, people who have used intravenous drugs, and people who work in the sex industry, all of which are predictors of susceptibility to and adverse outcomes from infection.<sup>23</sup> As a result of these factors, detained individuals represent a vulnerable population who are at an especially high risk of harm from infections.

Prisons and jails encounter a host of unique challenges that hinder infection control and fuel high rates of infection. These include restricted movement, overcrowding, confined spaces, high population turnover, rationed access to soap and laundry, restrictions on alcohol-based hand sanitizer and undiluted disinfectants, poor sanitation, limited isolation rooms and personal protective equipment, and low public priority for correctional healthcare, which can result in delayed case detection, poor contact investigations, interrupted supplies of medicine, inadequate treatment, and insufficient laboratory capacity and diagnostic tools.<sup>24</sup> Meanwhile, public health authorities often fail to target jails and prisons for public health interventions, resulting in, for example, the majority of detained individuals in small jails never being offered the vaccine for the 2009 H1N1 influenza

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<sup>19</sup> Kai Wright, *The United States of Anxiety Inside the Prison Pandemic* (2020), <https://www.wnycstudios.org/podcasts/anxiety/episodes/inside-prison-pandemic> (last visited May 5, 2020).

<sup>20</sup> U.S. Dep't of Justice Bureau of Justice Statistics, *Aging of the State Prison Population, 1993-2013* (2016), <https://www.bjs.gov/content/pub/pdf/aspp9313.pdf>.

<sup>21</sup> U.S. Dep't of Justice Bureau of Justice Statistics, *Medical Problems of Incarcerated People* (2008), <https://www.bjs.gov/content/pub/pdf/mpp.pdf>.

<sup>22</sup> Amanda Holpuch, *supra* note XX.

<sup>23</sup> See, e.g., Community Justice Exchange & Public Health Awakened, *Decarceration During COVID-19: A Messaging Toolkit for Campaigns for Mass Release* (2020), [https://static1.squarespace.com/static/5e1f966c45f53f254011b45a/t/5e98e335ddcb123729ccfa29/1587077943048/DecarcerationPublicHealthMessageGuide\\_FINAL\\_April2020.pdf](https://static1.squarespace.com/static/5e1f966c45f53f254011b45a/t/5e98e335ddcb123729ccfa29/1587077943048/DecarcerationPublicHealthMessageGuide_FINAL_April2020.pdf); Didier Raoult et al., *Infections in the Homeless*, 1 LANCET INFECT. DIS. 77, 77-84 (2001); Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2012); F.B. Mayr, S. Yende, & D.C. Agnus, "Racial Disparities in Infection and Sepsis: Does Biology Matter?" in *Yearbook of Intensive Care and Emergency Medicine* (2008). For how these factors specifically affect COVID-19 outcomes, see Fei Zhou et al., *Clinical Course and Risk Factors for Mortality of Adult Inpatients with COVID-19 in Wuhan, China: A Retrospective Cohort Study*, 395 LANCET 1054-62 (2020); Rong-Hui Du, *Predictors of Mortality for Patients with COVID-19 Pneumonia Caused by SARS-CoV-2: A Prospective Cohort Study*, 55 EUR. RESPIR. J. (2020); Travis P. Baggett et al., *Prevalence of SARS-CoV-2 Infection in Residents of a Large Homeless Shelter in Boston*, JAMA (2020); M.T. Bassett, Jarvis T. Chen & Nancy Kriger, *The Unequal Toll of COVID-19 Mortality by Age in the United States: Quantifying Racial/Ethnic Disparities*, HCPDS WORKING PAPER VOL. 19, NO. 3 (2020).

<sup>24</sup> Masoud Dara, *Tuberculosis Control in Prisons: Current Situation and Research Gaps*, 32 INT. J. INFECT. DIS. 112, 111-7 (2015); Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 CLIN. INFECT. DIS. 1047, 1047-55 (2007); Matthew J. Akiyama et al., *supra* note XX.

pandemic even though the vaccine was plentiful.<sup>25</sup> These factors not only contribute to the spread of infectious diseases within prisons and jails but can also affect the health of surrounding communities, given that detained individuals routinely interact closely with legal representatives, social workers, healthcare professionals, substance abuse counselors, spiritual and religious counselors, recreational therapists, teachers, social visitors, and corrections officers.<sup>26</sup> U.S. prisons and jails present opportunities for public health disasters, and the effects of an outbreak can spread across detained individuals, correctional staff, and local communities.<sup>27</sup>

Unsurprisingly, prisons and jails are currently being called “Petrie Dishes” and “Reservoirs” for COVID-19.<sup>28</sup> The major source of concern is that there are many ways for COVID-19 to spread quickly in correctional settings, such as staff entry and exit, transfer of individuals between jails and prisons, transfer of individuals to court appearances and to outside medical visits, and visits from legal representatives.<sup>29</sup> Some carceral facilities, like jails and immigration detention centers, have especially high turnover and receive new intakes from a variety of geographic locations, risking the introduction COVID-19 from different areas.<sup>30</sup> In addition, many smaller facilities do not have the capacity to evaluate or treat incarcerated people for COVID-19 in a dedicated health area, place suspected or confirmed cases into individual medical isolation, or assemble needed onsite healthcare staff, meaning that these facilities will have to transfer contagious patients to larger carceral facilities or to local hospitals.<sup>31</sup> There are also concerns about what will happen to incarcerated people if staff are heavily affected by infection. It is undeniable that COVID-19 poses a special challenge for prisons and jails.

## II. THE RESPONSE TO CORONAVIRUS IN U.S. PRISONS AND JAILS

Prisons and jails are not conducive to the provision of personal protective equipment or physical distancing, and resource and political constraints have made an appropriate response to COVID-19 especially difficult. A particular challenge has been balancing the sometimes competing goals of promoting public health and public safety. According to several experts, a substantial reduction in the incarcerated population is needed in order to contain the spread of COVID-19. According to epidemiologist Josiah Rich, “The more people behind bars, the more transmissions you are going to have.”<sup>32</sup> But, at the same time, there are fears of a potential uptick in preventable violence. To quote the Oregon District Attorneys Association, “We are already hearing from victims expressing worry about these potential releases,” given that “Oregon’s prison population is *not* substantially made up of

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<sup>25</sup> *Id.*

<sup>26</sup> See Centers for Disease Control and Prevention, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf>.

<sup>27</sup> Many of the hardest-hit rural counties have linked the spread of COVID-19 back to meatpacking plants, prisons, and nursing homes. Tim Marema & Bill Bishop, The 25 Rural Counties with Highest Infection Rates, in Daily Yonder, May 18, 2020, <https://dailyyonder.com/the-25-rural-counties-with-highest-infection-rates/2020/05/18/>.

<sup>28</sup> See, e.g., Jake Harper, Crowded Prisons Are Festering ‘Petrie Dishes’ For Coronavirus, Observers Warn, in NPR, May 1, 2020, <https://www.npr.org/sections/health-shots/2020/05/01/848702784/crowded-prisons-are-festering-petrie-dishes-for-coronavirus-observers-warn>; Oluwadamilola T. Oladeru, *supra* note XX.

<sup>29</sup> Centers for Disease Control and Prevention, *supra* note XX.

<sup>30</sup> *Id.*; See Noah Feldman, Deep Background with Noah Feldman Prisons and Jails Are a Coronavirus Time Bomb (2020), <https://www.stitcher.com/podcast/pushkin-industries/deep-background-with-noah-feldman/e/68251712> (last visited May 5, 2020).

<sup>31</sup> *Id.*

<sup>32</sup> Amanda Holpuch, *supra* note XX.

individuals serving long sentences for drug possession crimes” but rather for violent crimes like murder, rape, kidnapping, child abuse, and domestic violence.<sup>33</sup> As Attorney General William Barr crassly put it, “COVID-19 presents real risks, but so does allowing violent gang members and child predators to roam free.”<sup>34</sup>

The fundamental problem is that incarcerated people have a moral and legal right to a safe environment while confined by U.S. law enforcement, but that U.S. law enforcement also have an obligation to protect the public from preventable violence. Perhaps unsurprisingly, given the complexity of the current situation, law enforcement officers have struggled to weigh the considerations of public health and public safety when making practical decisions about whom to individually release and how to restructure facility operations for those who are not released.

In this Part, we review the current pandemic response in federal prisons, state prisons, and county and city jails.<sup>35</sup> We give an overview of the mechanisms that correctional facilities have put in place for dealing with COVID-19, and we illustrate how these mechanisms have been grievously incapable of containing its spread, signaling a need for more careful thought about how correctional facilities should address COVID-19 in the coming months and how they can prepare for the next global pandemic.

#### ***a. Coronavirus in Federal Prisons***

The Federal Bureau of Prisons manages 122 federal prisons throughout the U.S. that are organized across five different security levels—minimum, low, medium, high, and administrative—corresponding to different staff-to-detainee ratios, different dormitory housing, different work and treatment programs, and different specialized missions, such as the detention of pretrial offenders or the treatment of incarcerated people with chronic medical problems.<sup>36</sup> In recent years, federal prisons

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<sup>33</sup> Letter from Oregon District Attorneys Association, Inc., to Kate Brown, Governor of Oregon (April 8, 2020), [https://f089a6f3-e440-4f12-9600-0d9903293503.filesusr.com/ugd/818f22\\_05826c1a889e4e3b9f71a33f4b27b6a0.pdf](https://f089a6f3-e440-4f12-9600-0d9903293503.filesusr.com/ugd/818f22_05826c1a889e4e3b9f71a33f4b27b6a0.pdf).

<sup>34</sup> Memorandum from William Barr, United States Attorney General, to All Heads of Department Components and All United States Attorneys (April 6, 2020), <https://www.justice.gov/file/1266901/download>.

<sup>35</sup> There are additional populations to consider. Beyond prisons and jails, the American criminal justice system also holds about 46,600 individuals across 1,772 juvenile detention centers, 40,000 individuals across 218 immigration detention centers, 12,300 individuals across prisons operated within U.S. territories (American Samoa, Guam, and the U.S. Virgin Islands) and U.S. commonwealths (Northern Mariana Islands and Puerto Rico), 2,540 individuals across eighty jails operated by tribal authorities or the Bureau of Indian Affairs, 1,300 individuals across U.S. military prisons, as well as additional individuals across civil commitment centers and state psychiatric hospitals. Although this Article primarily focuses on U.S. prisons and jails, and space does not permit us to go in-depth about these congregate facilities’ response to COVID-19, it is important to note that many of the arguments that we will advance in this Article can be modified to apply to these facilities as well. See Juvenile Residential Facility Census Databook: 2000-2018, Number of Facilities and Juvenile Offenders by Facility Operation, United States, 2018,

[https://www.ojjdp.gov/ojstatbb/jrfcdb/asp/display\\_profile.asp](https://www.ojjdp.gov/ojstatbb/jrfcdb/asp/display_profile.asp); Amnesty International, USA: ‘We Are Adrift, About to Sink’ (2020), <https://www.amnesty.org/download/Documents/AMR5120952020ENGLISH.PDF>; U.S. Dep’t of Justice Bureau of Justice Statistics, Correctional Populations in the United States, 2016 (2018),

<https://www.bjs.gov/content/pub/pdf/cpus16.pdf>; U.S. U.S. Dep’t of Justice Bureau of Justice Statistics, Jails in Indian Country, 2016 (2017), [https://www.bjs.gov/content/pub/pdf/jic16\\_sum.pdf](https://www.bjs.gov/content/pub/pdf/jic16_sum.pdf); U.S. U.S. Dep’t of Justice Bureau of Justice Statistics, Prisoners in 2017 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf>; Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLICY INITIATIVE PRESS RELEASE, March 24, 2020, <https://www.prisonpolicy.org/reports/pie2020.html>.

<sup>36</sup> Federal Bureau of Prisons, Federal Bureau of Prisons COVID-19 Action Plan, March 13, 2020, [https://www.bop.gov/resources/news/20200313\\_covid-19.jsp](https://www.bop.gov/resources/news/20200313_covid-19.jsp); Federal Bureau of Prisons, About Our Facilities (last visited June 17, 2020), [https://www.bop.gov/about/facilities/federal\\_prisons.jsp](https://www.bop.gov/about/facilities/federal_prisons.jsp).

have operated at 114.1% of maximum capacity, confined approximately 170,000 individuals, and employed approximately 36,000 workers.<sup>37</sup> The diversity across federal prisons in terms of population, operations, and available resources renders a one-size-fits-all approach to COVID-19 inadvisable.

Even though law enforcement lacks the general authority to release incarcerated people for the express purpose of curbing infectious disease transmission, there are a few legal avenues through which it can respond to the COVID-19 pandemic.<sup>38</sup> Specifically, 18 U.S.C. § 3142 permits courts to temporarily release pretrial detainees for “compelling” reasons; 18 U.S.C. §§ 3582 and 4205(g) permits courts to place eligible elderly individuals with medical conditions on “compassionate release”; the First Step Act of 2018 permits the Bureau of Prisons to place low risk, elderly individuals on home confinement; 18 U.S.C. § 3624 permits the Bureau to place individuals on home confinement for the last twelve months of their sentences; the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act; P.L. 116-136) permits the Bureau to lengthen home confinement for individuals during an “emergency period”; and Article II of the Constitution permits the President to grant executive clemency.<sup>39</sup>

On March 13, 2020, the Bureau of Prisons announced its action plan to curtail the spread of COVID-19, which initially focused on reducing internal movement within prisons rather than releasing incarcerated people from prisons.<sup>40</sup> However, as the situation has evolved, the Bureau has modified its action plan to increase utilization of home confinement; on March 26, 2020, Attorney General William Barr issued a memorandum instructing the Bureau to prioritize release of individuals while taking care to consider the following factors: (1) their age and vulnerability to COVID-19, (2) the security level of the prisons in which they reside, (3) their conduct in prison, (4) their risk of recidivism, (5) whether they have plans for re-entering the community and whether they would be released to conditions that present a lower risk of contracting COVID-19 than prison, and (6) their crime of conviction.<sup>41</sup> On April 5, 2020, the Bureau announced that it had increased home confinement, with priority given to individuals who had COVID-19 risk factors and were located in prisons with the

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<sup>37</sup> Additional background is that almost half of federally incarcerated people are serving time for drug trafficking and more than a third for a public-order offense like weapons possession or undocumented immigration. U.S. Dep’t of Justice Bureau of Justice Statistics, *supra* note XX. *See also* Memorandum from M.D. Carvajal, Director of Bureau Prisons, to Inmate Families and Friends (April 21, 2020), [https://www.bop.gov/resources/news/pdfs/202004211\\_memo\\_to\\_inmate\\_families\\_and\\_friends.pdf](https://www.bop.gov/resources/news/pdfs/202004211_memo_to_inmate_families_and_friends.pdf).

<sup>38</sup> Congressional Research Service, Federal Prisoners and COVID-19: Background and Authorities to Grant Release (2020), <https://crsreports.congress.gov/product/pdf/R/R46297>.

<sup>39</sup> *Id.*

<sup>40</sup> To be more specific, the Bureau directed all federal prisons to suspend social and legal visits except on a case-by-case basis, increase telephone communication to 500 minutes per month, reduce staff travel, limit transfers, stagger mealtimes and recreation, and screen newly arriving individuals for COVID-19 exposure and symptoms. Federal Bureau of Prisons, *supra* note XX.

<sup>41</sup> Memorandum from William Barr, United States Attorney General, to M.D. Carvajal, Director of Bureau Prisons (March 26, 2020), [https://www.bop.gov/resources/news/pdfs/20200405\\_covid-19\\_home\\_confinement.pdf](https://www.bop.gov/resources/news/pdfs/20200405_covid-19_home_confinement.pdf). In a subsequent memorandum, Attorney General Barr directed BOP to be more aggressive in screening all incarcerated people for home confinement, “even if electronic monitoring is not available.” *See* Memorandum from William Barr, United States Attorney General, to M.D. Carvajal, Director of Bureau Prisons (April 3, 2020), <https://www.justice.gov/file/1266661/download>.

highest levels of infection.<sup>42</sup> Overall, however, these steps have led to a very modest reduction in the federal prison population: by mid-May, federal prisons had reduced their population by only 3%.<sup>43</sup>

### ***b. Coronavirus in State Prisons***

State Departments of Correction manage 1,833 state prisons that employ approximately 390,000 workers and confine 1,306,305 people.<sup>44</sup> Unlike federal prisons, a majority of those incarcerated in state prisons are serving time for violent offenses—e.g., murder, non-negligent manslaughter, rape, and sexual assault<sup>45</sup>—which could shift the risk/benefit profile of broad release (relative to federal prisons).

For the most part, state prisons have been slow to respond to COVID-19.<sup>46</sup> The principal strategy to cut back on the state prison population has been to implement a moratorium on new arrivals from jails, to release individuals who are elderly, medically vulnerable, or near the end of their sentences, and to commute certain sentences.<sup>47</sup> One governor argued that such reductions would benefit the whole state: “The early release of incarcerated individuals who are near their release date and meet certain criteria will help protect public health without a concomitant risk to public safety. This measure will serve to protect the health of those individuals, of staff and inmates at all state correctional facilities, and of all [state residents].”<sup>48</sup> Nevertheless, individual states have assumed disparate policies

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<sup>42</sup> Federal Bureau of Prisons, Update on COVID-19 and Home Confinement, April 5, 2020, [https://www.bop.gov/resources/news/20200405\\_covid19\\_home\\_confinement.jsp](https://www.bop.gov/resources/news/20200405_covid19_home_confinement.jsp).

<sup>43</sup> Emily Widra & Peter Wagner, *While Jails Drastically Cut Populations, State Prisons Have Released Almost No One*, PRISON POLICY INITIATIVE BRIEFINGS, May 14, 2020, <https://www.prisonpolicy.org/blog/2020/05/14/jails-vs-prison-update/>.

<sup>44</sup> Also, a total of 13 states have run their prisons at or above maximum capacity in recent years. U.S. Dep’t of Justice Bureau of Justice Statistics, *supra* note XX; U.S. Dep’t of Justice Bureau of Justice Statistics, Census of State and Federal Correctional Facilities, 2005 (2008), <https://www.bjs.gov/content/pub/pdf/csfcf05.pdf>.

<sup>45</sup> *Id.* at 1.

<sup>46</sup> Like federal prisons, state prisons have restructured internal facility operations in addition to releasing some incarcerated people to the community. For example, they have put restrictions on in-person visitation and imposed limits on the number of persons present at pardon hearings, commutation hearings, and parole hearings. *See, e.g.*, Utah Exec. Order No. 2020-3 (March 17, 2020) (temporarily suspending public access to State of Utah Board of Pardons and Parole hearings); Tenn. Exec. Order No. 36 (May 12, 2020) (temporarily suspending requirement that Board of Parole hearings be open to the public). In addition, while most states have eliminated medical co-pays for incarcerated people with COVID-19 symptoms, Nevada and Hawaii have not made any changes to their co-pay policy. *See* Prison Policy Initiative, Responses to the COVID-19 Pandemic, (last visited June 23, 2020), <https://www.prisonpolicy.org/virus/virusresponse.html>.

<sup>47</sup> *See, e.g.*, Wisc. Emergency Order No. 9 (March 20, 2020) (stating “I, Governor Tony Evers, order the Department of Corrections to implement a moratorium on admissions to the state prisons and juvenile facilities operated by the Department of Corrections to mitigate the spread of COVID-19”); Ill. Exec. Order No. 2020-13 (March 26, 2020) (stating “All admissions to the Illinois Department of Corrections from all Illinois county jails are suspended, with exceptions at the sole discretion of the Director of the Illinois Department of Corrections for limited essential transfers”); Calif. Exec. Order No. 36-20 (March 24, 2020) (suspending intake into state facilities, directing the Board of Parole Hearings to develop a process for conducting hearings by videoconference, and ceasing in-person parole hearings).

<sup>48</sup> N.M. Exec. Order No. 2020-21.

for prioritizing individuals for release,<sup>49</sup> which has resulted in the prison population declining by only 1.6% across 44 states and actually increasing in five states.<sup>50</sup>

### *c. Coronavirus in County and City Jails*

City and municipal authorities manage over 3,100 jails across the U.S. that hold approximately 738,400 people and employ roughly 221,600 full-time workers.<sup>51</sup> About a third of those detained in jails have already been convicted of crimes and have been sentenced or are waiting for sentencing, whereas about two-thirds have only been charged with crimes and are waiting for court or are being held for other reasons.<sup>52</sup> In addition to confining people, county and city jails are responsible for supervising 57,900 individuals within local communities via home detention, alcohol or drug treatment programs, community service, and other pretrial programs.<sup>53</sup> Thus, when it comes to jails' management of COVID-19, there are four major populations to consider: individuals who are serving county sentences; individuals who are being held pretrial; individuals who are being held for other reasons, like probation infractions; and individuals who are being supervised within local communities.

It will be no surprise that responses to the pandemic have varied considerably across jails. At one end of the spectrum, some officials have—unless there is a demonstrated danger—released people serving county jail sentences, eliminated bail, increased the volume of bail and plea hearings via video and teleconferencing, suspended sanctions on probation violations, and/or ceased arrests for low-level

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<sup>49</sup> For example, the governor of Kentucky has commuted the sentences of 186 inmates who meet the following criteria: (1) are at high risk for severe illness from COVID-19, (2) are serving sentences for non-violent, non-sexual offenses, (3) have fewer than five years left to serve, (4) have not tested positive or displayed symptoms of COVID-19, (5) have a residence to be released to, and (6) are able to self-quarantine at this residence for a period of fourteen days after release. Meanwhile, the governor of New Mexico has commuted the sentences of inmates: (1) whose release date is no more than thirty days away, (2) who have a parole plan in place, and (3) who are not serving a sentence for driving under the influence, a sex offense, domestic abuse, or assault on an officer. The New Jersey Corrections Department is prioritizing individuals who are *both* 60 years of age or older *and* possess underlying medical conditions that increases COVID-19 risk, followed by detainees who are *either* 60 years of age or older *or* possess underlying conditions, individuals who were denied parole in the past year, and individuals who are scheduled for release or are eligible for parole within 90 days. Montana is considering early release for individuals who meet *any* of the following: (1) are 65 years of age or older, (2) are medically frail, (3) are pregnant, or (4) are nearing their release date. And Maryland is prioritizing detainees who meet *all* of the following: (1) are at least 60 years of age or older, (2) have not been convicted of a violent crime or sexual offense, and (3) have a record of good institutional adjustment and an approved home plan. *See Id.*; Ky. Exec. Order No. 2020-267 (April 2, 2020); N.J. Exec. Order No. 124 (April 10, 2020); Memorandum from Steve Bullock, Governor of Montana, to Montanans and All Officers and Agencies of the State of Montana (April 1, 2020), <https://covid19.mt.gov/Portals/223/Documents/Corrections.pdf?ver=2020-04-01-133318-433>; Md. Exec. Order No. 20-04-18-01 (April 18, 2020).

<sup>50</sup> Emily Widra & Peter Wagner, *supra* note **XX**; Sandra E. Garcia, *supra* note **XX**; *see also* Jacob Kang-Brown et al., *People in Prison in 2019*, VERA INSTITUTE OF JUSTICE (2020), <https://www.vera.org/downloads/publications/people-in-prison-in-2019.pdf>.

<sup>51</sup> Additional background is that roughly 20% of jail jurisdictions operate at or above their maximum capacity, people are held in jails for an average of 25 days, and 80% of full-time workers spend more than half of their time in close contact with incarcerated people. U.S. Dep't of Justice Bureau of Justice Statistics, *Jail Inmates in 2018* (2020), <https://www.bjs.gov/content/pub/pdf/ji18.pdf>. Another relevant consideration is that jails vary in terms of funding, staffing, and equipment. American Jail Association, *Jail Statistics* (last visited June 23, 2020), <https://www.americanjail.org/jail-statistics>.

<sup>52</sup> *Id.* at 1.

<sup>53</sup> *Id.* at 9.

crimes in order to minimize jail populations.<sup>54</sup> At the other end of the spectrum, some officials have opposed releasing individuals “based solely on fears surrounding infectious disease,” postponed jury trials and grand jury proceedings (thereby causing delays and lengthening pre-trial confinement for the accused), and apprehended people in violation of stay-at-home orders or protesting the May 25 murder of George Floyd by Minneapolis police.<sup>55</sup> In some places, jail populations have therefore either increased or remained stagnant. Nevertheless, on the whole, jails have been much quicker to react to COVID-19 when compared to federal and state prisons: according to some reports, the median population reduction in jails has been roughly 32%.<sup>56</sup>

#### ***d. How the Response to Coronavirus Has Fallen Short***

It has been difficult to verify what the conditions in jails and prisons have really been like during COVID-19. Formal oversight of prisons and jails has dropped off, as state agencies, independent groups, and court-appointed monitors have either lost their access to prisons or have voluntarily halted their inspections.<sup>57</sup> At the same time, informal oversight has faded away, as jails and prisons have restricted social and legal visits and limited any facility programming that facilitates contact with the surrounding community.<sup>58</sup> A prison oversight expert has remarked, “In some of these places we now

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<sup>54</sup> For example, the Supreme Court of New Jersey ordered the release of all detainees serving county jail sentences; the Montana Supreme Court instructed judges to “release, without bond, as many incarcerated people as you are able, especially those being held for non-violent offenses”; the judicial body overseeing California’s courts mandated \$0 bail for detainees charged with certain offenses (this emergency rule was repealed on June 20); the governor of Michigan encouraged the early release of detainees who have behavioral health problems and can be diverted for treatment or who have been incarcerated for a traffic violation, failure to appear, or failure to pay (this executive order was rescinded in Exec. Order No. 2020-62); the governor of Washington removed a requirement to arrest individuals who violate the terms of their community supervision; and the governor of South Dakota suspended a rule requiring a minimum period of incarceration for parole violations. *See In the Matter of the Request to Commute or Suspend County Jail Sentences*, No. 084230 (N.J. March 22, 2020); Letter from Mike McGrath, Chief Justice of the Supreme Court of Montana, to Montana Courts of Limited Jurisdiction Judges (March 20, 2020); Circulating Order Memorandum to the Judicial Council, Order No. CO-20-11, <https://www.fresnobee.com/news/coronavirus/article241916756.html>; Mich. Exec. Order No. 2020-29; *In the Matter of Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency*, No. 25700-B-607 (Wash. Mar. 20, 2020); Memorandum from Donald W. Beatty, Chief Justice of South Carolina Supreme Court, to Magistrates, Municipal Judges, and Summary Court Staff (Mar. 16, 2020); Wash. Emergency Proclamation 20-35 (March 30, 2020); S.D. Exec. Order No. 2020-14 (April 7, 2020). For more examples, *see* United States Courts, Court Orders and Updates During COVID-19 Pandemic (last visited June 23, 2020), <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic>; Brennan Center for Justice, Courts’ Responses to the COVID-19 Crisis (last visited June 23, 2020), <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic>; National Center for State Courts, Coronavirus and the Courts, (last visited June 23, 2020), <https://www.ncsc.org/newsroom/public-health-emergency>.

<sup>55</sup> For example, Texas Governor Greg Abbott signed an executive order in which he restricted the ability of judges to release jail detainees accused of violent crimes and prohibited judges from releasing detainees based solely on fears surrounding infectious disease; the Pennsylvania Supreme Court denied a petition to release broad categories of inmates because broad release “fails to take into account the potential danger of inmates to victims and the general population, as well as the diversity of situations present within individual institutions and communities, which vary dramatically in size and population density”; and some courts have made minimal or no adjustments to their operations other than to bar individuals with exposure to COVID-19 from entering the courthouse. *See Id.*; Tex. Exec. Order No. GA-13 (March 29, 2020); *In Re: The Petition of the Pennsylvania Prison Society, Brian McHale, Jeremy Hunsicker, Christopher Aubry, Michael Foundos, and Frederick Leonard, On Behalf of all Similarly Situated Individuals*, No. 70 MM 2020 (Penn. April 2, 2020); *In Re: COVID-19 Public Health & Safety*, No. MC120-004 (Ga. Mar. 17, 2020).

<sup>56</sup> Emily Widra & Peter Wagner, *supra* note XX

<sup>57</sup> Keri Blakinger, As COVID-19 Measures Grow, Prison Oversight Falls, *in* THE MARSHALL PROJECT, March 17, 2020, <https://www.themarshallproject.org/2020/03/17/as-covid-19-measures-grow-prison-oversight-falls>.

<sup>58</sup> *Id.*

have no idea what's going on inside.”<sup>59</sup> The Brennan Center for Justice noted, “There is an enormous disconnect between what's being reported publicly and what people are actually experiencing in jails and prisons.”<sup>60</sup> Still, journalists have been able to collect anecdotal evidence suggesting that conditions are worse than normal in many correctional facilities.

When it comes to lowering carceral populations, many journalists have been critical of the discretionary and opaque process for managing release, particularly after high-profile and well-connected federal detainees like Michael Cohen and Paul Manafort were released despite falling short of the Bureau of Prisons' release criteria while others who did meet criteria remained incarcerated.<sup>61</sup> In addition, there have been reports that far too few have been released from facilities, resulting in people being held in cells with thirty to forty others, or worse, being held in extremely close proximity to those who have symptoms.<sup>62</sup>

But, setting aside the more complicated issue of removal from facilities, even basic preventive measures have not been consistently applied within facilities. For example, the *New Yorker* reported that prisons in Arkansas asked officers to come to work even if they tested positive for coronavirus:

“‘If your test results are positive,’ a memo from the Arkansas Department of Health said, ‘you may need to work if you do not display symptoms.’ Governor Hutchinson, in his daily press conference, explained, ‘In terms of the guards that might have tested positive, it is my understanding that they would only be guarding barracks in which the inmates have tested positive. He added, ‘So those precautions are in place, and certainly they are logical.’ ... all the guards were passing through the same entrance, checkpoints, and hallways.”<sup>63</sup>

And, this was not the only troubling discovery about the Arkansas prisons. Annie Burrow, a nurse who worked in several Arkansas prisons, said that,

“...when inmates put in sick calls, they typically weren't seen by a doctor for at least two weeks. Sometimes the infirmary nurses would become so overwhelmed by sick calls that—to avoid being fined if they didn't respond within three days, as was the policy—they would shred them. ‘It was general operating procedure,’ Burrow told me. ‘I watched nurses put the paper sick calls in the shredder and never blink an eye. When inmates complained, the nurses would say, ‘Oh, the slip got lost in the box,’ or ‘You filled out the wrong form.’ Burrow said, ‘They could easily blame it on the inmate.’”<sup>64</sup>

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<sup>59</sup> *Id.*

<sup>60</sup> Lauren-Brooke Eisen, COVID-19 Continues Its Toll on Jails and Prisons, THE BRENNAN CENTER FOR JUSTICE, May 4, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/covid-19-continues-its-toll-jails-and-prisons>.

<sup>61</sup> Joseph Neff & Keri Blakinger, Early Releases of Cohen and Manafort Shows How Unfair Prison System Is, Experts Say, *in* NBC NEWS, May 21, 2020, <https://www.nbcnews.com/news/us-news/early-release-cohen-manafort-shows-how-unfair-prison-system-experts-n1212001>.

<sup>62</sup> *See, e.g.*, Masha Gessen, A Long Night with the Jail-Support Crew Outside One Police Plaza After Protests in New York, *in* NEW YORKER, May 30, 2020, <https://www.newyorker.com/news/our-columnists/a-long-night-with-the-jail-support-crew-outside-one-police-plaza>.

<sup>63</sup> Rachel Aviv, Punishment by Pandemic, *in* NEW YORKER, June 22, 2020, <https://www.newyorker.com/magazine/2020/06/22/punishment-by-pandemic>.

<sup>64</sup> *Id.*

Additionally, it has been documented that “some facilities will post signs about hand-washing for detained people but then continue to charge them for access to soap.”<sup>65</sup> The weight of existing reports overwhelmingly suggests that prisons and jails are in a state of crisis.

### *e. Proposed Alternatives*

The current pandemic response has failed to suppress the spread of coronavirus within prisons and jails. As a result, it has become increasingly clear that correctional facilities simply have to reduce the population. To cite just two prominent examples, advocacy organizations and members of Congress have offered recommendations for how law enforcement agencies can accomplish this task.<sup>66</sup>

Specifically, the ACLU has urged the Department of Justice and Federal Bureau of Prisons to free all pregnant inmates within one year of their scheduled releases, to halt revocation of probation or supervised release as a response to infraction, to decline prosecution in low-level offenses, especially offenses involving drug possession or unauthorized entry to the U.S., and to increase the release of those who (1) are 65 and older, (2) have a terminal, debilitated, or chronic medical condition, or (3) have suffered a death of a family member who is a primary caregiver to their child.<sup>67</sup> ACLU of Pennsylvania has added to the list those who (1) are within three months of their minimum sentence, (2) are being detained for a violation of probation or parole which does not arise out of committing a new felony, (3) are eligible to periodically leave correctional facilities (for work release or intermittent sentences), and (4) are being detained because of an inability to post bail.<sup>68</sup>

Members of Congress have also pushed to accelerate release. As described previously, the CARES Act was passed in March to facilitate the release of detainees to home confinement during an “emergency period.” In May, House Democrats passed a relief package that featured a provision that would release all federally incarcerated people to community supervision during “a national emergency relating to a communicable disease,” provided that they are 50 years of age or older, within 12 months of release, and possess certain health conditions.<sup>69</sup> The legislation justified these priorities based on the fact that “[s]tudies have shown that individuals age out of crime starting around 25 years of age,”

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<sup>65</sup> Lauren-Brooke Eisen, *supra* note XX.

<sup>66</sup> The Centers for Disease Control and Prevention has also released guiding principles for law enforcement agencies and their respective health departments to assist them in coping with COVID-19. The CDC has recommended that correctional facilities strive to implement the following: (1) correctional facilities should make every effort to place suspected and confirmed COVID-19 cases under individual medical isolation with their own dormitory housing and bathroom; (2) facilities should prevent detainees who have been exposed to COVID-19 from transferring to other facilities unless it is deemed necessary for medical care, infection control, security, or to mitigate overcrowding; (3) facilities should identify lawful alternatives to in-person court appearances; (4) facilities should suspend medical co-pays for detainees seeking medical evaluation for respiratory symptoms; (5) facilities should provide detainees with a supply of soap at no cost to them; and (6) where possible, facilities should consider eliminating the cost of phone calls, increasing telephone privileges, and providing access to virtual visitation. Centers for Disease Control and Prevention, *supra* note XX.

<sup>67</sup> Letter from American Civil Liberties Union to Michael Carvajal, Director of Bureau Prisons (March 18, 2020), <https://www.aclu.org/letter/aclu-letter-doj-and-bop-coronavirus-and-criminal-justice-system>; see also Sarah McCammon, ACLU Calls for Release of Pregnant Inmates During the Coronavirus Pandemic, *in* NPR, May 1, 2020, [https://www.npr.org/sections/coronavirus-live-updates/2020/05/01/849402406/aclu-calls-for-release-of-pregnant-inmates-during-the-coronavirus-pandemic?utm\\_medium=RSS&utm\\_campaign=nprblogscoronavirusliveupdates](https://www.npr.org/sections/coronavirus-live-updates/2020/05/01/849402406/aclu-calls-for-release-of-pregnant-inmates-during-the-coronavirus-pandemic?utm_medium=RSS&utm_campaign=nprblogscoronavirusliveupdates).

<sup>68</sup> ACLU Pennsylvania, King’s Bench Petition on County Jails During COVID-19 (2020), <https://www.aclupa.org/en/cases/kings-bench-petition-county-jails-during-covid-19>.

<sup>69</sup> H.R. 6800, 116th Cong. § 191102 (2020), available at <https://docs.house.gov/billsthisweek/20200511/BILLS-116hr6800ih.pdf>. See also H.R. 6400, 116th Cong. (2020).

“released individuals over the age of 50 have a very low recidivism rate,” and that “there is a serious threat to the general public that prisons may become incubators of community spread of communicable viral disease.”<sup>70</sup> The bill made exceptions for release of federally incarcerated people if a determination was made that they are, “likely to pose a specific and substantial risk of causing bodily injury or using violent force” against another person.<sup>71</sup>

It is clear that the response to COVID-19 within prisons and jails has been inadequate. Nevertheless, the discussion about different response options has also revealed a range of potentially viable priorities for how to begin releasing incarcerated people during a pandemic (e.g., symptoms of COVID-19, age, underlying health conditions, pregnancy status, crime of conviction, risk of recidivism, security level, proportion of sentence served, prior conduct, history of probation infractions, eligibility for parole, caretaking responsibilities for dependents, alleged new crimes, etc.). In order to carefully weigh these priorities and create a comprehensive plan for releasing incarcerated people during the remainder of the coronavirus pandemic and any future public health emergencies, it is first important to establish why we have an obligation to reduce the carceral population.

### III. ARGUMENTS FOR PROTECTING DETAINEES

There are a number of compelling arguments for giving special consideration to incarcerated people during an infectious disease pandemic. While these arguments can be applied to any country, they are especially salient in the U.S., which has the highest incarceration rate in the world.<sup>72</sup> Many incarcerated people are vulnerable during a pandemic because of inadequate access to healthcare and poor underlying health status, which is often caused or exacerbated by the act of incarceration itself. In this Part, we make a series of moral, practical, and legal arguments in support of the claim that incarcerated people deserve special protections during a pandemic.

#### a. *Moral Arguments*

##### *The Human Right to Health*

In approaching the question as to what we ethically owe incarcerated people, it is useful to start with a human rights lens. Although we deprive people of their liberty and many of their rights<sup>73</sup> when we incarcerate them, it is important to remember that incarcerated people retain certain rights simply in virtue of their status as humans.

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<sup>70</sup> H.R. 6800, 116th Cong. § 191102(a) (2020).

<sup>71</sup> H.R. 6800, 116th Cong. § 191102(c)(2) (2020).

<sup>72</sup> Highest to Lowest – Prison Population Total, WORLD PRISON BRIEF, <https://www.prisonstudies.org/highest-to-lowest/prison-population-total> (last visited June 24, 2020). Though the U.S. only has about 5% of the world’s population, approximately 20% of the world’s incarcerated population are held here. Peter Wagner & Wanda Bertram, *What Percentage of the U.S. Is Incarcerated*, PRISON POLICY INITIATIVE (Jan. 16, 2020), <https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated/>. The more than 2.3 million inmates housed in U.S. jails and prisons represent a staggering percentage of the total national adult population (0.88%). Wendy Sawyer & Peter Wagner, *supra* note XX.

<sup>73</sup> Some philosophers deny that that carceral punishment violates people’s rights. According to this view, a person who voluntarily commits a crime while understanding the consequences tacitly consents to these consequences, and, accordingly, these consequences do not violate her rights. See Antony Duff and Zachary Hoskins, *Legal Punishment*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Dec. 21, 2019), <https://plato.stanford.edu/entries/legal-punishment/#toc>.

Several international bodies have claimed that all human beings have a right to health.<sup>74</sup> There are a number of different ways that international bodies have grounded this right—e.g., through the claim that health is a “natural” right and through the claim that achieving a certain level of health is necessary for the exercise of other rights. Below, we do not attempt to make the positive argument that people in fact have a right to health. Rather, we describe how an international understanding of the human right to health has evolved over time, in order to make the more modest point that there is precedent for thinking that *all* people, including those who have forfeited some of their rights via incarceration, have a very strong interest in health that gives us a correspondingly strong reason to protect it.

Time and again, international bodies have articulated a human right to health. In 1946, the World Health Organization was founded on the premise that “The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.”<sup>75</sup> In 1948, the Universal Declaration of Human Rights enshrined a number of additional human rights relevant to incarcerated populations, including a right to non-discrimination;<sup>76</sup> a right to life;<sup>77</sup> a right to be “free from torture and cruel, inhuman, or degrading treatment or punishment”;<sup>78</sup> a right to equal protection of the law;<sup>79</sup> and a right to an adequate standard of living, including access to medical care.<sup>80</sup> In 1966, the International Covenant on Economic Social and Cultural Rights<sup>81</sup> codified the idea that “Health is a fundamental human right indispensable from the exercise of other human rights.”<sup>82</sup> Though the right to health is not explicitly mentioned in the International Covenant on Civil and Political Rights, it is generally accepted that a number of the covenant’s provisions—i.e., the right to life<sup>83</sup> and the right to humane treatment<sup>84</sup>—can be used to address health-related conditions.<sup>85</sup>

In more recent years, the World Health Organization has developed a modern definition of health that reflects a more inclusive conception of what it means to be healthy, moving beyond biomedical views toward a broader view of “wellbeing”: “Health is a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity.”<sup>86</sup> The Committee on Economic, Social and Cultural Rights has since added to this that the “right to health should be understood as a right to the enjoyment of a variety of facilities and conditions which the state is responsible for providing

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<sup>74</sup> Though the U.S. has not signed on to all of the international instruments and treaties that we discuss, these instruments and treaties are nevertheless relevant as a source of broad international consensus about the moral duties we have to incarcerated people.

<sup>75</sup> WORLD HEALTH ORGANIZATION, BASIC DOCUMENTS, 1 (49<sup>th</sup> ed. 2020).

<sup>76</sup> Universal Declaration of Human Rights, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III), at art. 2 (Dec. 10, 1948) [hereinafter UDHR].

<sup>77</sup> *Id.* at art. 3.

<sup>78</sup> *Id.* at art. 5.

<sup>79</sup> *Id.* at art. 7.

<sup>80</sup> *Id.* at art. 25.

<sup>81</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>82</sup> *Id.* at art.12.

<sup>83</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, at art. 6, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966).

<sup>84</sup> *Id.* at art. 10.

<sup>85</sup> Cabal and Pasini v. Australia (7 August 2003) UN Doc CCPR/C/78/D/1020/2002) para. 7.7.

<sup>86</sup> United Nations, International Health Conference, *Constitution of the World Health Organization* (July 22, 1946), available from <https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1>.

as necessary for the attainment and maintenance of good health.” Together, these definitions suggest that states not only have an ethical obligation to provide basic healthcare services to its citizens but that states also have an obligation to address the various social determinants of health on a population level.

In addition, some international human rights instruments specify a right to health for incarcerated people in particular. For example, the United Nations Standard Minimum Rules for the Treatment of Incarcerated people (the Nelson Mandela Rules)<sup>87</sup> argues that incarcerated people deserve a basic level of care, even if they have given up other rights when convicted of crimes. These rules specifically assert that incarcerated people should “enjoy the same standards of health care that are available in the community.”<sup>88</sup>

Finally, in response to COVID-19, a number of international organizations issued a joint statement arguing that: “All states are required to ensure not only the security, but also the health, safety and human dignity, of people deprived of their liberty and of people working in places of detention at all times. This obligation applies irrespective of any state of emergency.”<sup>89</sup> In particular, this joint statement sheds light on the way that the concept of a right to health is meant to operate in an emergency. While there is some leeway for certain rights to be temporarily suspended in an emergency, those circumstances are limited to “public emergencies” that threaten the life of the nation,<sup>90</sup> and there are some rights that can never be suspended.

Taken together, these statements and international instruments show that there is clear consensus within the international human rights community that we have strong reason to protect the health of incarcerated populations.

#### *Specific Moral Reasons to Protect Incarcerated People*

Thus far, we have argued that it is generally accepted among international bodies that incarcerated people retain various rights that are owed to all humans as humans, which, notably, include a right to health. Beyond this general appeal to human rights, there are specific ethical arguments that support the claim that incarcerated people deserve particular attention during a pandemic.

First, there is the argument that we have special obligations to people whom we have made dependent on us for their welfare. When a person, *A*, cannot provide for herself because she is dependent on another person, *C*, the resulting relationship creates a set of minimum obligations that *C* cannot abrogate. The fiduciary relationship between *A* and *C* can flow out of a number of circumstances. For example, it can be contractual, as in the physician-patient relationship, or familial, as in the parent-

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<sup>87</sup> G.A. Res. 70/175, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (Jan. 8, 2016), available at <https://undocs.org/A/RES/70/175>.

<sup>88</sup> *Id.* at rule 24 Mandela rules.

<sup>89</sup> World Health Organization et al., *UNODC, WHO, UNAIDS and OHCHR Joint Statement on COVID-19 in Prisons and Other Closed Settings* (May 13, 2020), <https://www.who.int/news-room/detail/13-05-2020-unodc-who-unaid-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings>.

<sup>90</sup> Committee on Economic Social and Cultural Rights, ‘General Comment No. 14: The right to the highest attainable standard of health’, UN Doc E/C.12/2000/4 (11 August 2000); European Court of Human Rights, *Guide on Article 15 of the European Convention on Human Rights* (Dec. 31, 2019), [https://www.echr.coe.int/Documents/Guide\\_Art\\_15\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf).

child relationship. Incarcerated people can convincingly claim that they stand in this sort of relationship with the government: the government mediates their access to food, housing, sanitation and medical care. As a result, the government has certain obligations to incarcerated people that would certainly include taking reasonable steps to protect them from a deadly infectious disease. It is worth noting that, in the physician-patient case, the physician has not directly caused the circumstances that led to the patient's need for assistance. Since the state has directly caused the situation in which incarcerated people cannot care for themselves (however justifiably), there is an even stronger argument that the government must provide them with the necessary resources for survival.<sup>91</sup>

On a related note, one can make a second argument flowing from a right to self-defense. When presented with a direct threat to health and safety, people generally have a legal and moral right to defend themselves. While the rest of the U.S. is largely able to shelter-in-place, limit contacts, etc., incarcerated people cannot control their own risk exposure. Beyond a right to health, we have an obligation to provide incarcerated people with an opportunity to protect themselves from direct threats at least on par with those available to non-incarcerated people. This right for incarcerated people to defend themselves in the same way that the non-incarcerated population can could be derived from a number of the human rights discussed above, including the right to non-discrimination;<sup>92</sup> a right to life;<sup>93</sup> a right to be "free from torture and cruel, inhuman, or degrading treatment or punishment";<sup>94</sup> and a right to equal protection of the law.<sup>95</sup>

Third, there is an argument that emerges from the extra duties that society owes to protect vulnerable populations in a crisis.<sup>96</sup> The right to health generally requires that states pay particular attention to the needs of disadvantaged populations.<sup>97</sup> This is especially true in a pandemic, where the disease can have a differential impact on specific populations because of factors that can correlate with existing disadvantage (e.g., age, pre-existing conditions, exposure level, etc.). Given this definable vulnerability, societies have attempted to implement rules and policies to protect these high-risk groups. In response to the COVID-19 pandemic, we have already enacted special rules for retirement/nursing homes,<sup>98</sup> prioritized personal protective equipment access for front-line workers,<sup>99</sup> and have discussed early allocation of an eventual vaccine for people at high risk of mortality (e.g., elderly, people with

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<sup>91</sup> Though there is controversy around the claim that states can be holders of moral obligation, a number of scholars have persuasively made that case. See, e.g., Christoffer Spencer Lammer-Heindel, *Does the State Have Moral Duties? State Duty-Claims and the Possibility of Institutionally Held Moral Obligations*, IOWA RESEARCH ONLINE (July 2012), <https://ir.uiowa.edu/cgi/viewcontent.cgi?article=3388&context=etd>.

<sup>92</sup> UDHR, *Supra* note XX, at art. 2.

<sup>93</sup> *Id.* at art. 3.

<sup>94</sup> *Id.* at art. 5.

<sup>95</sup> *Id.* at art. 7.

<sup>96</sup> Even outside of the pandemic context, our society recognizes that we need targeted rules that pay special attention to vulnerable populations. For example, there are distinct protections for conducting research with certain human subjects (i.e., pregnant women, fetuses, children, incarcerated people, adults that lack capacity).

<sup>97</sup> WORLD HEALTH ORGANIZATION, *Health and Human Rights*, WORLD HEALTH ORGANIZATION (Dec. 29, 2017), <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health>.

<sup>98</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, *Coronavirus Disease 2019 (COVID-19): Preparing for COVID-19 in Nursing Homes*, CDC (June 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/long-term-care.html>;

CENTERS FOR DISEASE CONTROL AND PREVENTION, *Coronavirus Disease 2019 (COVID-19): Preventing the Spread of COVID-19 in Retirement Communities and Independent Living Facilities (Interim Guidance)*, CDC (Mar. 20, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/retirement/guidance-retirement-response.html>.

<sup>99</sup> Nancy S. Jecker et al., *Prioritizing Frontline Workers during the COVID-19 Pandemic*, AMERICAN JOURNAL OF BIOETHICS (May 13, 2020), <https://www.tandfonline.com/doi/full/10.1080/15265161.2020.1764140>.

preexisting conditions).<sup>100</sup> As discussed at length above, incarcerated people are among the highest-risk populations, bearing a disproportionate share of the COVID-19 disease burden. If society has a duty to protect vulnerable populations from the ravages of a novel infectious disease pandemic, there would need to be a strong moral justification for treating incarcerated people as a class with less care than other similarly high-risk groups.<sup>101</sup>

All of these arguments take on added urgency because of racial justice concerns exacerbated by the COVID-19 pandemic.<sup>102</sup> Already, COVID-19 has resulted in more total years of potential life lost for non-Hispanic black people (45,777 years) and Hispanic people (48,204 years) compared to non-Hispanic white people (33,446 years) even though the white population is 3-4 fold larger.<sup>103</sup> This translates into black people being 3.6 times more likely to die from COVID-19 than white people, and Hispanic people being 2.6 times more likely to die.<sup>104</sup> Plus, as detailed elsewhere in this article, people of color are disproportionately likely to be incarcerated. These background conditions, propagated by institutional racism and structural bias,<sup>105</sup> mean that the impacts of COVID-19 and of incarceration on people of color (independently, and synergistically<sup>106</sup>) do not simply raise straightforward medical and epidemiological issues. Given underlying injustices in the U.S., we cannot lose sight of the higher-level justice reasons for giving extra consideration to incarcerated people's safety during a pandemic.<sup>107</sup>

### ***b. Practical Arguments***

Beyond moral arguments, there are a number of practical reasons to provide extra protection for incarcerated people in an infectious disease pandemic. First, there are strong public health arguments for implementing physical distancing in prisons. WHO has argued that, in a pandemic, prison health should be equated with public health:

“[T]he risk of rapidly increasing transmission of the disease within prisons or other places of detention is likely to have an amplifying effect on the epidemic, swiftly multiplying the number of people affected. Efforts to control COVID-19 in the community are likely to fail if strong

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<sup>100</sup> Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): Strategies to Optimize the Supply of PPE and Equipment*, CDC (May 18, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/index.html>.

<sup>101</sup> There are obviously reasons to assess cases individual, and as discussed below, there are certainly particular kinds of incarcerated people that warrant different rules. See, e.g., UN HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, *Covid-19: No Excuse for Impunity for Those Convicted of Crimes against Humanity*, UNITED NATIONS (Apr. 29, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25840&LangID=E>.

<sup>102</sup> Mildred Z. Solomon, *A Perilous Moment for Our Nation*, THE HASTINGS CENTER (June 6, 2020), <https://www.thehastingscenter.org/news/a-perilous-moment-for-our-nation/>; Bonnie Chiu, Why Racial Justice Matters in Covid-19 Responses, in FORBES, May 26, 2020, <https://www.forbes.com/sites/bonniechiu/2020/05/26/why-racial-justice-matters-in-covid-19-responses/#7685950d585c>.

<sup>103</sup> M.T. Bassett, Jarvis T. Chen & Nancy Kriger, *supra* note XX.

<sup>104</sup> *Id.*

<sup>105</sup> NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, COMMUNITIES IN ACTION: PATHWAYS TO HEALTH EQUITY (2017).

<sup>106</sup> Noah Goldberg, *NY Prisons See Sharp Spike in Deaths Since Coronavirus Outbreak, Blacks Hit Hardest Behind Bars*, in THE NEW YORK DAILY NEWS, May 14, 2020, <https://www.nydailynews.com/coronavirus/ny-coronavirus-prison-deaths-blacks-disproportionate-20200514-xjk4v5owrhrfpil5gevbgyui-story.html>.

<sup>107</sup> Brandon Garrett, *Constitutional Criminal Procedure Post-COVID*, HARVARD LAW REVIEW BLOG (May 19, 2020), <https://blog.harvardlawreview.org/constitutional-criminal-procedure-post-covid/>.

infection prevention and control (IPC) measures, adequate testing, treatment and care are not carried out in prisons and other places of detention as well.”<sup>108</sup>

There is already strong evidence that the coronavirus is most infectious in confined spaces where people are unavoidably gathered together.<sup>109</sup> Given the speed at which COVID-19 has moved through prisons, they can “act as a source of infection, amplification and spread of infectious disease within and beyond prisons.”<sup>110</sup> This creates a strong practical reason to implement public health interventions that mitigate the risk that prisons and jails will serve as a driver of infection in a given region, accelerating community spread.

A second practical reason relates to protection of staff. While incarcerated people themselves are at extremely high risk of contracting COVID-19, prison guards, health care workers and other staff are also at heightened risk.<sup>111</sup> Working in a prison is already a difficult job; the threat of being exposed to a dangerous infectious disease has generated union complaints and has impacted morale.<sup>112</sup> Taking measures to reduce the spread of coronavirus in prisons would provide staff with some level of reassurance that their health is being protected, and could prevent the problematic (and potentially dangerous) situation where staffing levels drop because of illness or refusal to report to work. Protecting staff would also help to maintain access to adequate healthcare services for inmates, including both COVID-19 and baseline medical needs. Flattening the curve is even more important in penal institutions, where healthcare resources are stretched even under optimal circumstances.

### *c. Legal Arguments*

For the most part, the legal action around COVID-19 has argued that continued detention of inmates constitutes a violation of their rights under the Eighth Amendment, although some petitioners have also invoked the Fifth, Sixth and Fourteenth Amendments and the Americans with Disabilities Act.<sup>113</sup>

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<sup>108</sup> WORLD HEALTH ORGANIZATION REGIONAL OFFICE FOR EUROPE, *Prevention and Control of Covid-19 in Prisons and Other Places of Detention*, WORLD HEALTH ORGANIZATION (March 15, 2020), [https://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf](https://www.euro.who.int/__data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf).

<sup>109</sup> Kai Kupferschmidt, Why Do Some Covid-19 Patients Infect Many Others, Whereas Most Don't Spread the Virus at All, *in* SCIENCE, May 19, 2020, <https://www.sciencemag.org/news/2020/05/why-do-some-covid-19-patients-infect-many-others-whereas-most-don-t-spread-virus-all>; Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): Frequently Asked Questions*, CDC (June 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Spread>; Adam Rogers, To Beat Covid-19, You Have to Know How a Virus Moves, *in* WIRED, May 28, 2020, <https://www.wired.com/story/to-beat-covid-19-you-have-to-know-how-a-virus-moves/>.

<sup>110</sup> WORLD HEALTH ORGANIZATION REGIONAL OFFICE FOR EUROPE, *Prevention and Control of Covid-19 in Prisons*, *supra* note XX, at 1.

<sup>111</sup> Peter Eisler et al., ‘Death Sentence’ – The Hidden Coronavirus Toll in U.S. Jails and Prisons, *in* Reuters, May 18, 2020, <https://www.reuters.com/article/us-health-coronavirus-usa-jails-specialr/special-report-death-sentence-the-hidden-coronavirus-toll-in-us-jails-and-prisons-idUSKBN22U1V2>.

<sup>112</sup> Joe Davidson, Unions for Prisons, VA Workers File “Imminent Danger” Reports about Coronavirus Conditions, *in* THE WASHINGTON POST, April 9, 2020, [https://www.washingtonpost.com/politics/unions-for-prison-va-workers-file-imminent-danger-reports-about-coronavirus-conditions/2020/04/08/78962ea0-79e4-11ea-8cec-530b4044a458\\_story.html](https://www.washingtonpost.com/politics/unions-for-prison-va-workers-file-imminent-danger-reports-about-coronavirus-conditions/2020/04/08/78962ea0-79e4-11ea-8cec-530b4044a458_story.html).

<sup>113</sup> See Brandon Garrett, *Constitutional Criminal Procedure Post-COVID*, HARVARD LAW REVIEW BLOG (May 19, 2020), <https://blog.harvardlawreview.org/constitutional-criminal-procedure-post-covid/>; John Curran, Jake Gardener & Jeffery Ding, COVID-19 and the Constitution: How the Bill of Rights is Being Tested by the Coronavirus, *in* NEW YORK LAW JOURNAL, May 29, 2020, <https://www.law.com/newyorklawjournal/2020/05/29/covid-19-and-the-constitution-how-the-bill-of-rights-is-being-tested-by-the-coronavirus/>; Michael Campion Miller et al., The Pandemic in

Several courts have rejected these constitutional claims for release. Nevertheless, the current litigation indicates that incarcerated people do have a plausible case for release.<sup>114</sup>

The Eighth Amendment imposes duties on correctional facilities and prison personnel to provide humane conditions of detention. The Supreme Court has held that this right is violated if prison personnel exhibit deliberate indifference to inmates' medical needs or expose them to conditions that pose an unreasonable risk to their future health or safety, including conditions that involve "the mingling of inmates with serious contagious diseases with other prison inmates."<sup>115</sup> As the Supreme Court asserted in *DeShaney*, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." A federal court added in *Jolly*, "correctional officials have an affirmative obligation to protect inmates from infectious disease." As a result of these authorities, petitioners have argued, "This is not a complicated case on the law."<sup>116</sup>

Meanwhile, the Fifth, Sixth, and Fourteenth Amendments together with the Speedy Trial Act guarantee criminal defendants a right to a trial within specified time limits, access to legal counsel, and nonpunitive conditions of pretrial confinement.<sup>117</sup> In light of COVID-19, legal visits, jury trials, and various protections afforded under the Speedy Trial Act have been temporarily suspended in many jurisdictions.<sup>118</sup> As a result of these suspensions, there is concern that the accused will experience longer lengths of stay in correctional facilities as they await trial. In response, multiple federal courts have addressed requests of criminal defendants for pretrial release. One court's reasoning in favor of pretrial release was based on "(1) the original grounds for the defendant's pretrial detention, (2) the specificity of the defendant's stated COVID-19 concerns, (3) the extent to which [a] proposed release plan is tailored to mitigate or exacerbate other COVID-19 risks to the defendants, and (4) the likelihood that the defendant's proposed release would increase COVID-19 risks to others."<sup>119</sup> Another court ruled in support of release based on the reasoning that the "unprecedented and

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Prisons: Advocating for Clients in Federal Custody, *in* STEPTOE, April 9, 2020, [https://www.steptoec.com/en/news-publications/the-pandemic-in-prisons-advocating-for-clients-in-federal-custody.html#\\_ftn8](https://www.steptoec.com/en/news-publications/the-pandemic-in-prisons-advocating-for-clients-in-federal-custody.html#_ftn8).

<sup>114</sup> See discussion below.

<sup>115</sup> *Helling v. McKinney*, 509 U.S. 25 (1993). See also *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), *Estelle v. Gamble*, 429 U.S. 97 (1976), *Lareau v. Manson*, 651 F.2d 96 (2nd Cir. 1981), *DeShaney v. Winnebago County*, 489 U.S. 189 (1989), *Farmer v. Brennan*, 511 U.S. 825 (1994), *Jolly v. Coughlin*, 76 F.3d 468 (2nd Cir. 1996), and *Forbes v. Edgar*, 112 F.3d 262 (7th Cir. 1997).

<sup>116</sup> Brandon Garrett, *supra* note XX. See also Emergency Motion for Temporary Restraining Order or Preliminary Injunction, No. 20-cv-2134 (D. Illinois April 3, 2020). Nevertheless, the Kansas Supreme Court dismissed a writ of habeas corpus alleging that detention during the COVID-19 pandemic itself violates detainees' rights under the Eighth Amendment. In reaching its decision, the Court highlighted a recent incident in which a detainee who had been released because of the pandemic was re-arrested within a few short days on murder charges. *Respondents' Response to the Court's April 10, 2020 Order and Motion to Dismiss*, No. 122760 (K.S. April 14, 2020). Another court argued "Defendant argued for the first time in reply that he faces an increased risk of contracting COVID-19 if he remains in custody ... Defendant's argument, however, applies equally to anyone in custody, or, for that matter, at the halfway house or anywhere else in this community or any other. Defendant's argument applies equally to every detainee in detention; however, the Court cannot release every detainee at risk of contracting COVID-19 because the Court would then be obligated to release every detainee." *United States v. Fitzgerald*, No. 2:17-cr-00295-JCM-NJK (D. Nevada Mar. 24, 2020).

<sup>117</sup> U.S. Const. amend. VI; 18 U.S.C. §§ 3161–3174.

<sup>118</sup> See, e.g., *In re: Coronavirus/COVID-19 Pandemic*, No. 20MISC00154 (D. New York Mar. 13, 2020).

<sup>119</sup> Congressional Research Service, *supra* note XX, at 8. See also *United States v. Ryan*, No. 19-CR-756, 2020 WL 1861662, at \*2 (C.D. Cal. Apr. 14, 2020).

extraordinarily dangerous nature of the COVID-19 pandemic” limited the defendant’s ability to prepare his defense and constituted a “compelling reason” for temporary release.<sup>120</sup>

Finally, the Americans with Disabilities Act requires public entities to reasonably accommodate people with disabilities in its programs and services. At least one suit has alleged that the present treatment of incarcerated people with underlying health conditions violates the Americans with Disabilities Act because reasonable accommodation within the meaning of the statute would involve access to medical treatment and safe conditions of confinement in line with public health recommendations made by the Centers for Disease Control and Prevention.<sup>121</sup>

Courts will see an increasing volume of cases in the coming months regarding release. In May, Justice Sonia Sotomayor wrote, “It has long been said that a society’s worth can be judged by taking stock of its prisons. That is all the truer in this pandemic, where inmates everywhere have been rendered vulnerable and often powerless to protect themselves from harm. May we hope that our country’s facilities serve as models rather than cautionary tales.”<sup>122</sup>

#### **IV. HOW TO PROTECT DETAINEES**

We have argued that there are persuasive moral, practical, and legal arguments for extending special protections to incarcerated populations during a global pandemic, and we have argued that the responses of federal, state, and local carceral facilities have been deficient. In this Part, we suggest that there are multiple reasonable strategies for protecting incarcerated people during a pandemic but that keeping pre-coronavirus numbers of people in confinement is not one of them.

Any reasonable strategy for protecting incarcerated people would involve provision of personal protective equipment and sanitation materials, a decrease in the carceral population so as to enable physical distancing within facilities, prevention of arbitrary or discriminatory means of decreasing the carceral population, and avoidance of political calculations about whether it looks worse for elected officials to have multiple deaths in prison or multiple instances of recidivism. Instead, a reasonable strategy would set priorities for releasing incarcerated people based (at least to some extent) on (1) risk of recidivism for a violent offense, (2) pre-conviction status, (3) risk of mortality from coronavirus, (4) proportion of sentence served, and (5) caretaking responsibilities. However, there are multiple ways to satisfy these conditions. For example, reasonable strategies could vary in terms of how they deal with conflicts between an individual’s risk of recidivism for violence and risk of mortality, how they take account of an individual’s release plan, whether certain offenses preclude release, and the extent to which they allow for case-by-case judgements.

There is value in clearly articulating these areas of consensus and controversy about how to modify the penal system during a pandemic. Although there has been a plethora of general calls to rapidly release incarcerated people, there has not been much specific guidance for how to sequence individual

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<sup>120</sup> *Id.* See also *United States v. Boatwright*, No. 19-CR-301, 2020 WL 1639855, at \*5 (D. Nev. Apr. 2, 2020). However, other federal courts have rejected these arguments for pretrial release. See, e.g., *United States v. Clark*, No. 19-40068-01-HLT (D. Kansas March 25, 2020); *United States v. Williams*, No. PWG-13-544 (D. Nevada March 24, 2020) (in responding to a motion to reconsider bond, “Defendant has still failed to demonstrate by clear and convincing evidence that release is appropriate. The existence of the present pandemic, without more, is not tantamount to a ‘get out of jail free’ card.”)

<sup>121</sup> *Graham v. Allegheny County*, No. 2:20-cv-00496 (D. Pennsylvania May 27, 2020).

<sup>122</sup> *On Application to Vacate Stay*, No. 19A1034 (U.S. May 14, 2020).

releases. For example, the United Nations Human Rights Office declared that it is vital to “reduce prison populations and other detention populations wherever possible by implementing schemes of early, provisional or temporary release for those detainees for whom it is safe to do so, taking full account of non-custodial measures.”<sup>123</sup> In this Part, our goal is to provide more clarity on the question of how to establish an acceptable release policy for incarcerated people. We outline areas of consensus that should guide the creation of any correctional facility’s release policy, and we identify areas of reasonable disagreement that will require further debate.

### *a. Areas of Consensus*

Any strategy to protect incarcerated people during a global pandemic would have to incorporate prevention measures like provision of personal protective equipment and sanitation materials, and it would have to maximize physical distancing by preventing the unnecessary incarceration of new individuals and relocating already incarcerated individuals.

Many different views about the appropriate role of the penal system are compatible with reducing the carceral population. For example, one might think that the penal system is supposed to protect people against threats to their wellbeing by deterring, incapacitating, and reforming individuals who have been convicted of crimes in order to reduce future crimes.<sup>124</sup> Yet unsafe conditions of confinement also threaten the wellbeing of people, relatively safe alternatives to confinement exist, and many individuals in the penal system will not actually go on to commit future crimes that seriously harm people’s wellbeing. So the goal of protecting people can be consistent with (and might even favor) early release. For reference, one prominent model has estimated that if officials double release rates and limit new arrests to very serious offenses, they could prevent almost 100,000 unnecessary deaths (23,000 incarcerated and 76,000 non-incarcerated).<sup>125</sup> Another potential goal of the penal system is to punish individuals by making them pay for their crimes. However, a striking feature of the COVID-19 pandemic is that it can arguably make criminal punishment disproportionately severe. As Lauren Lyons recently argued, “we ought to release people from jails and prison in order to avoid their punishments becoming disproportionately severe and, correspondingly, unjustified on standard theories of the justification of punishment.”<sup>126</sup>

Thus, most people would agree that it is reasonable to release at least some incarcerated individuals during a life-threatening pandemic. More challenging questions arise when thinking about how to

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<sup>123</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, *Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic* (March 25, 2020),

<https://www.ohchr.org/Documents/HRBodies/OPCAT/AdviceStatePartiesCoronavirusPandemic2020.pdf>.

<sup>124</sup> As Antony Duff and Zachary Hoskins put it, “It is a contingent question whether punishment can be an efficient method of reducing crime in any of these ways, and some objections to punishment rest on the empirical claim that it cannot be—that there are other and more efficient methods of crime reduction.” We are deliberately not taking a philosophical position on punishment in this Article. Antony Duff and Zachary Hoskins, *supra* note XX. See also U.S. Dept’t of Justice Office of Justice Programs, *Five Things About Deterrence* (2016), <https://www.ncjrs.gov/pdffiles1/nij/247350.pdf>.

<sup>125</sup> American Civil Liberties Union, *COVID-19 Model Finds Nearly 100,000 More Deaths Than Current Estimates, Due to Failures to Reduce Jails*, ACLU, [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_covid19-jail-report\\_2020-8\\_1.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_covid19-jail-report_2020-8_1.pdf) (last visited June 24, 2020).

<sup>126</sup> Lauren Lyons, *Incarceration, COVID-19, and Emergency Release: Reimagining How and When to Punish*, KENNEDY INST. ETHICS J. (forthcoming Sept. 2020).

establish an actual policy for release. Setting the most difficult questions aside, there are a couple of features that all acceptable release policies would share. First, the process for releasing individuals would not be arbitrary, discriminatory, or politically driven. Second, the explicit purpose of release would be to reduce the population within each facility enough to enable physical distancing in compliance with recommendations made by the Centers for Disease Control and Prevention. Third, priority would be given to incarcerated people who meet (some combination of) specific criteria. These potential criteria are outlined below.

*Risk of recidivism for a violent offense*

One priority would be to release incarcerated people who pose a minimal risk to society.<sup>127</sup> Regardless of one's specific views about criminal detention, it is difficult to justify confining individuals who pose little societal risk during coronavirus. If one thinks that the penal system primarily serves a preventative function, then temporarily releasing individuals who are unlikely to immediately commit violent crimes seems like a fair price to pay for preventing the spread of a deadly infectious disease within and outside of penal institutions. Even if one takes a more retributive view, the health effects of being incarcerated during a pandemic could render the punishment no longer commensurate with the convicted crime.

Different factors could be used in order to determine which individuals pose a minimal risk to society. As a first cut, it would be reasonable for officials to screen individuals for release based on their crime of conviction, differentiating between violent crimes and low-level crimes. This step alone could result in a significant reduction of the prison population.

Assuming that one thinks that it would be tolerable to release individuals convicted of violent crimes,<sup>128</sup> additional factors can be considered to minimize societal risk. For example, the actual severity of what is categorized as a violent crime ranges dramatically, from unlawful possession of a firearm to burglary to homicide.<sup>129</sup> There is also increasingly strong evidence that people age out of crime, meaning that older individuals are much less likely to reoffend.<sup>130</sup> Similarly, prior conduct in correctional facilities can serve as a predictor of non-recidivism, even among those convicted of violent crimes.<sup>131</sup> Finally, the percentage of people who are victims of violent crimes perpetrated by a stranger is low,<sup>132</sup> meaning that preventative measures against revictimization (e.g., stay-away orders)

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<sup>127</sup> Because this argument is based on a concern for public safety, it specifically focuses on recidivism for violence and not general recidivism.

<sup>128</sup> Whether to release people convicted of violent crimes at all is an area of controversy, and other priorities might be set for release. However, it is worth noting that there are doubts that the prison population can be significantly reduced without releasing at least some people convicted of violent offenses. JUSTICE POLICY INSTITUTE, *Defining Violence: Reducing Incarceration by Rethinking America's Approach to Violence* (August 2016), [http://www.justicepolicy.org/uploads/justicepolicy/documents/jpi\\_definingviolence\\_final\\_report\\_9.7.2016.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/jpi_definingviolence_final_report_9.7.2016.pdf).

<sup>129</sup> *Id.*

<sup>130</sup> J. J. Prescott, Benjamin Pyle & Sonia B. Starr, *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643 (2020).

<sup>131</sup> Michael O'Hear, *Good Conduct Time for Prisoners: Why (and How) Wisconsin Should Provide Credits Towards Early Release*, 98 Marquette L. Rev. 487 (2014).

<sup>132</sup> U.S. Dep't of Justice Bureau of Justice Statistics, *Criminal Victimization*, 2018 (2019), <https://www.bjs.gov/content/pub/pdf/cv18.pdf>.

can be put in place and that most people would be unaffected by the added potential dangers of early release.<sup>133</sup>

However, a note of caution for any release policy that attempts to account for individual risk to society: there have been several efforts to use a fine-grained analysis of criminal history and demographic data in order to predict the risk of recidivism,<sup>134</sup> but care should be taken to not place too much confidence in these more elaborate methods because they internalize racial and class-based biases.<sup>135</sup> Estimates of recidivism risk can rely on factors like prior criminal history or arrest data, which can vary based on policing rates in different communities.<sup>136</sup>

#### *Presumption of innocence for the accused*

Another priority would be to release individuals who are being held pretrial. There are at least three reasons to favor release of the accused. First, presumption of innocence for the accused is a bedrock of the Constitution. We cannot “punish” people for crimes before they have been convicted; holding people who have been arrested is not supposed to be reprobative. Under these circumstances, it is difficult to justify confining individuals in particularly dangerous facilities for an extended time—all the more so because pandemics cause delays to jury trials that prolong confinement.

Second, there are normally due process limitations on pretrial detention that give defendants a right to release if a court hearing isn’t held within a specified time. Critically, though, an individual’s due process rights under the Fifth Amendment do not necessarily set a specific time-limit on pretrial detention, instead requiring “assessment on a case-by-case basis” that considers “factors in addition to the passage of time” and depends on “the total harms and benefits to prisoner and society.”<sup>137</sup> Presumably, the coronavirus pandemic is precisely the type of factor that ought to be weighed in this case-by-case assessment.

Third, whatever the intended purpose of the penal system, whether deterrence or censure, confining the accused is usually the least likely to serve that purpose.<sup>138</sup> This is because we are not confident that the accused have committed any crime at all. In that case, it would be reasonable to presume that many, if not most, of the accused should be released pending trial.

#### *Risk of mortality from coronavirus*

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<sup>133</sup> See Emily Widra, *Actual Violent Crime Has Nothing to Do with Our Fear of Violent Crime*, PRISON POLICY INITIATIVE (May 3, 2018), <https://www.prisonpolicy.org/blog/2018/05/03/gallup-fear/>.

<sup>134</sup> See, e.g., Seena Fazel, et al. *Prediction of violent reoffending on release from prison: derivation and external validation of a scalable tool*, 3 *LANCET PSYCH.* 535 (2016).

<sup>135</sup> Derek W. Braverman, et al., *OxRec Model for Predicting Risk of Recidivism: Ethics*, 3 *LANCET PSYCH.* 808 (2016). A Wisconsin case challenged the use of risk assessment instruments at sentencing because their proprietary nature prevents defendants from challenging their accuracy and scientific validity and because they take gender and race into account in formulating the risk assessment. *Loomis v. Wisconsin*, No. 16-6387 (W.I. Oct. 5, 2016).

<sup>136</sup> See Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 *EMORY LAW JOURNAL* 59, 103-4 (2017); Andrew Gelman, Jeffrey Fagan, & Alex Kiss, *Analysis of the New York City Police Department’s “Stop-and-Frisk” Policy in the Context of Claims of Racial Bias*, 102 *J. Am. Stat. Assoc.* 813 (2007).

<sup>137</sup> *United States v. Gonzales Claudio*, 806 F.2d 334, 340 (2d Cir. 1986); *United States v. D.W.*, 198 F. Supp. 3d 18, 23 (E.D.N.Y. 2016). See also Michael Campion Miller et al., *supra* note XX.

<sup>138</sup> Note that there may be exceptions. For example, take the case in which the intended purpose of the penal system is public safety, one person is being confined for an alleged violent crime like a homicide, and another person is being confined on a conviction of a low-level crime like a traffic violation.

A priority would also be to release individuals who are most likely to suffer if kept in detention.<sup>139</sup> One might think that legal punishment should inflict some amount of burdens, societal condemnation, pain, suffering, or harms to the person who committed a crime, and, thus, the sentence that a person receives in court should reflect the level of censure that her crime deserves—the severity of the sentence should be proportional to the seriousness of the crime. Lauren Lyons has argued that the pandemic increases the severity of a person’s formal sentence, and, therefore, it could warrant a shorter length of stay in the facility.<sup>140</sup> After all, the court was not aware that the person’s confinement would coincide with a dangerous pandemic that would directly affect the conditions of the facility. So, serving the full sentence under these conditions would constitute a punishment that extends beyond what the court had initially thought was deserved. The greater the risk of mortality from coronavirus, the greater the expected punishment.

*Proportion of sentence served*

It is difficult to make the case that a person who has already undergone the majority of her legally imposed sanction is posing a substantial risk to society by being released a few weeks or months early. Already, a court has decided that it would be appropriate to release her soon. In addition, a person who has undergone the majority of her sentence has already received the majority of her punishment that a court had deemed appropriate for her crime.

*Custodial responsibilities to third parties*

A final priority would be to release people who have caretaking responsibilities to dependents and cannot fulfill those responsibilities during their detention. Just like the priority of releasing people who are being held pretrial, this priority is based on a principle of protecting the innocent.

For example, being incarcerated while pregnant could heighten the risk of negative health consequences for a fetus downstream. This is especially true when a pandemic is raging through the carceral facility and adequate prevention measures are not in place. Currently, much remains unknown about the impact of COVID-19 on pregnancy, so protection of the fetus might be a factor to consider when scheduling releases.<sup>141</sup> Protection of the fetus might be the *most* important factor to consider during future pandemics, depending on the nature of the virus: take microcephaly and the other severe fetal brain defects caused by the Zika virus as a case example.

More controversially, one might also favor release for incarcerated people whose non-incarcerated dependents have become especially vulnerable during a pandemic (e.g., incarcerated people whose elderly parents or young children need specialized care).

***b. Areas of Controversy***

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<sup>139</sup> Although we are focusing on mortality, morbidity and general wellbeing are also ethically important goals.

<sup>140</sup> Lauren Lyons, *supra* note XX.

<sup>141</sup> Centers for Disease Control and Prevention, If You Are Pregnant, Breastfeeding, or Caring for Young Children, (2020) (last visited June 29, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/pregnancy-breastfeeding.html>; Centers for Disease Control and Prevention, Data on COVID-19 During Pregnancy (2020) (last visited June 29, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/special-populations/pregnancy-data-on-covid-19.html>.

We have argued that prioritizing some combination of the five above criteria would be relatively uncontroversial irrespective of one's views about the goals and limitations of the penal system. These criteria can provide the basis for establishing more specific release policies. For example, we assume that releasing incarcerated people who squarely meet the criteria would be permitted under any reasonable policy.<sup>142</sup> Despite this, several points of controversy remain.

To start, specific release policies may vary in terms of how they order the five criteria. For example, if one thinks that the primary purpose of the penal system is avoidance of future crimes, then individuals' risk of recidivism for a violent offense should take precedence. However, if one thinks of the penal system primarily in terms of punishment, then perhaps the utmost priority should be given to individuals who have served the majority of their time, irrespective of their risk of recidivism for violence.

Earlier, we suggested that people need to be removed from carceral facilities primarily in order to enable physical distancing. Thus, how specific release policies prioritize among the five criteria will also have to take into account the individual facilities' population, population density, size, staffing, operations, and resources. When starting to sequence individuals for release, a facility might find that removal of all low-level offenders alone is sufficient for safe physical distancing, whereas another facility may find that removal of low-level offenders has little effect. Also, it may be more practicable for facilities to schedule releases based on straightforward criteria like proportion of sentence served, age, or crime of conviction as opposed to criteria that require more individualized assessments like recidivism risk.

Release policies may also vary in terms of what they do when the above criteria conflict with one another. Arguably, the most pressing conflict is between risk of mortality from coronavirus and risk of recidivism for a violent offense. This is where the debate between public health and public safety becomes relevant. As a New York City Police Commissioner stated, "Each of these releases has a potential impact on public safety, and you try to weigh that against the humanity issue of having someone contract the disease in jail. We're trying to strike that balance."<sup>143</sup> Assuming that one accepts the broad arguments for increasing physical distancing in carceral facilities, the question of how to strike the appropriate balance between public health and public safety remains. Our hope is that there are enough incarcerated people who can be released without eliciting this conflict that safe physical distancing within facilities will be possible. Crime rates have plummeted during the coronavirus pandemic despite a number of incarcerated people being released.<sup>144</sup> In addition, there is evidence that imprisonment is an ineffective long-term strategy for preventing violence, as it seems to have no

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<sup>142</sup> Note that, at most, incarcerated people can meet four of the five criteria.

<sup>143</sup> Anna Flagg, *Jails Are Coronavirus Hotbeds. How Many People Should Be Released to Slow the Spread*, SLATE, (JUNE 3, 2020), <https://fivethirtyeight.com/features/jails-are-coronavirus-hotbeds-how-many-people-should-be-released-to-slow-the-spread/>.

<sup>144</sup> Simone Weichselbaum & Weihua Li, *As Coronavirus Surges, Crime Declines in Some Cities*, in THE MARSHALL PROJECT, March 27, 2020, <https://www.themarshallproject.org/2020/03/27/as-coronavirus-surges-crime-declines-in-some-cities>. However, some have objected to this argument on the grounds that it is likely there has been an increase in crime, but that the jump has been "masked in crime statistics by the even greater reduction caused by people sheltering at home." Jordan S. Rubin, *Pandemic-Era Prison Releases a 'Tipping Point' for Reformers*, in BLOOMBERG LAW, May 29, 2020, <https://news.bloomberglaw.com/us-law-week/pandemic-era-prison-releases-a-tipping-point-for-reformers>.

rehabilitative or deterrent effects after release.<sup>145</sup> And, although imprisonment does seem to have a slight preventative “incapacitation” effect in the short-term, there is evidence that preventing one person from committing a new violent crime would require imprisoning 16 such individuals.<sup>146</sup> In short, it is possible that many people convicted of violent crimes could be sentenced to probation rather than prison with little impact on public safety.<sup>147</sup>

There is an additional conflict between presumption of innocence for the accused and risk of recidivism for certain offenses. For example, there is evidence that early release for individuals accused of domestic violence would likely contravene the public safety goals of incarceration:

“Studies agree that for those abusers who reoffend, a majority do so relatively quickly. In states where no-contact orders are automatically imposed after an arrest for domestic violence, rearrests for order violations begin to occur immediately upon the defendant’s release from the police station or court ... Of those rearrested for domestic violence, approximately two-thirds reoffended within the first six months.”<sup>148</sup>

As a result, it could be reasonable to build exceptions into release policies for the accused. The need for such exceptions is especially acute because domestic violence incidents have been increasing during stay-at-home orders,<sup>149</sup> and victims can be harmed if they report an instance of abuse and then their accused abuser is released home.<sup>150</sup>

Another point to consider is whether the availability of safe alternatives to incarceration should be a precondition for release. Alternatives to incarceration include home confinement, drug treatment programs, homeless shelters, etc., some of which might put individuals at a higher risk of acquiring coronavirus than the carceral facility itself. Some officials might argue that the decision to release incarcerated people ought to depend on whether release would actually lower their risk of morbidity and mortality from coronavirus. However, since background injustices cause some people to be unable to return to a safe place, it could be ethically problematic to base release policies on the safety of people’s options. There may be negative distributive consequences if policies explicitly prioritize saving the people who have a safe place to go.

A final point of controversy is whether officials should primarily rely on individualized assessments and case-by-case judgements or follow hard guidelines for release. If officials take the former approach, then no offenses would preclude release: an elderly individual who was convicted of a particularly brutal offense as a teenager but who is extremely unlikely to reoffend now would not be

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<sup>145</sup> David J. Harding et al., *A Natural Experiment Study of the Effects of Imprisonment on Violence in the Community*, 3 Nat. Hum. Behav. 671 (2019).

<sup>146</sup> *Id.* See also David J. Harding, Do Prisons Make Us Safer?, in SCIENTIFIC AMERICAN, June 21, 2019, <https://www.scientificamerican.com/article/do-prisons-make-us-safer/>.

<sup>147</sup> *Id.*

<sup>148</sup> U.S. Dep’t of Justice National Institute of Justice, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* 1, 21 (2009).

<sup>149</sup> See Julie Bosman, Domestic Violence Calls Mount as Restrictions Linger: ‘No One Can Leave,’ in N.Y. TIMES, May 15, 2020, <https://www.nytimes.com/2020/05/15/us/domestic-violence-coronavirus.html>; Maclean Stanley, Why the Increase in Domestic Violence During COVID-19?, in PSYCHOLOGY TODAY, May 9, 2020, <https://www.psychologytoday.com/us/blog/making-sense-chaos/202005/why-the-increase-in-domestic-violence-during-covid-19>.

<sup>150</sup> *Id.*

categorically excluded. While this approach could be fairer insofar as it gives everyone a chance at release, it could also introduce the influence of personal biases from officials.

Because of the need to tailor release policies to individual facilities' characteristics, we are hesitant to make a sweeping generalization about how officials should organize releases. Rather, we recommend that prison officials establish independent committees to guide policy development at the state and federal levels, while taking care to build in flexibility for implementation at a local level. Hospitals have already started using independent committees to make triage decisions about the allocation of scarce ventilators to COVID-19 patients in intensive care units.<sup>151</sup> Prisons and jails could take a similar approach in order to reduce the risk that decisions are based on stereotypes or unfair beliefs about people's dangerousness or worth.<sup>152</sup>

## CONCLUSION

U.S. officials have a serious obligation to protect incarcerated people during a global pandemic, which, for practical purposes, translates into an obligation to rapidly and safely reduce the incarcerated population. There are several questions that we have not addressed in this Article, including the questions of how to provide necessary supervision, housing, and medical care for those who are released into local communities and how to modify law enforcement practices to keep carceral populations down. Undoubtedly, the process of decarceration is going to be complex. Regardless, the number one goal of public health responses to COVID-19 should be to save lives. Non-incarcerated Americans might have to tolerate some level of discomfort and risk in order to achieve this goal.

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<sup>151</sup> University of Pittsburgh Department of Critical Care Medicine, *Allocation of Scarce Critical Care Resources During a Public Health Emergency*, (April 15, 2020), [https://ccm.pitt.edu/sites/default/files/UnivPittsburgh\\_ModelHospitalResourcePolicy\\_2020\\_04\\_15.pdf](https://ccm.pitt.edu/sites/default/files/UnivPittsburgh_ModelHospitalResourcePolicy_2020_04_15.pdf); See also David Wasserman, Govind Persad, and Joseph Millum, *Setting Priorities Fairly in Response to COVID-19: Identifying Overlapping Consensus and Reasonable Disagreement* (Under review. Email [dtwasserm@gmail.com](mailto:dtwasserm@gmail.com)).

<sup>152</sup> Members of prison abolitionist movements—including grassroots organizers, activist collectives, prisoner associations, and student groups—might take issue with our Article insofar as it implicitly accepts the premise that prisons are necessary for public safety. Prison abolitionists envision a world where all communities, including poor communities and communities of color, are safe without prisons and other forms of state-sanctioned violence. In contrast to prison reformists, they believe that reforms will fail to dismantle the underlying immorality of prisons and more strongly emphasize that resources would be better spent on social services that address the root social causes of crime. These arguments are increasingly gaining mainstream attention in light of police brutality and calls to defund and abolish the police. This Article has deliberately focused on more conservative perspectives on incarceration. We take it that members of prison abolitionist movements already endorse our thesis that officials should reduce the carceral population because they advocate for doing so even outside of a pandemic. We also remain neutral in order to convey the more conformist point that efforts to release incarcerated people during a pandemic should have a broad constituency *even if* some members of the public take a hardline view on crime. Thanks to E. Jardas for this contribution.