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PART II: COVID-19 AND CRIMINAL JUSTICE

CHAPTER 4

CRIMINAL JUSTICE IN A TIME OF PANDEMIC

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I. COVID-19

Coronavirus Disease 2019 (COVID-19) is a severe acute respiratory illness that has spread among people through respiratory transmissions. On January 30, 2020, the World Health Organization declared COVID-19 to be a public health emergency of international concern.¹ On March 11, 2020, the World Health Organization classified COVID-19 as a pandemic. And on May 1, 2020, with more than 3.2 million confirmed cases of COVID-19 and more than 233,000 deaths attributable to COVID-19, the World Health Organization declared that COVID-19 was still a public health emergency of international concern.²

There is no vaccine currently available for COVID-19.³ Even testing for coronavirus antibodies is largely unavailable or potentially unreliable.⁴ On April 24, 2020, the World Health Organization also warned that there was still no evidence that people who have recovered from COVID-19 and have antibodies are protected from a second infection.⁵ The number of cases and fatalities was expected to increase throughout the United States and around the world.⁶

In addition to the health issues raised, the COVID-19 pandemic has raised a great many legal issues, including issues of civil and criminal liability,⁷ substantive criminal law, and the treatment of prisoners. This chapter is being written while the pandemic rages. This chapter cannot answer all the legal questions about COVID-19 nor can it even predict the future questions that will arise. The chapter is merely a snapshot of some of the criminal law and criminal justice issues relating to COVID-19.

¹ Knvul Sheikh, *W.H.O. Renews Proclamation of Global Health Emergency*, N.Y. TIMES, May 2, 2020, at A12.

² *Id.*; James Barron, *Coronavirus Update: W.H.O. Renews Emergency Declaration*, N.Y. TIMES, May 2, 2020, at A4.

³ See, e.g., Knvul Sheikh, *Developing a Vaccine Will Not Be the Only Hurdle*, N.Y. TIMES, May 5, 2020, at A4; Denise Grady, *H.I.V. Drugs Didn't Work in China Study*, N.Y. TIMES, Mar. 20, 2020, at A14.

⁴ F.D.A. *Presses for Data on Accuracy of Results*, N.Y. TIMES, May 5, 2020, at A7.

⁵ “As of 24 April 2020, no study has evaluated whether the presence of antibodies to SARS-CoV-2 confers immunity to subsequent infection by this virus in humans.” World Health Organization, *“Immunity passports” in the context of COVID-19* (Apr. 24, 2020), <https://www.who.int/news-room/commentaries/detail/immunity-passports-in-the-context-of-COVID-19>.

⁶ Sheryl Gay Stolberg & Eileen Sullivan, *U.S. Quietly Fears Virus's Daily Toll Will Soon Double – Grim Internal Forecast of Deaths in May as Trump Pushes States to Reopen*, N.Y. TIMES, May 5, 2020, at A1.

⁷ See, e.g., Jim Tankersley & Charlie Savage, *Fearing Raft of Lawsuits, Businesses Seek Shield From Pandemic Liability*, N.Y. TIMES, Apr. 29, 2020, at A17.

II. COVID-19 AND CRIME RATES

A. *Decreases in the Overall Crime Rate*

Crime rates dropped in many categories as states issued “stay at home” orders. In New York City, for example, the number of felony and misdemeanor cases dropped 43.3 percent from March 18 to March 24 as compared with the same period in 2019.⁸ Other regions in the State of New York showed drops of nearly 69 percent in misdemeanors and felonies.⁹ And “[t]he number of felonies specifically dipped 33 percent in New York City and about 60 percent in the rest of the state [of New York].”¹⁰

Other cities also reported lower crime rates. Crime in St. Louis, Missouri, for example, fell by 21 percent in one month.¹¹ Chicago also reported a 30 percent decline during the month of April 2020 in major crime (a combination of homicides, robberies, sexual assaults, felony thefts, burglaries, and aggravated batteries).¹² And from March 22 to April 23, Chicago police made 1,406 arrests compared with 4,985 arrests during the same period in 2019, a decline of nearly 72 percent.¹³ The period also marked the lowest number of arrests during a similar period since 2001.¹⁴

B. *Domestic Violence Increases (Even if Reporting of It Didn’t)*

Stay-at-home orders in various states mean that many victims of domestic violence are stuck in close quarters with their abusers, often in stressful and dangerous situations. These stay-at-home orders “have fueled incidents of domestic violence,” and reports of domestic violence have increased in many states and around the world.¹⁵ “Experts and law enforcement leaders across the [United States] . . . have warned about possible upticks in domestic crimes and family-related violations the longer people are confined by sheltering restrictions.”¹⁶ Tensions may further increase where family members or domestic partners are among those recently unemployed.

Domestic-related crimes in Chicago were reported at a higher rate from March 22 to April 23, 2020 than over the same period in the previous four years.¹⁷

In New York City, fewer victims of domestic violence have been calling the police or the city’s domestic abuse hotline.¹⁸ The drop in the phone calls to the police or the hotline is “far from reassuring,” however.¹⁹ Rather than signaling a drop in domestic violence, the lower number of calls may indicate increased difficulties that abuse victims have when reaching

⁸ *Crime Rates Plunge as Virus Spreads*, N.Y. TIMES, Apr. 7, 2020, at A13.

⁹ *Id.*

¹⁰ *Id.*

¹¹ John Eligon, *It’s a Slap in the Face’: Many Victims Are Angry That Jails Freed Inmates*, N.Y. TIMES, Apr. 26, 2020, § 1, at 4.

¹² Jeremy Gorner, *Chicago Overall Crime, Arrest Numbers Drop*, CHICAGO TRIB., May 3, 2020, § 1, at 11.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Ashley Southall, *Decline in Police Reports About Domestic Violence May Be Very Scary’ Sign*, N.Y. TIMES, Apr. 19, 2020, § 1, at 17.

¹⁶ Gorner, *supra* note 12.

¹⁷ *Id.*

¹⁸ Southall, *supra* note 15.

¹⁹ *Id.*

out for help during a stay-at-home order.²⁰ They may be unable to use a phone or computer to reach out for help.

Additionally, some victims of domestic abuse decide not to go to shelters for fear of contracting the coronavirus.²¹ For example, one woman in New York who wanted to leave her abusive husband ultimately decided that “the risk of exposing herself or her infant to the virus at a shelter was too high.”²²

And finally, it may be more difficult to get orders of protection when the government has ordered people to stay at home.²³ Judges may be reluctant to exclude people from their homes when the state or local government has ordered them to stay there.²⁴

C. Restaurant Burglary Rates Increase

Restaurants, stores, and other businesses were forced to lay off employees and to close their doors under emergency orders designed to prevent further spread of COVID-19. These forced closures not only jeopardized the financial health of these businesses, but they turned the suddenly-empty buildings into “tempting targets for burglars emboldened by the quiet streets and deserted spaces.”²⁵ Instead of breaking into homes that are likely occupied with residents sheltering in place, thieves instead found easier targets with empty restaurants, gas stations, and “non-essential” businesses. “Across the country, closed restaurants have been invaded by thieves who seem especially drawn to well-stocked liquor cabinets, and iPads and other equipment.”²⁶ After New York City declared a state of emergency on March 12, 2020 ordering non-essential businesses to close, “the number of commercial burglaries . . . surged to 763, from 330 over the same period in 2019”²⁷ Of that increased number of burglaries, at least 140 were at restaurants, a number three times greater than reported for the previous year.²⁸

D. Shoplifting

Shoplifting may also be on the rise as store employees may be reluctant or afraid to confront customers suspected of taking merchandise. Even when observing shoplifters in action, a store clerk in Chicago was overheard to be telling a coworker that she did not want to lose her job (or her life) because of a confrontation with a suspected shoplifter.

E. Feared Rise in Hate Crimes and Extremist Violence

Throughout history, pandemics have fueled not only illness and death, but also hate and blame.²⁹ The COVID-19 pandemic is no different. In February 2020, the World Health Organization acted expeditiously announced that the disease caused by the 2019 novel coronavirus of 2019 should be referred to as COVID-19, a name that – according to the

²⁰ “With schools and nonessential businesses shut, victims have lost opportunities to find privacy away from their abusers and seek help, such as going to work or walking children to school.” *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Amelia Nierenberg & David Yaffe-Bellany, *Restaurants Suffer Twice: First, Layoffs. Now, Thieves.*, N.Y. TIMES, May 1, 2020, at A21.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Samuel K. Cohn, *Pandemics: Waves of Disease, Waves of Hate from the Plague of Athens to A.I.D.S.*, 85 HISTORICAL RESEARCH 535 (2012), available at <https://doi.org/10.1111/j.1468-2281.2012.00603.x>

Director-General of the WHO – was purposefully selected because it “did not refer to a geographical location, an animal, an individual[,] or group of people[.]”³⁰ This choice was intended to limit the stigma and harm that results from being associated with a deadly pandemic.³¹ Nevertheless, repeated efforts to associate the virus with China – where COVID-19 was first identified as a source of illness – have resulted in alarming spikes in violence and hate crimes against Asians and Asian-Americans generally.³²

Responding to a record number of hate crimes in New York, the State’s Attorney General launched a hotline to help members of the community report hate crimes and pledged that her office would support local law enforcement in its efforts to prosecute perpetrators of hate crimes.³³

On a federal level, Attorney General William Barr and Assistant Attorney General for Civil Rights Eric Dreiband called upon department prosecutors throughout the country to be on the alert for hate crimes during the COVID-19 pandemic, while the Federal Bureau of Investigation has stated that it would “use all authority granted to [it] by federal law to investigate and hold those who commit violent acts accountable for their actions.”³⁴ In April, the FBI confirmed that it was considering charging a Texas man with a hate crime after he allegedly tried to kill a family of three because he “thought the family was Chinese, and infecting people with the coronavirus.”³⁵ Nevertheless, the federal response has been characterized as “inadequate” and “disappointing” by numerous U.S. Senators who have called on the Department of Justice to release a “concrete plan” to address the surge in discrimination against Asian-American and Pacific-Islander individuals.³⁶

Other groups have also been the victims of hate crimes associated with the COVID-19 pandemic. In New York, for example, a couple was arrested on hate crime charges after they accosted a group of Hasidic men, yelled anti-Semitic slurs, blamed them for spreading the virus, and tried to rip off their face-masks.³⁷ In another incident, California police investigated whether a man who donned a Ku Klux Klan hood to comply with a requirement to wear face masks in public could be charged with a hate crime.³⁸ Ultimately, however, the department concluded that there was insufficient evidence to prosecute him on that basis: the man claimed that he donned the hood to express his frustration with the coronavirus and

³⁰ Victoria Forster, *Coronavirus Gets A New Name: COVID-19. Here’s Why That Is Important*, FORBES (Feb. 11, 2020), available at <https://www.forbes.com/sites/victoriaforster/2020/02/11/coronavirus-gets-a-new-name-covid-19-heres-why-renaming-it-is-important/#25f6a99d548e>.

³¹ *Id.*

³² Sabrina Tavernise and Richard A. Oppel Jr., *Spit On, Yelled At, Attacked: Chinese-Americans Fear for Their Safety*, N.Y. TIMES (Mar. 23, 2020), available at <https://www.nytimes.com/2020/03/23/us/chinese-coronavirus-racist-attacks.html>.

³³ AG James Launches Hotline to Combat Coronavirus Hate Crimes and Xenophobic Rhetoric (Mar. 23, 2020), available at <https://ag.ny.gov/press-release/2020/ag-james-launches-hotline-combat-coronavirus-hate-crimes-and-xenophobic-rhetoric>.

³⁴ U.S. Attorney’s Office for the Northern District of Georgia, *Federal law enforcement leaders address discrimination amid Coronavirus pandemic* (Apr. 24, 2020), available at <https://www.justice.gov/usao-ndga/pr/federal-law-enforcement-leaders-address-discrimination-amid-coronavirus-pandemic>

³⁵ Marty Johnson, *FBI may charge man who attacked Asian Americans over coronavirus with hate crime: report*, THE HILL (Apr. 1, 2020), available at <https://thehill.com/homenews/state-watch/490692-fbi-may-charge-man-who-attacked-asian-americans-over-coronavirus-with>.

³⁶ See, e.g., *Sen. Warner calls on Justice Dept. to address coronavirus-related hate crimes*, WHSV (May 4, 2020), available at <https://www.nbc12.com/2020/05/04/sen-warner-calls-justice-dept-address-coronavirus-related-hate-crimes/>.

³⁷ Aaron Katersky & Ivan Pereira, *Couple arrested for hate crime in Brooklyn, allegedly blaming spread of COVID-19 on Jews: Police*, ABC NEWS (May 11, 2020), available at <https://abcnews.go.com/US/couple-arrested-hate-crime-brooklyn-allegedly-blaming-spread/story?id=70616958>.

³⁸ Don Sweeney, *‘Frustrated’ man who wore KKK-style hood to grocery won’t be charged, [California] cops say*, SACRAMENTO BEE (May 12, 2020), available at <https://www.sacbee.com/news/coronavirus/article242669336.html>

with government directives regulating behavior, not to make a racial statement.³⁹ Shortly afterwards, another California man went shopping while donning a face mask decorated with a Nazi swastika; he, too, was not charged with a hate crime after claiming that his conduct was “intended to be a peaceful protest” against what he claimed were Nazi-like policies enacted by the Governor.⁴⁰ According to the Anti-Defamation League, a record-breaking number of anti-Semitic incidents were recorded in the United States and there are concerns that 2020 may push the number of such incidents even higher due to the COVID-19 outbreak and the soaring unemployment figures associated with the pandemic.⁴¹

State and federal officials share similar concerns. In March 2020, the New Jersey Office of Homeland Security and Preparedness stated that white supremacist groups had encouraged their followers to conduct attacks during the coronavirus outbreak to incite fear and to target ethnic minorities and immigrants.⁴² And on April 23, 2020, the U.S. Department of Homeland Security reportedly warned law enforcement officials across the United States about mobilizations of violent extremist groups in response to stay-at-home orders.⁴³ The warning noted “recent arrests of individuals who had threatened government officials imposing coronavirus-related regulations.”⁴⁴ Among the more recent plots was one involving a 36-year-old extremist who was killed in a shootout with F.B.I. agents. The man was a member of a neo-Nazi group and had been planning an attack on a hospital in Missouri, apparently in connection with his belief that the federal government was using the pandemic as an “excuse to destroy our people.”⁴⁵

III. OTHER CRIMES

A. *Intentional Transmission of COVID-19 and Related Offenses*

The intentional transmission of an infectious disease has often been prosecuted as a criminal offense. The relatively recent HIV/AIDS pandemic provides a concrete example of a public health crisis that has left a significant mark on criminal law: more than 30 states enacted statutes to criminalize the “transmission” of HIV in a variety of contexts.⁴⁶ In some jurisdictions, similar legislation expressly targeting COVID-19 is being considered. For example, a bill (NJ S2361) has been introduced in New Jersey that would make it a second-degree crime to credibly threaten to infect another person with COVID-19.⁴⁷ The legislation would provide for punishment of up to 10 years in prison and a fine of up to \$150,000.⁴⁸

³⁹ *Id.*

⁴⁰ Marcy Oster, *San Diego shopper asked to remove Nazi face mask*, FORWARD (May 11, 2020), available at <https://forward.com/fast-forward/446143/san-diego-area-shopper-asked-to-remove-face-mask-decorated-with-nazi/>

⁴¹ *Anti-Semitic incidents in U.S. hit record high in 2019, report says*, L.A. TIMES (May 12, 2020), available at <https://www.latimes.com/world-nation/story/2020-05-12/anti-semitic-incidents-u-s-record-high-2019>; Reports of Anti-Asian Assaults, Harassment and Hate Crimes Rise as Coronavirus Spreads, Anti-Defamation League (May 4, 2020), available at <https://www.adl.org/blog/reports-of-anti-asian-assaults-harassment-and-hate-crimes-rise-as-coronavirus-spreads>.

⁴² Neil MacFarquhar, *The Coronavirus Becomes Latest Battle Cry for U.S. Extremist Groups*, N.Y. TIMES, May 4, 2020, at A8.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See Sarah J. Newman, *Prevention, Not Prejudice: The Role of Federal Guidelines in HIV-Criminalization Reform*, 107 Nw. U.L. REV. 1403, 1405 (2013). Enacted at a time when legislators did not fully understand how HIV was transmitted, many of those HIV “transmission” bills criminalized acts that could not actually result in the transmission of HIV.

⁴⁷ <https://www.billtrack50.com/BillDetail/1227620>.

⁴⁸ *Id.*

Existing criminal laws can be used to charge individuals who intentionally transmit the virus, or attempt to do so. In Illinois, Governor J.B. Pritzker noted that criminal penalties could attach under the state's reckless conduct laws; according to a local State's Attorney, a reckless conduct charge would be appropriate if an individual who has tested positive for the virus went out in public and coughed on others.⁴⁹ In New Jersey, a number of individuals who claimed to have COVID-19 were arrested after coughing and spitting on law enforcement officers; the criminal charges filed against them included counts for aggravated assault and making terroristic threats during a state of emergency.⁵⁰ In New York, individuals claiming to be infected with COVID-19 who spat at or coughed on police officers were charged with a variety of crimes, including attempted assault, menacing, and harassment in the second degree.⁵¹ In California, a local sheriff's department is determining whether to criminally prosecute prisoners for intentionally spreading the virus after surveillance video showed numerous inmates drinking from the same glass and breathing into a shared cloth face-mask.⁵² Initial reports suggest that the conduct was linked to an attempt to deliberately infect each other with COVID-19 so that the inmates could qualify for early release. In Massachusetts, a 65-year-old man was taken into custody after coughing and spitting on produce in a grocery store; although there was no evidence that the individual had COVID-19, authorities were contemplating charges for assault and battery, and destruction of property.⁵³ Similar incidents have been reported in grocery stores in other states, including Missouri, New Jersey, and Pennsylvania.⁵⁴

On a federal level, the Deputy Attorney General urged all heads of law enforcement components, heads of litigating divisions, and United States Attorneys to consider charging those who engage in similar behavior with violations of the United States' terrorism statutes because "coronavirus appears to meet the statutory definition of 'biological agent[.]'"⁵⁵ This

⁴⁹ "The Governor was asked during a press conference that if somebody violates your executive order, what is the criminal penalty?" [Grundy County Illinois State's Attorney Jason] Helland said. "He [Governor Pritzker] said, 'Of course, it's reckless conduct.' Well, reckless conduct is the willful disregard of the safety of another. In my opinion, in order to reach that standard, you would have to knowingly test positive for COVID-19, be in a public place and coughing on people to get to that willful standard of committing a criminal act. Reckless conduct would be somebody who knows that they are sick and they are out in public. That would be a major issue. Test positive, do an act to infect another. That would be a criminal act." *Hlland: We won't prosecute Stay-At-Home Order violations*, HERALD NEWS (May 7, 2020), available at 2020 WLNR 13030327 (Westlaw).

⁵⁰ Office of the New Jersey Attorney General, *AG Grewal: If You Threaten a Cop with COVID-19, You Will Face the Maximum Criminal Charges* (Apr. 1, 2020), available at <https://www.nj.gov/oag/newsreleases20/pr20200401a.html>.

⁵¹ Since mid-March, seven people charged for coughing, spitting on police officers in Erie County, WKBW (May 12, 2020), available at <https://www.wkbw.com/news/local-news/since-mid-march-seven-people-charged-for-coughing-spitting-on-police-officers-in-erie-county>.

⁵² Stella Chan, *Inmates at one California jail tried to infect themselves with coronavirus*, Los Angeles Sheriff says, CNN (May 12, 2020), available at <https://www.cnn.com/2020/05/11/us/california-inmates-coronavirus-self-infection/index.html>.

⁵³ *Coronavirus: Man accused of spitting and coughing on produce at grocery store in Massachusetts*, ABC News (Apr. 6, 2020), available at <https://abc7news.com/coronavirus-grocery-store-man-accused-spitting-on-produce-stop-and-shop/6080918/>.

⁵⁴ GianCarlo Canaparo & Zack Smith, *We Don't Need Terrorism Charges to Prosecute Those Who Cough to Spread COVID-19*, HERITAGE FOUNDATION (Apr. 7, 2020), available at <https://www.heritage.org/crime-and-justice/commentary/we-dont-need-terrorism-charges-prosecute-those-who-cough-spread-covid>; Scottie Andrew & Anna Sturla, *A grocery store threw out \$35,000 in food that a woman intentionally coughed on, sparking coronavirus fears, police said*, CNN (Mar. 26, 2020), available at <https://www.cnn.com/2020/03/26/us/woman-coughed-on-produce-trnd/index.html>.

⁵⁵ Office of the Deputy Attorney General, Memorandum for All Heads of Law Enforcement Components, Heads of Litigating Divisions, and United States Attorneys on "Department of Justice Enforcement Actions Related to COVID-19" (Mar. 24, 2020), available at <https://www.justice.gov/file/1262771/download> (citing 8 U.S.C. § 1781; *id.* § 175 (development/possession of a biological agent for use as a weapon); *id.* § 875 (threats by wire);

advice was promptly followed by the U.S. Attorney's Office for the Middle District of Florida in a case involving a St. Petersburg man who falsely claimed he had COVID-19 and coughed on a police officer who was responding to a domestic violence call involving the man; the defendant was charged with perpetrating a biological weapons hoax under 8 U.S.C. § 1038(a)(1).⁵⁶ Similar charges were filed against a man in Texas who posted on Facebook that he had hired someone to spread the virus in local grocery stores to discourage customers from shopping there.⁵⁷

The use of federal terrorism statutes to prosecute individuals who are alleged to have spread COVID-19, or threaten to do so, has been criticized as an unwarranted or misguided expansion of federal power.⁵⁸

B. Violation of Public Health Orders

In an effort to curb the pandemic, states have adopted a variety of measures designed to promote social-distancing and limit the spread of the virus. These orders do not always contain specific guidance with respect to how they should be enforced, with some critics noting that the lack of uniformity could lead to unsafe practices.⁵⁹ In some states, like Hawai'i, non-compliance with these measures has led to arrests and conviction on criminal charges. Hawai'i was the first state in the country to require all residents and tourists to shelter-in-place for 14 days upon arrival in the islands.⁶⁰ Travelers must initial and sign a self-quarantine form acknowledging that they have received notice of the requirement and the criminal penalties that stem from violating the order (up to a \$5,000 fine and a year imprisonment).⁶¹

These prevention efforts seem to have had a positive impact, but depend for their success on compliance by tourists and the collaboration of airport health officials and members of the tourist industry.⁶² Airport health officials are required to verify contact information provided upon arrival and hotel staff provide guests with reminders of their obligations. They are also trained to report violators to the police; this has led to multiple arrests over the past several months involving residents of multiple states.⁶³

⁵⁶ *id.* § 876 (threats by mail); *id.* § 1038 (false information and hoaxes regarding biological weapons); *id.* § 2332a (use of a weapon involving a biological agent).

⁵⁷ U.S. Attorney's Office for the Middle District of Florida, *St. Petersburg Man Who Threatened To Spread Covid-19 Virus By Spitting And Coughing On Police Officers Charged With Biological Weapons Hoax* (Apr. 8, 2020), available at <https://www.justice.gov/usao-mdfl/pr/st-petersburg-man-who-threatened-spread-covid-19-virus-spitting-and-coughing-police>.

⁵⁸ Michael Balsamo, *US Charges 2 With Terror Crimes Over Threats to Spread Virus*, U.S. NEWS & WORLD REP. (Apr. 8, 2020), available at <https://www.usnews.com/news/politics/articles/2020-04-08/us-charges-2-with-terror-crimes-over-threats-to-spread-virus>.

⁵⁹ Zack Smith & GianCarlo Canaparo, *Why COVID-19 Spitters Shouldn't Be Prosecuted as Federal Terrorists*, Heritage Foundation (Apr. 20, 2020), available at <https://www.heritage.org/crime-and-justice/commentary/why-covid-19-spitters-shouldnt-be-prosecuted-federal-terrorists>.

⁶⁰ Emily Brindley & Jesse Leavenworth, *Local enforcement of Lamont's orders varies; Some say patchwork of policies could lead to unsafe practices*, HARTFORD COURANT (May 5, 2020), available at 2020 WLNR 12636128 (Westlaw).

⁶¹ State of Hawaii Dep't of Public Transportation, *Improved verification process implemented for airline passengers* (Apr. 24, 2020), available at <https://hidot.hawaii.gov/blog/2020/04/24/improved-verification-process-implemented-for-airline-passengers/>

⁶² *Id.*

⁶³ Josh Campbell, *Trapped in paradise: Breaking quarantine could mean prison time for tourists in Hawaii*, CNN (May 11, 2020), available at <https://www.cnn.com/travel/article/hawaii-tourist-arrests-quarantine/index.html>.

⁶⁴ *Id.*

In New Mexico, the failure to self-quarantine in violation of a public health order is considered a misdemeanor; there, a woman was arrested after she entered a restaurant, informed the personnel that she was infected, and used the restroom.⁶⁴ She “faces a fine of up to \$100 and up to six months in jail.”⁶⁵ In New Jersey, violations of COVID-19 Executive Orders are treated as disorderly persons offenses and carry a sentence of up to six months in jail and a fine of up to \$1,000.⁶⁶ Some examples of the conduct that resulted in charges include failing to wear a mask in a store, failing to maintain an appropriate social distance from other customers, hosting a large party, and keeping a business open.⁶⁷

Other states have preferred to focus their efforts on educating the public about the health benefits to be derived from compliance with executive orders rather than on enforcing them through punitive measures. Under Connecticut’s general statutes, for example, residents can be arrested on a Class D felony for violating executive orders related to the COVID-19 pandemic, although the Chief State’s Attorney advised police departments to avoid doing so.⁶⁸ Focusing on alternatives to criminal enforcement as a way of achieving compliance with executive orders reflects a concern for the general well-being of the community and a recognition that punitive measures represent poor public policy: an arrested person might contract the virus as the result of even a brief stay in police custody and then infect others after being released.⁶⁹

Enforcement of social-distancing measures through arrests and criminal prosecutions has raised concerns about the potential for racial profiling and the disparate impact this type of police activity might have on communities of color. These concerns are justified. In Brooklyn, the district attorney’s office reported that it had arrested 40 people for violating social-distancing rules in the first seven weeks that they became operative; 35 of those were black, 4 were Hispanic, and only one was white.⁷⁰ These statistics parallel those of New York City as a whole, where, of the 120 people arrested for violating social-distancing rules, 68 percent were black and 24 percent were Hispanic.⁷¹

Concerns about racial profiling have also been cited as a factor that has kept some black men from feeling comfortable wearing a protective mask.⁷² In a well-publicized incident in March, a police officer kicked two black men out of a store on the grounds that they were wearing masks and, therefore, breaking the law.⁷³ This led the Mayor of Atlanta, Keisha Lance Bottoms, to issue an executive order “directing the Atlanta police not to enforce a state law that prohibits the wearing of face masks in public.”⁷⁴ The N.A.A.C.P is seeking enactment

⁶⁴ Matthew Reisen, *Police say woman with COVID-19 violated public health order*, ALBUQUERQUE JOURNAL (Apr. 15, 2020), available at <https://www.abqjournal.com/1443805/woman-with-covid-19-violates-public-health-order-in-estancia.html>.

⁶⁵ *Id.*

⁶⁶ AG Grewal and Col. Callahan Issue Weekly Round-Up on COVID-19 Enforcement Matters, INSIDER NJ [New Jersey] (May 9, 2020), available at <https://www.insidernj.com/ag-grewal-col-callahan-issue-weekly-round-covid-19-enforcement-matters-3/>.

⁶⁷ *Id.*

⁶⁸ Emily Brindley & Jesse Leavenworth, *Local enforcement of Lamont’s orders varies; Some say patchwork of policies could lead to unsafe practices*, HARTFORD COURANT (May 5, 2020), available at 2020 WLNR 12636128 (Westlaw).

⁶⁹ *Id.*

⁷⁰ Ashley Southall, *Scrutiny of Social-Distance Policing as 35 of 40 Arrested Are Black*, N.Y. TIMES (May 7, 2020), available at <https://www.nytimes.com/2020/05/07/nyregion/nypd-social-distancing-race-coronavirus.html>.

⁷¹ *Id.*

⁷² Derrick Bryson Taylor, *For Black Men, Fear That Masks Will Invite Racial Profiling*, N.Y. TIMES (Apr. 14, 2020), available at <https://www.nytimes.com/2020/04/14/us/coronavirus-masks-racism-african-americans.html>.

⁷³ *Id.*

⁷⁴ *Id.*

of similar measures nation-wide on the ground that “[n]o person should be fearful of engaging in lifesaving measures due to racism.”⁷⁵

Police enforcement of social-distancing orders has, in some cases led to the orders being revised for the benefit of the offenders. For example, after a Dallas salon owner violated a stay-at-home order by refusing to close her business and was sentenced to seven days in jail, Texas Governor Greg Abbott modified his executive order “to ensure confinement is not a punishment for violating an order.”⁷⁶ In Oklahoma, the Mayor of Stillwater amended an order that required customers to wear masks in stores and restaurants after employees were “threatened with physical violence and showered with verbal abuse” for attempting to enforce the order.⁷⁷ The Mayor concluded that he could not “in clear conscience, put [the] local business community in harm’s way, nor can police be everywhere,” consequently the modified order merely asks local stores and business to encourage, but not require, patrons to cover their faces.”⁷⁸

Some commentators have suggested it may be appropriate to introduce legislation to criminalize intentional denials or mismanagement of the pandemic.⁷⁹ Examples of criminal conduct that might fall within this rubric could include the intentional failure “to provide timely and widespread testing for the virus,” “to acquire personal protective equipment for health workers,” or “to order critical social-distancing measures.”⁸⁰ Conversely, some jurisdictions, like New York, have enacted legislation that would grant immunity from civil and criminal liability to nursing homes and long-term care facilities for any harm that results to patients as a result of a good faith effort to provide care pursuant to an emergency rule or state directive.⁸¹ Other jurisdictions, like Florida and California, are being actively lobbied to do so.⁸²

C. Attempted Sale of Non-Existent Surgical Masks

Pandemics create incentives for fraud. With the COVID-19 pandemic, fraudulent schemes arose as a result of scarcities in the supply of personal protective equipment. In one case filed in Brooklyn, two men from Southern California tried to get \$4 million for a supposed stockpile of surgical face masks.⁸³ The problem was that the surgical face masks did not actually exist.⁸⁴ To promote their scheme, the men wrapped empty boxes and put fake 3M labels on them.⁸⁵ The men were charged with conspiracy to commit wire fraud and face up to 20 years in prison and fines of up to \$250,000.⁸⁶

⁷⁵ *Id.*

⁷⁶ Audrey McNamara, *Salon owner released from jail after Texas governor changes coronavirus orders*, CBS NEWS (May 8, 2020), available at <https://www.cbsnews.com/news/shelley-luther-salon-owner-released-from-jail-texas-governor-greg-abbott-changes-coronavirus-orders/>.

⁷⁷ Meredith Deliso, *Oklahoma city reverses face mask requirement amid threats of violence*, ABC NEWS (May 3, 2020), available at <https://abcnews.go.com/US/oklahoma-city-reverses-face-mask-requirement-amid-threats/story?id=70481052>.

⁷⁸ *Id.*

⁷⁹ David J. Scheffer, *Is It a Crime to Mishandle a Public Health Response?*, COUNCIL ON FOREIGN RELATIONS (Apr. 22, 2020), available at <https://www.cfr.org/article/it-crime-mishandle-public-health-response>.

⁸⁰ *Id.*

⁸¹ Foley & Lardner LLP, *COVID-19: States Protect Long-Term Care Facilities from Liability*, (May 6, 2020), 2020 WLNR 12814488 (Westlaw).

⁸² *Id.*

⁸³ *Scheme to Sell Masks That Didn’t Exist*, N.Y. TIMES, May 1, 2020, at A8.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* The criminal indictment against Donald Allen and Manuel Revolorio was unsealed in federal court in Brooklyn. *Id.* The men were arrested and released on \$50,000 bond each after appearing in the federal district court in Los Angeles. *Id.* See also U.S. Attorney’s Office for the Eastern District of New York, *Two Individuals*

D. COVID-19 Testing, Wire Fraud, and Mail Fraud

Henry Gindt II was charged in New York with wire fraud, mail fraud, and conspiracy to commit wire fraud and mail fraud for selling stolen COVID-19 test kits and not providing the test results to those who purchased the stolen kits on his telemedicine website, YouHealth.⁸⁷ The federal charges carry a maximum penalty of 20 years in prison and a \$250,000 fine.⁸⁸

E. Wrongful Claims for Small-Business Paycheck Protection Money

A federal government Paycheck Protection Program intended to provide financial relief to small businesses found itself run dry when larger businesses applied for and received the financial relief.⁸⁹ The \$660 billion program “was meant to extend a lifeline to small businesses battered by the pandemic, allowing them to keep employees on the payroll.”⁹⁰ Large companies, instead, “managed to qualify for small-business loans from a hastily devised government program intended to help barbershops, restaurants, dry cleaners and other mom-and-pop shops.”⁹¹

The Secretary of the Treasury threatened “to hold big companies criminally liable if they did not meet the program’s revised criteria for accepting loans.”⁹² But some observed that it would be “a heavy lift” to pursue criminal claims against companies that had been approved for loans based on the government’s guidelines.⁹³

After the Treasury Secretary made the announcement of potential criminal liability and audits of companies that had taken money under the program, some recipients of the government money quickly returned it in advance of a May 7 deadline.⁹⁴ Other companies that received the bailout money were hesitant to spend it, fearing they might incur criminal liability under vague and quickly changing government guidelines.⁹⁵

F. Failure to Vacate

The economic hardships that millions of Americans have experienced as a result of the COVID-19 pandemic have made it increasingly difficult for many people to pay their rent.⁹⁶ A number of jurisdictions have enacted eviction moratoriums in an effort to ensure that impoverished renters are able to continue living in their homes, however the absence of a national moratorium means that poor people will find it more difficult to shelter in place if

Arrested for Conspiring to Defraud Purported Purchasers of Personal Protective Equipment (Apr. 27, 2020). <https://www.justice.gov/usao-edny/pr/two-individuals-arrested-conspiring-defraud-purported-purchasers-personal-protective>.

⁸⁷ *Mail and Wire Fraud: Man Faces Charges Over Virus Home Tests*, N.Y. TIMES, May 9, 2020, at A11.

⁸⁸ *Id.*

⁸⁹ Alan Rappeport, *Treasury Pushes to Recoup Loans to Large Companies*, N.Y. TIMES, Apr. 29, 2020, at A1.

⁹⁰ Stacy Cowley, Emily Flitter, & David Enrich, *They Got Aid. Now They’re Afraid of Spending It*, N.Y. TIMES, May 3, 2020, § 1, at 1.

⁹¹ Rappeport, *supra* note 89, at A1.

⁹² *Id.*

⁹³ *Id.* at A16.

⁹⁴ Jeanna Smialek, *Hotel Group Plans to Return \$70 Million in Aid Meant for Small Businesses*, N.Y. TIMES, May 3, 2020, § 1, at 8; . . . *And More Than \$375 Billion Has Been Returned*, N.Y. TIMES, May 5, 2020, at B9.

⁹⁵ Cowley et al., *supra* note 90, at 8.

⁹⁶ <https://www.nytimes.com/2020/04/08/business/economy/coronavirus-rent.html>

they are unable to meet their rent.⁹⁷ In at least one state, Arkansas, the inability to pay rent can result in the forfeiture of any right to continue occupancy and the failure to vacate within ten days of receiving an eviction notice is a criminal offense.⁹⁸ Unlike his counterparts in dozens of other states, Governor Asa Hutchinson of Arkansas has resisted calls to issue an executive order banning evictions for those suffering hardships related to COVID-19.⁹⁹ At least three “failure to vacate” cases were filed in April 2020, the first full month of mandated closures in Arkansas, and an attorney for Arkansas Legal Aid predicts that things could get worse in the coming months.¹⁰⁰

Criminal prosecutions for failure to vacate offenses are also likely to be complicated because tenants who are ill with coronavirus may find it difficult to find a moving company willing to provide services or they may simply be too ill to relocate within the narrow time frame provided for by the relevant statute.¹⁰¹

IV. MODIFICATIONS TO CRIMINAL PROCEEDINGS

Court proceedings changed dramatically during the coronavirus outbreak. The pandemic has caused considerable delays in the administration of justice as well as modifications in the proceedings themselves. Courthouses across the country were closed and hearings were deferred in a majority of jurisdictions.¹⁰² In many states, the suspension of trials and in-person proceedings was extended into the summer months.¹⁰³ These closures will result in lengthy postponement of cases. In Mississippi, for example, authorities anticipate that hundreds of criminal cases may be subjected to year-long delays after it was announced that two of six court terms held in Lauderdale County would be continued.¹⁰⁴

The decision to close courts and defer proceedings is linked to concerns that detainees might contract the virus in the courthouse and then transmit it to others during their confinement, as well as concerns related to the risks that the jury selection process might fuel an outbreak among potential jurors and the broader community.¹⁰⁵ In some jurisdictions, like Oklahoma, all civil and criminal trials were rescheduled until the summer, but county officials have the discretion to keep courthouse buildings open for hearings and other business.¹⁰⁶ The lack of uniformity has caused some anxiety for workers concerned for their

⁹⁷ Jessica Contrera & Tracy Jan, *Facing eviction as millions shelter in place*, WASH. POST (Mar. 22, 2020), available at <https://www.washingtonpost.com/dc-md-va/2020/03/22/evictions-coronavirus-renters-shelter-in-place/>.

⁹⁸ ARK. CODE ANN. § 18-16-101(b)(1) (West) (“If, after ten (10) days’ notice in writing shall have been given by the landlord or the landlord’s agent or attorney to the tenant to vacate the dwelling house or other building or land, the tenant shall willfully refuse to vacate and surrender the possession of the premises to the landlord or the landlord’s agent or attorney, the tenant shall be guilty of a misdemeanor.”).

⁹⁹ Ginny Monk, *Ill with coronavirus, woman faced eviction*, ARKANSAS DEMOCRAT GAZETTE (May 11, 2020), available at 2020 WLNR 13245822 (Westlaw).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *State court closures in response to the coronavirus (COVID-19) pandemic, 2020*, [https://ballotpedia.org/State_court_closures_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020#Federal_responses](https://ballotpedia.org/State_court_closures_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020#Federal_responses) (last accessed May 13, 2020).

¹⁰³ *Id.*

¹⁰⁴ Erin Kelly, *COVID-19 causes months of delays for Lauderdale County criminal cases*, MERIDIAN STAR (Mississippi), May 8, 2020, available at 2020 WLNR 13125239.

¹⁰⁵ *Id.*

¹⁰⁶ Oklahoma Supreme Court and Oklahoma Court of Criminal Appeals, *Third Emergency Joint Order Regarding the COVID-19 State of Disaster*, SCAD No. 2020-36 (Apr. 29, 2020), available at <https://www.oscn.net/news/2004291453/scad-no-202036>.

health as well as confusion because some courthouses require masks and social distancing, while others have more relaxed policies in place.¹⁰⁷

As a result of the pandemic, some long-standing records were broken. The Georgia Supreme Court held oral arguments via video-conferencing, marking “the first time in the court’s 175-year history that arguments were held virtually.”¹⁰⁸ Similarly, the Rhode Island Supreme Court heard cases remotely by video-conference for the first time in its 273-year history.¹⁰⁹ Even the U.S. Supreme Court heard oral arguments by telephone for the first time in May 2020.¹¹⁰

The shift to virtual proceedings has garnered some detractors. One veteran court-watcher, Lyle Denniston, who has reported on the Supreme Court over the course of more than five decades, opined that holding arguments remotely harms the “equal status of each Justice, gives the [Chief Justice] arbitrary power, diminishes cross-bench exchanges, promotes wool-gathering by lawyers, prizes order over depth, lets technology triumph, [and] looks amateurish.”¹¹¹

At least two other problems with using remote video may pose unrecognized dangers for legal proceedings. First,

human beings are exquisitely sensitive to one another’s facial expressions. Authentic expressions of emotion are an intricate array of minute muscle contractions, particularly around the eyes and mouth, often subconsciously perceived, and essential to our understanding of one another. But those telling twitches all but disappear on pixelated video or, worse, are frozen, smoothed over[,] or delayed to preserve bandwidth.¹¹²

A second problem in using remote video conferencing for legal proceedings is that video chats can:

inhibit trust because we can’t look one another in the eye. Depending on the camera angle, people may appear to be looking up or down or to the side. Viewers may then perceive them as uninterested, shifty, haughty, servile[,] or guilty. For this reason, law scholars and criminal justice advocates have questioned the fairness of remote depositions, hearings[,] and trials.¹¹³

V. OTHER CRIMINAL JUSTICE ISSUES AND PRISON ADMINISTRATION

¹⁰⁷ Erin Akins, *Masks not a requirement in [Oklahoma] county courthouse, has some lawyers concerned*, KFOR NEWS (May 12, 2020), available at <https://kfor.com/news/masks-not-a-requirement-in-ok-county-courthouse-has-some-lawyers-concerned/>.

¹⁰⁸ *State court closures in response to the coronavirus (COVID-19) pandemic, 2020*, [https://ballotpedia.org/State_court_closures_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020#Federal_responses](https://ballotpedia.org/State_court_closures_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020#Federal_responses) (last accessed May 13, 2020).

¹⁰⁹ [https://ballotpedia.org/State_court_closures_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020#Federal_responses](https://ballotpedia.org/State_court_closures_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020#Federal_responses).

¹¹⁰ See Adam Liptak, *Supreme Court Hears Fist Arguments Via Phone*, N.Y. TIMES, May 5, 2020, at A20; Adam Liptak, *Supreme Court to Hear Cases by Telephone*, N.Y. TIMES, May 4, 2020, at A1.

¹¹¹ Garrett Epps, *Not Everyone Is Happy With the Supreme Court’s Live Broadcasts*, THE ATLANTIC (May 12, 2020), available at <https://www.theatlantic.com/ideas/archive/2020/05/lyle-denniston-despises-supreme-courts-new-format/611515/>.

¹¹² Kate Murphy, *Why Zoom is Terrible*, N.Y. TIMES, May 4, 2020, at A23 (Op-Ed).

¹¹³ *Id.*

A. Cash Bail Eliminated for Most Crimes

To reduce the number of people who must be incarcerated, some jurisdictions such as California eliminated cash bail for most crimes.¹¹⁴ The order from California's judicial council ending cash bail for most crimes allowed "thousands of people awaiting trial to be released from jails."¹¹⁵ California voters will be asked in November to decide whether other risk-assessment tools should permanently replace cash bail.¹¹⁶ "For decades, cash bail has been held out by activists as an exemplar of unfairness in the criminal justice system, with wealth the primary factor determining whether someone is in jail or free."¹¹⁷

B. Prisoners at Risk

Jails and prisons are understandably "among the worst places to be" during a pandemic.¹¹⁸ "People are packed into cells and dorms where they sleep mere feet apart without proper access to masks, hand sanitizer, or medical care."¹¹⁹ People simply cannot "social distance" in a jail or prison. Some criminal-justice advocates accordingly "have been calling for jails and prisons to release people behind bars to help stop the virus' spread, especially those who are elderly, have health issues, or who are locked up for nonviolent offenses."¹²⁰

The Federal Bureau of Prisons publishes statistics relating to the number of inmates who have tested positive for COVID-19 on its website.¹²¹ These statistics offer evidence that many thousands of inmates who have been infected continue to be housed in federal prison facilities. As of May 9, 2020, 3,300 federal inmates and 250 staff members tested positive for the virus. This number does not, however, include inmates who are housed in privately managed prisons. Consequently, it is not surprising that dozens of prisoners are dying of COVID-19 while in custody.¹²²

The first federal prisoner to die of COVID-19 in custody was Patrick Jones, who died on March 28, 2020.¹²³ He was serving time for a non-violent drug offense.¹²⁴ He worked in a prison textile factory at the Oakdale Federal Correctional Complex in Louisiana.¹²⁵ By the third week of April, seven more inmates had died.¹²⁶ Prison factories around the country remained open, subjecting workers to increased risks of infection.¹²⁷

The first female federal prisoner to die of COVID-19 in custody was Andrea Circle Bear of Eagle Butte, South Dakota.¹²⁸ She had been sentenced to serve 26 months for using

¹¹⁴ Tim Arango & Thomas Fuller, *California: In Crisis, Liberals See a Shot at Change*, N.Y. TIMES, May 5, 2020, at A14.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Angelina Chapin, *A Mother in Federal Prison Has Died of the Coronavirus*, THE CUT (Apr. 29, 2020), <https://www.thecut.com/2020/04/a-mother-in-federal-prison-has-died-of-the-coronavirus.html>.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ <https://www.bop.gov/coronavirus/>

¹²² As of May 9, 2020, the Bureau of Prisons reported that 46 inmates held in federally managed prisons had died of COVID-19.

¹²³ Editorial, *No Death Sentences for Minor Offenses*, N.Y. TIMES, Apr. 24, 2020, at A22.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *First Female Victim in a Federal Prison*, N.Y. TIMES, May 1, 2020, at A8.

a residence on the Cheyenne River Indian Reservation to sell drugs.¹²⁹ In March 2020, Ms. Circle Bear was transferred from a jail in Winner, South Dakota, to Federal Medical Center Carswell, a prison with approximately 1,625 female prisoners.¹³⁰ She was brought to a hospital because of concerns about her pregnancy, but she was sent back to the prison that same day.¹³¹ A few days later she showed symptoms of infection with COVID-19.¹³² She was brought back to the hospital and, on April 1, her baby was born by cesarean section.¹³³ Three days later, on April 4, her coronavirus test came back positive.¹³⁴ She died on April 28 at the age of 30.¹³⁵

The Marshall Project has been tracking data related to the numbers of federal and state prisoners and prison staff infected with COVID-19. These figures are, understandably, much higher than the figures reported by the federal Bureau of Prisons.¹³⁶ By May 6, 2020, 20,119 inmates had tested positive, with a 39 percent rate of increase from the previous week; 6,193 prison staff members tested positive. These numbers are merely indicative: the lack of systematic testing makes the numbers unreliable as a measure of the true extent of infection within the prison population. Over 304 inmates and at least 22 staff members have died of COVID-19 in prisons across the United States.

There is an increasing recognition that prison populations are especially vulnerable to infection. Seven out of the top ten outbreaks in the country have occurred in prisons or jails.¹³⁷ In April 2020, three-fourths of the 1,800 inmates in a prison in Marion, Ohio tested positive for coronavirus, making that prison the largest source of coronavirus cases in the United States.¹³⁸ At least two inmates and one staff person had died.¹³⁹ The coronavirus also spread through Rikers Island in New York and the Cook County Jail in Chicago.¹⁴⁰

C. Early Release of Prisoners

An editorial in the *New York Times* put forth that “[n]o one deserves to die of COVID-19 in prison or jail.”¹⁴¹ It noted that releasing prisoners during the COVID-19 crisis “is not just an act of mercy to protect prisoners’ health, and the health of the prison staff” but that having fewer sick inmates would mean “less strain on the already burdened prison hospital system.”¹⁴² The editorial further stated that if prisons were “unwilling to release some inmates outright, they could send eligible people into home confinement, at least for the duration of this crisis.”¹⁴³ The editorial concluded that at least “in the very short term, while inmates and staff members are dying, prisons need to release people immediately.”¹⁴⁴

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ A State-by-State Look at Coronavirus in Prisons, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

¹³⁷ See *Coronavirus in the U.S.: Latest Map and Case Count*, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last accessed May 13, 2020).

¹³⁸ John Eligon, *It’s a Slap in the Face: Many Victims Are Angry That Jails Freed Inmates*, N.Y. TIMES, Apr. 26, 2020, § 1, at 4.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Editorial, *No Death Sentences for Minor Offenses*, N.Y. TIMES, Apr. 24, 2020, at A22.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

A number of initiatives have been taken to reduce overcrowding. Some of these changes have followed on the heels of lawsuits seeking the release of incarcerated persons.¹⁴⁵ Others resulted from administrative responses and judicial action.¹⁴⁶ Many prisons and jails have reduced their populations by double digit percentages.¹⁴⁷ The number of federal prisoners who have been released to home confinement, however, seems to be lagging notwithstanding an acknowledgement of the grave health risks that these inmates face.

In a memo dated March 26, 2020, Attorney General Barr recognized that some inmates “might be safer serving their sentences in home confinement” and therefore directed the Bureau of Prisons to “prioritize the use of [its] statutory authorities to grant home confinement for inmates seeking transfer[.]”¹⁴⁸ The Attorney General’s memo sets forth a detailed “totality of the circumstances” test that relies on a variety of factors to determine whether an inmate should be released to home confinement. It also clarifies that inmates who have committed sex offenses are ineligible for home detention. In the six weeks following the release of the Attorney General’s Memo, there was an increase of 85.9 percent in the number of federal inmates confined at home.¹⁴⁹ However, by the end of April 2020, “home confinement went up by only 1,027 under the new guidance set out by the attorney general – about half of 1 percent of the more than 174,000 people” in the federal Bureau of Prison’s custody at the start of that month.¹⁵⁰

Some states have also released prisoners. California, for example, released nearly 10,000 inmates from state prisons or jails.¹⁵¹ In Massachusetts, the Supreme Judicial Council ruled that “a reduction in the number of people held in custody” was necessary; the ruling came in response to an emergency petition seeking “the release to the community of as many individuals as possible as expeditiously as possible[.]”¹⁵² In Washington, more than 1,000 inmates who had been convicted of non-violent crimes were released from state prisons pursuant to an emergency proclamation and commutation order signed by the governor.¹⁵³ Prisoners’ rights advocates contended that this was insufficient in light of the severe health risks faced by inmates and sought judicial relief. The Washington Supreme Court, however, denied a petition seeking the release of inmates on the ground that their detention during the pandemic violated the State Constitution’s “cruel punishment” clause.¹⁵⁴ In Wisconsin, nearly 1,600 inmates were released in the two-month period between March and May; almost all of them were inmates who had been detained for violating probation, parole, or extended

¹⁴⁵ John Eligon, *It's a Slap in the Face: Many Victims Are Angry That Jails Freed Inmates*, N.Y. TIMES, Apr. 26, 2020, § 1, at 4.

¹⁴⁶ <https://www.prisonpolicy.org/virus/virusresponse.html#state>.

¹⁴⁷ *Id.*

¹⁴⁸ U.S. Attorney General, Memorandum for Director of Bureau Prisons, Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic (Mar. 26, 2020), available at https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf.

¹⁴⁹ <https://www.bop.gov/coronavirus/>.

¹⁵⁰ Joseph Neff & Keri Blakinger, *Despite urgency, few federal prisoners released under coronavirus emergency policies*, USA TODAY (Apr. 30, 2020), available at <https://www.usatoday.com/story/news/investigations/2020/04/30/coronavirus-few-federal-prisoners-released/3050692001/>.

¹⁵¹ Tim Arango & Thomas Fuller, *California: In Crisis, Liberals See a Shot at Change*, N.Y. TIMES, May 5, 2020, at A14.

¹⁵² *Committee for Public Counsel Servs. v. Chief Justice of the Trial Court*, No. SJC-12926 (Mass. Apr. 3, 2020), available at <https://www.mass.gov/files/documents/2020/04/03/12926.pdf>.

¹⁵³ James Drew, *State won't release more vulnerable inmates after split Supreme Court ruling*, NEWS TRIB. [Tacoma, Washington] (Apr. 23, 2020), available at <https://www.thenewstribune.com/news/coronavirus/article242246746.html>.

¹⁵⁴ *Id.*

supervision terms.¹⁵⁵ In some jurisdictions, authorities made the decision to release those who were near the end of their sentences, those who were serving short weekend sentences, or those who were being held pretrial or had been sentenced for misdemeanor or non-violent offenses.¹⁵⁶

Although the early release measures are designed to reduce the likelihood of infection within the prison population, there is evidence that in some instances it may have the opposite effect. In California, surveillance video taken at a Los Angeles County correctional facility provided evidence that inmates were purposefully attempting to infect themselves so that they could qualify for early release.¹⁵⁷ Authorities estimate that the inmates' conduct contributed to 21 new infections at the correctional facility.¹⁵⁸

D. Differing Views on the Early Release of Prisoners

Crime victims and their families have expressed anger upon learning that inmates have been released from prison.¹⁵⁹ There has been a backlash against these early releases, even though the individuals are released for public health reasons.¹⁶⁰ One reason for the backlash can be traced to the fact that victims have not always received advance notification, or any notification, of the release of those who perpetrated crimes against them.¹⁶¹ This failure to notify may contravene statutory and constitutional requirements in some jurisdictions.¹⁶² Some states have adopted accelerated parole programs that expressly require timely victim notification prior to an inmate's release.¹⁶³

¹⁵⁵ Emily Hamer, *Wisconsin DOC has released nearly 1,600 inmates so far to combat COVID-19 spread*, WISCONSIN STATE J. (May 8, 2020), available at https://madison.com/wsj/news/local/crime-and-courts/wisconsin-doc-has-released-nearly-1-600-inmates-so-far-to-combat-covid-19-spread/article_03537daa-e1ec-5fe8-ac68-f5cf38ce8be5.html.

¹⁵⁶ Prison Policy Initiative, *Responses to the COVID-19 pandemic*, <https://www.prisonpolicy.org/virus/virusresponse.html#state> (last accessed May 13, 2020).

¹⁵⁷ Stella Chan, *Inmates at one California jail tried to infect themselves with coronavirus, Los Angeles Sheriff says*, CNN (May 12, 2020), available at <https://www.cnn.com/2020/05/11/us/california-inmates-coronavirus-self-infection/index.html>.

¹⁵⁸ *Id.*

¹⁵⁹ John Eligon, *It's a Slap in the Face: Many Victims Are Angry That Jails Freed Inmates*, N.Y. TIMES, Apr. 26, 2020, § 1, at 4.

¹⁶⁰ *Id.*

¹⁶¹ Christine Byers, *Missouri AG concerned about inmates released due to COVID-19 concerns*, KSDK (Mar. 31, 2020), available at <https://www.ksdk.com/article/news/crime/kim-gardner-st-louis-inmates-released-coronavirus-eric-schmitt/63-da823a97-a248-4a53-8890-242c0437fe17> (Missouri AG quoted as saying that he found it "particularly troubling" that inmates were being released without notifying victims pursuant to the State's mandate under the Sunshine Law); Rudy Harper, *The state, prosecutors at odds over releasing inmates due to COVID-19 fears*, WXYZ (May 5, 2020), available at <https://www.wxyz.com/news/coronavirus/the-state-prosecutors-at-odds-over-releasing-inmates-due-to-covid-19-fears> (quoting a Michigan prosecutor as saying that his office had a "moral responsibility, an ethical responsibility, a just responsibility" to notify victims about the impending release of perpetrators); Christine Carrega, *Victim's family says they weren't told of violent offender's release amid COVID-19*, ABC NEWS (Apr. 7, 2020), available at <https://abcnews.go.com/Health/crime-victim-calls-slap-faces-violent-offenders-released/story?id=69957568> (quoting victims who learned of the release of perpetrators after the fact).

¹⁶² See, e.g., Tyria Goines, *Marsy's Law for Georgia calls on sheriffs to notify victims of inmates released due to COVID-19*, WRDW (Apr. 2, 2020), available at <https://www.wrdw.com/content/news/Marsys-Law-for-Georgia-calls-on-sheriffs-to-notify-victims-of-inmates-released-due-to-COVID-19-569331611.html> (noting that under a 2018 law, Georgia requires that crime victims be notified before inmates are released).

¹⁶³ See, e.g., Order of the Governor of the State of Maryland, No. 20-04-18-01 (Apr. 18, 2020), available at <https://governor.maryland.gov/wp-content/uploads/2020/04/Prisoner-Release-4.18.20.pdf> (Maryland Executive Order that provides for expeditious release of inmates as a measure to reduce the spread of the virus, but requires victims to be notified a minimum of five days prior to the inmate's release).

Prosecutors and prison officials will continue to struggle with determining which inmates can be released early. Releasing inmates early carries risks, but so does keeping them in overcrowded facilities.¹⁶⁴ In many jurisdictions, one factor that weighs heavily in the determination of whether an inmate can qualify for an early release is the severity of the underlying crime that led to the inmate's incarceration.¹⁶⁵ Another factor that is frequently given consideration is the amount of time already served. As the pandemic continues to spread throughout prison and jail populations, the amount of time served that would render an inmate eligible for home confinement or early release has often been reduced.¹⁶⁶

Advocates for ending mass incarceration expressed hope that the legacy of the coronavirus pandemic will be to demonstrate that the United States "incarcerates too many people" and that "[a]s state and local budgets collapse, the high cost of incarceration will be tougher to justify."¹⁶⁷ Others have taken the position that it is "absurd" to release "hardened criminals from jail to prevent the spread of COVID-19" only to incarcerate those who fail to comply with stay-at-home orders and reopen their businesses.¹⁶⁸ Finally, the early release of hundreds of criminals has increased fears for personal safety among many in the broader communities. This, in turn, appears to have contributed to an upsurge in gun sales in some jurisdictions.¹⁶⁹

VI. DEATH PENALTY

In his chapter on Capital Punishment in this 2020 edition of *The State of Criminal Justice*, Ronald J. Tabak relates that in mid-March 2020 the Texas Court of Criminal Appeals issued 60-day stays of two executions that had been scheduled for later that month. The court cited as one rationale "the current health crisis and the enormous resources needed to address that emergency." On April 1, 2020, the court issued another such stay, as did District

¹⁶⁴ John Eligon, *It's a Slap in the Face: Many Victims Are Angry That Jails Freed Inmates*, N.Y. TIMES, Apr. 26, 2020, § 1, at 4.

¹⁶⁵ Order of the Governor of the State of Maryland, No. 20-04-18-01 (Apr. 18, 2020), available at <https://governor.maryland.gov/wp-content/uploads/2020/04/Prisoner-Release-4.18.20.pdf> (in Maryland, inmates whose term of confinement includes a sentence for a sexual offense are ineligible for early release); Lea Skene, *Review panel to consider medical release for some Louisiana state prison inmates due to coronavirus*, THE ADVOCATE (Apr. 14, 2020), available at https://www.theadvocate.com/baton_rouge/news/coronavirus/article_62e9f822-7e79-11ea-bfb3-933881495eb6.html (Louisiana's review panel adopted a series of "narrow criteria that inmates must meet" including "nonviolent convictions excluding sex offenses"); Josh Gerstein, *Feds again shift guidance on prisoner releases due to coronavirus*, POLITICO (Apr. 23, 2020), available at <https://www.politico.com/news/2020/04/23/coronavirus-prisons-206155> (noting that federal guidelines generally disqualify inmates convicted of "sex or terrorism offenses").

¹⁶⁶ Office of the Attorney General, Memorandum for Director of Bureau of Prisons, Increasing Use of Home Confinement at Institutions Most Affected by COVID-19, available at <https://www.justice.gov/file/1266661/download> (memorandum authorizing expansion of "the cohort of inmates who can be considered for home release"); Josh Gerstein, *Feds again shift guidance on prisoner releases due to coronavirus*, POLITICO (Apr. 23, 2020), available at <https://www.politico.com/news/2020/04/23/coronavirus-prisons-206155> (noting that the federal Bureau of Prisons had initially considered inmates who had served at least 50 percent of their sentence, but subsequently expanded consideration to those who had served as little as 25 percent).

¹⁶⁷ Tim Arango & Thomas Fuller, *California: In Crisis, Liberals See a Shot at Change*, N.Y. TIMES, May 5, 2020, at A14.

¹⁶⁸ Audrey McNamara, *Salon owner released from jail after Texas governor changes coronavirus orders*, CBS NEWS (May 8, 2020), available at <https://www.cbsnews.com/news/shelley-luther-salon-owner-released-from-jail-texas-governor-greg-abbott-changes-coronavirus-orders/> (quoting Texas Governor Greg Abbott).

¹⁶⁹ See, e.g., Sabrina Eaton, *Personal safety concerns cause gun sales to soar in Ohio during virus pandemic*, CLEVELAND PLAIN DEALER (May 9, 2020), available at 2020 WLNR 13100351 (Westlaw).

Judge Angela Saucier in a fourth case, on April 6, 2020.¹⁷⁰ Defense attorneys sought stays of executions in several states, asserting that the COVID-19 pandemic was making it substantially more difficult to undertake the investigations necessary to develop and present evidence in support of clemency. Another consideration was the potential danger of having substantial groups of people assemble for executions.

His chapter also reports that on April 10, 2020, nine “doctors, pharmacists and front-line medical workers” sent an open letter to state prison systems. The letter urged the state prison systems to turn over drugs such as midazolam – which the states were holding for use in executions – to health care professionals who needed these drugs urgently for helping patients. Many of these drugs are in very short supply.¹⁷¹

VII. CONCLUSION

The criminal law and criminal justice issues relating to COVID-19 will continue to develop as the disease continues to spread.

¹⁷⁰ Danielle Haynes, *Texas delays third execution amid COVID-19 Pandemic*, UPI (Apr. 1, 2020), available at https://www.upi.com/Top_News/US/2020/04/01/Texas-stays-third-execution-amid-COVID-19-pandemic/5001585770325/; *4th Texas execution delayed in midst of virus outbreak*, AP NEWS (Apr. 6, 2020), available at <https://apnews.com/e2021b26e914e2edc8df25b609dc77c7>.

¹⁷¹ Asher Stockler, *Health Care Workers Ask States to Hand Over Death Penalty Drugs Needed to Fight COVID-19 Pandemic*, NEWSWEEK, Apr. 10, 2020.