

COVID-19, Incarceration, and the Criminal Legal System

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SUMMARY. Even before the pandemic, contact with the criminal legal system resulted in health harms on both individual and community levels, with disproportionate impact on people of color. The COVID-19 crisis magnified the deleterious public health impact of policing, prisons, community supervision, and other elements of the United States' vast system of control and punishment. Despite the scientific consensus that prisons and jails needed to be rapidly depopulated to avert disaster, the number of people released has remained small, resulting in explosive outbreaks of COVID-19 behind bars. Depopulation of correctional settings is also rarely paired with meaningful efforts to connect reentering individuals to vital supports. Community supervision systems failed to relax onerous probation/parole requirements, while police have taken on enforcement of physical distancing and other public health orders. Even as COVID-19 is raging, the criminal legal system is resisting changes necessary to facilitate pandemic response. With a focus on incarceration, this Chapter provides an overview of how the U.S. criminal legal system has shaped its COVID-19 response, situating prescriptions in the current debate about divestment from structures of social control in favor of a renewed focus on the social contract. This Chapter will discuss (1) how criminal legal system has exacerbated the current public health emergency and (2) how the United States can use this moment to reform this system and its legal underpinning.

Introduction

On March 28, 2020, Patrick Jones died of COVID-19-related illness. Jones, a 49-year-old African American man, was serving a 27-year sentence for distribution of crack cocaine within 1,000 feet of a junior college. Having spent years behind bars, he had "long-term, pre-existing conditions that are risk factors for developing more severe COVID-19 disease" (DOJ, 2020). Jones was the first person in federal custody to die of COVID-19; tragically, he would not be the last: since his death, over 100 people in federal prisons have met the same fate. As of July 26, 2020, over 600 people have perished in state and local facilities (Dolovich, 2020). Across the nation, more than four out of five of all COVID-19 hotspots are in correctional institutions (N.Y. Times, 2020), resulting in an infection rate that is nearly six times higher behind bars than in the overall population (Saloner et al., 2020).

Long before COVID-19 hit, incarceration (and the larger criminal legal system) was already understood as a source of multiple health harms. The United States' correctional institutions are characterized by widespread overcrowding, lack of basic sanitation, substandard health care, and many other issues symptomatic of abuse and neglect of people behind bars. The dismal health status of its enormous correctional population and the failure to provide adequate reentry supports explain the link

between the United States' status as the world's leading jailer and its position at the bottom of public health rankings among peer nations. In addition to the racial justice, fiscal stewardship, and other reform imperatives, public health data demonstrating individual and community detriment from incarceration helped amplify calls for reform. Aside from marginal sentencing reform, these calls went largely unheeded.

COVID-19 found in the criminal legal system precisely the kind of dysfunction that most efficiently fuels its spread. After discussing how the structure and function of the correctional system made it highly vulnerable to the pandemic, this Chapter focuses on the role of the correctional system in shaping COVID-19 spread. Acknowledging that incarceration is but one piece of a much larger carceral ecosystem, we conclude with a discussion of broader structural criminal legal reforms vital to bringing COVID-19 under control.

The Criminal Legal System as a Public Health Crisis Before COVID-19

With 5% of the global population, the United States is home to 20% of those incarcerated (Franco-Paredes et al., 2020). People of color are overrepresented: in 2015, the incarcerated population was 56% Black and Latinx. Disturbingly high rates of incarceration, coupled with harsher sentencing and other factors that decrease chances

of success post-release, result in a bloated criminal legal system filled with people whose demographics do not reflect the general population. Carceral institutions are also woefully overcrowded due to overcriminalization and disinvestment in health and social supports. At least 400,000 persons with some type of mental illness are incarcerated – about 18% of the incarcerated population. Poverty and race play a significant role in incarceration rates, with “40[%] of crimes attributed to poverty and 80[%] of incarcerated persons self-identified as low-income” (FPWA, 2019).

Contact with the criminal legal system is a public health crisis that affects millions of Americans and their families. Poor people, living in communities targeted for heightened enforcement, too often find themselves caught in a spiral of citations, arrests, fines, and court fees that drive them deeper into poverty and create barriers to employment, education, and public benefits. While engaged in this system on either side of correctional institutions, people are barred from full participation as members of their community, by both law and institutional practice. Those who go to jail or prison experience poor diets, unsanitary and dangerous physical conditions, violence, stress, and separation from family. On release, individuals experience enormous barriers to reentry, which often leads to significant health detriment, including by shaping social determinants of health like housing, health services, and financial support. As an extreme example, those reentering from carceral institutions are 130 times more likely to die of a drug overdose than the general public (Johnson & Beletsky, 2020).

The Criminal Legal System in the Context of COVID-19

Despite marginal pre-pandemic change, existing legal and policy tools have failed to substantially reform America's correctional institutions and the broader system that feeds – and is fed – by them. In the context of a pandemic, the dysfunction of this system has been thrown in sharp relief. When COVID-19 hit, there were wide calls for depopulation and decarceration of correctional institutions, reflecting concerns about previous infectious disease outbreaks behind bars (Franco-Paredes et al., 2020). Such calls drew on existing, but rarely deployed, legal authority to depopulate carceral institutions held by wardens, governors, and other actors in the criminal legal system to address situations exactly like these. As discussed below, there have been myriad efforts to reduce the incarcerated population using various legal and policy tools, both from within (e.g., executive orders) and challenging the system (e.g., litigation).

Federal Actions to Reduce Prison Populations

In the context of the pandemic, the Bureau of Prisons announced a number of efforts to address COVID-19 risk, including reducing federal correctional populations (BOP, 2020). While thousands were released, observers decried the lack of transparency, substantial delays in implementation, and failures of the risk-and-needs assessment tool developed by the Department of Justice to “classify prisoners and determine who may be eligible for rehabilitative programs, or even early release” (Goldsmith, 2020). Additionally, individual releases are frequently opposed by federal prosecutors. Thus, despite federal assurances of efforts to decrease the incarcerated population, steps taken to date are largely symbolic.

State Actions to Reduce Prison Populations

Several states also took steps to reduce the prison population, most often by releasing those with low-level or non-violent offenses and the medically vulnerable. Some examples drawn from tracking by the Prison Policy Initiative (2020):

- California reduced bail for misdemeanors and some low-level felony offenses, which has shrunk the prison population by up to 45%; “early releases of people held for ‘low-level’ offenses have reportedly helped drop the jail population by half” in Washington County, OR. The local jail population in Philadelphia “has dropped by 17% since the beginning of April, following special court hearings to release hundreds of people held for low-level charges, cash-bail, and ‘nonviolent’ charges.”
- Ohio courts “began to issue court orders and conduct special hearings to increase the number of people released from local jails... reducing [one county jail’s] population by more than 30%.” Miami-Dade County jails in Florida and the Northwestern Regional Adult Detention Center in Virginia have both decreased the average daily population by about 20%.
- An April order from the Massachusetts Supreme Judicial Court (SJC) “authorized the release of people held in jails pretrial for ‘nonviolent’ offenses and those held on technical probation and parole violations,” resulting in a 20% decrease in the prison population in Plymouth and Norfolk counties and an 11% decrease in the population at the Bristol County jail.

Many states and municipalities took similar steps to reduce incarcerated populations, but much of the action is too little, and too late. While almost 80,000 people incarcerated are confirmed to have contracted COVID-19 as of July 25, one project found an overall population reduction of over 60,000 from jails and over 30,000 from prisons (Dolovich, 2020). As a result, people behind bars and correctional staff will be infected and die. The existence of COVID-19 hotspots inside carceral institutions will also substantially affect the overall shape of the pandemic in surrounding communities.

Legal and Policy Actions Taken

From a public health perspective, it is clear that we must reduce the number of people incarcerated. Unfortunately, efforts to secure release have been largely unsuccessful (Dolovich, 2020). Courts have turned back claims under the Eighth Amendment’s ban of “cruel and unusual punishment,” as well as under state laws. Agencies and courts have made only limited use of compassionate relief mechanisms for people at higher risk (due to both the aging incarcerated population and the inadequacy of health care in carceral institutions) (Dolovich, 2020). Governors have largely opposed depopulation efforts, despite ample legal authority to deploy them (Becker, 2020).

Instead of depopulation, correctional officials in many jurisdictions took measures that satisfy political and judicial pressure by signaling their ability to meet the challenges posed by COVID-19 behind bars. This has included providing somewhat better access to soap and other sanitation products, distributing personal protective equipment (PPE), widespread lockdowns to enforce

social distancing, and introducing privileges of unclear infection control utility, such as access to movies and additional dessert options.

COVID-19 Exacerbates Issues in the Criminal Legal System

It is both a moral and public health imperative to maximize the number released, but also to minimize the number of those entering the criminal legal system. Experts understand that carceral institutions, halfway houses, and other involuntary congregate settings are hotspots for disease transmission. Moreover, “[o]vercrowding, insufficient sanitation, poor ventilation, and inadequate healthcare in prisons contribute to enabling these institutions as breeding grounds of infectious disease outbreaks. Detention and incarceration of any kind involves large groups of people living in cohorts in confined spaces creating many challenges for curbing the spread of COVID-19” (Franco-Paredes et al., 2020).

How COVID-19 Exacerbates Existing Reentry Issues

Effective public health is predicated on the social contract – an informal agreement to make some individual sacrifices for the benefit of the community. Departure from shared values, equity, and investments in human capital have ushered in a fraying of this contract, resulting in growing income inequality and structural oppression. Overall, U.S. cities invest more in criminal legal systems than in agencies responsible for health and social support, combined (Health in Justice Action Lab, 2020). The health sequelae of these investment priorities had become visible even before the current pandemic, most vividly in the declining life expectancy in the United States.

The global pandemic makes the need to depopulate jails and prisons all the more urgent, but efforts to do so must always be coupled with increased supports for people through the reentry process. Indeed, without these supports, already vulnerable populations leaving jails and prisons are at increased risk for health problems, mental health distress, poverty, relapse, and homelessness (Johnson & Beletsky,

Table 31.1: Barriers to Reentry and COVID-19

BARRIER	WHY THIS POSES A BARRIER & COVID-19-SPECIFIC CONSIDERATIONS
Transportation	Many individuals do not have anyone to pick them up from jail or prison. COVID-19 exacerbates this barrier as public transportation may be more limited. The person picking them up might also be concerned about potential exposure. Challenges continue as individuals must find transportation to services, jobs, or other mandated locations.
Clothing, Food, & Amenities	Most individuals are released with whatever they wore upon entering or receive a single change of clothing that may not fit. They often receive no information about food resources. Any information received might be outdated or inaccurate as many community services – and clothing stores – are temporarily or permanently closed.
Financial Resources	Most individuals do not receive any money for food, transportation, or shelter. In pre-COVID-19 times, this could lead to homelessness and reliance on inadequate public assistance systems (e.g., food pantries or shelters). COVID-19 presents even greater challenges to access. State or local agencies that administer public assistance may be closed to the public, while community organizations that provide public assistance are grappling with increased demand and maintaining infection prevention measures.
Documentation	Individuals may not have a valid state-issued identification card and, if they do, that card may have expired during their incarceration. COVID-19 closures might mean waiting even longer for state and local agencies to reopen before obtaining IDs.
Housing	Because “[r]eentry often relies heavily on person-to-person contact as well as group settings and living situations,” traditional reentry supports like halfway houses are not feasible. People reentering “need stable and appropriate lodging to observe CDC guidelines for hygiene and social distancing” (Johnson & Beletsky, 2020).
Employment & Education	“[T]hose reentering are typically barred from receiving cash assistance or unemployment, which means they rely on jobs to survive.” Both the stigma of a record and unemployment could push individuals into jobs with “extreme levels of risk, including in the illicit economy,” threatening not only their safety, but their freedom (Johnson & Beletsky, 2020).
Health Care	As states and localities release hundreds of people, they must also take steps to ensure treatment continuation. “An estimated 65% of the 2.3 million people [incarcerated] have a diagnosable [SUD], more than seven times the background rate” and “[n]early 15% of incarcerated men and 30% of women also have diagnosable mental health disorders” (Beletsky, 2019). “On top of existing barriers, people reentering society will be less able to reach medical providers or clinics because of social distancing” (Johnson & Beletsky, 2020).
Support Systems	Many without community connections have no organic support and limited knowledge of available resources. COVID-19 exacerbates these challenges because “those just reentering society, unable to even go to a public library to use a computer, lack the credit for a cell phone plan nor the means to get one since stores are closed” (Johnson & Beletsky, 2020).

Table 31.2: The Sequential Intercept Model as applied to COVID-19

INTERCEPT	PROPOSED ACTION	COVID-19-SPECIFIC CONSIDERATIONS
0 – Community Services	Stop relying on police officers as de facto first responders. Utilize mobile crisis outreach teams if someone is experiencing behavioral health crises, interpersonal violence, or other situations. Divert people to crisis services (rather than jails or emergency departments).	Reducing initial interactions with the criminal legal system (e.g., reducing “stop and frisk” that places individuals in close contact with often unmasked officers) addresses the particular health harms COVID-19 presents.
1 – Law Enforcement	This intercept is characterized by both better training (i.e., educating police on how to interact with individuals based on their needs) and person/situation-specific training (i.e., for dispatchers to ensure that the appropriate individual(s) responds to a crisis).	Educate first responders on operating in the context of COVID-19. As protests continue, train law enforcement to employ de-escalation techniques that limit health harms (e.g., stop using tear gas that causes people to cough and spread COVID-19).
2 – Initial Detention & Initial Court Hearings	Focus on diverting individuals from this intercept entirely. Courts should order pretrial supervision and diversion to reduce any episodes of incarceration.	Courts must resist the urge to incarcerate people during the pandemic. If detained, screen individuals for health conditions, including COVID-19, and other needs.
3 – Jails & Courts	Once a person is in “the system,” interventions should focus on providing supportive services to protect individuals from further harm by their interactions with criminal legal systems.	Employ measures directed both at staff (e.g., practicing infection control by masking) as well as individuals (e.g., provide PPE). Conduct frequent COVID-19 screening.
4 – Reentry	Reentry planning is essential to breaking the cycle of interaction. This includes discharge planning similar to hospitals and “warm hand-offs” (transporting person directly to services that increase positive outcomes).	During the pandemic, reentry must not only be managed remotely, but also unequivocally include housing, transportation, and financial assistance.
5 – Community Corrections	This intercept is often where the “cycle” begins as individuals violate parole or probation – often unintentionally or out of desperation – and are returned to incarceration.	Interventions must include specialized, potentially remote, community supervision (i.e., for people with SUD); continued treatment of physical (including COVID-19) and mental health conditions; and expanded access to services.

2020). Serious mental illness, addiction, poverty, and other social determinants of health – not to mention an ongoing pandemic – exacerbate and cause additional challenges. The Urban Institute’s Justice Policy Center identified eight factors that prevent successful reentry, offering solutions to such barriers (La Vigne et al., 2008). Table 31.1 summarizes these factors in the context of COVID-19.

Reducing Interactions with the Criminal Legal System Post-COVID-19

Interactions with the criminal legal system (most commonly in the form of policing) already result in health harms, particularly dangerous for people of color, who disproportionately experience more lethal police action than their white counterparts. To address COVID-19, such interactions must be limited not only to accommodate social distancing requirements, but also because police brutality and murders of unarmed people represent a separate, ongoing pandemic (Stolberg, 2020). Each point of

contact with the criminal legal system – “from the point of crisis pre-arrest, through detention, and post-release” – is an opportunity to reduce the health harms of these systems (Beletsky, 2019). One conceptual framework for harm reduction is the Sequential Intercept Model, which can be used to conceptualize opportunities to better serve people experiencing physical, behavioral, and mental health challenges within the criminal legal system. Although more upstream measures that reduce initial entry to the criminal legal system are needed, the Model (discussed in the context of COVID-19 in Table 31.2) provides an important guiding framework for the opportunities to “off-ramp” individuals out of the criminal legal system. 🌱

Recommendations for Action

Federal government:

- The federal Bureau of Prisons should:
 - o Continue decarceration efforts while ensuring reentry services are expanded accordingly;
 - o Restore the Obama-era program that gave cell phones to those who cannot afford a phone line (1) for communication with family, employers, and social services and (2) as a way to check in with parole/probation, register for benefits, contact social workers, and schedule appointments with health care providers;
 - o Ensure access to shelter upon release, including providing temporary housing (e.g., hotel rooms) to individuals who need assistance or a safe space to quarantine post-release;
 - o Conduct frequent (daily or weekly) COVID-19 screenings on all staff and individuals incarcerated in federal facilities.
- The Department of Health and Human Services should continue to encourage states to use emergency 1135 waivers, which allow states to use Medicaid funds for housing and moving expenses.
- Congress should eliminate the “inmate exclusion” in Medicare and Medicaid, opening the door for the use of federal health dollars in correctional settings.
- Legislators should change laws, including controlled substances and other statutes criminalizing health and economic vulnerability, to shrink the footprint of the criminal legal system.

State governments:

- State correctional officials should:
 - o Expand COVID-19 testing of individuals and correctional officers in carceral institutions;
 - o Ensure transportation upon release;
- o Provide financial assistance upon release;
- o Provide temporary ID cards to those without a valid ID upon release.
- Legislators and appropriate agencies should:
 - o Change statutes, regulations, and institutional policies to ensure individuals are not barred from seeking public assistance for housing due to their record;
 - o Change statutes, regulations, and institutional policies to relax conditions of probation and parole that mandate obtaining employment, substance use treatment, housing, or continuing education.
- Legislators should mandate and fund:
 - o Virtual job counseling and access to online classes for those reentering (and technology resources for those who can no longer access places with publicly available resources);
 - o The provision of expanded reentry services and virtual capacity to ensure the continuation of such services;
 - o Services to reduce COVID-19 spread post-incarceration, including:
 - Access to shelter upon release, including providing temporary housing (e.g., hotels) to individuals who need assistance or a safe space to quarantine;
 - Provision of medications during and after incarceration;
 - Testing for COVID-19 upon release, and again two weeks after;
 - Provision of naloxone (opioid overdose reversal drug) to individuals with SUD;
 - Assistance with re-enrolling in Medicaid to those who qualify.
- Legislators should repeal criminal record bans for health care profession

licensing for people otherwise qualified and not a risk.

Local governments:

- City and county jail officials should:
 - o Expand COVID-19 testing of individuals and correctional officers in carceral institutions;
 - o Ensure transportation upon release;
 - o Provide financial assistance upon release.
- Local governments should mandate and fund:
 - o Virtual job counseling and access to online classes for those reentering (and technology resources for those who can no longer access places with publicly available resources);
 - o Expanded reentry services and virtual capacity to ensure the continuation of such services:
 - Services to reduce COVID-19 spread and other health harms post-release, including:
 - Access to shelter upon release, including providing temporary housing (e.g., hotels) to individuals who need assistance or a safe space to quarantine;
 - Provision of medications during and after incarceration;
 - Testing for COVID-19 upon release, and again two weeks after;
 - Provision of naloxone (opioid overdose reversal drug) to individuals with SUD;
 - Assistance with re-enrolling in Medicaid to those who qualify.
- Legislators should enact “ban the box” ordinances prohibiting the check box that asks if applicants have a criminal record in hiring applications.

About the Authors

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References

- Becker, D. (2020). Mass. High Court Urges Governor to Use His Powers to Release Prisoners Because of COVID-19. *WBUR*. Retrieved July 26, 2020, from <https://www.wbur.org/news/2020/04/28/sjc-charlie-baker-executive-powers-furloughs-parole-covid-19-coronavirus>
- Beletsky, L. (2019). Memorandum: Treating Substance Use and Mental Health Disorders in Correctional Settings. Retrieved July 5, 2020, from https://d5e387bc-53d6-4733-81d9-1157ea24c80e.filesusr.com/ugd/1367d9_f328af27fec44a619ec0d04ce2e56afa.pdf
- Dolovich, S. (2020). UCLA Law Covid-19 Behind Bars Data Project. Retrieved July 5, 2020, from <https://law.ucla.edu/academics/centers/criminal-justice-program/ucla-covid-19-behind-bars-data-project>
- Federal Bureau of Prisons (BOP)(2020). BOP Implementing Modified Operations. Retrieved July 26, 2020, from https://www.bop.gov/coronavirus/covid19_status.jsp
- Federation of Protestant Welfare Agencies, Inc. (FPWA)(2019). Ending the Poverty to Prison Pipeline. Retrieved July 5, 2020, from <https://www.fpwa.org/wp-content/uploads/2019/04/FPWAs-Ending-the-Poverty-to-Prison-Pipeline-Report-2019-FINAL.pdf>
- Franco-Paredes, C., Jankousky, K., Schultz, J., Bernfeld, J., Cullen, K., Quan, N. G., Kon, S., Hotez, P., Henao-Martinez, A. F., & Krsak, M. (2020). COVID-19 in Jails and Prisons: A Neglected Infection in a Marginalized Population. *PLoS Neglected Tropical Diseases*, 14(6), e0008409.
- Goldsmith, K. (2020). The Status of the First Step Act One Year Later. *American Bar Association Journal*. Retrieved July 5, 2020, from <https://www.abajournal.com/magazine/article/the-status-of-criminal-justice-reform-one-year-later>
- Health in Justice Action Lab (2020). Carceral Resource Index. Retrieved July 9, 2020, from <https://www.healthinjustice.org/carceral-resource-index>
- Johnson, S., & Beletsky, L. (2020). Helping People Transition from Incarceration to Society During a Pandemic. Retrieved July 5, 2020, from <https://ssrn.com/abstract=3608298>
- La Vigne, N., Davies, E., Palmer, T., & Halberstadt, R. (2008). Release Planning for Successful Reentry: A Guide for Corrections, Service Providers, and Community Groups. Retrieved July 5, 2020, from <https://www.urban.org/sites/default/files/publication/32056/411767-Release-Planning-for-Successful-Reentry.PDF>
- New York Times (N.Y. Times)(2020). Coronavirus in the U.S.: Latest Map and Case Count. Retrieved July 9, 2020, from <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#click=https://t.co/ay2Xtf0m5G>
- Prison Policy (2020). Responses to the COVID-19 Pandemic. Retrieved July 5, 2020, from <https://www.prisonpolicy.org/virus/virusresponse.html>
- Saloner, B., Parish, K., Ward, J. A., DiLaura, G., & Dolovich, S. (2020). Research Letter: COVID-19 Cases and Deaths in Federal and State Prisons. *JAMA*.
- Stolberg, S. G. (2020). 'Pandemic Within a Pandemic': Coronavirus and Police Brutality Roil Black Communities. *New York Times*. Retrieved July 20, 2020, from <https://www.nytimes.com/2020/06/07/us/politics/blacks-coronavirus-police-brutality.html>
- U.S. Department of Justice – Federal Bureau of Prisons (DOJ)(2020). Press Release: Inmate Death at FCI Oakdale I. Retrieved July 26, 2020, from https://www.bop.gov/resources/news/pdfs/20200328_press_release_oak_death.pdf