

# Prosecutorial Discretion During a Pandemic: Implications for the Criminal Justice System and the Rule of Law

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## INTRODUCTION

The COVID-19 pandemic has altered the course of history in many significant ways. This virus is highly contagious, and it has proven to be a major concern in densely populated communities such as prisons.<sup>1</sup> In addition to sheer density, prisons tend to hold clusters of people belonging to vulnerable populations which are at an elevated risk of becoming seriously ill or dying as a result of contracting the virus.<sup>2</sup> Many localities across the nation have responded to the threat COVID poses to prison operations by preemptively announcing non-prosecution policies and blanket release policies.<sup>3</sup> Under the former, a locality announces particular crimes or levels of offenses which will not be prosecuted for a certain period of time or for the foreseeable future, thereby allowing those who violate these particular laws to go unpunished.<sup>4</sup> Under the latter, a locality allows groups of prisoners to be released en masse—whether by crime, by age, or by another metric or formula—rather than based upon the exigencies of their individual situations.<sup>5</sup>

This Note argues that the criminal justice system's blanket release and non-prosecution policies are *not* the proper response to the COVID pandemic. Rather, case-by-case adjudication is a hallmark of this system and better serves and balances the goals of achieving justice and providing the consistency required by the rule of law. This is a groundbreaking topic within the scholarship given the recent and ongoing developments of this crisis. Therefore, it addresses a timely and meaningful issue faced by actors within the criminal justice system across the nation on a daily basis.

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1. See Jacey Fortin, *Losing a Loved One Twice: First to Prison, Then to Covid*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/us/covid-prison-inmates-family.html> [<https://perma.cc/T5MB-R8L7>].

2. See Nicole Wetsman, *Prisons and jails are vulnerable to COVID-19 outbreaks*, VERGE (Mar. 7, 2020), <https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap> [<https://perma.cc/QKC4-AMCV>].

3. See *Prosecutors Responses to Covid-19*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/prosecutors-responses-covid-19> [<https://perma.cc/DMC7-AKQ9>] (last visited Feb. 13, 2021).

4. See *id.*

5. See *id.*

Part I will provide background information on the unique and powerful role that prosecutors play in our criminal justice system as well as the significant challenges faced by prisons and actors within the criminal justice system in trying to contain the spread of COVID. Part II will detail the various responses to the pandemic taken by localities across the United States, with a focus on the commonalities across jurisdictions as well as the steps that have proven the most effective. Part III will discuss the impacts of blanket release and non-prosecution policies on the greater criminal justice system and the rule of law, including a lack of deterrence, issues associated with seemingly arbitrary exercises of government power, and the effects on crime rates and why this metric has significant limitations at this stage of the pandemic. Finally, Part IV will offer some potential solutions, including the use of virtual trials, carefully-utilized solitary confinement for sick and vulnerable prisoners, and potential lessons to be learned from universities in reducing community spread, such as improvements in ventilation systems, food services, sanitation, contact tracing, and lockdowns.

## I. BACKGROUND INFORMATION

### A. PROSECUTORS & PUNISHMENT

The American criminal justice system has a unique hallmark: virtually unreviewable prosecutorial discretion. In spite of their broad authority, prosecutors, like all other attorneys, retain a duty pursuant to Model Rule 8.4 not to engage in conduct that is prejudicial to the administration of justice.<sup>6</sup> However, with such great leeway in performing their jobs, prosecutors have a greater potential than other actors within the criminal justice system to “abuse their powers and indulge their self-interests, biases, or arbitrariness.”<sup>7</sup> In fact, no other public official in the United States “has as much unreviewable power and discretion as the prosecutor.”<sup>8</sup> While Model Rule 8.4 represents an ideal, the traditional checks and balances that constrain government power in other realms simply do not apply to the prosecutor, a party which exercises legislative, executive, and judicial functions without significant constraints.<sup>9</sup>

In addition to the growth of prosecutorial power in recent decades,<sup>10</sup> jail time has become an increasingly prevalent method of punishment in the American criminal justice system, and prison terms have increased substantially.<sup>11</sup> This

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6. MODEL RULES OF PROF'L CONDUCT R. 8.4 (2018) (“It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice[.]”).

7. Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 961 (2009).

8. *Id.* at 960.

9. See David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 512–13 (2016).

10. *Id.* at 481.

11. William T. Pizzi, *Understanding the United States' incarceration rate*, 95 JUDICATURE 207, 207 (2012) (explaining the sharp and consistent increase in the United States incarceration rate since the late 1970s).

seems to be a uniquely American phenomenon, as U.S. incarceration rates have “reached multiples of the rates in other western countries.”<sup>12</sup> This has led to bipartisan decriminalization efforts initiated by groups on both sides of the aisle.<sup>13</sup> Many of these groups have set forth proposed decarceration policies in response to growing pushback against rising incarceration rates, placing us in what one scholar has referred to as the dawn of the “decarceration era.”<sup>14</sup> The goals of these decarceration policies include reducing the prison population, improving prison conditions, and preparing inmates for successful reentry into mainstream society.<sup>15</sup>

## B. COVID & PRISONS

The COVID pandemic has, at least temporarily, altered the world as we once knew it. Social distancing requirements, capacity limitations, and mask mandates have become the new normal. These restrictions and the guidance provided by top medical experts are ever-changing in an attempt to curb the spread of COVID as the pandemic continues to develop and evolve.<sup>16</sup> A pandemic of this scale is truly unprecedented in modern times, and beyond the direct effect on those who have been ill and those who have lost loved ones to the virus, the secondary effects of the restrictions have placed a significant strain on mental health and wellness.<sup>17</sup>

Given the technological capabilities of the modern world, people’s daily lives have often shifted to a virtual format in some way, allowing people to complete various personal and professional tasks from the comfort (and sanitation) of their

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12. *Id.*

13. See *Criminal Law Reform*, ACLU, <https://www.aclu.org/issues/criminal-law-reform> [<https://perma.cc/X4W9-N49Z>] (last visited Feb. 7, 2021); *Overcriminalizing America*, MANHATTAN INST., <https://www.manhattan-institute.org/overcrim> [<https://perma.cc/M7GK-RJZA>] (last visited Feb. 7, 2021). For a discussion of the conservative shift toward decriminalization efforts, see Pat Nolan, *Conservatives and Liberals Join Together for Criminal Justice Reforms*, RIGHT ON CRIME (Apr. 16, 2015), <https://rightoncrime.com/2015/04/conservatives-and-liberals-join-together-for-criminal-justice-reforms/> [<https://perma.cc/Z6AN-AH6B>].

14. Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 71 (2016).

15. *Id.* at 74–75.

16. See *The Changing Nature of the COVID-19 Response*, ATLANTIC HEALTH SYS. (Sept. 11, 2020), <https://www.atlantichealth.org/about-us/stay-connected/news/content-central/2020/covid-19-coronavirus/community-conversations/covid-response-evolves.html> [<https://perma.cc/C4G3-D6QB>].

17. See, e.g., William Wan, *For months, he helped his son keep suicidal thoughts at bay. Then came the pandemic.*, WASH. POST (Nov. 23, 2020), <https://www.washingtonpost.com/health/2020/11/23/covid-pandemic-rise-suicides/> [<https://perma.cc/T7D8-6T9X>] (“Since the coronavirus arrived, depression and anxiety in America have become rampant. Federal surveys show that 40 percent of Americans are now grappling with at least one mental health or drug-related problem. But young adults have been hit harder than any other age group, with 75 percent struggling.”); Jeff Wilser, *How Will We Cope With the Pandemic Fall?*, N.Y. TIMES (Oct. 9, 2020), <https://www.nytimes.com/2020/10/09/well/family/fall-covid-mental-health.html> [<https://perma.cc/RMS6-SCWZ>] (explaining people’s severe anxiety induced by the return indoors pursuant to COVID restrictions after the warm weather of summer and fall ended as well as the unprecedented nature of these concerns).

own homes through the Internet and Zoom calls.<sup>18</sup> In the legal world, trials in many jurisdictions have transitioned to Zoom, a process filled with its own unique set of challenges.<sup>19</sup> However, given that prison sentences cannot be served online, the prison system cannot operate in the virtual environment into which other institutions and industries have transitioned over the past year.<sup>20</sup> Therefore, incarceration policies are of heightened concern to both policymakers and criminal justice system actors during this pandemic.

Since the beginning of the COVID crisis, there have been grave concerns regarding the potential spread of the deadly virus within prisons and detention centers as well as to the communities surrounding such facilities.<sup>21</sup> High population density within confined spaces limits social distancing abilities, and a lack of basic sanitary supplies among a vulnerable population has led to conditions that are conducive to the rapid spread of easily communicable viruses.<sup>22</sup> Therefore, prisons and detention centers pose a special threat to public health during pandemics such as COVID.

## II. COVID'S EFFECTS IN PRISONS & PROSECUTORIAL RESPONSES

Many prosecutors have responded to COVID's threat to the prison system by systematically and intentionally failing to initiate charges for many low-level offenses and recommending that certain nonviolent criminals be released from prison or pre-trial detention.<sup>23</sup> The utilization of prosecutorial discretion to limit crowding in jails and backlogs on court dockets during the pandemic has led to different responses across localities; our decentralized criminal law system has become an arbitrary patchwork of law enforcement during this crisis, where the same laws may be applied differently, and in some cases may not even be applied at all, from jurisdiction to jurisdiction.

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18. See Rory Cellan-Jones, *Coronavirus: What if this had happened in 2005?*, BBC (Mar. 28, 2020), <https://www.bbc.com/news/technology-52052502> [<https://perma.cc/GN24-RFJJ>] (explaining the telework phenomenon induced by the COVID pandemic as well as the unfeasibility of such a transition just fifteen years earlier).

19. See Cara Salvatore, *May It Please The Camera: Zoom Trials Demand New Skills*, LAW360 (June 29, 2020), <https://www.law360.com/articles/1278361/may-it-please-the-camera-zoom-trials-demand-new-skills> [<https://perma.cc/77HQ-LSKN>].

20. *But see* Mirko Bagaric, Dan Hunter & Gabrielle Wolf, *Technological Incarceration and the End of the Prison Crisis*, 108 J. CRIM. L. & CRIMINOLOGY 73, 77 (2018) (advocating for the use of "technological and remote surveillance capabilities for dealing with criminals").

21. See Michael Ollove, *How COVID-19 in Jails and Prisons Threatens Nearby Communities*, PEW CHARITABLE TR. (July 1, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/01/how-covid-19-in-jails-and-prisons-threatens-nearby-communities> [<https://perma.cc/UQJ6-7XVE>].

22. *Id.*; see also Timothy Williams, Benjamin Weiser & William K. Rashbaum, *'Jails Are Petri Dishes': Inmates Freed as the Virus Spreads Behind Bars*, N.Y. TIMES (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html> [<https://perma.cc/G3PY-YLCM>].

23. See Alvin Bragg & Cynthia Godsoe, *Prosecutorial Discretion: The Prosecutor's Role in Curbing Infections in Prisons*, ROUTE FIFTY (June 5, 2020), <https://www.route-fifty.com/health-human-services/2020/06/prosecutors-role-curbing-infections-prisons/165937/> [<https://perma.cc/9DMQ-EG4E>].

During the initial outbreak, localities ranging from large cities to small municipalities released significant numbers of individuals from custody.<sup>24</sup> Even officials in conservative localities such as Morgan County, Alabama, “which voted for President Trump [in 2016] by a more than three-to-one margin,” released “more than 100 people from custody prior to having any known Covid-19 cases.”<sup>25</sup> Given the general emphasis by conservatives on being tough on crime to keep law and order,<sup>26</sup> this suggests that the enactment of these policies was not a politically motivated decision but rather one focused largely on public health during a period of extreme uncertainty. Various law enforcement officials from across the nation signed a joint statement early on in the pandemic requesting that jails stop admitting and detaining people if they do not pose a “serious risk to the physical safety” of communities and that prosecutors “take steps to dramatically reduce detention and the incarcerated population.”<sup>27</sup> Some states and localities went ahead with this plan; deals were struck between prosecutors and defense attorneys to release groups of inmates from jails.<sup>28</sup> Cities such as New York began to pursue a policy of non-prosecution of low level offenses.<sup>29</sup> California set bail at \$0 across the board, virtually guaranteeing defendants the opportunity to be released pending what would almost certainly be delayed trials.<sup>30</sup> While the specific approaches taken were varied and numerous given the localized nature of criminal law enforcement, there was one commonality: actors in the criminal justice system were responding to the invisible threat posed by the virus which was, and largely remains, a source of significant uncertainty.

One particular logistical concern common to all release policies has been the chance of spreading the virus to the wider community rather than containing an outbreak within the walls of a prison.<sup>31</sup> In cities such as New Orleans, prosecutors refused to adopt a blanket release policy due to concerns of infecting the general public in the city.<sup>32</sup> Further, in a concerning response to the incentives created by

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24. *See id.*; *see also* Brentin Mock, *Where Inmates Are Getting Bailed Out in the Coronavirus Crisis*, BLOOMBERG (Mar. 21, 2020), <https://www.bloomberg.com/news/articles/2020-03-21/prosecutors-are-halting-arrests-amid-covid-19-outbreak> [<https://perma.cc/C3Z8-7H3B>] (explaining that Baltimore halted prosecution of all drug, prostitution, and public urination offenses).

25. Bragg & Godsoe, *supra* note 23.

26. *See, e.g.*, Josh Kelety, *Trump Makes Law-and-Order Pitch in Phoenix While Arizona COVID-19 Cases Surge*, PHX. NEW TIMES (June 24, 2020), <https://www.phoenixnewtimes.com/news/trump-arizona-law-and-order-rally-students-covid-protesters-supporters-11477273> [<https://perma.cc/Z996-67SE>].

27. *Joint Statement from Elected Prosecutors on COVID-19 and Addressing the Rights and Needs of those in Custody*, FAIR AND JUST PROSECUTION, at 2 (Mar. 25, 2020), <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf> [<https://perma.cc/B8XB-KZ8T>].

28. Bragg & Godsoe, *supra* note 23.

29. Nicole Zayas Fortier & Weronika Bzura, *Prosecutors Disappoint During the Pandemic*, ACLU (July 29, 2020), <https://www.aclu.org/news/criminal-law-reform/prosecutors-disappoint-during-the-pandemic/> [<https://perma.cc/W2DF-EZHK>].

30. *Id.*

31. *See* Ollove, *supra* note 21.

32. *See* Mock, *supra* note 24.

new release policies, inmates in one California prison were discovered to be colluding to voluntarily infect themselves with COVID in order to increase their chances of release.<sup>33</sup> Coordinated efforts to infect one another exacerbate the already challenging problem of managing COVID. The release policies in place were the direct cause of these opportunistic behaviors; without the chance to be let out of jail, there is no reason to voluntarily infect oneself with a potentially lethal virus.

As fears at the outset of the pandemic predicted, COVID has “shined a light on vulnerable communities and weak spots in the health care system.”<sup>34</sup> The rate of underlying conditions among incarcerated people is much higher than the general population, which has led to a greater risk of complications and death from the virus.<sup>35</sup> Spread of the virus within prisons has been significant: nearly half of the South Dakota prison population tested positive for the virus at one point, and prison staff have spread the virus to the greater communities within the state.<sup>36</sup> At the Elmira Correctional Facility in New York, nearly forty percent of inmates tested positive for the virus in October of 2020.<sup>37</sup> Spread to surrounding communities has also proven to be a valid concern.<sup>38</sup> For those who have been released, rejoining society and communities plagued by unemployment and other trauma caused by the pandemic and the ensuing economic restrictions has been even more difficult than during normal times; there has been a strain placed on support systems because of the large number of newly freed prisoners that have been released within relatively short periods of time.<sup>39</sup>

Prisons have taken a wide variety of steps to help ease the spread of the virus in the same way that the greater nation has. These measures include mass testing, quarantining those who test positive, restricting access to community work and volunteer programs, revising schedules to limit contact, and bolstering disinfection services.<sup>40</sup> When case numbers rise, some prisons have even resorted to

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33. Timothy Bella, *Inmates tried to infect themselves with the coronavirus to get early release*, *Los Angeles County sheriff says*, WASH. POST (May 12, 2020), <https://www.washingtonpost.com/nation/2020/05/12/inmates-coronavirus-infect-los-angeles/> [<https://perma.cc/AXZ8-HDYJ>].

34. Erin Schumaker, *Almost half of South Dakota's prison population tests positive for COVID-19*, ABC NEWS (Oct. 27, 2020), <https://abcnews.go.com/Health/half-south-dakotas-prison-population-tests-positive-covid/story?id=73853624> [<https://perma.cc/8AMC-UP62>].

35. *Id.*

36. *Id.*

37. Graham Kates, *Hundreds of inmates test positive as COVID-19 rips through New York prison*, CBS NEWS (Oct. 28, 2020), <https://www.cbsnews.com/news/covid-new-york-elmira-correctional-facility-outbreak/> [<https://perma.cc/7RRC-JR7C>].

38. See, e.g., Ruth Brown, *At Oregon prison, most staff are Idahoans. COVID-19 cases here tied to outbreak there*, IDAHO STATESMAN (Oct. 23, 2020), <https://www.idahostatesman.com/news/coronavirus/article246584198.html> [<https://perma.cc/VDD3-AXZ2>].

39. See Abené Clayton, *Freed, then locked in: leaving a California prison amid a pandemic*, GUARDIAN (Oct. 29, 2020), <https://www.theguardian.com/us-news/2020/oct/29/california-prisons-covid-19-pandemic-releases-reentry> [<https://perma.cc/WF3T-DM8Z>].

40. See Schumaker, *supra* note 34.

utilizing solitary confinement cell blocks for isolating those who test positive to prevent further spread.<sup>41</sup> In Oklahoma, the shutdown of visitation and volunteer programs has proven successful, as has a hazard pay program meant to incentivize more prison workers to station themselves within COVID hot spot areas inside prisons.<sup>42</sup> In order to more effectively wall off prisons from the outside world, Oklahoma's Department of Corrections has also instituted daily health screenings and temperature checks for prison workers to ensure they are not spreading the virus throughout the prison or to the greater community after their shift ends and they return home.<sup>43</sup> Limiting prisoner movement during outbreaks and increasing the frequency at which surfaces are sanitized have also proven successful in easing the spread of the virus.<sup>44</sup>

### III. IMPACTS ON THE CRIMINAL JUSTICE SYSTEM & RULE OF LAW

Beyond the individual level concern of providing prisoners with an incentive to contract the virus, release and non-prosecution policies have grave impacts on the greater criminal justice system and rule of law. Without the potential for punishment, the law no longer serves as a deterrent to those contemplating criminal acts. Also, the legitimacy of the criminal justice system comes into question when actors within the system use their broad discretion in a manner that leads to differential enforcement of the same laws from one locality to the next. Finally, despite the urge to consider crime rates in deciding whether the policies that have been instituted have had the expected negative effects, this methodology has serious drawbacks. Even if reported crime has been unaffected, unreported crime, which remains undetected in these statistics, may have grown given the lockdowns in place across the nation. As a result of these lockdowns, there are much fewer opportunities for criminal behavior, much fewer officers patrolling the streets to witness and report crime, and potentially much more crime occurring within the home away from the view of the public eye.

#### A. A LACK OF DETERRENCE

When actors within the criminal justice system make public statements that they will not initiate charges for a particular contemplated offense, a potential

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41. See Marcia Brown, *Prisons' Pandemic Response: Throw the Infected Into the Hole*, AM. PROSPECT (Oct. 29, 2020), <https://prospect.org/justice/prisons-coronavirus-pandemic-response-solitary-confinement/> [<https://perma.cc/9EYG-JEAF>]; see also Arielle Zionts, *Pennington County Jail creates quarantine lockdown units to prevent COVID-19 spread*, RAPID CITY J. (Oct. 28, 2020), [https://rapidcityjournal.com/news/local/pennington-county-jail-creates-quarantine-lockdown-units-to-prevent-covid-19-spread/article\\_12b0c049-dd2f-59dc-b34f-701680383b42.html](https://rapidcityjournal.com/news/local/pennington-county-jail-creates-quarantine-lockdown-units-to-prevent-covid-19-spread/article_12b0c049-dd2f-59dc-b34f-701680383b42.html) [<https://perma.cc/3EPQ-S5SL>].

42. See Janelle Stecklein, *DOC strategy seems to be slowing spread of COVID-19*, DUNCAN BANNER (Oct. 29, 2020), [https://www.duncanbanner.com/oklahoma/news/doc-strategy-seems-to-be-slowing-spread-of-covid-19/article\\_f77eb6cb-6336-52c2-9b43-631b2b3dbaff.html](https://www.duncanbanner.com/oklahoma/news/doc-strategy-seems-to-be-slowing-spread-of-covid-19/article_f77eb6cb-6336-52c2-9b43-631b2b3dbaff.html) [<https://perma.cc/JDW6-XJZN>].

43. See *id.*

44. See *id.*

criminal will not perceive a threat of being caught for that crime.<sup>45</sup> Put simply, when there are no consequences in place for certain acts, there is no external incentive not to commit those acts. This creates a window for opportunism, allowing criminals to commit acts that normally would carry at least a marginal threat of capture and ultimately punishment. When getting away with a crime is the top concern, the lack of deterring consequences may potentially lead to a rise in crime in locales that have announced these non-prosecution plans. This permits lawlessness in communities where there are publicized and systematic release and non-prosecution policies in place.

Under the deterrence theory of punishment, when morality is not a meaningful constraint, this lack of a disincentive fails to prevent potential criminals from committing the discouraged act, i.e., the crime.<sup>46</sup> Popular acceptance of the proposition that harsher sentences that are out of proportion to the crime in question can deter future crime in part explains the rapid and steady increase in incarceration rates and prison terms.<sup>47</sup> Despite this perception, the reality is that the deterrent effect is brought about not by the severity of the punishment, but rather by the perception and certainty of being caught.<sup>48</sup> Certainty of punishment under a system of law, when proportional to the crime, tends to deter commission of the crime.<sup>49</sup> Rather than the certainty of punishment necessary for criminal deterrence, in many jurisdictions during the COVID era there has been just the opposite in place: certainty of non-punishment.<sup>50</sup> Some may argue that release policies have less of an impact on deterrence than non-prosecution policies because in the case of the former, folks have already been through the criminal justice system and served some sort of punishment in prison for their crime. However, both reflect a more lax approach to punishment where people are punished to a lesser degree than they would have been in a pre-COVID world; in other words, the pandemic dictates people's fate rather than their individual circumstances.

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45. See Misha Glenny, *From drug dealers to loan sharks: how coronavirus empowers organized crime*, GUARDIAN (June 7, 2020), <https://www.theguardian.com/commentisfree/2020/jun/07/drug-dealers-loan-sharks-organised-crime-coronavirus> [<https://perma.cc/V5Q3-BDVP>].

46. See Owen Gallupe & Stephen W. Baron, *Morality, Self-Control, Deterrence, and Drug Use: Street Youths and Situational Action Theory*, 60 CRIME & DELINQ. 284, 284 (2014) (“[M]orality has a strong effect on hard but not soft drug use, whereas the impact of deterrence on both forms of behavior is stronger than self-control.”).

47. Pizzi, *supra* note 11, at 208.

48. *Five Things About Deterrence*, NAT'L INST. JUST., at 1 (May 2016), <https://www.ncjrs.gov/pdffiles1/nij/247350.pdf> [<https://perma.cc/X3SH-ZDWM>]; see German Lopez, *The great majority of violent crime in America goes unsolved*, VOX (Mar. 1, 2017), <https://www.vox.com/policy-and-politics/2017/3/1/14777612/trump-crime-certainty-severity> [<https://perma.cc/V9U9-2J78>] (explaining the rise in prison sentences and mandatory minimum sentences, which have proven ineffective because they focus on harshness of punishment rather than certainty of punishment which is the true deterrent in the criminal justice system).

49. Pizzi, *supra* note 11, at 208.

50. See Ben Stickle & Marcus Felson, *Crime Rates in a Pandemic: the Largest Criminological Experiment in History*, 45 AM. J. CRIM. JUST. 525, 528 (2020) (“[P]unitive responses to crime . . . were slowed or ceased altogether as courts closed, police were encouraged to reduce contact with the public, and thousands of prisoners were released early.”).



Therefore, the negative impact on deterrence is likely to be similar for both release and non-prosecution policies.

### B. ARBITRARY GOVERNMENT POWER

The differential enforcement of the same laws also creates concerns that the use of government power will be perceived as arbitrary.<sup>51</sup> Where the criminal justice system provides discretion to its actors, that discretion can be utilized for an improper purpose without a means by which the injured party can petition for redress.<sup>52</sup> The criminal justice system implements the incredible yet necessary power of depriving citizens of their liberties. While discretion is a necessary tool to ensure that justice is served in the wide variety of cases that arise across a wide variety of jurisdictions and circumstances,<sup>53</sup> prosecutors have a duty as lawyers to utilize that discretion appropriately.<sup>54</sup> Consistent treatment of defendants and consistent application of the criminal law are necessary components of a legitimate criminal justice system which citizens entrust with such great powers.<sup>55</sup> Tangible and clear consequences in many cases provide the disincentive necessary to prevent wrongdoing, while wavering and very distant threats of punishment do not. A more uniform method of addressing the threat posed by COVID to those within prisons, such as case-by-case adjudication across all localities, is less arbitrary and therefore lends more legitimacy to the criminal law enforcement efforts taking place during the pandemic.

### C. IMPACTS ON CRIME RATES

As the world returns to some greater degree of normalcy, an enduring lack of deterrence from the criminal justice system coupled with a revival of opportunities for criminal behavior could have the dangerous and expected impact of increasing crime rates across the board.<sup>56</sup> As the opportunity to commit certain

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51. See Jasmine Heiss, Oliver Hinds, Eital Schattner-Elmaleh & James Wallace-Lee, *The Scale of the COVID-19-Related Jail Population Decline*, VERA INST. JUST., at 3 (Aug. 2020), <https://www.vera.org/downloads/publications/the-scale-of-covid-19-jail-population-decline.pdf> [<https://perma.cc/VBE4-QB5J>] (“[The] patchwork facilitation of releases echoes the often irregular administration of criminal legal systems from state to state, county to county, and courtroom to courtroom that emerges when law enforcement, prosecutors, judicial actors, and others are granted such broad discretion to punish and incarcerate.”).

52. See Ross J. Corbett, *Suspension of Law during Crisis*, 127 POL. SCI. Q. 627, 636 (2012) (“If the law is vague enough to grant the needed discretion, it is difficult to see how misuse of that discretion could be condemned in practice in all but the most egregious cases.”).

53. See *id.* at 630.

54. See generally MODEL RULES OF PROF'L CONDUCT R. 8.4 (2018).

55. See Sheldon A. Evans, *Categorical Nonuniformity*, 120 COLUM. L. REV. 1771, 1800 (2020) (“The means of the decisionmaking process is what promotes the legitimacy in a system of uniform application . . . . Applying the *same* means, regardless of the inputs or outputs, is what legitimizes the process by establishing a level of equity that carries a sense of fairness.”).

56. See Neil MacFarquhar & Serge F. Kovaleski, *A Pandemic Bright Spot: In Many Places, Less Crime*, N.Y. TIMES (May 26, 2020), <https://www.nytimes.com/2020/05/26/us/coronavirus-crime.html> [<https://perma.cc/R2MZ-VKM4>] (“History indicates that hard times often reduce crime. Chicago showed a marked drop in murders in 1918, when America faced the devastating Spanish flu . . . . After 293 killings in the city in 1917, the number fell to 260 in 1918 before rising to 345 the following year.”).

crimes has increased and the vigilance of police patrolling lesser crimes has decreased, the profile of crime in America has already changed drastically since before the start of the pandemic.<sup>57</sup>

There has been an uptick in property thefts, including both vehicles and commercial buildings, in some cities during the crisis due to vacancies, abandonment, and decreased utilization of both forms of property.<sup>58</sup> There has been a corresponding drop in home burglaries because residences are less likely to be vacant when people are sheltering in place and quarantining.<sup>59</sup> Also, despite a drop in overall violent crime rates, homicide rates in many cities either remained high or have risen.<sup>60</sup> Chicago Mayor Lori Lightfoot mentioned that the impact of the virus on the normal operations of jails and courts may be partially to blame, with more people intent on causing harm out on the city streets rather than confined in prison.<sup>61</sup>

Beyond crimes involving other people, there is also likely to be less street patrolling by the police given their role in enforcing the evolving COVID-related policies; further, there have been significant personnel limitations in departments caused by officers who have become ill with the virus as well as those who are mandated to quarantine at home after known exposure to it.<sup>62</sup> In many locales, officers have also been preoccupied in responding to the unrest and riots that have come to symbolize the turbulent state of the world of late.<sup>63</sup> As a result of these several contributing factors, low level offenses may not be reported to the same degree that they were before COVID simply because they are not being caught by law enforcement as often as they once were. In some extreme cases, even more serious crimes such as domestic abuse may be going unreported due to

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57. See John H. Boman IV & Owen Gallupe, *Has COVID-19 Changed Crime? Crime Rates in the United States during the Pandemic*, 45 AM. J. CRIM. JUST. 537, 537 (2020).

58. Brooke Wolford, *Coronavirus has 'massive' impact on US crime rates: Here are some of the big changes*, MIAMI HERALD (July 21, 2020), <https://www.miamiherald.com/news/coronavirus/article244393022.html> [<https://perma.cc/L6XV-VHWC>].

59. *Id.*

60. See Cheryl Corley, *Crime Has Declined Overall During the Pandemic, But Shootings And Killings Are Up*, NPR (July 20, 2020), <https://www.npr.org/2020/07/20/892418244/crime-has-declined-overall-during-the-pandemic-but-shootings-and-killings-are-up> [<https://perma.cc/DY3F-C92A>]; MacFarquhar & Kovaleski, *supra* note 56 (“With fewer witnesses around and with the police less likely to stop them, [young men] feel less vulnerable to being caught. The men also find it easier to track down rival drug lords or gang leaders, who are most likely sheltering at home like everyone else.”).

61. Corley, *supra* note 60.

62. See *id.* (“[D]rug crimes are measured by arrests, not citizen reports to police,” [Arizona State University criminologist Ojmarrh] Mitchell says. “During a pandemic, police aren’t necessarily employing the pro-active police tactics and practices that typically result in discovering drugs.”); MacFarquhar & Kovaleski, *supra* note 56 (“The dip in crime has been compounded by the fact that some police departments have been hampered by quarantines, or have made fewer arrests to limit interactions or to avoid filling jails.”).

63. See, e.g., Manny Fernandez, *For Police Officers, Demonstrations Take a Toll and Test Duty*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/2020/06/02/us/police-officers-minneapolis-protest.html> [<https://perma.cc/T422-WLRJ>]; Danielle Wallace, *Over 60 Portland 911 calls go unheeded overnight as police respond to riot*, FOX NEWS (Aug. 16, 2020), <https://www.foxnews.com/us/portland-riots-911-calls> [<https://perma.cc/XR7D-4NKS>].

victims' inability to escape from their homes in addition to their lack of in-person access to mandated reporters, such as teachers or psychologists, who may recognize signs of abuse.<sup>64</sup> Crimes occurring in private and out of the criminal justice system's sight can become more prevalent without ever showing up in local crime statistics. Without comprehensive and complete data, such conclusions about a drop in crime are misleading. In addition to painting an incomplete picture of crime rates in evaluating release and non-prosecution policies, there is also a concern that those who have been released from jail or not prosecuted for their crime may return home and cause domestic violence problems, perpetuating crime that goes unreported but is directly linked to such policies.<sup>65</sup>

Proponents of blanket release and non-prosecution policies argue that there has been no clear and definitive pattern of an increase in crime since these policies have been implemented, as would have otherwise been expected without the deterring effect of potential punishment in place.<sup>66</sup> However, the data presently available creates an incomplete picture given where we currently stand amidst this crisis which is still unfolding and is in many ways worsening with the passage of time. Further, the data that is available may be skewed because there is less opportunity for criminal behavior involving other people with the quarantine orders and work-from-home policies in place; these regulations have generally kept people in their homes and out of large metropolitan centers where such crime is more likely to take place.<sup>67</sup> Therefore, COVID-related policies may have temporarily created a safer world in general with less opportunity for crime. Like so many other aspects of this crisis, the true, full impact is yet to be determined.

#### IV. POTENTIAL SOLUTIONS

Given the individualized nature of criminal law enforcement and punishment, case-by-case adjudication which considers the specific circumstances and exigencies at play is a necessary element of any decision to release a prisoner or to not prosecute a defendant. As the pandemic continues to unfold and the criminal justice system is forced to adapt, virtual trials will likely become more common and

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64. See MacFarquhar & Kovaleski, *supra* note 56 (“Some cities indicated a decrease in both domestic abuse and child abuse calls. The police in those cities said they suspected that abuse was actually more prevalent, given that most people are stuck at home. But with no teachers to spot bruises in the classroom, and nowhere for people to escape their abusers, such crimes were less visible, they said.”).

65. See Boman & Gallupe, *supra* note 57, at 541–42 (“Lockdowns have forced those who cohabit to remain in close proximity with each other and thereby have increased opportunity for domestic provocation and intimate partner altercations. . . . Unfortunately, domestic argument calls have more than doubled . . . during the COVID-19 lockdowns compared to the same time period in . . . 2019.”).

66. See *Decarceration and Crime During COVID-19*, ACLU (July 27, 2020), <https://www.aclu.org/news/smart-justice/decarceration-and-crime-during-covid-19/> [<https://perma.cc/TN6E-KC8Q>] (“[T]he reduction in jail population was functionally unrelated to crime trends in the following months. In fact, in nearly every city explored, fewer crimes occurred between March and May in 2020 compared to the same time period in 2019, regardless of the magnitude of the difference in jail population.”).

67. See Wolford, *supra* note 58.

will become a more reliable method of adjudication with time. When put into effect properly, solitary confinement may also help isolate inmates who have contracted COVID in order to prevent spread to other inmates. Finally, universities serve as a strong model for prison policy given that both institutions face the same challenges that come with the clustering of large population groups during a pandemic where preventing spread is the top priority. Recommendations and improvements in various realms, such as ventilation systems, food services, sanitation, contact tracing, and properly-instituted lockdowns, can be applied in prisons to help ensure that they remain a viable option in the criminal justice system and thus reduce the need to rely on release and non-prosecution policies.

#### A. NECESSARY CASE-BY-CASE ADJUDICATION & VIRTUAL TRIALS

Blanket release and non-prosecution policies are not the proper response to the COVID pandemic. Case-by-case adjudication is a fundamental requirement in our criminal justice system to achieve justice and the consistency required by the rule of law. Unjustified differential treatment across different localities and between individual prisoners lacks basic fairness and erodes the courts' vital power of persuasion.

There are concerns that there is not enough time to litigate each prisoner's individual petition for release or to determine whether each crime committed should be prosecuted in a way that considers an individual's vulnerability to serious illness or death from the virus.<sup>68</sup> However, such a process is a necessity of the criminal justice system. A person's rights as they move throughout the criminal justice system are individual ones; he or she is tried as an individual and he or she serves out his or her punishment as an individual. Thus, the decision not to prosecute him or her or to release him or her once in prison ought to also be an individualized decision which takes into account the specific circumstances surrounding incarceration; these include the prisoner's health and the level of spread within the particular prison in which they are serving the sentence or to which they would be sent if convicted. This is not to say that the evaluation of each individual's circumstances must be completely comprehensive, as this would certainly put a strain on the system. However, generally applicable policies that blindly apply to all prisoners and potential defendants in a given jurisdiction or to all who have been convicted of a particular crime evade the individualized nature of the administration of the American criminal justice system.

As actors within the criminal justice system become more familiar with and adept at working by means of videoconferencing software over the Internet, case backlogs within courts will likely decline as judges become better able to hear

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68. See Mock, *supra* note 24 (“‘Now is not the time for a piecemeal approach where we go into court and argue one by one for the release of at-risk individuals,’ wrote [Baltimore State’s Attorney Marilyn] Mosby to her staff, The Baltimore Sun reported.”).

and dispose of more cases on their dockets.<sup>69</sup> The ability to keep up with case-loads will be one incentive to move away from the release and non-prosecution policies that have been utilized in many localities during this pandemic; courts will be better-equipped to hear individual petitions for release in a timely manner. Also, despite the unique challenge posed by jury trials in a virtual world,<sup>70</sup> continual postponement is not the answer. Rather, despite the challenge, courts ought to work expeditiously at instituting the technology and logistics necessary to conduct jury trials via teleconferencing software through which jurors can serve their civic duty from their homes when proper in-person social distancing is an impossibility. Hiring technology consultants and facilitators may help to speed this process along. Despite pushback and skepticism, virtual jury trials have proceeded fairly regularly in the civil context and in some limited situations in the criminal context for low-level offenses.<sup>71</sup> Expanding them further in the realm of criminal trials appears inevitable,<sup>72</sup> and it will do wonders for getting the justice system closer to pre-pandemic normalcy. Making the adjudication portion of the criminal justice process as normal as possible will help actors in the system abandon policies that have kept people away from the criminal justice system entirely, given that it will make case-by-case resolutions more feasible again.

#### B. SOLITARY CONFINEMENT AS A SUBSTITUTE FOR QUARANTINE

When properly tailored and modified, isolation and solitary confinement are a workable form of quarantine within prisons,<sup>73</sup> with some similarities to the quarantine and stay-at-home orders in place across the nation. Given that the high population density and lack of basic sanitation in prisons make quarantining essentially impossible,<sup>74</sup> this may be the next best option. Solitary confinement areas could be utilized to isolate those who test positive for the virus to reduce the risk of them spreading it to other inmates or even to isolate and protect the most vulnerable of prisoners from exposure during an outbreak.<sup>75</sup> Determinations of

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69. See IBA Litigation Committee, *Impact of COVID-19 on Court Operations & Litigation Practice*, INT'L B. ASS'N, at 110–13 (June 22, 2020).

70. See *id.*

71. See David Lee, *Texas Judge Holds First Virtual Jury Trial in Criminal Case*, COURTHOUSE NEWS SERV. (Aug. 11, 2020), <https://www.courthousenews.com/texas-judge-holds-first-virtual-jury-trial-in-criminal-case/> [<https://perma.cc/W26Q-D9HP>].

72. See Carl Smith, *All Rise: Virtual Court Is Now in Session*, GOVERNING (Sept. 16, 2020), <https://www.governing.com/now/All-Rise-Virtual-Court-Is-Now-in-Session.html> [<https://perma.cc/EUC7-3BYR>].

73. See Brown, *supra* note 41.

74. See *Covid-19's Impact on People in Prison*, EQUAL JUST. INITIATIVE (last visited Feb. 13, 2021), <https://eji.org/news/covid-19s-impact-on-people-in-prison/> [<https://perma.cc/289T-ZR65>] (“The inability to quarantine or practice social distancing, together with overcrowding, imperils the lives of many people incarcerated in jails and prisons.”).

75. See David Cloud, Dallas Augustine, Cyrus Ahalt & Brie Williams, *The Ethical Use of Medical Isolation – Not Solitary Confinement – to Reduce COVID-19 Transmission in Correctional Settings*, AMEND AT UCSF, at 1, 3 (Apr. 9, 2020) (distinguishing punitive solitary confinement from medically beneficial medical isolation procedures).

who gets to be isolated could take into account factors such as age and underlying conditions which make someone more susceptible to serious complications from the virus. Such a policy must be instituted humanely, and prisoners must of course be treated with dignity and continue to be provided with basic human necessities while in isolation. Prisons could even make such a system voluntary, where those within the most vulnerable groups (whether because of age or preexisting health conditions) who wish to isolate away from the rest of the prison community sign up for and are selected from a lottery process.

Opponents of such policies have raised concerns about the punitive aspects of solitary confinement including restrictions on recreation opportunities, visitors, and access to personal property, as well as potential prisoner reluctance to report symptoms due to a fear of being placed in solitary confinement as a result.<sup>76</sup> However, for many prisoners, isolation may be a welcome reprieve if it means staying healthy and stopping the rapid spread of this potentially lethal virus, particularly for those who are at the greatest risk of becoming seriously ill or even dying should they contract the virus. As discussed, there have been significant restrictions on visitors and recreation for the entirety of prison populations during this pandemic, so prisoners likely would not be suffering much more serious burdens while in medical isolation, and these increased burdens would be voluntary in a system such as the one outlined above. Likewise, despite the stigma of solitary confinement as severely isolating and harmful, it likely would not carry the same degree of mental health concerns as longer term solitary confinement given its limited duration and its purpose in this context as a temporary protective method rather than a permanent form of punishment.<sup>77</sup> As part of the voluntary system, permitting prisoners to opt out of isolation would help make this seem less punitive and more precautionary.

### C. UNIVERSITIES AS A MODEL

Prisons and detention centers need stricter precautions and protocols to ensure that they remain viable options for criminal sentencing without creating undue risks of viral transmission. Similar to the problems faced on university campuses, these institutions need policies and procedures in place to limit crowded areas and to track and ultimately reduce the spread of the virus within their populations. While universities have had the luxury of closing their campuses and operating virtually, those that have continued in-person operations and those that will begin to open again in the near future are useful guides for basic prison policies of what is and is not effective in stopping the spread of the virus. Both institutions contain a “mixed population” of people “ranging from young to older adults who are

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76. See *id.* at 2.

77. See Kirsten Weir, *Alone, in ‘the hole’*, APA (May 2012), <https://www.apa.org/monitor/2012/05/solitary> [<https://perma.cc/9SSA-AS3X>] (distinguishing “relatively short” solitary confinement for days and weeks utilized during the 20th century from solitary confinement for years which is used today).

highly interconnected in multiple, close-contact networks,” making institutions of higher education a useful starting point in the inquiry into how to make prisons safer during the pandemic.<sup>78</sup>

### 1. VENTILATION SYSTEMS

Prisons ought to install and update their ventilation systems to ensure adequate purification of the air and reduce viral particle counts. The CDC has issued guidance for institutions of higher education operations to stop the spread of COVID, which includes suggestions regarding ventilation system upgrades.<sup>79</sup> Prisons tend to lag far behind the curve in this realm, with several states in the warmest regions of the nation failing to even install air conditioning in their facilities.<sup>80</sup> Some states have begun installing air purification systems, which make the COVID particles easier to filter out of the air.<sup>81</sup> This makes prisons safer and prevents undue risks of spreading the virus within them, allowing them to remain a viable option for actors within the criminal justice system to utilize. This ultimately erases the incentive behind the release and non-prosecution policies that are in place across the nation and helps in getting the system closer to pre-pandemic normalcy.

### 2. FOOD SERVICES & SANITATION

Prisons should focus their efforts on revamping food services for prisoners and enhancing sanitation within the facilities. The CDC guidance for higher education institutions in the realm of food services includes the use of disposable items such as plates and utensils, as well as individually plated and pre-packaged meals.<sup>82</sup> Several states have been following these measures in their prisons, but personnel limitations due to the virus have posed a significant challenge.<sup>83</sup> In addition, increases in prices from food suppliers for individually packaged meals has created serious budgeting concerns across many states.<sup>84</sup>

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78. *Considerations for Institutions of Higher Education*, CDC (Oct. 5, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/colleges-universities/considerations.html> [<https://perma.cc/36A3-EYWP>].

79. *See id.*

80. *See* Alexi Jones, *Cruel and unusual punishment: When states don't provide air conditioning in prison*, PRISON POL'Y INITIATIVE (June 18, 2019), <https://www.prisonpolicy.org/blog/2019/06/18/air-conditioning/> [<https://perma.cc/L8PA-8QEF>]; Lauren McGaughy, *'It's hell living there': Texas inmates say they are battling COVID-19 in prisons with no A/C*, DALL. MORNING NEWS (July 31, 2020), <https://www.dallasnews.com/news/investigations/2020/07/31/the-heat-is-on-texas-inmates-say-they-are-battling-covid-19-in-prisons-with-no-ac/> [<https://perma.cc/D7DG-UR6P>].

81. *See SC prisons will install air purifiers to limit COVID spread*, ASSOCIATED PRESS (Oct. 11, 2020), <https://apnews.com/article/virus-outbreak-south-carolina-prisons-245e2cce7ffb8988dde5552eb9efa390> [<https://perma.cc/6C64-2BGK>].

82. *Considerations for Institutions of Higher Education*, *supra* note 78.

83. *See* Megan Rowe, *Prison food service programs juggle inmate feeding in the coronavirus era*, FOOD MGMT. (July 30, 2020), <https://www.food-management.com/business-industry/prison-food-service-programs-juggle-inmate-feeding-coronavirus-era> [<https://perma.cc/E3ME-7DED>].

84. *See id.*

In the realm of cleanliness and sanitation, easy access to hand sanitizer throughout prison facilities is a cheap method which has been proven effective in reducing the spread of the virus and keeping people healthy.<sup>85</sup> However, due to its alcohol base and potential for abuse, this and other cleaning products are still deemed contraband in many prisons and thus are not allowed to be placed in general access areas or to be in the possession of individual prisoners.<sup>86</sup> The CDC has recommended that prisons relax such restrictions on alcohol-based sanitizer to the degree that security concerns and the specific operational environment allows.<sup>87</sup> Closer supervision and attention to the use of this and other related cleaning products by prison staff could permit the use of such an important tool in slowing the spread of the virus and thus permitting prisons to operate more safely. This in turn erases the incentive behind the release and non-prosecution policies in place in many localities.

### 3. CONTACT TRACING

Prisons ought to implement more rigorous contact tracing to better track and prevent the spread of COVID.<sup>88</sup> Prompt identification and monitoring of those that contract the virus and those they come in contact with “can break the chain of transmission effectively and prevent further spread of the virus in a community.”<sup>89</sup> Partnerships with health departments can ensure that prisons have the large amount of resources necessary to effectively and systematically track exposure and illness among prisoners within different areas of their facilities.<sup>90</sup> Better contact tracing within prisons mitigates the spread of the virus.<sup>91</sup> This makes prisons a safer option in the criminal justice system, erasing the incentives behind the release and non-prosecution policies detailed above.

### 4. LOCKDOWNS

Prisons should carefully implement lockdowns to help put out the proverbial “fire” that is the virus; this strategy focuses on completely eliminating

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85. See *Considerations for Institutions of Higher Education*, *supra* note 78.

86. See Keri Blakinger & Beth Schwartzappel, *How can prisons contain coronavirus when Purell is contraband?*, ABA J. (Mar. 13, 2020), <https://www.abajournal.com/news/article/when-purell-is-contraband-how-can-prisons-contain-coronavirus> [<https://perma.cc/VHA5-YU66>].

87. Casey Tolan, *Hand sanitizer is still considered contraband in some prisons around the country*, CNN (May 5, 2020), <https://www.cnn.com/2020/05/05/us/coronavirus-prison-hand-sanitizer-contraband-invs/index.html> [<https://perma.cc/7T63-DU4A>].

88. Cf. *Considerations for Institutions of Higher Education*, *supra* note 78.

89. *Id.*

90. *See id.*

91. See Brie A. Williams, Cyrus Ahalt, David Cloud, Dallas Augustine, Leah Rorvig & David Sears, *Correctional Facilities In The Shadow Of COVID-19: Unique Challenges And Proposed Solutions*, HEALTH AFF. (Mar. 26, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200324.784502/full/> [<https://perma.cc/ZDK2-RCB3>] (“Testing and screening for COVID-19 infections in jails and prisons is absolutely critical, as contact tracing is a feasible means of mitigating the spread of disease in a closed institution.”).



transmission of the virus by preventing all contact between people to the degree possible in modern society until those who are infected recover and are no longer contagious.<sup>92</sup> Those opposing the use of such a policy within prisons claim that it results in undetected spread of the virus.<sup>93</sup> There are further concerns about negative impacts on the mental health of prisoners arising from both the isolation of being locked and confined within cells for so many hours of the day as well as the inability to receive visitors.<sup>94</sup> However, time restrictions can be utilized to ensure that those prisoners who are sick with the virus are not locked down beyond the point at which they are no longer contagious and that those who are exposed to the virus are not locked down beyond the quarantine period for exposure. Further, permitting continued outdoor recreation time in a socially distanced manner would be helpful in promoting wellness. Exercise and even educational programs could be hosted outdoors. With such limitations and modifications, lockdowns can be the least restrictive means of preventing spread within prison communities.

In order to target lockdowns in this manner to ensure their effectiveness, there must be more comprehensive testing of prison inmates as well as prison workers, an approach which did not begin in earnest until the summer of 2020.<sup>95</sup> This follows from the contact tracing efforts detailed above. Better tracking prisoner exposure and potential spread within areas or halls of particular prisons can better inform officials regarding who requires testing. Armed with this information, lockdowns can be less burdensome and harmful while ultimately keeping prisons safer and removing the incentives behind blanket release and non-prosecution policies.

## CONCLUSION

During a year of unprecedented new norms and challenges, the duties and work of prosecutors have become the target of strong scrutiny and criticism. The pandemic that has changed our world does not appear to be abating anytime soon, so prosecutors and other criminal justice system actors have no choice but to adapt and respond with permanent and effective solutions to ensure the continuity of our criminal justice system along with the safety and health of those passing through it. Pursuant to their duty under Model Rule 8.4, these actors must remain committed to individualized adjudication to ensure that justice is done, whether

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92. See *Expert Recommends 5-Week Lockdown to Crush COVID-19*, WEBMD (Dec. 8, 2020), <https://www.webmd.com/coronavirus-in-context/video/yaneer-bar-yam> [<https://perma.cc/S7QG-JEMK>].

93. See Cloud et al., *supra* note 75, at 2 (“As a result [of lockdowns], interactions with correctional staff and healthcare staff often become less frequent and people with symptoms may go undetected.”).

94. See Reuven Blau & Rosa Goldensohn, *Families Fear for Inmates as COVID Spike Puts State Prisons on Lockdown*, CITY (Nov. 4, 2020), <https://www.thecity.nyc/justice/2020/11/4/21550496/families-fear-for-inmates-as-covid-spike-puts-state-prisons-on-lockdown> [<https://perma.cc/SEF3-H62A>]; *Prisoners locked up for 23 hours due to Covid rules is ‘dangerous,’* BBC (Oct. 20, 2020), <https://www.bbc.com/news/uk-54607813> [<https://perma.cc/TT65-WGRJ>].

95. See Blau & Goldensohn, *supra* note 94.

in prisoner release or non-prosecution decisions. This duty entails an analysis of the entirety of the circumstances and exigencies surrounding a particular case prior to acting. No one factor should be dispositive, but there must be some degree of consistency across time and place to ensure the continued legitimacy and effectiveness of the system.

In maintaining the integrity of the legal profession, prosecutors must serve and balance values including fairness and compassion as well as justice and righteousness. The recent prosecutorial policies that this Note has highlighted have not effectively balanced these virtues, and they set a dangerous precedent for the rule of law going forward for times of both peace and crisis. In the world's continued battle against an invisible enemy, continuing to learn more about it will allow officials to better trace and ultimately stifle its spread within communities such as prison systems. This will ensure not only that prisoners remain healthy, which is an important policy goal on its own, but also that prisons themselves remain a viable option for actors within the criminal justice system to utilize. This continuity with pre-pandemic norms would restore some normalcy as well as erase the need for the blanket prisoner release and non-prosecution policies that have been put in place across the United States, ultimately ridding the criminal justice system of the dangers they pose to it and the greater rule of law.