

COVID-19 Relief and the Ordinary Inmate

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This is the story of two men in Alabama. It is the story of a child in Texas; a woman in Washington. Or more precisely it is my retelling of their story, mixed with the stories of others like them to form a single narrative.¹ This is not my story, but it is one I can tell—not because I know it best (I don't) or because I am most entitled to give it voice (I'm not), but because I know it. I have known it for the last twenty years, over and over again, told by clients and whispered by loved ones. It is not an extraordinary story. It is utterly ordinary. It is common in its repetition, its subject matter, even in the ways it is told. It is not the story of Paul Manafort² or Roger Stone.³ It is not the story that populates the website of the Innocence Project⁴ or becomes a made-for-TV movie full of redemption and rebirth.⁵ Those are good stories. But they are not this story. This is the story of everyday men, women, and children, bound by criminal systems across the country.

This is the story of Jim, which is not his real name. He currently lives in a correctional facility in Alabama. In his thirty years he has been convicted of multiple theft, drug (possession, manufacture and distribution), and writing bad checks charges along with a burglary and a resisting arrest charge. At one point, he thought he had turned his life “around”—he had a job that provided a salary and benefits, including health insurance; he'd married and become a father; he and his wife

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¹ To be clear, I have taken fictional liberties with their stories to preserve their anonymity and in the interests of conserving word count. Their real stories are long and complex—as the story of most lives are. I cannot do them justice in these pages, and so I offer brief and fictionalized glimpses based on what I know.

² Paul Manafort is the former Trump campaign chairman who was serving a seven-and-one-half year sentence. See Josh Gerstein, *Paul Manafort Released from Prison Because of Virus Concerns*, POLITICO (May 13, 2020), <https://www.politico.com/news/2020/05/13/paul-manafort-released-from-prison-due-to-virus-concerns-254532>. He was released to home confinement under the Bureau of Prisons' COVID-19 release program despite the fact that he did not appear to meet the guidelines issued by BOP. *Id.*

³ Roger Stone is a longtime friend and former campaign advisor to President Trump. See Peter Baker, Maggie Haberman & Sharon LaFraniere, *Trump Commutes Sentence of Roger Stone in Case He Long Denounced*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/07/10/us/politics/trump-roger-stone-clemency.html>. He was convicted of seven felonies and sentenced to 40 months in federal prisons before President Trump commuted his sentence ensuring not only his early release, but that he never had to report to federal prison at all. *Id.*

⁴ See *All Cases*, INNOCENCE PROJECT, <https://www.innocenceproject.org/all-cases/> (last visited Nov. 1, 2020).

⁵ See generally *THE HURRICANE* (Universal Pictures 1999) (starring Denzel Washington as Rubin “The Hurricane” Carter, a former middleweight boxer wrongfully convicted for triple murder).

purchased a small home ten miles from his work—but bad news sent him off his course. After an unexpected cancer diagnosis and what seemed like hopeless treatment efforts that left Jim wasted and unable to work, Jim began to rely on heroin to dull the edges of his new, “living with cancer” reality. He lost his job. His family struggled to make payments on their home. His wife grew frustrated and scared.

Jim was eventually arrested after buying heroin from a confidential informant. When sheriff’s officers approached him immediately after the buy, he ran. As the officers caught him—it doesn’t take much to outrun a man weakened by cancer, chemo, and horse—he punched one and picked up a resisting arrest charge. This was the third time in four months Jim had been arrested. The only difference was this time he was charged with drug possession and resisting arrest. The other times he had been let go. In addition to the drug possession and resisting charges, his probation officer moved to revoke his probation. His probation was revoked. He was convicted. As I sit in my office and write his story, he sits dying in an open dorm in a correctional facility. He can’t see his wife or child because the prison in which he lives suspended in-person outside visits in an effort to curtail COVID-19 spread. Sometimes he makes it to chemotherapy, but not always. As those around him become infected with the coronavirus, he waits for compassionate release so that he might die at home and not in prison.

He is eligible for compassionate release or a medical furlough⁶—a state post-conviction remedy that allows early release for a “geriatric inmate, permanently incapacitated inmate, or terminally ill inmate.”⁷ And he has filed for one, though the path to release has been slow and inconsiderate. It has not considered that his time is short and may be made shorter by his disease and the presence of a deadly contagion in the facility to which he is confined. It has not considered that as the pandemic has stressed medical resources within and outside the prison, the treatments that might slow his cancer or ease his discomfort are not available more often than he receives them. It has not considered that he has not seen his wife or been able to hold his child. It has not considered that just as he is not with them, they are not with him and all are suffering as his own mortality becomes increasingly evident. Under the Alabama Code, the Commission of the Department of Corrections sets both the procedure for medical furlough and the conditions of permitted release.⁸ In setting that procedure, the state has not considered the complexities of meeting requirements for medical furlough—the certainty of imminent death (a prediction oncologists are often reluctant to make, at least in terms

⁶ Section 14-14-3(a) (2015) of the Code of Alabama defines eligibility for medical furlough, also known as compassionate release, as permitting a condition that existed at the time of sentencing to serve as a basis for medical furlough if “the inmate has become permanently incapacitated or terminally ill after the date of sentencing.” ALA. CODE § 14-14-3 (a) (2015).

⁷ ALA. CODE §14-14-4 (a) (2016).

⁸ See *id.* §§ 14-14-5 (a), (e) & (g) and 14-14-3 (b), (c) (requiring the inmate to submit to medical examination to confirm the terminal nature of his condition and requiring proof of financial responsibility for all expenses including medical needs upon release).

of days or months); the arrangement for end-of-life care, housing, and monitoring; and all the financial burdens such arrangements require.⁹

Alabama is not alone in these types of requirements for early release based on medical condition. The compassionate release provisions of the First Step Act require not only that medical claims rise to the level of being extraordinary or compelling, but that the inmate provide proof of such conditions as well as “proposed release plans, including where the inmate will reside, how the inmate will support himself/herself, . . . where the inmate will receive medical treatment, and how the inmate will pay for such treatment.”¹⁰

Likewise, Jim’s story is hardly novel. He could be one of dozens of men (or women) I knew and know who, as addicts, drifted in and out of carceral systems. He could be one of dozens I knew and know who, after years of poverty, intravenous drug use, and bad luck, suffer a string of medical problems that render their lives harder and, sometimes, end it. And he could be one of dozens I knew and know who, even if there was a policy that could release him in the face of death or a contagion, has no place to go. His house is gone. His family’s savings depleted to cover required monitoring and medical bills. He is just one more ordinary man stuck in prison.

This is the story of Frederick, which is not his real name. He is currently in custody in a privately-run detention facility in Alabama serving a ten-year sentence for manufacturing methamphetamine. He is not a nice man. Everyone says so. He tells me this the first time I talk to him. When I call the sheriff’s office to request some records the deputy who I speak to regales me with the stories of Frederick’s sins—he is poor and he cooks meth. He is an addict who decorates with guns and Confederate flags. He is a liar and a thief and as violent as they come. But he is also a man. His girlfriend is literally and figuratively lost without him. She wanders through town asking people when he will come home. She has petitioned the judge who sentenced him, the sheriff who arrested him, and the governor—asking, begging for his release. The first time I talk to her she tells me he is not a nice man, but she can’t live without him. I think she is right.

I know less about Frederick’s crime. He says he did it and doesn’t want to talk about it. Given that he pled guilty quickly to avoid additional charges, his record is scant—just a few police reports and court paperwork (an information or charging document, his bail order, his plea paperwork, and his sentencing order). He calls, writes, and emails because his facility is crowded. People sleep on tables and the floor. They spill out of dormitories into public spaces. They cannot shower every day. He reports there is not enough food to eat and he is hungry most days. There is no medical care other than the curative power of infirmary-dispensed ibuprofen. His teeth are literally rotting out of his head, but he can’t see a dentist and people have started to get sick. Rumors of COVID-19 are flying and he never would have pled

⁹ See §§ 14-14-5, 14-14-4.

¹⁰ U.S. DEP’T OF JUSTICE, FED. BUREAU OF PRISONS, PROGRAM STATEMENT NO. 5050.50, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. § 3582 and 4205(g) (2018).

guilty to the charge if he had known it was a randomized death sentence by coronavirus. He calls me because he wants to get released. An error in the calculation of his time served added an additional year to his parole eligibility date (he should be eligible in 2022 but the Alabama Department of Corrections lists the date as 2023). He wants me to fix it. I can't find the error—at least not the one he wants. The calculation looks correct given his time served pretrial—which the record shows was two days. But he knows his time in custody better than an electronic record (or the paper one I talk the clerk into sending to me). He spent a little over a year in the county jail. He counted time between court hearings and visits from his girlfriend who he watched deteriorate in his own way. He lost a tooth in a fight over food.

As I pore over his records, the only “error” I can find is that he was only held two days pretrial on the number of the case for which he is now in custody before his pretrial custody was transferred over to a number assigned to a probation revocation hearing. It is an error because he could have been held on both while he sat and waited for the probation time to run out and his case to wind its way through the state's criminal system. But it is an error I can't fix. And even if I could, a 2022 release date won't get him home anytime soon. He asks if he should write to President Trump and request a commutation. I find it hard to explain over prison email the limited power of a president in a state criminal system and he grows frustrated.

This is the story of Denise, which is not her real name. As I sit in my office and write her story, Denise sits in the Washington Correctional Center for Women in Yakima, Washington. In 2009, Denise was arrested for assaulting and robbing two men she knew. She used a gun. It wasn't loaded, and, even if it was, she said she would never have fired it. But Washington's law doesn't distinguish between a loaded gun and a functioning unloaded one. The gun made it armed robbery. Besides, she had pistol-whipped one of the men when she thought he was going to attack her. She split the skin above his eye open. In court, he obligingly showed the jury the scar.

This was not Denise's first criminal law rodeo. She had lived on the street off and on since she was fifteen and her juvenile and later adult record reflected that hard-lived life—solicitation, drug (possession, manufacture, and distribution), theft, assault, robbery, and threats charges all populated her criminal history. She had been a victim as well in ways that criminal law might not recognize—poverty, undiagnosed learning and possibly mental health disabilities, neglect by adults who should have cared for her from parents to teachers to social workers—but also in ways that criminal law might recognize—she had her own reported assaults and thefts that came to, as she told me once, nothing.

At trial, she claimed self-defense. She took the stand and earnestly told the jurors that the men had robbed *her* and that she did what she had to do to get her money back. She was hard to believe. Pretrial detention left her twitchy. She had trouble making eye contact. She was hostile and defiant when questioned, even by her lawyer. Her story didn't always make sense. It was hard to reconcile with the world the jurors knew. No, she hadn't called the police or asked anyone for help.

Yes, she always kept the gun. No, she wasn't sure how she had met the two men. Yes, she was the same Denise convicted of theft and prostitution. In contrast, the men, who lived in a house with a foundation in a hip part of the Capitol Hill neighborhood in Seattle, were clear. Their story, even in its improbability, resonated with the jurors. They had been walking home from dinner at a restaurant. Denise, who they didn't know but appeared homeless to them, walked up behind them and robbed them at gun point. She grew angry when one of them fumbled to open his wallet and hit him on the head with the gun. The blood was everywhere. When police stopped her after the men promptly called 911 to report the crime, she was covered in blood and had five twenty-dollar bills, the men's money, in her hand. The gun was in her coat pocket.

Denise couldn't be believed. Denise was dangerous. Denise had hurt these men. Denise deserved to be convicted. So she was. Two weeks later, Denise was sentenced on an Armed Robbery and Assault 2 with a Deadly Weapon. The judge ran the sentences concurrently and sentenced her within the standard sentencing range for Washington State to 264 months or 22 years (20 for the underlying offenses, and 2 years for the weapon enhancement). Given that she was convicted of a serious violent offense, she was not eligible for the good time credit that might have reduced her sentence by a half or a third. She'll serve the 22 years.

Denise's facility has suffered COVID-19 infections. So far, Denise has stayed safe, though scared. Her descriptions of crowded conditions and lack of personal protective equipment (or even personal hygiene products) warn of the daily risks she faces in a carceral system. But for Denise, there is no basis for release. The offense for which she was convicted renders her ineligible for state early release, even if her remaining sentence did not preclude consideration.¹¹ She has no silver-bullet appeal pending in the wings. She is not dying (at least not now) or on the precipice of parole. She is just stuck in prison waiting to see if she dies in or out of custody.

Like Jim and Frederick, there is nothing extraordinary about Denise. She was convicted, not for the first time. She was sentenced, not for the first time. And she is serving her time. Even if she could be released, she has nowhere to go. No family that visits or calls or wonders what became of her. No friends who have offered a couch or their own resources so that she might escape the threat of COVID-19. In her last letter, she tells me she is surprised I still write her back. No one else does apparently. She is just an ordinary woman.

This is the story of Michael, which is not his real name either. Michael ran away from home. According to his mother, Michael was difficult. He didn't like school, and school didn't like him much either. According to his school records, he was disruptive and disrespectful when he was present which wasn't often. His contact with the juvenile system started small. At thirteen he had a couple shoplifting

¹¹ See generally WASH. REV. CODE §§ 9.95.017(2) (2009), 9.94A.729(2) (2015) (prohibiting good time credit for individuals convicted of a felony with a deadly weapon enhancement); WASH. REV. CODE § 9.94A.729(3)(d)(i)(B) (prohibiting good time credit for person convicted of a violent offense).

charges, a misdemeanor mischief for taking a Sharpie marker to a bus stop partition, and a night in a juvenile facility. A year later, he was busted for drug possession—he entered a treatment program through the courts. He failed out. He served six weeks at a juvenile facility and was released on probation. He stayed with his mom, his grandmother and his younger siblings. When COVID-19 closed his school, the family shared one computer. When his mother was furloughed and later lost her job permanently, the family began to rely on a food bank for meals. It was hard. It was new.

After George Floyd's death, he left home against his mother's wishes and joined protests. He was arrested for destruction of property and theft. While the prosecutor has not yet filed charges in connection to the arrest, his probation officer revoked his probation. He was sent back to the regional juvenile detention facility. He thought he would be released, but the probation officer recommended against it. His mother told him she couldn't take him anymore. He was too much. Everything was too much. The group home where he might have gone stopped taking new residents because of delayed courts and the pandemic. He's still in the regional detention facility. Even if a probation placement is found for him, the probation officer reports that the prosecutor will likely just file charges against him and he will remain in custody.

There is nothing extraordinary about Michael's story. He could be one of dozens of adolescents I knew and know. He is stuck in a system that admittedly has been slowed to a crawl by COVID-19, but it would likely trap him regardless. His mother's unwillingness to house him—for what may be her own good reasons—leaves him with few options. He is stuck and no pandemic-related remedy offers him relief.

I could have written this essay without telling their stories. To do so would have been more, ironically, ordinary. I could have spoken of them in generalities—even more so than I already am. I could have omitted names (I didn't, after all, use their real names). I could have relied solely on the statistics of COVID-19 infection rates and the lack of meaningful or significant jail and or release programs in the face of the pandemic that inform parts of this piece. But to do so is to gloss over what must at some level be apparent—the statistics, the number of men, women, and children susceptible to the pandemic because they are in custody, are someone's Jim, Frederick, Denise, and Michael. They are people. So their stories *are* the story of this essay.

This essay, however, is also more than just their stories. It is also the story of carceral systems ill-equipped to handle the COVID-19 pandemic. It is the story of jails and prisons uniquely susceptible to contagions, and the devastating impact of that susceptibility on widening communities from detainees, to staff, to families, to strangers living in proximity. It is the story of different types of loss and safety; of death and fear of death, of lack of personal protective equipment and lack of medical care. It is the story of the link between the free world and the incarcerated one—a link that was always there but was somehow more obscured until the pandemic.

It is also the story of susceptibility fueled by the lack of mechanisms of release for ordinary people. Those people who do not suffer an almost-done terminal diagnosis or who do not have short terms left on their sentences or who have no safe homes to return to with the resources to maintain their constant contact with their jailers are the ordinary folks this essay is written for. Even as scholars and advocates have lamented the deficiencies of remedies pre- and post-conviction in a pandemic world for the extraordinary, the ordinary are not saddled with slow and deficient remedies—they have none. For the ordinary men, women, and children held in custody in 2020 and beyond, pretrial detention and sentencing laws make no exception in the face of a potentially fatal contagion. So, they wait. They do their time. Some grow sick. And some die. For those who work in their midst, or await their return, they too wait and do their own type of time.

These combined systematic flaws—carceral systems that permit mass infection within and outside their walls and release triggers premised on extraordinary circumstances or conditions—are a sort of roulette of disaster for ordinary people in custody who serve and wait and grow sick and die. These flaws, however, are also an opportunity to reconsider the priorities that animate these flaws and to question (or reimagine) systems that rebalance those priorities not just around the lives of the extraordinary, but around the lives of the ordinary—around the lives of Jim, Frederick, Denise, Michael, and all of us seeking to drive criminal law toward some community reckoned norm.

I. JAILS, PRISONS, AND PANDEMICS

To think about how and why a public health crisis provided insights into the failings of carceral systems and the priorities that animate them, it is helpful to think first of those carceral systems in the context of the pandemic. This part endeavors to do that, considering how and why jails and prisons across the nation were and are susceptible to the contagion and the extent that this susceptibility affects the free or un-incarcerated communities in and around those carceral systems.

A. Contagion Spread

Before the first reported cases of COVID-19 in the United States, the nation's jails and prisons were centers for contagion spread. In 1918, San Quentin Prison was a hotbed for an influenza outbreak.¹² In more recent times, carceral populations have shown higher rates of contagious infections than free populations.¹³ MRSA

¹² See L. L. Stanley, *Influenza at San Quentin Prison, California*, 34 PUB. HEALTH REP. 996, 996–1008 (1919).

¹³ See Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 CLINICAL INFECTIOUS DISEASES 1047, 1047–55 (2007) (noting that detained populations demonstrated higher rates of infections such as HIV, hepatitis B and C, syphilis, gonorrhea, chlamydia, influenza, MRSA, varicella-zoster, and tuberculosis).

outbreaks in jails, for example, demonstrated staggeringly high infections rates, some as high as 94% of the detained population.¹⁴ Jails and prisons boast both the highest incidence and number of tuberculosis infections in the nation.¹⁵ That these carceral institutions should suffer high rates of infection and large numbers of affected inmates is not surprising. The ease of infection spread is the product of both the conditions of the facilities themselves and the vulnerability of those detained in these facilities.

1. The Structure of Infection

By their nature, jails and prisons promote high rates of infection that render these institutions “ticking time bombs” for the spread of infectious disease.¹⁶ Their carceral nature literally restricts movement; coupled with overcrowding and the lack of medical care or access to personal hygiene products or protective equipment, jails and prisons are structured both physically and institutionally to facilitate infectious spread.¹⁷ Overcrowded, shared, and close quarters¹⁸ ensure that there is no opportunity to socially distance for those in custody. Cells within facilities are small, often shared spaces. Bathrooms, laundry, and meal facilities are likewise communal. Toilets in cells usually have no lids and often double as sinks.¹⁹ Poor air circulation promotes the spread of contagions.²⁰

¹⁴ Chicago’s Cook County recorded a 94% MRSA infection rate, *see* Bianca Malcom, *The Rise of Methicillin-Resistant Staphylococcus aureus in U.S. Correctional Populations*, 17 J. CORR. HEALTH CARE 254, 254–265 (2011); Bick, *supra* note 13, at 1047, 1049–51.

¹⁵ *See* Lauren A. Lambert et al., *Tuberculosis in Jails and Prisons: United States, 2002–2013*, 106 AM. J. PUB. HEALTH 2231, 2231–37 (2016).

¹⁶ Letter from David Patton et al., Fed. Pub. & Cmty. Defs., to Attorney Gen. William P. Barr et al., Att’y Gen. (Mar. 19, 2020), <https://sentencing.typepad.com/files/20200319--letter-to-ag-barr-et-al.-re-covid-19.pdf>.

¹⁷ *See* U.S. DEP’T OF JUST. CIV. RTS. DIV., INVESTIGATION OF ALABAMA’S STATE PRISONS FOR MEN (April 2, 2019), <https://www.justice.gov/opa/press-release/file/1150276/download> (noting chronic overcrowding in Alabama prisons); Laura Hawks, Steffie Woolhandler, & Danny McCormick, *Covid-19 in Prison and Jails in the United States*, JAMA INTERN. MED., (Apr. 28, 2020), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2765271>.

¹⁸ *See* Jennifer Gonnerman, *How Prisons and Jails can Respond to the Coronavirus*, THE NEW YORKER (Mar. 14, 2020), <https://www.newyorker.com/news/q-and-a/how-prisons-and-jails-can-respond-to-the-coronavirus>; Lipi Roy, *Infections and Incarceration: Why Jails and Prisons Need to Prepare for COVID-19 Now*, FORBES (Mar. 11, 2020), <https://www.forbes.com/sites/lipiroy/2020/03/11/infections-and-incarceration-why-jails-and-prisons-need-to-prepare-for-covid-19-stat/#1fa6b08e49f3>.

¹⁹ *See* Motion and Memorandum in Support of Pretrial Release and in Support of Community Efforts to Limit the Spread of COVID-19, United States District Court, Western District of Washington at Seattle (on file with author).

²⁰ *See* Gonnerman, *supra* note 18; Roy, *supra* note 18.

The lack of access to personal hygiene products such as soap (which often is rationed, must be purchased by the inmates, or is simply not always available)²¹ and hand sanitizer and undiluted disinfectants (both which are contraband in most carceral facilities due to their alcohol content even in the midst of COVID-19 outbreaks)²² and the lack of personal protective equipment such as face masks or shields²³ fuel the spread of contagions in incarcerated populations. Even the most basic precautions—social distancing, hand washing and sanitizing, and face masks—that might curtail the spread of COVID-19 in the free world are impossible, banned, or not simply provided in the carceral one.

The lack of medical facilities and staff further exacerbate these underlying structural deficiencies. Two 2016 Department of Justice (“DOJ”) reports on the federal Bureau of Prisons (“BOP”) found that the BOP suffered chronic medical staff shortages and failed to take adequate measures to address them, leading to problems meeting the medical needs of prisoners.²⁴ An examination of state prison facilities demonstrates they are no better.²⁵ Lack of isolation rooms, the de-prioritization of correctional healthcare, the lack of laboratory facilities and diagnostic tools, and the absence of uninterrupted supplies of medicine, all translate to the absence of diagnosis, delayed detection, non-existent or ineffective contact tracing, inadequate treatment, and misdiagnosis.²⁶ At Immigration and Customs Enforcement (“ICE”) facilities, recent whistle-blower reports revealed that despite facility policies requiring a medical exam within three days of a detainee reporting COVID-19 symptoms, the lack of examination rooms and beds led nurses to shred inmate requests for care that the medical staff could not meet as a result of already overtaxed medical facilities.²⁷ Reports that trickle out of jails and prisons across the country are not much better.²⁸

²¹ See Conor Friedersdorf, *Can't We at Least Give Prisoners Soap?* THE ATLANTIC (Apr. 1, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/make-soap-free-prisons/609202/>.

²² See Roy, *supra* note 18.

²³ See Emily Widra & Tiana Herring, *Half of States Fail to Require Mask Use by Correctional Staff*, PRISON POL'Y INITIATIVE (Aug. 14, 2020), <https://www.prisonpolicy.org/blog/2020/08/14/masks-in-prisons/> (noting that the lack of masks in jails and prisons applies to both inmates and staff).

²⁴ See U.S. DEP'T OF JUST. OFF. OF THE INSPECTOR GEN., REVIEW OF THE FEDERAL BUREAU OF PRISONS' MEDICAL STAFFING CHALLENGES (Mar. 2016), <https://oig.justice.gov/reports/2016/e1602.pdf>.

²⁵ See, e.g., UNITED STATES DEP'T OF JUST. CIV. RTS. DIV., *supra* note 17.

²⁶ See Bick, *supra* note 13, at 1047, 1047–55.

²⁷ See José Olivares & John Washington, *“A Silent Pandemic”: Nurse at ICE Facility Blows the Whistle on Coronavirus Dangers*, THE INTERCEPT (Sept. 14, 2020), <https://theintercept.com/2020/09/14/ice-detention-center-nurse-whistleblower/>.

²⁸ See Maggie Quinlan, *Nurse at Coyote Ridge Prison Describes ‘Petri Dish’ of ‘Inhumane Conditions’*, THE SPOKESMAN-REVIEW (Aug. 15, 2020), <https://www.spokesman.com/stories/2020/aug/14/nurse-at-coyote-ridge-prison-describes-petri-dish/>.

Healthcare in jails and prisons is often a low priority. Public health interventions among incarcerated populations are rare.²⁹ Recently released documents from the Alabama Department of Corrections (“ADOC”) and the Alabama Governor’s Office reveal that in times of a public health crisis, ADOC’s master plan was to dig graves rather than direct inmates to free-world hospitals where they might exhaust limited resources.³⁰ In other instances, jails and prisons are simply left out of the public health planning process all together.³¹ In Arkansas, prison guards reported that they were told to report to work even if they had tested positive for COVID-19.³² For inmates in the facilities where these guards worked, addressing chronic understaffing concerns was a higher priority than preventing the spread of the contagion.³³

As troubling as it is to think of state officials purposely neglecting or ignoring healthcare among the incarcerated, the position is also fatally myopic for the larger population. Jails and prisons do not hold isolated or static populations. Staff, visitors, and inmates themselves pass through carceral facilities into free world settings carrying contagions with them. Staff, including medical, counseling, and guard staff, leave jails and prisons every day and return to their families and communities. Recent COVID-19 outbreaks in Ohio,³⁴ Colorado,³⁵ and California³⁶ reveal the entwined nature of prisons and communities. After outbreaks in prisons among

²⁹ For example, inmates were not offered H1N1 vaccines in 2009 despite the pandemic and the existence of surplus vaccine. See Matthew J. Akiyama, et al., *Flattening the Curve for Incarcerated Populations—Covid-19 in Jails and Prisons*, NEW ENG. J. MED., (May 28, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMp2005687>.

³⁰ See Connor Sheets, *Alabama Prison System’s COVID-19 Plan Anticipates Widespread Infection, Deaths, National Guard Intervention*, AL.COM (April 7, 2020), <https://www.al.com/news/2020/04/alabama-prison-systems-covid-19-plan-anticipates-widespread-infection-deaths-national-guard-intervention.html>.

³¹ See Akiyama, et al., *supra* note 29.

³² See Samantha Michaels, *Arkansas Told Corrections Officers to Keep Working Even if They’re Infected with COVID-19*, MOTHER JONES (June 2, 2020), <https://www.motherjones.com/crime-justice/2020/06/arkansas-told-corrections-officers-to-keep-working-even-if-theyre-infected-with-covid-19/>.

³³ *Id.*

³⁴ See, e.g., Sarah Volpenhein, *Marion Prison Outbreak Seeping Into Larger Community*, MARION STAR (Apr. 25, 2020), <https://www.marionstar.com/story/news/local/2020/04/25/marion-prison-ohio-coronavirus-outbreak-seeping-into-larger-community/3026133001/>.

³⁵ See, e.g., Elise Schmelzer, *Staff shortages, extended lockdowns in coronavirus-ridden Colorado Prison creates “tenuous” situation*, THE DENVER POST (Dec. 19, 2020), <https://www.denverpost.com/2020/12/19/colorado-prisons-coronavirus-staffing-conditions/>; Olivia Prentzel, *Dozens of inmates test positive for COVID-19 in “inevitable” outbreak at El Paso County Jail*, THE GAZETTE (Oct. 29, 2020), https://gazette.com/news/dozens-of-inmates-test-positive-for-covid-19-in-inevitable-outbreak-at-el-paso-county/article_cd4a8464-1a2f-11eb-934d-3b578f228fcc.html.

³⁶ See, e.g., Nadia Lopez, *Prisons in California’s Central Valley are COVID-19 hotbeds. Here’s how it happened*, THE FRESNO BEE (Dec. 19, 2020), <https://www.fresnobee.com/news/coronavirus/article247723155.html>.

incarcerated populations, rates of COVID-19 spiked in the towns surrounding these facilities where prison staff lived with their families.³⁷ The impact of these outbreaks on these communities—many of which were already economically marginalized—was not only significantly higher than among other populations, it was devastating.³⁸

Even as jails and prisons sought to shut down in-person visitor and court access as the pandemic intensified (which created its own set of mental health and constitutional concerns), inmates were still released at the completion of their sentences. In addition, as courts and parole boards across the country have reopened, inmates are beginning to be transported once again from carceral facilities to hearings. All of these ensure more access points for contagion spread.

2. Jail and Prison Populations and Infection

The structure—both physically and politically—of jails and prisons are not the only reason for high infection rates among carceral populations. Vulnerable people are disproportionately represented in those populations. Across the country, jails and prisons are filled with older and medically compromised individuals.³⁹ Incarcerated populations are also disproportionately marginalized people. Jails and prisons are disproportionately full of people of color, poor people, and people without legal status.⁴⁰ Jails and prisons are disproportionately full of those who suffer housing insecurity, addiction, and mental health issues. These are not only the people most likely to be arrested, charged, convicted, and locked up, but they are also the people least likely to have received consistent medical care, most likely to be susceptible to diseases like COVID-19, and most likely to suffer adverse outcomes from infection. COVID-19 has not only infected these populations at a higher rate in both the free and incarcerated world, but it has killed them at a higher rate.⁴¹ Yet, DOJ reported

³⁷ See, e.g., Volpenhein, *supra* note 34.

³⁸ *Id.*

³⁹ See U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GEN., THE IMPACT OF AN AGING INMATE POPULATION ON THE FED. BUREAU OF PRISONS, 1 (rev. ed. 2016); Weihua Li & Nicole Lewis, *This Chart Shows Why the Prison Population Is So Vulnerable to COVID-19*, THE MARSHALL PROJECT (Mar. 19, 2020), <https://www.themarshallproject.org/2020/03/19/this-chart-shows-why-the-prison-population-is-so-vulnerable-to-covid-19>.

⁴⁰ See Eli Day, *The Race Gap Is Glaring, and Poverty Is Making It Worse*, MOTHER JONES (Feb. 2, 2018), <https://www.motherjones.com/crime-justice/2018/02/the-race-gap-in-u-s-prisons-is-glaring-and-poverty-is-making-it-worse/>; *U.S. Incarceration Rates by Race and Ethnicity*, PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/graphs/raceinc.html> (last visited March 14, 2021); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (Diane Wachtell, ed., The New Press 2012).

⁴¹ See Brendan Saloner, Kalid Parish, Julie A. Ward, et al., *Covid-19 Cases and Death in Federal and State Prisons*, JAMA (July 8, 2020) <https://jamanetwork.com/journals/jama/fullarticle/2768249> (“[T]he adjusted death rate in the prison population was 3.0 times higher than would be expected if the age and sex distributions of the US and prison populations were equal.”). For up-to-date information on infection rates, see *UCLA COVID-19 Behind Bars Data Project*, UCLA

that Bureau of Prison facilities and services, including medical services, were inadequate to meet the needs of an aging prison population, leading to delays in medical treatment for prisoners with acute and chronic heart and neurological conditions, who wait an average of 114 days to see medical specialists.⁴²

The realities of carceral institutions, with their high number of older and medically compromised individuals,⁴³ their treatment of hand sanitizer as contraband,⁴⁴ and their requirement that marginalized inmates to pay for medical care and personal hygiene supplies,⁴⁵ create a high-risk roulette in which inmates, await infection and death.

B. *The Community Toll*

Jail and prison walls, however, don't bind the effects of the contagion. Just as jail and prison staff and their families suffer their own horror of the contagion as their loved ones carry infection to and from their carceral workplaces, so too do inmates' communities suffer. As the pandemic escalated, the waiting began. In homes across the country, people waited to see if promised relief would send their loved ones home, away from jails and prisons; home to socially distance; home to protect themselves from contagions; home to help bear the burdens of childcare and schooling; home to cradle the awful fear that was, is, COVID-19. In homes across the county, people waited for the news that the nation or the state realized that the way to flatten the curve, to beat the infection rate, was to redefine safety not in terms of completed prison sentences or pretrial detention, but in terms of emptying prisons and jails. Safety lay in release, not incarceration.⁴⁶ As the days, weeks, and months ticked by and the absence of relief mechanisms and the reluctance of discretionary decisionmakers conspired to slow release to a trickle if at all, a new reality set in: communities that awaited inmates, ordinary inmates, would suffer the contagion

LAW, <https://law.ucla.edu/academics/centers/criminal-justice-program/ucla-covid-19-behind-bars-data-project> (last visited March 14, 2021).

⁴² U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GEN., *THE IMPACT OF AN AGING INMATE POPULATION ON THE FED. BUREAU OF PRISONS* (rev. ed. 2016).

⁴³ See U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GEN., *supra* note 39; Li & Lewis, *supra* note 39.

⁴⁴ See Roy, *supra* note 18 ("Hand sanitizers, for instance, are often considered contraband Other harsh realities of jail life that prevent proper application of CDC recommendations include limited access to toilet paper and paper towels; and handcuffs prohibit the use of hands to cover one's mouth.").

⁴⁵ See Jimmy Jenkins, *Prisons and Jails Change Policies to Address Coronavirus Threat Behind Bars*, NPR (Mar. 23, 2020), https://www.npr.org/2020/03/23/818581064/prisons-and-jails-change-policies-to-address-coronavirus-threat-behind-bars?utm_medium=RSS&utm_campaign=national.

⁴⁶ See Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 NW. UNIV. L. REV. 59 (2020) (arguing that safety goals are better accomplished during a pandemic through release than detention).

twice. Once in their own midst as they lived in a free world that rode wave after wave of the virus —waves that crashed and broke more often and with greater force on the back of the marginalized—and twice as they fought to keep track of those they loved stuck inside carceral systems.

Looking at the structures and populations of these carceral systems, it is little wonder that our nation’s jails and prisons have been referred to as COVID-19 hotbeds, petri dishes, and ground zero.⁴⁷ It is little wonder that the largest clusters of COVID-19 outbreaks in the United States have occurred in jails and prisons.⁴⁸ It is little wonder that inmates are more than two-and-a-half times to three times more likely to contract COVID-19 than members of the free population.⁴⁹ How could it be otherwise? These systems were built to undervalue the very lives they hold. They risk not only inmate safety but send ripples out among the free world populations linked to those inmates by occupation or affection.

To imagine being in a jail or prison in the time of COVID-19, I think how often since January 2020 I have awoken in a panic over a virus I cannot see but know stalks someone or wondered if a slight fever or a sore throat was the start of COVID-19. I think how many friends, neighbors, and loved ones I know have been touched by infection. I imagine that fear, that loss, amplified by three. I imagine the weight of that fear and loss if I were to lock myself away with it in a room where I cannot protect myself and I cannot get the care I might need if I were to become infected. Still it is not enough. It is not the same as the fear, panic, and sometimes hopelessness I hear in the voices of inmates and their loved ones who call and ask, “Isn’t there anything that can be done?”

II. CONTAGION AND REMEDY

Despite the well-documented trifecta that inmates in the nation’s jails and prisons suffer higher rates of infection than their free world counterparts, that these jails and prisons are poorly equipped to mitigate the spread of contagions, treat the infected, or provide adequate care for the especially vulnerable populations they house, and that the effects of jail- and prison-based contagion epicenters are wide-reaching for free world communities, remedies that might have released inmates

⁴⁷ See Jake Harper, *Crowded Prisons Are Festering “Petrie Dishes for Coronavirus, Observers Warn*, NPR (May 1, 2020), <https://wamu.org/story/20/05/01/crowded-prisons-are-festering-petrie-dishes-for-coronavirus-observers-warn/>.

⁴⁸ *Id.*

⁴⁹ See, e.g., Miranda Bryant, *Coronavirus Spread at Rikers Is a ‘Public Health Disaster’, Says Jail’s Top Doctor*, GUARDIAN (Apr. 1, 2020, 10:36 AM), <https://www.theguardian.com/us-news/2020/apr/01/rikers-island-jail-coronavirus-public-health-disaster> (estimating the rate of infection in New York City jails at 3.91% compared to the total New York City population at 0.5%); Megan Crepeau & Jason Meisner, *Cook County Jail Detainee Dies of COVID-19*, CHI. TRIB. (Apr. 7, 2020), <https://www.chicagotribune.com/coronavirus/ct-coronavirus-cook-county-jail-death-20200406-42b3dkcqsbeyzflmsso6s2j4wi-story.html> (reporting 234 detainees infected at Cook County Jail); Saloner, Parish, Ward, et al., *supra* note 41.

have been largely ineffective. This ineffectiveness is the product of its own trifecta. First, these remedies focus on the extraordinary, not the ordinary, stranding inmates without options. Second, these remedies are slow, poorly equipped to address mass risk, and require degrees of documentation that are difficult to come by in the best of times and extraordinarily difficult to come by in the time of COVID-19. Finally, these remedies focus on safety calculations that fail to take into account the raging public health crisis.

A. *Saving the Extraordinary*

Any discussion of criminal remedies that contemplates release is already a discussion of a rare and extraordinary event. Release after a decision to detain, whether in a post-conviction or pretrial setting is unusual. Ordinary claims—that a witness lied or the fact-finder got it “wrong”—are either procedurally barred, incognizable, or result in relief that falls short of release. While there may be greater space for release in the pretrial setting where recent movements in bail reform have pushed decarceral agendas,⁵⁰ even in the pretrial setting, carceral populations rates remain high.⁵¹ Release efforts—whether in the form of pretrial detention relief such as bail reform or post-conviction relief such as the First Step Act—move around the perimeter of populations, leaving large swaths of the carceral population in place. This is not only a product of such relief mechanism’s focus on the extraordinary, as will be discussed in a moment, but also a product of faith placed in discretionary actors to promote release.⁵² In the context of COVID-19, both proved ineffective. Focus on the extraordinary has failed to reduce jail and prison populations sufficiently to flatten the infection’s curve. And reliance on discretionary power suffered not only the usual inconsistencies present when such power is or is not exercised, but, in the context of incarcerated populations, wardens and other discretionary decision makers refused to release inmates in their custody.⁵³

1. Remedy and the Extraordinary

Post-conviction remedies tend to tie relief to the extraordinariness of the inmate’s claim. Some of this post-conviction focus on extra-ordinariness is endemic

⁵⁰ See Shima Baradaran Baughman, *Dividing Bail Reform*, 104 IOWA L. REV. 947 (2020).

⁵¹ The Prison Policy Initiative estimates that half a million people in the United States are currently detained pretrial. This amounts to an astonishing 74% of all jail populations. See *Pretrial Detention*, PRISON POLICY INITIATIVE, https://www.prisonpolicy.org/research/pretrial_detention/ (last updated Dec. 29, 2020).

⁵² Such discretionary actors on the front end may include law enforcement officers, judges or jurors and wardens, probation and parole officers or governors and the president on the back end.

⁵³ See, e.g., Keri Blakinger & Joseph Neff, *Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent were Denied*, THE MARSHALL PROJECT (Oct. 7, 2020), <https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied>.

to post-conviction remedies themselves. As noted above, relief, especially release as relief, is not ordinary. Faith in the finality of decisions and the procedural protections of trial or plea proceedings conspire to leave reviewing jurists reluctant to release inmates. Viewed from another perspective, the rise of Innocence Projects is a testament to permitting release only in rare instances—the extra-ordinary innocent convicted despite all procedural protections.

There is, however, no DNA test that exonerates the ordinary guilty men and women who acted out of economic desperation or in a learned response to a hard childhood or cruel home. Even “ordinary” post-conviction relief on the merits evokes the extraordinary—cases set aside for prosecutorial vindictiveness, ineffective assistance of counsel, or delays in trial to game a prosecutorial advantage, to name a few, are themselves few and far between and may not receive release as a remedy. Consider the prosecutor’s failure to turn over exculpatory evidence under *Brady v. Maryland*.⁵⁴ To gain relief a defendant must demonstrate that the evidence in question was in the possession of the prosecutor, was exculpatory, and was material.⁵⁵ Evidence that does not undermine faith in the conviction does not qualify as material under the *Brady* standard.⁵⁶ Even those who accomplish the extraordinary feat of proving the claim receive a remedy of retrial with the new evidence.⁵⁷ Faced with the possibility of a second trial, *Brady*, the defendant from whom the doctrine draws its name, pled guilty rather than roll the dice and hope for a better outcome than that already offered at the end of his Court awarded second trial.⁵⁸

The very language of federal statutes contemplates the extraordinary. 18 U.S.C. § 3142 permits temporary release if the detainee can establish “compelling” circumstances.⁵⁹ 18 U.S.C. §§ 3582 and 4205(g) provides for “compassionate release” for elderly inmates;⁶⁰ 18 U.S.C. § 3624 permits inmates to be placed on home confinement in the last year of their sentences.⁶¹ Even the language of the First Step Act requires an inmate to demonstrate “extraordinary or compelling circumstances reasons [that] warrant such a reduction.”⁶²

Many of these remedies, like their state court counterparts which focus on individuals and not procedural violations or substantive missteps, imagine the extraordinary defendant. Early release programs contemplate those near the end of

⁵⁴ 373 U.S. 83 (1963).

⁵⁵ *Id.* at 87.

⁵⁶ *Id.* at 90.

⁵⁷ *Id.*

⁵⁸ See Stephanos Bibas, *The Story of Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Justice in Criminal Procedure*, in *CRIMINAL PROCEDURE STORIES* (Carol Steiker, ed. 2005).

⁵⁹ 18 U.S.C. § 3142 (2008).

⁶⁰ 18 U.S.C. §§ 3582 (2018), 4205(g) (1987).

⁶¹ 18 U.S.C. § 3624 (2019).

⁶² 18 U.S.C. § 3582(c)(1)(A) (2018).

their time served with non-violent convictions and near spotless carceral records that speak to rehabilitation and compliance. Compassionate release and medical release programs imagine those near the end of another sentence—the end of life as a result of terminal illness or permanent disability. In each of these, the offender him/herself stands on the edge of some extraordinary moment—albeit perhaps a lesser one than that contemplated in a merits post-conviction challenge—as evidenced by the rarity of the relief. How many men, women, and children left carceral existences, even as the pandemic ravaged their facilities, on medical or compassionate release or the First Step Act provisions? The short answer, as evidenced by infection rates, is not enough.⁶³

2. Remedies and Discretion

The statutes described above rely heavily on a series of discretionary decisionmakers to determine first whether or not a claimant qualifies for release and, once qualified, whether or not the relief is merited. Both calculations are complex, but the calculation of merit especially so, as the discretionary decision-maker must weigh not only the defendant's claim, but also predictive concerns of future dangerousness release might pose (often described as safety concerns). These safety concerns will be discussed in the next part, but they are also worth mentioning here as they inform other unarticulated factors that may affect discretionary decision-making.

Discussions of mass incarceration often describe law and order rhetoric as its origins. To characterize policing efforts as a war on drugs, for example, is to identify not only those who are accused and/or convicted of law violations, but to characterize those folks as the enemy and imbue them with a dangerous identity. This characterization and its effect on policing strategies and public perception of the need for longer prison sentences and pretrial detention has been well explored elsewhere, but less attention has been paid to the incentive it created to exercise discretionary decision-making away from release for individual claimants. As Professor Lauryn Gouldin has noted in the pretrial context, judges are rarely praised for the number of pretrial releasees who comply with every condition on release.⁶⁴ Instead these discretionary decision-makers receive attention for those they released who failed to comply and created a harm or risk in the process with a new offense.⁶⁵ The focus is understandable on the one hand—the ordinary law-abiding narrative is less exciting than the dramatic or traumatic, the extraordinary—but it is also consistent with the story of the danger of those who are or should be locked up.

Inmates are inmates because they are dangerous, deserve punishment, and sometimes are irredeemable. This mindset keeps law and order systems in place. To

⁶³ See Blakinger & Neff, *supra* note 53.

⁶⁴ See Lauryn Gouldin, *Reforming Pretrial Decision Making*, 55 WAKE FOREST L. REV. 857 (2020).

⁶⁵ *Id.*

imagine that members of those systems would find incentive to release would require not only that they turn their back on the rhetoric of their profession, but that they weather in the process the public's concern that the abandonment of this rhetoric has and will create harm in the form of future criminal acts. Even in the face of data that suggests recidivism risks can be mitigated and/or that older individuals are unlikely to reoffend,⁶⁶ still decision-makers use their discretionary power to hold not release. Add in the overrepresentation of marginalized populations in the nation's jails and prisons, and a discussion about discretionary release becomes a discussion about how the rhetoric of criminal law is the rhetoric of the dangerous other who must be detained to keep the world safe.⁶⁷

I have painted this discussion in the broadest terms and failed to do it complete justice. This is a broad concept—Paul Butler,⁶⁸ James Forman, Jr.,⁶⁹ and others have written whole books on the topic after years of research. I cannot claim to cover its waterfront completely, and yet I note it here because any discussion of discretionary power must also come with a discussion that discretionary power favors the extraordinary. The ordinary are painted broadly with a brush of dangerousness and risk that justifies their continued detention. Consider pardons and commutations or COVID-19 release provisions promulgated by Attorney General Barr for BOP and the numbers grow smaller, the release more extraordinary.⁷⁰

COVID-19 based release covered under the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act; P.L.: 116-136) permits BOP to lengthen home confinement during the “emergency period” of the pandemic. While Barr ordered a reduction in the federal prison population in the hopes of flattening the curve, reliance on warden's discretion to institute such a policy and to release inmates proved fatal to the goals.⁷¹ Consider FCI Danbury. Of the 241 applications for compassionate release in the face of the pandemic, Professor Lee Kovarsky notes that in the first six weeks of the pandemic none were granted.⁷²

⁶⁶ See J.J. Prescott, Benjamin Pyle & Sonia Starr, *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643 (2020).

⁶⁷ See PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (The New Press eds., 2017) (describing the power of creating this narrative in the context of Black men).

⁶⁸ *Id.*

⁶⁹ JAMES FOREMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (Farrar, Straus, and Giroux) (2017).

⁷⁰ See Blakinger and Neff, *surpa* note 53.

⁷¹ *Id.*

⁷² See Lee Kovarsky, *Pandemics, Risks, and Remedies*, 106 VA. L. REV. 71 (2020).

Yet, if you are the confidant of a president,⁷³ a fallen rap star⁷⁴ or the cause du jour of a Kardashian,⁷⁵ pardon or commutation may be possible. For the rest of the ordinary inmates, it is an elusive treasure. Even the ordinary, extraordinary inmate—the victim of rape who kills her attacker,⁷⁶ the reformed addict and murderess who found God in prison,⁷⁷ the child sentenced to life without parole reconsidered in his fifties,⁷⁸ all fall short. Their sentences are not commuted, their crimes not pardoned, they are not paroled, the stories of fall and redemption they tell are too utterly ordinary to warrant attention or discretionary relief. Even in a time of a public health crisis, release is elusive.

B. *The Miscalculation of Safety in Unsafe Times*

Beyond their adherence to the rhetoric of detention, pretrial and post-conviction relief models are subject to a myriad of well-deserved criticisms. They disfavor marginalized populations—populations that suffer disproportionate policing and prosecution. The same populations more likely to receive a longer sentence and to be denied early release are the populations least able to bear the downstream consequences of detention—whether pretrial or post-trial. The criminal and carceral systems in their lives literally disrupt their communities. Post-conviction relief adds insult to that injury.

Even before the pandemic, the procedures around relief were notoriously slow and required degrees of documentation that are often difficult to produce.⁷⁹ As others

⁷³ See Amita Kelly, Ryan Lucas & Vanessa Romo, *Trump Pardons Roger Stone, Paul Manafort and Charles Kushner*, NPR (Dec. 23, 2020), <https://www.npr.org/2020/12/23/949820820/trump-pardons-roger-stone-paul-manafort-and-charles-kushner>.

⁷⁴ See Joe Coscarelli, *Lil Wayne, Kodak Black and Others Pardoned by Trump*, THE N.Y. TIMES (Jan. 21, 2020), <https://www.nytimes.com/2021/01/20/arts/music/trump-pardons-lil-wayne-kodak-black.html>.

⁷⁵ See Peter Baker, *Alice Marie Johnson is Granted Clemency by Trump After Push by Kim Kardashian West*, THE N.Y. TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/us/politics/trump-alice-johnson-sentence-commuted-kim-kardashian-west.html>.

⁷⁶ See Jeremiah Dobruck, *Psychology Professor Sentenced to 6 Years in Killing of a Man She Said Raped Her*, DAILY PILOT (July 15, 2016), <https://www.latimes.com/socal/daily-pilot/tn-dpt-me-esparza-sentencing-20160715-story.html>.

⁷⁷ See *Karla Faye Tucker: Born Again on Death Row*, CNN (March 26, 2007), <https://www.cnn.com/2007/US/03/21/larry.king.tucker/>.

⁷⁸ See Lauren Gill, *Sentenced to Life Without Parole at 17 and Denied Freedom at 52*, THE APPEAL (Aug. 7, 2019), <https://theappeal.org/alabama-life-without-parole-denied-freedom-supreme-court/>.

⁷⁹ This reality is especially pronounced in the post-conviction setting; however, pretrial procedure also affords few opportunities for pretrial detention review. Once a person is detained, pretrial or as a result of a sentence, the inertia of detention holds them in place. From a pretrial perspective, this is troubling given that pretrial detention decisions are often made astonishingly quickly and at the beginning of the criminal process when little is known about the case. See EMILY BAZELON, CHARGED 37 (2019) (noting that pretrial detention decisions are “often made in a few minutes or less, based on scant information presented early on at an arraignment hearing.”). These

before me have noted, they were built around a lack of urgency. Decisions had already been made, and any reconsideration that might upset the stability of those prior decisions had to be carefully considered and painstakingly justified. In the best of times, the slowness of detention relief can be maddeningly cruel—carrying irony (pretrial detention and sentencing decisions are made with lightening quick speed in comparison to post-decision relief) and downstream consequences in its wake.⁸⁰

In the time of a pandemic that created an urgent need for relief, such delays literally cost lives—both of inmates and of those who worked in jails and prisons. Part of this glacial pace is certainly attributable to reluctant discretionary decisionmakers who perhaps had few or misplaced incentives even in the face of directives for relief and mounting infection rates. However, proof requirements also slowed relief prospects and rendered release impossible for many inmates.

Claim-vetting processes requires a degree of litigational fortitude and documentation that renders pro se proceedings difficult if not impossible. Compassionate release, and medical release petitions in particular, require claimants to create a factual record often beyond their reach. The criteria for such relief limits its reach to elderly and seriously or terminally ill inmates. The pandemic should have created an incentive to release such inmates—those at greatest risk of succumbing to the virus. Yet, procedural barriers and high proof requirements left applicants without relief even as the pandemic ravaged facilities.⁸¹ In the end, carceral systems and the procedural mechanics that maintain their populations are literally and figurately a grind.

This is a problem. This deserves the attention it has received and hopefully will continue to receive. Yet, such relief provisions, even if they had moved expeditiously and enjoyed fewer proof and procedural hurdles were (and are) poorly positioned to address a pandemic for a variety of reasons. I want to focus on two. First, they fundamentally miscalculate safety concerns in the best of times, but they tragically miscalculate them in the time of COVID-19. Second, they are structured around individual relief, when the pandemic necessitated a focus on aggregate carceral population reduction.

Turning to the first, the miscalculation of safety concerns, I, and others, have written elsewhere about the failure of criminal systems to properly calculate safety

decisions, once made, are often difficult to challenge once imposed. *See* Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. (forthcoming 2021). Likewise, detention imposed post-conviction, while the product of conviction and a sentencing hearing, is often difficult to set aside. *See* Kovarsky, *supra* note 72.

⁸⁰ The longer a person is detained the more likely they are to suffer economic, social, and developmental consequences. For an excellent discussion of this in the pretrial setting, *see* Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713–14 (2017).

⁸¹ In *Wilson et al. v. Williams et al.*, a federal district court judge referred to the BOP's discharge proceedings as "Kafkaesque" and noted that even after being ordered to implement the AG Barr's directive expeditiously, effected facilities "made minimal effort to get at-risk inmates out of harm's way." Order, *Wilson et al. v. Williams et al.*, No. 4:20-cv-00794, at *2 (N.D. Ohio May 19, 2020).

concerns by ignoring the entwined interests the community and the defendant or detainee share.⁸² This bifurcation of safety between the defendant and all those not the defendant—often characterized as the community is safest when the defendant is not in it—is problematic in ordinary times, but foolhardy in the face of the pandemic.

This link between detention and safety drove ordinary and COVID-19 based release programs to focus on releasing those who posed the lowest safety risk based on the offense for which they had been convicted and/or their ability to resettle within the free world—an ability often dictated by access to resources. Setting aside for a moment the bias that may influence both the types of charges a defendant may face and/or be convicted of and the bias that may infect access to resources, this focus on safety based on the type of conviction miscalculated the necessity of release during the time of the pandemic (and before).

First, such a focus severely limited and continues to limit the number of inmates eligible for release. Focusing only on the pandemic based release programs, in the pretrial context, “safe release” bets were often already released. In the post-conviction setting, the numbers of incarcerated low-level and non-violent offenders are relatively small compared to the overall population. These low-level offenders and safe bets are the unicorns of the release world. They are the extraordinary, not the ordinary inmate. Second, this calculus defined “safety” in terms of the harm the inmate might do once released, ignoring the potentially greater harm that would occur if carceral populations did not decrease significantly.

This failure to focus on the center mass of the incarcerated population and to encourage discretionary decision-making that skewed toward release signals a secondary problem with release models—that they are by and large designed to address individual harms and not to think in terms of a collective cure.⁸³ Relief mechanisms most commonly contemplate single claimants making individual claims that they, as individuals, merit relief. This is not to say class actions or claims surrounding conditions of confinement do not exist, though as Professor Kovarsky notes, such claims reside in “steep terrain.”⁸⁴ Yet, this focus on the collective was precisely what the pandemic required. The risk the contagion presented to incarcerated populations and beyond was and is linked to total carceral populations. Simply put, the more people in any given facility, the greater the risk of harm both to the inmates and to those who come in contact with them.

Admittedly, at first glance, to fashion relief around the collective as opposed to the individual would have only directly addressed one aspect of the risk the

⁸² See, e.g. Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. (forthcoming 2021); Jenny E. Carroll, *Safety, Crisis, and Criminal Law*, 51 ARIZ. ST. L. REV. 505 (2021); See K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 709–10 (2020); Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 276 (2019).

⁸³ Kovarsky, *supra* note 72, at 72.

⁸⁴ *Id.*

pandemic posed to incarcerated populations: overcrowding. Such a focus, however, would have also opened the possibility of addressing other aspects of risk—that of access to resources outside of jails and prisons to ensure that formerly incarcerated people could survive and re-integrate into their communities.

To refocus available relief on releasing as many inmates as possible to permit best CDC practices to flatten the curve would have also required contemplating release relief that ensured not just that people got out of jail or prison, but also that those who were released were able to safely shelter at home and to receive adequate medical care. In the face of this focus on a community centered notion of safety that included, not excluded, the incarcerated and their former brethren, infection risks would have significantly decreased.

III. CONCLUSION—IMAGINING SOME PATH FORWARD

I began this essay with the stories of people trapped in carceral systems in the midst of the pandemic. Each were utterly ordinary people unable to gain release because they could not satisfy the requirements for release and their safety, or the safety of those in their community was not sufficiently prioritized. There are so many lessons that might be drawn from this pandemic and these stories. I offer one: to focus detention relief on the extraordinary undervalues the lives of the ordinary people within carceral systems and, in the process, miscalculates policies that might promote safety. This is true in a time of COVID-19, but it is also true in ordinary times. Jim, Frederick, Denise, and Michael do not meet the criteria for compassionate or medical release. They are either well and/or have no safe home to return to if released.

I therefore conclude this essay wondering what a carceral system might look like that calculated safety not only in terms of a predicted communal risk of recidivism, but in terms of lives lived safely in the company of people who cared. Would criminal law or the civilized world truly collapse if instead of spending billions of dollars to warehouse people out of our midst and out of existence, those funds were invested into communities, treatment centers, support networks, and homes for the likes of Jim, Frederick, Denise, and Michael? It is not a new proposal. Literally centuries of work seek to reimagine punitive systems as rehabilitative, or to remodel personal responsibility narratives—do the crime, do the time—as collective responsibility ones—what you do to the least among you, you do also unto me.⁸⁵ Modern calls for abolition and restructuring of communal goals are extensions of that tradition. This essay therefore joins an old and rising chorus that calls for the recognition of the value of release systems for the ordinary—a value shared by inmate and larger communities alike.

⁸⁵ See *Matthew 25:40*, though all religions seem to have some version of this, though ironically, this particular passage continues that those who did not treat the least well should be cast into damnation.