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Criminal Law in Crisis

*Benjamin Levin**

Introduction

On April 5, 2020, Michael Tyson, a 53-year old man arrested for a technical parole-violation, became the first reported person on Rikers Island to die from COVID-19.¹ By April 20, over two-thirds of the people incarcerated in Ohio's Mario Correctional Institution had tested positive for the novel coronavirus, and over twenty percent of Ohio's 12,919 confirmed cases had been traced to the state's prison system.² By April 30, prisons or jails had been identified as the source of eight out of ten of largest viral clusters in the United States.³

Advocates sprang to action: They called for governors to use clemency, pardon, and furlough powers;⁴ they petitioned judges to release defendants awaiting trial;⁵ they called on police to issue citations instead of arresting individuals;⁶ and they implored prosecutors to drop charges or seek non-carceral alternatives when they did prosecute as a way to reduce the risk of exposing

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¹ See Joshua Bates, *New York's Rikers Island Jail Sees First Inmate Death From COVID-19*, TIME (Apr. 6, 2020), <https://time.com/5816332/rikers-island-inmate-dies-coronavirus/> [<https://perma.cc/4BJ9-8ZGX>].

² See Bill Chappell, *73% Of Inmates At An Ohio Prison Test Positive For Coronavirus*, NPR (Apr. 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> [<https://perma.cc/4BJ9-8ZGX>].

³ See *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Apr. 30, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> [<https://perma.cc/9N3V-56TZ>] (permalink contains data as of Aug. 1, 2020).

⁴ See, e.g., Rachel Barkow, *Our Leaders Have the Power to Release People in Prison. Now They Must Use It.*, THE APPEAL, Mar. 27, 2020, <https://theappeal.org/coronavirus-prison-commutations>; James King, *A Plea to Governor Newsom: Don't Abandon Elderly Incarcerated People to Die From COVID-19*, THE APPEAL (Mar. 30, 2020), <https://theappeal.org/gavin-newsom-california-prisons-coronavirus-covid-19/> [<https://perma.cc/SZA4-A3QK>].

⁵ See, e.g., *Disability Rights Mont. v. Mont. Jud. Dists. 1-22*, OP 20-0189, 2020 WL 1867123, at *1 (Mont. Apr. 14, 2020); *Comm. for Pub. Counsel Servs. v. Chief Justice of Trial Court*, SJC-12926, 2020 WL 2027846 (Mass. Apr. 28, 2020); Deborah Becker, *Mass. High Court Rules Some Prisoners Will Be Eligible For Release Due To COVID-19*, WBUR-FM (Apr. 3, 2020), <https://www.wbur.org/news/2020/04/03/sjc-prisoners-emergency-petition-ruling> [<https://perma.cc/7LL7-637T>].

⁶ See, e.g., *Police Responses to Covid-19*, BRENNAN CTR. (Mar. 27, 2020), <https://www.brennancenter.org/our-work/research-reports/police-responses-covid-19> [<https://perma.cc/U4WJ-RXD7>].

more people to the deadly virus.⁷

The arguments offered were simple and compelling: the combination of a deadly virus and the U.S. criminal system presented a humanitarian crisis.⁸ Criminal justice reform, decarceration, or abolition—all causes that had gained ground in recent years⁹—suddenly seemed more urgent. Addressing the massive and metastasized carceral state was not only the right thing to do; it might be the only way to save the lives of 2.3 million incarcerated people and countless others who work in, live near, or interact with the carceral system.¹⁰

This exceptional situation and crisis mentality offer an important opportunity to reexamine the hardships experienced by people affected by the criminal system and potentially to save lives in the process.¹¹ But, they also offer an important opportunity to recognize the cruelty, inhumanity, and destructiveness that define U.S. criminal policy even in “normal” times. That is, so many of the most shocking aspects of criminal law’s administration during the pandemic are actually extensions of problems that plague the system in “normal” times.¹²

In this Essay, I offer a brief account of how the pandemic lays bare the structural flaws of the carceral state and the contemporary realities of the criminal system. I provide two primary examples or illustrations, but they are

⁷ See, e.g., Rebecca Klar, *Brooklyn DA Says His Office Won’t Prosecute Some Low-Level Offenses amid Coronavirus Outbreak*, THE HILL (Mar. 17, 2020), <https://thehill.com/homenews/state-watch/487987-brooklyn-da-says-his-office-wont-prosecute-some-low-level-offenses-amid> [<https://perma.cc/N4RY-QD5C>].

⁸ See Sharon Dolovich, *Every Public Official With The Power To Decarcerate Must Exercise That Power Now*, THE APPEAL (Apr. 10, 2020), <https://theappeal.org/every-public-official-with-the-power-to-decarcerate-must-exercise-that-power-now/> [<https://perma.cc/9KQV-VU4R>]; Alice Sperti, *Mass Incarceration Poses a Uniquely American Risk in the Coronavirus Pandemic*, THE INTERCEPT (May 6, 2020), <https://interc.pt/2WanYwE> [<https://perma.cc/2EXV-WBNI>].

⁹ See Douglas Husak, *The Price of Criminal Law Skepticism: Ten Functions of the Criminal Law*, 23 NEW CRIM. L. REV. 27, 29 (2020); see also *Introduction*, 132 HARV. L. REV. 1568 (2019); see also Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> [<https://perma.cc/V7VQ-R9VW>]; see generally Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018); see also Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 3 (2019).

¹⁰ See Ed Pilkington, *Mass Incarceration Could Add 100,000 Deaths to US Coronavirus Toll, Study Finds*, GUARDIAN (Apr. 22, 2020), <https://www.theguardian.com/us-news/2020/apr/22/coronavirus-us-jails-incarceration-death-toll-study> [<https://perma.cc/U49W-UF4L>].

¹¹ Cf. STUART HALL ET AL., *POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER* xv (1978) (“Resolutions to the crisis can take different forms; there is no preordained result.”).

¹² See generally Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, NW. U. L. REV. (forthcoming 2020), *permanently available at* <https://ssrn.com/abstract=3576163>.

not meant to serve as an exhaustive list. Rather, by highlighting these issues, problems, or—perhaps—features, I mean to push back on claims of exceptionalism and to suggest that this moment of crisis should serve not just as an opportunity to marshal resources to address the pandemic, but also as a chance to address the harsh realities of the U.S. criminal system.¹³ Further, my claim is not that criminal law is in some way unusual in this respect (*i.e.*, similar observations certainly could be and have been made about the health-care/insurance system, the tethering of social benefits to employment, pervasive inequality, and many other features of U.S. political economy).¹⁴ Nevertheless, the current moment provides an opportunity to appreciate the ways in which many particularly problematic aspects of criminal law in crisis are basic features of the U.S. carceral state.¹⁵

To this end, my argument proceeds in two Parts, each addressing one of the aspects or pathologies of U.S. criminal policy that the pandemic has exacerbated. In Part I, I address the absence of “sentencing realism” or, perhaps more accurately, the failure to consider the reality of jails and prisons when imposing sentences or pretrial detention. In Part II, I address the basic limitations of thinking of “the criminal system” as a “system.” What do commentators and lawmakers miss when they suggest or assume that criminal law and its administration are the same in a rural county in Colorado as in an urban county in New York? What is lost in treatments of criminal law and punishment that assume a generally applicable and coherent sets of policies, practices, and justifications?

In each Part, I explain how the pandemic has made each phenomenon easier to identify, but also how each phenomenon defined the criminal system in pre-COVID-19 days. Ultimately, I argue that the “crisis” frame provides an opportunity for reform, but also risks obscuring the ways in which the criminal system was in crisis long before the first COVID-19 tests came back positive.

¹³ See *id.* at 3 (“In many ways, the current COVID-19 crisis has revealed a criminal justice system that was always broken and always teetered on the edge of some disaster.”).

¹⁴ See generally Shaun Ossei-Owusu, *Coronavirus and the Politics of Disposability*, BOSTON REVIEW (Apr. 8, 2020), <http://bostonreview.net/class-inequality-race-politics/shaun-ossei-owusu-coronavirus-and-politics-disposability> [<https://perma.cc/6RBM-YAWU>] (arguing that the pandemic highlights longstanding structural inequality).

¹⁵ See Derecka Purnell, *Coronavirus has Shown that it is Possible to Change the US Criminal Justice System*, GUARDIAN (Apr. 7, 2020), <https://www.theguardian.com/commentisfree/2020/apr/07/criminal-justice-system-us-coronavirus-shown-possible-to-change> [<https://perma.cc/2Q75-YKKD>].

I. Sentencing Realism

In late April, as the number of COVID-19 cases linked to jails and prisons grew, the *New York Times* editorial board called on officials to take action to release incarcerated people and declared that “no one deserves to die of Covid-19 in prison or jail.”¹⁶ The *Times* was not the first place these arguments had surfaced. Commentators frequently described jails as “petri dishes” and stressed the absence of soap or hand sanitizer.¹⁷ Indeed, even though people in New York state prisons were put to work in March producing hand sanitizer, they were not actually allowed to possess sanitizer in their cells.¹⁸ (New York has since joined twenty-nine other states in allowing hand sanitizer; the remaining twenty states still treat hand sanitizer as prison contraband in most or all cases).¹⁹ Advocates and officials had come to accept the logic of decarceration: any decision to put a person in a cage was a decision to risk exposing them to the virus.²⁰

The shift in perspective was a significant one in that it framed punishment not simply in terms of days, weeks, months, or years, but rather in terms of *what punishment actually would look like*. In this respect, the pandemic frame allowed a

¹⁶ Editorial, *No One Deserves to Die of Covid-19 in Jail*, N.Y. TIMES (Apr. 24, 2020), <https://www.nytimes.com/2020/04/23/opinion/coronavirus-prisons.html?smid=tw-share> [<https://perma.cc/N4B7-2XDE>].

¹⁷ E.g., Jonathan Capehart, Opinion, *‘No Such Thing as Social Distancing’ When You’re Incarcerated*, WASH. POST (Mar. 31, 2020), <https://www.washingtonpost.com/opinions/2020/03/31/no-such-thing-social-distancing-when-youre-incarcerated/> [<https://perma.cc/DB3H-7WT2>]; Timothy Williams et al., *Jails Are Petri Dishes: Inmates Freed as the Virus Spreads Behind Bars*, N.Y. TIMES (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html> [<https://perma.cc/AN7K-D4JP>]; Holly Yan, *Prisons and Jails across the US are Turning into ‘Petri Dishes’ for Coronavirus. Deputies are Falling Ill, Too.*, CNN (Apr. 10, 2020), <https://www.cnn.com/2020/04/09/us/coronavirus-jails-prisons/index.html> [<https://perma.cc/44V8-Y7LT>].

¹⁸ Antonia Noori Farzan, *Inmates are Manufacturing Hand Sanitizer to Help Fight Coronavirus. But Will They Be Allowed to Use It?*, WASH. POST (Mar. 10, 2020), <https://www.washingtonpost.com/nation/2020/03/10/hand-sanitizer-prison-labor/> [<https://perma.cc/Y8AB-7LYS>].

¹⁹ Casey Tolan, *Hand Sanitizer Is Still Considered Contraband in Some Prisons around the Country*, CNN (May 5, 2020), <https://www.cnn.com/2020/05/05/us/coronavirus-prison-hand-sanitizer-contraband-invs/index.html> [<https://perma.cc/8D6G-3QET>].

²⁰ See Emma Grey Ellis, *Covid-19 Poses a Heightened Threat in Jails and Prisons*, WIRED (Mar. 24, 2020), <https://www.wired.com/story/coronavirus-covid-19-jails-prisons/> [<https://perma.cc/W2K5-QWCA>]; Brent Orrell & Grant Duwe, *COVID-19 has Exposed the Interlocking Risks of Mass Incarceration*, THE HILL (Apr. 30, 2020) <https://thehill.com/opinion/criminal-justice/495547-covid-19-has-exposed-the-interlocking-risks-of-mass-incarceration> [<https://perma.cc/R7DD-5BFA>]; Tony Saavedra, *Early Release Begins in Orange County Jails after More than 100 Inmates Exposed to Coronavirus*, ORANGE CNTY. REGISTER (Mar. 27, 2020), <https://www.ocregister.com/2020/03/27/early-release-begins-in-orange-county-jails-after-hundreds-of-inmates-exposed-to-coronavirus/> [<https://perma.cc/BS25-UR7P>].

departure from business as usual. As Eve Hanan has argued, prisons are frequently “invisible” is the administration of criminal punishment and its study.²¹

When judges impose carceral sentences on defendants, they rarely speak in terms of the conditions of confinement that a defendant will face.²² Further, in both state and federal systems, judges do not actually have the authority to sentence a defendant to a specific jail or prison.²³ A federal defendant sentenced to a carceral term in her home state might have a very different experience than a defendant who is assigned to a prison across the country.²⁴ Incarceration in a distant state (or distant corner of a defendant’s home state) might reduce dramatically the likelihood that friends and family can visit, might exacerbate racial or cultural differences between the defendant and prison staff, and might make the process of re-entry on the back-end even more difficult.²⁵ Similarly, being sent by the state department of corrections or the Federal Bureau of Prisons to a facility with a reputation for violence, abuse, or unsanitary conditions might look very different than being sent to a prison with many educational and job training programs and a reformist warden.²⁶ And individual characteristics of a defendant (*e.g.*, race, class, sexuality, mental health) might

²¹ See generally M. Eve Hanan, *Invisible Prisons*, UC DAVIS L. REV. (forthcoming 2021) (manuscript on file with author).

²² Alice Ristroph has suggested that the Supreme Court’s Eighth Amendment proportionality jurisprudence might provide some avenue for changing this practice and importing more realism into the sentencing process. See Alice Ristroph, *Hope, Imprisonment, and the Constitution*, 23 FED. SENT. R. 75, 77 (2010) (“*Graham* thus suggests that to assess the severity of a prison sentence, one must give some consideration to the prisoner’s subjective experience. It is not enough to consult the calendar and count years.”).

²³ *Cf.*, *e.g.*, *Olim v. Wakinekona*, 461 U.S. 238, 245–46 (1983) (holding that bureaucrats deciding to transfer an inmate to another state’s prison does not deprive the inmate of a liberty interest under the Due Process Clause) (an inmate has “no justifiable expectation that he will be incarcerated in any particular prison” or “in any particular state.”); see also Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 195 (2009) (“Sentencing decisions are usually made by judges while decisions about conditions of incarceration are usually made by prison bureaucrats (under conditions that are generally less open, accountable, and reviewable than they are in the courtroom). Judges can recommend prison assignments, but at least in the federal system, the Bureau of Prisons is under no obligation to follow their recommendations.”).

²⁴ See generally Benjamin Levin, *Inmates for Rent, Sovereignty for Sale: The Global Prison Market*, 23 S. CAL. INTERDISC. L.J. 509 (2014).

²⁵ See, *e.g.*, *id.*; Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1815, 1856 (2020); Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 601 (2006) (noting specific challenges faced by incarcerated parents separated from their children by long distances).

²⁶ See, *e.g.*, Kaufman, *supra* note 25, at 1833 n.102; see also Levin, *supra* note 24.

dramatically alter her experience of incarceration.²⁷

The lack of inquiry into the circumstances of incarceration is not confined to the sentencing phase or to the post-guilt stages of the criminal process.²⁸ When a judge determines that a defendant should be detained pretrial or held on unrealistically high bail, she generally does not make a finding on the record about the actual conditions of confinement that the defendant will face or the impact on her life, health, or safety that this period of incarceration will have.²⁹ Indeed, despite the Supreme Court's insistence that pretrial detention is not punishment and is somehow practically and conceptually distinct from post-conviction incarceration,³⁰ the same jails house individuals charged with crimes alongside people convicted of crimes.³¹ And, some accounts suggest that the conditions faced by people detained pretrial in jails often may be harsher than those faced by individuals convicted and sentenced to terms in prison.³²

Put simply, a fundamental lack of realism tends to define judges' treatment of decisions about when and for how long to incarcerate. The decisions are framed as simply bimodal (*i.e.*, incarceration or no incarceration) or in terms of duration, not quality or conditions.³³

The pandemic has shone a light on the heedlessness of the decision-making process: when a judge sentences an immunocompromised defendant to a carceral term, she is not just deciding that this defendant should be segregated from society or should be denied a range of basic liberties; rather, the judge has effectively decided that it is acceptable for the defendant to be exposed to a

²⁷ See, e.g., Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1301 (2011); David Gray, *Punishment As Suffering*, 63 VAND. L. REV. 1619, 1630 (2010); Kolber, *supra* note 23; E. Lea Johnston, *Modifying Unjust Sentences*, 49 GA. L. REV. 433, 443 (2015).

²⁸ For an account of how pretrial detention and its flawed doctrinal framework have operated during the pandemic, see generally Carroll, *supra* note 12.

²⁹ To learn about these conditions, see generally Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1312–13 (2012). For a firsthand perspective on the experience of incarceration, see Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. C.R.-C.L. L. REV. 257 (2013).

³⁰ See generally *United States v. Salerno*, 481 U.S. 739, 746–52 (1987).

³¹ See Appleman, *supra* note 29, at 1312–13 (“[P]retrial detainees are often incarcerated alongside the ten percent of convicted criminals who are housed in jails rather than prisons. This indicates that the holding conditions for pretrial detainees are, at minimum, punishment-like, as it is precisely the same as that for some convicted offenders. The lines between prison and jail are becoming increasingly blurred, and not for the better.” (footnotes omitted)).

³² See *id.*; Robert G. Lawson, *Turning Jails Into Prisons—Collateral Damage from Kentucky's “War on Crime”*, 95 KY. L.J. 1, 4–5, 24–25 (2007); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1684–88 (2003).

³³ See generally Hanan, *supra* note 21.

potentially fatal illness.³⁴ Similarly, a determination that a defendant should be detained pretrial for purposes of “public safety” amounts to a determination that the potential risk of violence to the community that the defendant poses is greater or clearly outweighs the risk that the defendant will get sick and die (or, of course, that she will contract the virus and expose others to it once she is released). As Jenny Carroll has argued compellingly, pretrial detention determinations during the pandemic have revealed the lack of attention paid to “downstream consequences” during bail hearings.³⁵

A characterization of sentencing and bail determinations during the pandemic that emphasizes the stakes and conditions of incarceration strikes me as completely accurate. But, importantly, this characterization also accurately describes how such determinations *always* work. That is, on an average day in criminal court there is not a deadly virus wreaking havoc behind bars, but the incarcerated person may well face many challenges, hardships, or obstacles that the official description of sentence (e.g., “sixty months’ imprisonment”) does not capture.³⁶ What the pandemic reveals (or, perhaps, highlights), then, is the reality that these judicial determinations usually lack a firm grounding in the conditions of confinement that actually define the incarcerated person’s time behind bars.³⁷ Similarly, such determinations generally disregard collateral consequences and other hardships that the sentence will entail for the defendant, her family, and her community.³⁸ In a legal system that purports to reject “cruel” punishments, it would be unseemly for a judge to sentence a defendant to serve time in a prison notorious for abuse if the judge believed the defendant were particularly blameworthy. But it also would be more honest, forcing society to face the reality of criminal punishment and the actual scale of its punitiveness.³⁹

³⁴ To be clear, judges do not explicitly make such determinations on the record, but appreciating the impact of sentencing and bail determinations requires considering their social context.

³⁵ See Carroll, *supra* note 12, at 8.

³⁶ Cf. *Karr v. State*, 459 P.3d 1183, 1187–88 (Alaska Ct. App. 2020) (“At the hearing, the trial court shall conduct an individualized assessment to determine the least restrictive bail condition or conditions that will reasonably ensure the defendant’s appearance in court and protect the victim, other people, and the community in light of the COVID-19 pandemic and any other new information that may be provided.”).

³⁷ See Carroll, *supra* note 12, at 8.

³⁸ See, e.g., Benjamin Levin, *Criminal Employment Law*, 39 CARDOZO L. REV. 2265, 2306 (2018); Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 303 (2015); Kevin R. Reitz, *The Economic Rehabilitation of Offenders: Recommendations of the Model Penal Code (Second)*, 99 MINN. L. REV. 1735, 1754 (2015).

³⁹ Notably, in the literature on collateral consequences, scholars generally make this realist- or transparency-focused pitch—punishment includes more than just the term of incarceration, so judges should articulate those other terms, prosecutors and defense attorneys should consider

To appreciate whether punishment is proportional, whether the punishment fits the crime, etc., we should be able to understand what the punishment *is*.⁴⁰ It matters whether the punishment amounts to a high likelihood of exposure to COVID-19, a high likelihood of rape, or a high likelihood that the incarcerated person will be able to take college courses. These distinctions tell us what the punishment is. And as a practical matter, the realities of incarceration—more than simple classifications of duration—should help us understand what it means to say that society has deemed it appropriate to incarcerate.

II. Not One System, But Many

The coronavirus also has driven home the importance of the local (*i.e.*, local politics, practices, institutions, and actors) in discussions of criminal justice policy. The essential questions for controlling the spread of the virus behind bars tend to rely on local actors and micro decisions. Although governors and legislators have substantial roles in exercising clemency power, redefining crimes, or setting limits on who should be incarcerated and for how long,⁴¹ how a jurisdiction deals with arrests, release, and jail management may be the results of decisions by individual sheriffs, wardens, police chiefs, and district attorneys.⁴² In the context of the pandemic, we have seen that different states,

them at plea bargaining, and appellate judges should incorporate them into Eighth Amendment proportionality analysis. *See, e.g.*, A.B.A., ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 1, 18 (3d ed. 2004); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1825 (2012); Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1210 (2016); Margaret Colgate Love, *Managing Collateral Consequences in the Sentencing Process: The Revised Sentencing Articles of the Model Penal Code*, 2015 WIS. L. REV. 247, 263 (2015).

⁴⁰ *See, e.g.*, Chin, *supra*, note 39, at 1825; Levin, *supra*, note 38, at 2306; Mayson, *supra*, note 38, at 303. *Cf.* Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 6 (2010) (arguing that criminal law operates to redistribute pain from the victim to the offender).

⁴¹ *See, e.g.*, Barkow, *supra*, note 4; John Herrick, *Colorado Places a Moratorium on New Prison Intakes During Pandemic*, COLO. INDEP. (Mar. 26, 2020), <https://www.coloradoindependent.com/2020/03/26/colorado-moratorium-prisons-inmates-covid-19-cspii/> [<https://perma.cc/V7XF-XLND>]; Matt McKinney, *Gov. Tom Wolf to Temporarily Release Pa. State Inmates amid Coronavirus Crisis as Legislative Effort Falls Apart*, PHILA. INQUIRER (Apr. 10, 2020), <https://www.inquirer.com/health/coronavirus/spl/pennsylvania-coronavirus-state-prison-reprieves-1800-inmates-20200410.html> [<https://perma.cc/8P5E-D3SP>].

⁴² *See, e.g.*, Jessica Pishko, *What Sheriffs Can Do To Slow the Coronavirus Outbreak*, THE APPEAL (Mar. 18, 2020), <https://theappeal.org/what-sheriffs-can-do-to-slow-the-coronavirus-outbreak/> [<https://perma.cc/MW32-P3U6>]; Juliana Feliciano Reyes, *Philly Jail Workers Want Judges to Release More Inmates Because of Coronavirus*, PHILADELPHIA INQUIRER (Apr. 22, 2020), <https://www.inquirer.com/jobs/labor/coronavirus-philadelphia-prisons-reduce-jail->

counties, and municipalities adopt disparate approaches to the crisis; such differences reflect the ways in which criminal policy often is made on the retail, rather than wholesale level.

For example, jail population data reflect different approaches by prosecutors, judges, sheriffs, and police chiefs seeking to stem the tide of the virus. Between early March and mid-April, the jail population in Denver, Colorado shrank 41%,⁴³ the jail population in Washington D.C. declined by 21%,⁴⁴ and the number of people incarcerated in Mobile Alabama's Metro Jail decreased by 30%.⁴⁵ State prisons reflect a similarly varied story. Some states, like Michigan and Wisconsin, took drastic action, ramping up parole grants and compassionate releases;⁴⁶ others, like Kansas and Oklahoma, moved much more slowly, identifying high risk individuals, but only releasing a small percentage of them.⁴⁷ Even different probation departments took different tacks: in mid-March, Arkansas, Nevada, New York, and Rhode Island all suspended in-person

population-unions-20200422.html [https://perma.cc/VNK9-327S]; Ricardo Torres-Cortez, *115 Clark County Jail Inmates Released to Prevent Virus Spread*, LAS VEGAS SUN (Apr. 21, 2020), <https://lasvegassun.com/news/2020/apr/21/115-clark-county-jail-inmates-released-virus-threa/> [https://perma.cc/M233-8S8J].

⁴³ See David Sachs, *Denver's Jail Population is Drastically Shrinking, but that Alone Can't Stop Deputies and Inmates from Getting Coronavirus*, DENVERITE (Apr. 20), 2020, <https://denverite.com/2020/04/20/denvers-jail-population-is-dramatically-shrinking-but-inmates-and-deputies-are-far-from-immune-to-coronavirus/> [https://perma.cc/R75V-HCM3].

⁴⁴ See *Inmate Populations Decrease at D.C. Jail amid Coronavirus Fears*, WASH. POST (Apr. 15, 2020), https://www.washingtonpost.com/context/inmate-populations-decrease-at-d-c-jail-amid-coronavirus-fears/711e28b0-de38-4889-b957-a2057001ac33/?itid=lk_inline_manual_36 [https://perma.cc/YG7Q-5X3Q].

⁴⁵ See Christopher Harress, *Amid COVID-19 Pandemic, Mobile Metro Jail Releases a Third of Inmates*, AL.COM (Apr. 10, 2020), <https://www.al.com/news/2020/04/amid-covid-19-pandemic-mobile-metro-jail-releases-a-third-of-inmates.html> [https://perma.cc/6UXN-VC98].

⁴⁶ See Paul Egan, *Michigan Prison Population Sees Record Drop During Coronavirus Pandemic*, DETROIT FREE PRESS (Jun. 9, 2020), <https://www.freep.com/story/news/local/michigan/2020/06/09/michigan-prison-population-drops-coronavirus/5326185002/> [https://perma.cc/32ER-YWAX]; Emily Hamer, *Wisconsin DOC Has Released Nearly 1,600 Inmates so far to Combat COVID-19 Spread*, WIS. STATE J. (May 8, 2020), https://madison.com/wsj/news/local/crime-and-courts/wisconsin-doc-has-released-nearly-1-600-inmates-so-far-to-combat-covid-19-spread/article_03537daa-e1ec-5fe8-ac68-f5cf38ce8be5.html [https://perma.cc/NCR8-ERZ2].

⁴⁷ See Kayla Branch, *Coronavirus in Oklahoma: Up to 14 State Inmates Could be Released on Medical Parole*, THE OKLAHOMAN (May 5, 2020), <https://oklahoman.com/article/5661646/coronavirus-in-oklahoma-up-to-14-state-inmates-could-be-released-on-medical-parole> [https://perma.cc/4C9Z-WKQU]; Editorial, *Only 6 Kansas Inmates Released Amid COVID-19 Outbreak. Why Hasn't Gov. Kelly Done More?*, KAN. CITY STAR (May 4, 2020), <https://www.kansascity.com/opinion/editorials/article242477236.html>.

probation and parole visit requirements, replacing them with phone, text, or online check-ins;⁴⁸ California, on the other hand only suspended in-person visits for the elderly and immunocompromised.⁴⁹ Put simply, the departures from “business as usual” (and the effects of those departures) were hardly uniform across jurisdictions.

Again, this lack of uniformity is an important point in the pandemic context. But, it also is an insight that has been a staple of criminal justice scholarship and advocacy over the past decade.⁵⁰ Despite the generally accepted use of “the criminal justice system” to describe the U.S. model of administering criminal law, scholars increasingly have pushed back on the application or logic of systems theory.⁵¹ At the very least, they have suggested, the “criminal justice system” (whether it really deals with “justice” is another question)⁵² is not a single system; rather, it reflects an amalgam of different “systems,” different political choices made by different political actors in different contexts.⁵³ In

⁴⁸ See *Responses to the COVID-19 Pandemic*, PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/virus/virusresponse.html> (last visited June 13, 2020) [<https://perma.cc/2SZJ-PX6F>] (permanent source updated July 14, 2020).

⁴⁹ See *id.* In this Part and throughout, I am greatly indebted to the Prison Policy Initiative for their invaluable work in tracking developments at the state and local level.

⁵⁰ And, to be clear, much advocacy operates at the local level, so “the past decade” understates the ways in which many activists and reformers have been operating at the local level for much longer.

⁵¹ See, e.g., LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 461 (1993) (“The criminal justice ‘system’ is not a system at all.”); Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward A Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1528 n. 7 (2020); Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUDS. 419, 421 (2018); Benjamin Levin, *Rethinking the Boundaries of “Criminal Justice,”* 15 OHIO ST. J. CRIM. L. 619, 619–20 (2018); Sara Mayeux, *The Idea of “The Criminal Justice System,”* 45 AM. J. CRIM. L. 55, 65 (2018).

⁵² See, e.g., Bell, *et al.*, *supra* note 51, at 1528 n. 7 (“We view “criminal legal system” as a more objective way of describing the legal components of current American institutions of control and punishment. These institutions—criminal lawmaking, policing, courts, prison, probation, and more—do not come together to constitute a system of “justice”; they collectively function primarily as a means of control and often perpetuate profoundly unjust management of populations.”); Levin, *supra* note 51, at 620 (“[S]ome scholars and activists have begun to challenge the use of the term “criminal justice” at all. Given the widely articulated concerns about structural inequality and the massive U.S. prison population, is “criminal justice” an accurate or appropriate description of the nation’s model of criminalization, policing, prosecution, and punishment? Framed as deep structural critiques, a new cluster of critical accounts refers simply to the “criminal system” or the “criminal legal system,” omitting any reference to justice.”); Mayeux, *supra* note 51, at 56 (“Activists refer instead to ‘the criminal punishment system,’ believing that ‘justice’ has little to do with American courts and prisons.”).

⁵³ See, e.g., VANESSA BARKER, *THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS* 178 (2009); RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION*

other words, it makes sense to say that the way to address COVID-19 on Rikers Island or in policing New York City might look different from the way to address the pandemic in rural Colorado. But, it also would make sense to say that the “criminal justice system” in New York City is not the same system as the one in Sterling, Colorado.⁵⁴

Further, media coverage and (until recently) legal scholarship tend to overstate the federal system and the role of national criminal policy.⁵⁵ In critiques of mass incarceration, federal statutes and federal policies tend to take on outsized significance, even though the federal system represents a small percentage of the U.S. carceral archipelago.⁵⁶ Indeed, this is one explanation for why the War on Drugs is commonly viewed as the primary driver of expanding prison populations; even though a minority of incarcerated people are being held for drug offenses,⁵⁷ drug charges represent a much larger proportion of

184–85 (2019); PHILIP GOODMAN, JOSHUA PAGE, AND MICHELLE PHELPS, *BREAKING THE PENDULUM: THE LONG STRUGGLE OVER CRIMINAL JUSTICE* 7 (2017); Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV. 537, 558 (2015) (“The criminal justice system lags behind most other government agencies when it comes to data tracking, for a very simple reason: the ‘system’ is not a system at all. Instead, it is a loose affiliation among independent law enforcement agencies, individual counties, local jails, and state prisons.”); John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1089 (2013) (“The criminal justice ‘system’ in the United States. . . is not a “system’ at all, but rather a chaotic swirl of local, county, state, and (less frequently) federal actors, all with different constituencies and incentives.”).

⁵⁴ Indeed, there’s a strong argument that it is inaccurate to characterize New York City as having a single criminal justice system, as the politics, racial dynamics, social context, and crime rates vary dramatically borough to borough.

⁵⁵ See, e.g., John Pfaff, *Bill Clinton is Wrong About His Crime Bill. So are the Protesters He Lectured*, N.Y. TIMES (Apr. 12, 2016), <https://www.nytimes.com/2016/04/12/magazine/bill-clinton-is-wrong-about-his-crime-bill-so-are-the-protesters-he-lectured.html> [<https://perma.cc/ZRD5-N35D>] (critiquing the overemphasis on federal statutes in discussions about mass incarceration). There’s something to be said here about elite law schools and the pervasiveness of hierarchy in the legal academy—federal courts are more powerful and therefore “prestigious” than state ones, and clerkships at the federal level are a coin of the realm in gaining access to the legal professoriate. So, on some level, it should not be surprising that federal laws and the federal system are treated as unduly important in academic discussions of criminal policy. Of course, this pathology persists in the national media, which may mean that the forces at play are less those of legal elitism than simply those of general, versus specific, applicability—federal criminal policy affects all students, lawyers, readers, and viewers, while the local does not.

⁵⁶ See generally Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POLICY INITIATIVE (Mar. 19, 2019), www.prisonpolicy.org/reports/pie2019.html [<https://perma.cc/7EUE-RKR5>].

⁵⁷ See, e.g., JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017).

federal cases than state cases, so focusing on the federal system allows for an exaggerated impression of drug crime's role.⁵⁸ Similarly, this might be one reason why federal criminal justice reform efforts often are framed as though they would accomplish much more than they will, from President Obama's 2016 decision to end solitary confinement for juveniles in federal prisons (there were 26 juveniles in federal custody at the time),⁵⁹ to the First Step Act, passed with much fanfare during the Trump presidency, but critiqued by many as a quite-tentative first step.⁶⁰ This is not to say that federal policies do not matter, or that reforms at that level are not important to the hundreds of thousands of people charged or incarcerated in the federal system. Rather, it is to say that describing the federal system as "the criminal justice system" would be a gross misstatement,⁶¹ and that the federal system is distinct from those of the states in many ways.

Framed differently, generalized characterizations of a "criminal justice system" are always inaccurate. As Sara Mayeux has argued, "reflexive invocations of 'the criminal justice system' may hinder rather than facilitate thoughtful discussion of the wide range of topics generally subsumed under that terminological umbrella."⁶² These characterizations and framings always presume a shared logic and a shared politics. The pandemic reveals the ways in which such an understanding of criminal law and its administration is misguided. Certainly, local politics are embedded in a broader political economy and cultural imagination.⁶³ Nevertheless, the politics of criminal law are local, and even when

⁵⁸ See Sawyer & Wagner, *supra* note 56.

⁵⁹ See German Lopez, *President Obama's Solitary Confinement Reforms Seriously Limit a Brutal, Damaging Practice*, VOX (Jan. 26, 2016), <https://www.vox.com/2016/1/26/10834770/obama-solitary-confinement-changes> [

⁶⁰ See Jamiles Lartey, *Trump's Prison Reform: Republicans on Side but Some Progressives Hold out*, GUARDIAN (June 5, 2018), <https://www.theguardian.com/us-news/2018/jun/05/trump-prison-reform-first-step-act-tension> [<https://perma.cc/7KLL-M5A5>]; Natasha Lennard, *The First Step Act is not Sweeping Criminal Justice Reform—and the Risk is that it Becomes the Only Step*, THE INTERCEPT (Dec. 19, 2018), <https://theintercept.com/2018/12/19/first-step-act-criminal-justice-reform-bill/> [<https://perma.cc/6AEM-RX2R>].

⁶¹ See Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds-the Center Doesn't*, 117 YALE L.J. 1374, 1401 (2008).

⁶² Mayeux, *supra* note 51, at 62.

⁶³ See HADAR AVIRAM, CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT (2015); DARRYL K. BROWN, FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW (2015); BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER (2011); NICOLA LACEY, THE PRISONERS' DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES (2008); LISA L. MILLER, THE MYTH OF MOB RULE: VIOLENT CRIME &

the responses are national or statewide, the implementation generally relies on local realities.⁶⁴ In the same way, resistance to criminal law and its enforcement tends to be centered at the local level, through activism, advocacy, and individual engagement. From the community group, to the bail fund, to the public defender's office, the move to resist punishment relies not only on those looking at the system, but those looking to see the way that the law affects their friends and neighbors.⁶⁵

Conclusion: Crisis and its Limitations

The pandemic is a crisis. But what can this crisis, or perhaps more accurately this crisis frame, tell us about criminal law and its administration in the United States? ⁶⁶ "Crisis is not objectively bad or good," argues Ruth Wilson Gilmore in her seminal book *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California*.⁶⁷ "[R]ather, it signals systemic change whose outcome is determined through struggle."⁶⁸

On the one hand, crisis and the attendant language of urgency and exceptionality have been features of movements to reform or transform the U.S. criminal system. Constitutional litigation relies on narratives of exceptionality—the abuse at the hands of police or guards must have passed some threshold of the mundane in order to trigger liability; the denials of process or procedural protections to a defendant must not have been mere inconveniences or "harmless errors" for a conviction to be set aside. So too do movements, advocacy, and activism. Think here of the resonance of innocence stories and exonerations or even tales of the "disproportionate" punishments leveled

DEMOCRATIC POLITICS (2016); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009).

⁶⁴ See, e.g., Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. (forthcoming 2020), *permanently available at* <https://ssrn.com/abstract=3551506>.

⁶⁵ See, e.g., Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018); Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684 (2019); Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019); Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (2017).

⁶⁶ "Crisis is a term that has been weakened through overuse," argue Stuart Hall and Bill Schwarz. Stuart Hall & Bill Schwarz, *State and Society, 1880-1930* in STUART HALL, THE HARD ROAD TO RENEWAL: THATCHERISM AND THE CRISIS OF THE LEFT 95, 96 (1990). Nevertheless, they contend that "[c]rises occur when the social formation can no longer be reproduced on the basis of the pre-existing system of social relations." *Id.*

⁶⁷ RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 54 (2007).

⁶⁸ *Id.*; see also HALL ET AL., *supra* note 11, at xv.

against the three-strikes defendant who committed a minor offense (*e.g.*, Gary Ewing’s life sentence for stealing three golf clubs).⁶⁹ In other words, the language of crisis, disruption, and exceptionality provides a hook and a means of shining light on the darkest corners of criminal law. It also allows for and often appears to necessitate an emergency response.

On the other hand, crisis suggests that there are norms or, perhaps more accurately, a “normal,” which has been disrupted and which must be reinstated.⁷⁰ Such a frame, then, poses two risks for those hoping to dismantle the carceral state or transform the way that U.S. criminal law operates. First, suggesting that a particular crisis or set of crisis conditions is exceptional risks legitimating the non-crisis conditions and accepting the desirability of the old normal.⁷¹ Second, the language of crisis and exception presupposes that we truly are witnessing exceptional circumstances or an exceptional case, that each story of injustice, misconduct, abuse, or disease is an aberration, rather than a representation or manifestation of structural and systemic pathologies.⁷² Indeed, part of what makes exceptionality so appealing as a rhetorical advocacy strategy is its limitation—it allows the public, voters, or lawmakers to embrace reform or do justice without requiring them to confront larger structural problems.⁷³

The pandemic has exacerbated or laid bare flaws that already were very present. And, as noted at the outset, the examples I provided are only examples. There are numerous other problematic aspects of criminal law and policy that predated the pandemic but have been thrown into more stark relief: the tendency to use police or criminal law as the tools to control individual conduct (and the focus on individual misconduct, rather than structural problems);⁷⁴ the

⁶⁹ See *Ewing v. California*, 538 U.S. 11 (2003).

⁷⁰ Cf. GIORGIO AGAMBEN, *STATE OF EXCEPTION* 31 (2003) (Kevin Attell trans., University of Chicago Press, London 2005) (“Far from being a response to a normative lacuna, the state of exception appears as the opening of a fictitious lacuna in the order for the purpose of safeguarding the existence of the norm and its applicability to the normal situation.”).

⁷¹ See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 429–32 (1995).

⁷² See Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1421 (2016).

⁷³ See, *e.g.*, AGAMBEN, *supra* note 70, at 31; Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 621–23 (2005) (arguing that the focus on factually innocent defendants can risk distracting from the unjust system faced by all defendants, guilty and not-guilty alike).

⁷⁴ See, *e.g.*, Jessica Pishko, *Policing Coronavirus*, THE APPEAL (Apr. 7, 2020), <https://theappeal.org/policing-coronavirus/> [<https://perma.cc/QVZ8-BKA4>]; Scott Skinner-Thompson, *Don’t Criminalize COVID-19*, SLATE (Mar. 27, 2020), <https://slate.com/news-and-politics/2020/03/criminalize-coronavirus-hiv-stigma.html> [<https://perma.cc/J9NW-9GLU>].

differential use of criminal law to regulate communities based on differences of race, class, or social marginality;⁷⁵ the impulse to exclude people from benefits or to impose additional punishments on them because of their criminal records;⁷⁶ the refusal to extend humane treatment or forgiveness to certain defendants because of the kind of crimes they committed (or are accused of);⁷⁷ the failure of institutional actors to use their power to alleviate suffering;⁷⁸ and

⁷⁵ See, e.g., Ashley Southall, *Scrutiny of Social-Distance Policing as 35 of 40 Arrested Are Black*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/2020/05/07/nyregion/nypd-social-distancing-race-coronavirus.html?smid=tw-share> [https://perma.cc/825N-WFBX]; Malaika Jabali, Opinion, *Coronavirus policing leads to harsher repercussions for black Americans*, GUARDIAN (Apr. 15, 2020), <https://www.theguardian.com/commentisfree/2020/apr/15/coronavirus-policing-surveillance-black-americans> [https://perma.cc/7QH2-ANC8]; Fabiola Cineas, *Senators are Demanding a Solution to Police Stopping Black Men for Wearing—and Not Wearing—Masks*, VOX (Apr. 22, 2020), <https://www.vox.com/2020/4/22/21230999/black-men-wearing-masks-police-bias-harris-booker-senate> [https://perma.cc/7CTY-ZCCX].

⁷⁶ See, e.g., *Applying for an SBA Loan with a Criminal Record*, COLLATERAL CONSEQUENCES RESOURCE CENTER (Mar. 27, 2020), <http://ccresourcecenter.org/2020/03/27/applying-for-an-sba-loan-with-a-criminal-record/> [https://perma.cc/5E6N-GHWX].

⁷⁷ See, e.g., Scott Buffon, *Coconino County Jail Releases Nonviolent Inmates in Light of Coronavirus Concerns*, ARIZ. DAILY SUN (Mar. 20, 2020), https://azdailysun.com/news/local/coconino-county-jail-releases-nonviolent-inmates-in-light-of-coronavirus/article_a6046904-18ff-532a-9dba-54a58862c50b.html [https://perma.cc/CKD8-5XYM] (“[T]here has been no final guidance to say whether officers will cite and release any or all non-violent offenders . . . but officers currently are able to make that choice under current police regulations in instances of non-violent, misdemeanor crimes. Any person who commits a violent or felony crime will require being put in jail.”); Andy Downing, *Confronting the Coronavirus Threat in Ohio’s Correctional System*, COLUMBUS ALIVE (Apr. 17, 2020), <https://www.columbusalive.com/news/20200417/confronting-coronavirus-threat-in-ohios-correctional-system> [https://perma.cc/9P9D-7GYM] (“[Governor] DeWine, in response to the growing numbers, authorized the release of 105 nonviolent inmates from state prisons, all of whom are within 90 days of their scheduled release date.”); Kevin Grasha, *Order to Authorize Hamilton County Sheriff to Release Low-Risk, Nonviolent Jail Inmates*, CINCINNATI ENQUIRER (Mar. 16, 2020), <https://www.cincinnati.com/story/news/crime/crime-and-courts/2020/03/16/coronavirus-hamilton-county-sheriff-release-low-risk-inmates/5062700002/> [https://perma.cc/73BN-MUZ5]; Phil Hirschhorn, *Maine Prisons and Jails Increase Safety Precautions, Decrease Population During Coronavirus Outbreak*, WMTW ABC 8 (Apr. 15, 2020), <https://www.wmtw.com/article/maine-prisons-and-jails-increase-safety-precautions-decrease-population-during-coronavirus-outbreak/32147891> [https://perma.cc/BUA3-VDJY]; *Morgan Jail Releases Nonviolent Inmates to Protect against COVID-19*, HARTSELLE ENQUIRER (Apr. 19, 2020), <https://hartselleenquirer.com/2020/04/19/morgan-jail-releases-nonviolent-inmates-to-protect-against-covid-19/> [https://perma.cc/Q27S-ZM7K].

⁷⁸ See, e.g., ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM (2019); see also *The Paradox of “Progressive Prosecution”*, 132 HARV. L. REV. 748 (2018), but cf. Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171 (2019) (arguing that prosecutors and other criminal justice actors are not all-powerful and have to deal with institutional obstacles).

so on.

Certainly, COVID-19 changes the stakes or the calculus from criminal law in “normal” times; the stakes of criminal law always are extraordinarily high, but the virus raises many decisions to life-and-death. And, this urgency might shift the political calculation for some academics, activists, and advocates: perhaps some who otherwise would adopt a narrow, pragmatic approach focusing only on “non-violent offenders” or easy cases now realize the immediate need to help less-sympathetic individuals or push for sweeping change.⁷⁹ But, perhaps more radical actors who generally view the narrow approach as legitimating or somehow dangerous to a broader decarceral vision might embrace moderate or intermediate reforms more quickly in a world where time is of the essence to save individual lives.⁸⁰ Or, perhaps both.

In many ways, criminal law is defined by crisis. The language of exceptional misbehavior justifies punishment, new laws, and new methods of social control.⁸¹ The current pandemic provides a much-needed opportunity to reimagine that frame and consider the ways in which the institutions of criminal law are not just responsive to crisis; they also create crisis.

⁷⁹ See MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 165–69 (2014) (describing and critiquing this approach); Levin, *supra* note 9, at 309–15 (same).

⁸⁰ Cf. Dan Berger, Mariame Kaba, & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration> [<https://perma.cc/GA5M-FZEF>] (arguing that certain incremental and pragmatic reforms are and can be consistent with abolitionism); see generally Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1616 n. 21 (2019) (collecting sources).

⁸¹ See generally JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007).