VIRGINIA LAW REVIEW ONLINE

VOLUME 106 JULY 2020 71–98

ESSAY

PANDEMICS, RISKS, AND REMEDIES

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INTRODUCTION

The coronavirus ("COVID") pandemic exposed America's brittle reliance on incarceration as means of promoting justice and social welfare. For each criminal detention site, a single prisoner infection ultimately threatened the entire institutional community. The risk of COVID infection in jails and prisons was, for that reason, more than just pervasive; it was also lethally *systemic*.[1] Prisoners were sardined behind bars, and the contagion's presence at any single facility produced rates of infection many times higher than they were in the free world.[2]

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[1] For a longer explanation of what I mean by "systemic risk," see infra Part I.

[2] The Marshall Project collects state-by-state data about infection and mortality in state and federal prisons, and it presents comparisons between in-prison and out-of-prison rates. See A State-by-State Look at Coronavirus in Prisons, Marshall Project [hereinafter State-by-State Data], https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons [https://perma.cc/DAW8-T26Q] (last updated June 4, 2020); see also, e.g., COVID-19 Infection Tracking in NYC Jails, Legal Aid Soc'y (May 27, 2020), https://legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails/ [https://perma.cc/8MNR-RQ7U] (observing that the coronavirus infection rates for inmates and staff of New York's Department of Corrections, at 8.72% and 12.66%, respectively, vastly exceed the infection

The American legal system had a flat-footed response to COVID's unique threat.[3] Lawyers and advocacy groups fought furiously for legal remedies,[4] but their efforts largely failed to prevent infection and death on a massive scale.[5] The boogeyman of violent recidivism frustrated efforts to secure wholesale remedies, and already over-taxed criminal justice institutions were unable to provide case-by-case relief at the speed and scale necessary to protect detained populations.[6]

There is a temptation to view the COVID-prisoner spectacle primarily as a failure of political and bureaucratic will—exaggerated fear of released offenders swamping the social returns on wholesale discharge. That account is not wrong so much as it is incomplete. I argue that the failure to adequately release criminal detainees *also* reflected a deficit in the deep structure of American discharge remedies. Specifically, COVID exposed a mismatch between pandemic risks that were systemic and remedies that were not. A single infection could decimate an entire facility, but jurisdictions lacked discharge mechanisms capable of effectuating speedy release at sufficient scale.[7]

rate for the general population of the state of New York, which is 1.90%) (data accurate as of June 9, 2020).

[3] I am deliberately omitting from this discussion the efforts of lawyers who represent non-citizens detained by U.S. Immigration and Customs Enforcement ("ICE"). The critique of such detention differs in meaningful ways from the critiques of mass incarceration that relate to my thesis here—although COVID presents a similar threat in ICE facilities.

[4] See, e.g., Press Release: ACLU Sues Oakdale Federal Prison for Release of Those Most at Risk from COVID-19, ACLU (Apr. 6, 2020), https://www.aclu.org/press-releases/aclu-sues-oakdale-federal-prison-release-those-most-risk-covid-19 [https://perma.cc/8WY8-ZSCL] (announcing lawsuit to secure discharge of prisoners from Oakdale federal penitentiary in Louisiana).

[5] See Radley Balko, Stopping Covid-19 Behind Bars Was an Achievable Moral Imperative. We Failed., Wash. Post (May 1, 2020), https://www.washingtonpost.com/opinions/-2020/05/01/stopping-covid-19-behind-bars-was-an-achievable-moral-imperative-we-failed/ [https://perma.cc/45CG-5GLQ]; see also infra notes 8–11 and accompanying text (setting forth representative failures). As of June 9, 2020, there were at least 40,656 cases of coronavirus reported for people in prisons (not jails) and 496 deaths. See State-by-State Data, supra note 2. There were an additional 8,471 cases among prison staff and 34 deaths. See id.

[6] See Sandra E. Garcia, U.S. Prison Population Remained Stable as Pandemic Grew, N.Y. Times (May 14, 2020), https://nyti.ms/3cu58Xc [https://perma.cc/Y4R4-NAC8] ("The United States prison population remained stable in the early months of the year, decreasing by just 1.6 percent from January through March even as prisons emerged as incubators for the spread of Covid-19 . . . .").

[7] Speedy discharge is especially important during a pandemic because, among other things, an earlier discharge means that a discharged prisoner is less likely to bring an infection from a facility into the broader community.

I proceed in five Parts. In Part I, I specify the grounds for characterizing COVID as a systemic risk to prisoners and their adjacent communities. In Parts II through IV, I demonstrate the remedial deficit—systemic health risk without systemic remedies—by showing that existing discharge mechanisms are too slow, require too much multilateral unanimity, and vest discharge powers in the wrong institutions. In Part V, I suggest that the key to closing the remedial deficit tracks a broader intuition about decarceration, and that it requires jurisdictions to concentrate discharge powers in decision makers closer to acutely affected localities.

I. COVID RISK AND CRIMINAL DETENTION

American criminal detention was ground zero for COVID outbreaks. By early May 2020, of the ten biggest U.S. COVID clusters—meaning outbreaks connected to a particular institution—*seven* were in jails or prisons.[8] Over *eighty percent* of the 2500 prisoners at the Marion Correctional Institution in central Ohio tested positive, giving it the morbid distinction as the country's single biggest COVID hot spot.[9] The infection rate at New York City's Rikers Island facility was over six times the rate in the surrounding community, which was itself the early metropolitan epicenter of the U.S. outbreak.[10] Two months after American outbreaks began, seventy percent of the federal prison inmates taking tests were COVID-positive.[11] Because of limitations on detection and testing, moreover, the topline numbers undercount the crisis.[12]

The reasons why COVID infection was so acute inside criminal detention facilities are intuitive. Jails and prisons are under-funded, over-crowded, and populated by detainees who are disproportionately

[8] See Coronavirus in the U.S.: Latest Map and Case Count, N.Y. Times, https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html [https://perma.cc/-FJ8G-YRMR] (screen capture on file with author).

[9] See Editorial: Prison COVID Outbreak Aided by Crowding, Columbus Dispatch (May 3, 2020), https://www.dispatch.com/opinion/20200503/editorial-prison-covid-outbreak-aided-by-crowding [https://perma.cc/5TYF-6X98].

[10] See Josiah Bates, Campaigns, Fundraisers Work To Bail New York City Inmates amid COVID-19 Outbreaks in Jails and Detention Centers, Time (Apr. 17, 2020), https://time.com/5821512/bail-campaigns-new-york-inmates-coronavirus/ [https://perma.cc/-RHQ4-XCP3].

[11] See Michael Balsamo, Over 70% of Tested Inmates in Federal Prisons Have COVID-19, Associated Press (Apr. 29, 2020), https://apnews.com/fb43e3ebc447355a4f71e3563dbdca4f.

[12] See Peter Eisler et al., Across U.S., COVID-19 Takes a Hidden Toll Behind Bars, Reuters (May 18, 2020), https://www.reuters.com/investigates/special-report/health-coronavirus-usa-jails/ [https://perma.cc/9MWB-H49J].

susceptible to illness.[13] These are places that house older, sicker people with complex medical needs,[14] and where "social distancing" is impossible, yet the facilities typically have dismal sanitation and ventilation, and otherwise inferior health infrastructure.[15] Once the infection arrives at a criminal detention facility, it rips through the population like a tornado.

Many of the same circumstances that facilitate prisoner-to-prisoner transmission also facilitate transmission to staff and visitors,[16] who then carry it into the free world.[17] The prison towns where the correctional staff live are disproportionately rural, and the "rural mortality penalty" attributable to poorer health infrastructure in such areas makes these communities particularly vulnerable to the pandemic.[18] The incidence of

[13] See Laura Hawks et al., COVID-19 in Prisons and Jails in the United States, JAMA Internal Medicine, JAMA Network (Apr. 28, 2020), https://jamanetwork.com/journals/-jamainternalmedicine/fullarticle/2765271 [https://perma.cc/Z6Z6-T82S]; Weihua Li & Nicole Lewis, This Chart Shows Why the Prison Population Is So Vulnerable to COVID-19, Marshall Project (Mar. 19, 2020), https://www.themarshallproject.org/2020/03/19/this-chart-shows-why-the-prison-population-is-so-vulnerable-to-covid-19 [https://perma.cc/4ZRQ-TMT2]; Michael Tonry, From Policing to Parole: Reconfiguring American Criminal Justice, 46 Crime & Just. 1, 2 (2017).

[14] See Emily Widra, Since You Asked: How Many People Aged 55 or Older Are in Prison, by State?, Prison Pol'y Initiative (May 11, 2020), https://www.prisonpolicy.org/-blog/2020/05/11/55plus/ [https://perma.cc/K3VR-7UN7].

[15] See Clark Neily, Decarceration in the Face of a Pandemic, Cato Inst. (Apr. 30, 2020), https://www.cato.org/blog/decarceration-face-pandemic [https://perma.cc/8TW5-W9E4]; Megan Wallace et al., COVID-19 in Correctional and Detention Facilities—United States, February–April 2020, CDC (May 15, 2020), https://www.cdc.gov/mmwr/volumes/69/-wr/mm6919e1.htm [https://perma.cc/5CBB-N5SP]. For example, even in late April 2020, the Metropolitan Detention Center in New York still lacked simple procedures to identify prisoners with COVID, prevent spread, and provide care. Facility Evaluation: Metropolitan Detention Center COVID-19 Response, Chunn v. Edge, No. 20-cv-01590, at 1–2 (E.D.N.Y. Apr. 30, 2020).

[16] Because of the risk of visitor transmission, prisons across the country have restricted visitor access. See Brenna Ehrlich, Are Prisons Doing Enough To Prevent Coronavirus Outbreaks?, Rolling Stone (Mar. 12, 2020), https://www.rollingstone.com/culture/culture-features/prisons-covid-19-966251/.

[17] See Anna Flagg & Joseph Neff, Why Jails Are So Important in the Fight Against Coronavirus, N.Y. Times (Mar. 31, 2020), https://www.nytimes.com/2020/03/31/upshot/-coronavirus-jails-prisons.html [https://perma.cc/HT3W-UA5W].

[18] See Arthur G. Cosby et al., Growth and Persistence of Place-Based Mortality in the United States: The Rural Mortality Penalty, Am. J. Pub. Health (Dec. 19, 2018), https://ajph.aphapublications.org/doi/10.2105/AJPH.2018.304787 [https://perma.cc/X4T6-R5BT]; Jonathan Ben-Menachem, Coronavirus Exposes Precarity of Prison Towns, Appeal (Apr. 21, 2020), https://theappeal.org/coronavirus-prison-towns/ [https://perma.cc/R45Q-WW58].

contagion in America's criminal detention facilities therefore threatens not just the prisoners but also the fragile rural ecosystems that house them.

In the financial context, "systemic risk" describes the threat to an economic system from a chain reaction in which a single adverse economic event causes substantial, cumulative loss across the entire system.[19] The finance literature uses the term "contagion" to describe whatever phenomenon transmits knock-on effects across the system.[20] In the COVID context, however, the public health terminology is not a metaphor. For my purposes, the systems are the detention facilities and the local communities to which their staff and visitors belong, and the contagion is COVID transmission. Because of (1) how aggressively COVID moves across these systems, (2) the unique vulnerability of a population ravaged by chronic diseases, substance abuse, and age-related complications, and (3) the third-rate remedial health infrastructure, the systemic risk is enormous. The entire community (the system) shares the extraordinary risks associated with a single infection. As I explain in Parts II through IV, existing mechanisms for prisoner discharge are remarkably ill-equipped to meet the scale and timing of these systemic risks.

Systemic risk also justifies a normative assumption I make in the balance of this Essay—that there is moral value in substantial prisoner discharge during the COVID pandemic. Before COVID, political debates over the wisdom of mass incarceration raged, even if the pertinent empirical work rather lopsidedly demonstrated its senselessness. That data generally came down in favor of familiar arguments: that longer sentences did not meaningfully deter future offending,[21] that well-run treatment programs are better at reducing recidivism risk,[22] that longer

[19] See Adam J. Levitin, In Defense of Bailouts, 99 Geo. L.J. 435, 443 n.20 (2011) (collecting definitions); Steven L. Schwarcz, Systemic Risk, 97 Geo. L.J. 193, 197 (2008) (identifying the inclusion of a chain reaction as a commonality across definitions).

[20] See, e.g., David A. Skeel Jr., States of Bankruptcy, 79 U. Chi. L. Rev. 677, 718 (2012) (describing three different types of market contagion).

[21] See Rachel E. Barkow, Prisoners of Politics: Breaking the Cycle of Mass Incarceration 42–43 (2019); Council of Econ. Advisors, Economic Perspectives on Incarceration and the Criminal Justice System 37 (2016); Nat'l Research Council, The Growth of Incarceration in the United States: Exploring Causes and Consequences 139–140 (Jeremy Travis et al. eds., 2014).

[22] See Francis T. Cullen, Rehabilitation: Beyond Nothing Works, *in* 42 Crime & Just., Crime & Justice in America, 1975–2025, at 299 (Michael Tonry ed., 2013); Francis T. Cullen et al., Reinventing Community Corrections, *in* 46 Crime & Just., Reinventing American Criminal Justice 27 (Michael Tonry & Daniel S. Nagin eds., 2017).

incarceration is often criminogenic,[23] that prison time imposes huge costs on innocent family members and affected communities,[24] that mass incarceration shatters budgets,[25] that states over-sentence because of moral hazards,[26] that the social costs disproportionately burden communities of color,[27] and so forth.

Because COVID presents systemic risks on top of all of the other evidence favoring decarceration,[28] I assume for the purposes of this Essay that decarcerating *during the COVID outbreak* is normatively desirable.[29] I do not, for example, answer empirically unsupported arguments about how the social cost of incremental recidivism might exceed the social benefit of COVID-based discharge.[30] Individual acts of violent reoffending might be evocative political arguments,[31] but the actual risks

[23] See Barkow, supra note 21, at 46.

[24] See Steven D. Levitt, The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation, 111 Q.J. Econ. 319, 347 (1996); see also, generally, Donald Braman, Doing Time on the Outside: Incarceration and Family Life in Urban America (2007) (comprehensively exploring the effect of incarceration on families and affected communities).

[25] See Peter Wagner & Bernadette Rabuy, Following the Money of Mass Incarceration, Prison Pol'y Initiative (Jan. 25, 2017), https://www.prisonpolicy.org/reports/money.html [https://perma.cc/WJ45-SD2U]

[26] See Franklin E. Zimring & Gordon Hawkins, The Scale of Imprisonment 140 (1991).

[27] See Bruce Western & Christopher Wildeman, The Black Family and Mass Incarceration, 621 Annals Am. Acad. Pol. & Soc. Sci. 221, 233–41 (2009).

[28] The literature arguing in favor of decarceration is massive, and I join the basic view that mass incarceration has been an economic and social disaster. See generally Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 127–59 (2010) (arguing that mass incarceration functions as a means of racial control); Barkow, supra note 21 (urging a more evidence-based, technocratic treatment of incarceration, typical of the cost-benefit approach taken by administrative agencies); John F. Pfaff, Locked In: The True Causes of Mass Incarceration and How To Achieve Real Reform (2017) (scrutinizing the role of prosecutors in mass incarceration).

[29] Cf., e.g., Neily, supra note 15 (characterizing the position of COVID decarceration as being supported by "all but the most obtuse proponents of mass incarceration").

[30] See, e.g., Sean Kennedy, Maryland Should Not Release Prisoners. It's Safer for Everyone, Wash. Post (Apr. 27, 2020), https://www.washingtonpost.com/opinions/2020/04/27/-maryland-should-not-release-prisoners-its-safer-everyone/ [https://perma.cc/MM2M-UTPZ]; Craig McCarthy, Dozens of Rikers Inmates Arrested Again After Coronavirus Release, N.Y. Post (May 12, 2020), https://nypost.com/2020/05/12/over-100-inmates-rearrested-after-their-coronavirus-release/ [https://perma.cc/E5Y4-BALJ].

[31] See, e.g., Zachary A. Siegel & Leo Beletsky, Why We Shouldn't Reward Fearmongering in Criminal Justice Reporting, Appeal (May 19, 2020), https://theappeal.org/pulitzer-prize-matt-bevin-commutations/ [https://perma.cc/E5M2-SC5Y] (discussing how sensationalistic reporting produced political blowback).

are simply too lopsided.[32] Instead, and assuming that there is social value in speedy, scalable discharge during a pandemic, I train my focus on the remedial deficit.

II. CIVIL RIGHTS LITIGATION

The systemic remedy that jumps to most minds is class action relief under federal civil rights statutes—specifically, under the federal habeas corpus provisions[33] and 42 U.S.C. § 1983. Such litigation was indeed widespread,[34] and the complaints sometimes subclassed the plaintiffs into pre-trial and post-conviction detainees.[35] Additionally, the plaintiff class often included a medically vulnerable subclass that sought relief above and beyond the relief sought by the remainder, usually discharge or some other time-bounded physical removal from the vulnerable facility.[36] The Section 1983 claim was usually the vehicle for seeking changed conditions, and the habeas claim was usually the vehicle for seeking release.[37]

As COVID-discharge litigation unfolded,[38] however, the limits of the civil rights remedies became apparent. First, because both involved adversarial judicial process, they simply took too long. Second, the standard of care linked to the underlying Eighth and Fourteenth Amendment claims—that facility operators not be "deliberately

[32] See generally J.J. Prescott et al., Understanding Violent-Crime Recidivism, 95 Notre Dame L. Rev. 1643, 1647 (2020) (reporting extensive data analysis of recidivism rates for those convicted of violent crimes and concluding that, in a social welfare calculation, early release is usually an appropriate policy response).

[33] See 28 U.S.C. §§ 2241, 2254, 2255 (2012).

[34] See UCLA Covid-19 Behind Bars Data Project, UCLA Law, https://law.ucla.edu/-centers/criminal-justice/criminal-justice-program/related-programs/covid-19-behind-bars-data-project/ [https://perma.cc/FT5W-7V8E] (last visited May 6, 2020) (tracking such litigation).

[35] See, e.g., Class Action Complaint for Declaratory and Injunctive Relief and Petition for Writs of Habeas Corpus, Banks v. Booth, No. 1:20-cv-00849, at 29–30 (D.D.C. Mar. 30, 2020).

[36] See, e.g., Class Action Complaint, Money v. Pritzker, No. 1:20-cv-02093, at 40–42 (N.D. Ill. Apr. 2, 2020).

[37] See, e.g., Petition for Writ of Habeas Corpus, Injunctive, and Declaratory Relief, Livas v. Myers, No. 2:20-cv-00422, at 27–29 (W.D. La. Apr. 6, 2020) (seeking discharge under 28 U.S.C. § 2241); Class Action Complaint and Application for Temporary Restraining Order and Other Injunctive Relief, Valentine v. Collier, No. 4:20-cv-01115, at 32–34 (S.D. Tex. Mar. 30, 2020) (seeking changed conditions under 42 U.S.C. § 1983).

[38] As of May 19, there were over 100 lawsuits nationwide seeking discharge or other ways to "reduce overcrowding and infection risks in jails." Eisler et al., supra note 12.

indifferent"—proved exceptionally easy for the government to meet. Third, there were serious doctrinal problems with each remedy, including exhaustion requirements, that reduced the value of the federal forum.

A. Habeas Corpus

The result of a successful habeas class action would be a declaration that a particular custody category is unlawful, and an order that class-member-prisoners be discharged.[39] Most plaintiff classes seeking a habeas remedy nevertheless encountered obstacles that were insurmountable: the showing necessary to prove the underlying constitutional violation was too high, the habeas vehicle too closely resembled conditions-of-confinement litigation that courts prefer to funnel through Section 1983, and exhaustion requirements forced plaintiffs to spend precious time seeking inferior state and administrative remedies. Even if plaintiffs could prevail on the most expedited litigation calendar conceivable, moreover, they would spend weeks or months waiting for the ultimate discharge order.[40]

First, habeas class plaintiffs seeking COVID-based discharge must show an egregious custodial defect amounting to a constitutional violation,[41] and the decisional law on the underlying constitutional question is steep terrain. (Section 1983 plaintiffs must show the same thing.) The Eighth Amendment protects *post-conviction* detainees from unlawful conditions of confinement,[42] and the Fourteenth Amendment

[39] The use of the class action mechanism in habeas cases is rare, and the Supreme Court has never formally approved it. See Jennings v. Rodriguez, 138 S. Ct. 830, 858 n.7 (2018) (Thomas, J., concurring in part and concurring in the judgment) (citing Schall v. Martin, 467 U.S. 253, 256 n.10 (1984)).

[40] In the COVID litigation over conditions at the Elkton Federal Correctional Institution, initially considered one of the very biggest prisoner successes, and which resulted in a later-reversed order to release medically vulnerable detainees, there was still significant lag. The emergency action was filed on April 13. See Emergency Petition for Writ of Habeas Corpus, Injunctive, and Declaratory Relief, Wilson v. Williams, No. 4:20-cv-00794 (N.D. Ohio Apr. 13, 2020). Even though the district court ordered relief nine days later, the order gave the facility two weeks to comply. See Wilson v. Williams, No. 20-3447 (6th Cir. May 4, 2020). There was considerable litigation in which the plaintiffs sought more aggressive compliance with the district court's preliminary order, and the Sixth Circuit did not finally rule on the preliminary injunction until June 9—when it vacated the lower court order. See Wilson v. Williams, 961 F.3d 829 (6th Cir. 2020). Had the plaintiffs won in the Sixth Circuit, there would have been a two-month lag.

[41] See 28 U.S.C. §§ 2241(c)(3) & 2254(a) (2012). Section 2255(a) cognizability is slightly different, but not in ways that implicate my discussion here.

[42] See Farmer v. Brennan, 511 U.S. 825, 832 (1994).

provides parallel protection to *pre-trial* detainees.[43] For these challenges, a claimant must usually prove that corrections officials were "deliberate[ly] indifferent" to a particular risk that jeopardized the health and safety of a prisoner.[44] Supreme Court precedent makes clear that deliberate indifference to serious medical needs violates the Federal Constitution.[45]

Historically, winning under the deliberate indifference standard is difficult,[46] and the early signs for those seeking COVID-based discharge are consistent with that history.[47] In class litigation seeking improved COVID-era conditions in a Texas-based facility, for example, the Fifth Circuit held that it would not assess liability when a facility took some steps to address health concerns,[48] and that there was not deliberate indifference just because the measures taken failed to "reasonably abate[]" the infection.[49] Instead, the Fifth Circuit explained, the deliberate indifference standard requires COVID plaintiffs to show some subjective intent that is greater than or equal to recklessness—there could be no deliberate indifference finding when the state officials "subjectively believe the measures they are taking are []adequate" and the facility "continues to take [medically informed] measures . . . to abate and control

[43] See City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983).

[44] See Wilson v. Seiter, 501 U.S. 294, 303 (1991). At least one federal court, however, has determined that a *pre-trial* Fourteenth Amendment claimant need not prove deliberate indifference, because pre-trial detention cannot be conceptualized as punishment. See Banks v. Booth, No. 1:20-cv-00849, at 8–9 (D.D.C. June 18, 2020).

[45] See Estelle v. Gamble, 429 U.S. 97, 104 (1976).

[46] See generally Joel H. Thompson, Today's Deliberate Indifference: Providing Attention Without Providing Treatment to Prisoners with Serious Medical Needs, 45 Harv. C.R.-C.L. L. Rev. 635, 637 (2010) (discussing the inability of prisoner claimants to meet the deliberate indifference standard).

[47] But see Ruling on Motion for Temporary Restraining Order and Motion To Dismiss, Martinez-Brooks v. Carvajal, No. 3:20-cv-00569, at 42–57 (D. Conn. May 12, 2020) [hereinafter FCI Danbury Order] (awarding temporary restraining order ("TRO") in part based on the expectation that plaintiffs would prevail on deliberate indifference theory).

[48] See Valentine v. Collier, No. 20-20207, at 6–7 (5th Cir. Apr. 22, 2020).

[49] *Id.* at 7.

the spread of the virus."[50] Recent Sixth and Eleventh Circuit opinions reached the same conclusion for roughly the same reasons.[51]

Second, there is some dissonance between, on the one hand, the habeas remedy, and on the other, the Eighth and Fourteenth Amendment rights to adequate detention conditions. Conditions-of-confinement plaintiffs usually seek changed conditions under Section 1983, and not discharge under the habeas statutes. Indeed, a well-known thread of Supreme Court precedent reinforces the idea that habeas is for discharge, and Section 1983 is for conditions.[52] Even though such precedent should pose few problems for habeas plaintiff classes in COVID-discharge litigation,[53] the boundary has been a salient obstacle to relief.[54]

The confusion arises from the fact that conditions-of-confinement litigation ordinarily seeks a change in the condition, rather than discharge. That class plaintiffs seek discharge on the basis of an unconstitutional condition has nonetheless caused defendants to frame the class action complaints as typical Section 1983 conditions-of-confinement litigation in disguise. Specifically, government defendants often argued that the Prison Litigation Reform Act ("PLRA") requires special processing of conditions-of-confinement claims in any discharge-seeking litigation.[55]

[50] Id. at 8. I do not mean to suggest that a thick subjective prong is correct. A minority of circuits differ from the Fifth insofar as they do not apply a stringent subjective prong in cases where pre-trial plaintiffs seek *prospective* relief. See, e.g., Darnell v. Pineiro, 849 F.3d 17, 35 (2d Cir. 2017). Indeed, the leading Supreme Court case indicates that a defendant refusing to address an excessive risk *necessarily* meets the subjective prong when it resists relief. See Farmer v. Brennan, 511 U.S. 825, 846 n.9 (1994).

[51] See Wilson v. Williams, 961 F.3d 829 (6th Cir. 2020); Swain v. Junior, 958 F.3d 1081, 1089–90 (11th Cir. 2020); see also Order, Hallinan v. Scarantino, No. 5:20-hc-02088, at 28–34 (E.D.N.C. June 11, 2020) (district court decision finding against prisoner-plaintiffs on deliberate indifference); Order, Lucero-Gonzalez v. Kline, No. 2:20-cv-00901, at 14 (D. Ariz. June 2, 2020) (same).

[52] See, e.g., Preiser v. Rodriguez, 411 U.S. 475, 500 (1973) (holding that a prisoner seeking "release" must use the habeas remedy). But see Wilson v. Williams, 961 F.3d 829 (6th Cir. 2020) (holding that conditions-of-confinement litigation can proceed under habeas provisions as long as the plaintiffs seek discharge).

[53] There are, however, meaningful questions about whether convicted prisoners seeking COVID discharge were supposed to proceed under the generally applicable post-conviction provisions in §§ 2254 and 2255, or under the failsafe provisions in § 2241.

[54] Cf. Wilborn v. Mansukhani, 795 F. App'x 157, 163 (4th Cir. 2019) (remarking that seven of ten "circuits that have addressed the issue in a published decision have concluded that claims challenging the conditions of confinement cannot be brought in a habeas petition").

[55] See, e.g., Answer, Return of Writ, and Response in Opposition to Petition for Writ of Habeas Corpus, Injunctive and Declaratory Relief, Wilson v. Williams, No. 4:20-cv-00794, at 15–18 (N.D. Ohio Apr. 17, 2020).

At least two federal courts have expressly refused to subject habeas class plaintiffs to the PLRA provisions,[56] but many others have simply dismissed habeas challenges as impermissible shortcuts through Section 1983 litigation that the PLRA restricts.[57]

Third, remedy-specific doctrine often obstructed timely relief at scale.[58] Consider the thick exhaustion requirements that some courts imposed on both pre-trial and post-conviction detainees. In some of these cases, the named plaintiffs sued on behalf of other class members and may have sought some sort of collective relief in state courts beforehand.[59] Because exhaustion is typically regarded as a property of *individual* claims, however, most courts confronted with the question determined that claimants had to exhaust remedies individually—including, for example, a holding that pre-trial class members had to challenge their custody during individual bond hearings.[60] Requiring individualized exhaustion both disables the systemic scope of the remedies and slows them down.

[56] See, e.g., Wilson v. Williams, 961 F.3d 829, 838 (6th Cir. 2020) ("The BOP's attempts to classify petitioners' claims as 'conditions of confinement' claims, subject to the PLRA, are unavailing."); FCI Danbury Order, supra note 47, at 33–36.

[57] See, e.g., Order, Hallinan v. Scarantino, No. 5:20-hc-02088, at 21–26 (E.D.N.C. June 11, 2020); Amended Order Denying Ex Parte Application for Temporary Restraining Order and Order To Show Cause Re: Preliminary Injunction, Wilson v. Ponce, No. 2:20-cv-04451, at 18 (C.D. Cal. June 10, 2020); Order Denying Motion for Preliminary Injunction, Victor Alvarez v. Larose, No. 20-cv-00782, 2020 WL 3053193, at *4 (S.D. Cal. June 7, 2020); Wragg v. Ortiz, No. 2:20-cv-05496, 2020 WL 2745247, at *20 (D.N.J. May 27, 2020); Ruling, Livas v. Myers, No. 2:20-cv-00422, at 19 (W.D. La. Apr. 22, 2020). More recently, the Federal District for the District of Columbia simply ducked the question, determining that a habeas claim was sufficiently unlikely to succeed on the merits that the court need not resolve the habeas vehicle question. See Banks v. Booth, No. 1:20-cv-00849, at 30 n.4 (D.D.C. June 18, 2020).

[58] I focus on exhaustion here, but there were other doctrinal snags. For example, the severe restrictions on successive post-conviction litigation appearing in 28 U.S.C. §§ 2244(b) and 2255(h) reduced the potential plaintiff pool, as some prisoners were probably unwilling to reduce the expected return on future post-conviction litigation.

[59] See, e.g., Petitioners' Reply in Support of Their Petition for Writs of Habeas Corpus, Money v. Jeffreys, No. 1:20-cv-02094, at 39–41 (N.D. Ill. Apr. 8, 2020).

[60] See, e.g., Memorandum Opinion and Order, Mays v. Dart, No. 1:20-cv-02134, at 12–14 (N.D. Ill. Apr. 9, 2020); cf. Memorandum Opinion and Order, Money v. Jeffreys, No. 1:20-cv-02094, at 46–47 (N.D. Ill. Apr. 10, 2020) (in post-conviction claimant class action brought under 28 U.S.C. § 2254, finding non-exhaustion because there was "no effort to establish that the trial courts in the numerous other counties where they are housed are [or were] unavailable").

B. 42 U.S.C. § 1983

42 U.S.C. § 1983 is the federal civil rights statute that permits a plaintiff to obtain damages or injunctions against state officials who violate federal law, and the state officials are usually just a stand-in for the state itself. Section 1983 class action plaintiffs seeking COVID-based discharge experience many of the same problems encountered by prisoners in the parallel habeas litigation, as well as some unique problems of their own.[61]

First, demonstrating the underlying Eighth and Fourteenth Amendment violations in Section 1983 litigation involves the same hurdles that it does in habeas litigation. As explained in Section II.A, many jurisdictions have elevated the standard for deliberate indifference beyond what *Farmer v. Brennan*[62] appears to have contemplated—requiring plaintiffs seeking *prospective* relief to prove something more than the fact that a defendant is resisting "reasonable measures to abate an intolerable risk of which they are aware."[63]

Second, Section 1983 plaintiffs seeking discharge run headlong into the PLRA. For these plaintiff classes, courts generally subject the litigation to 18 U.S.C. § 3626(a)(2)–(3), the PLRA's restrictions on prisoner release.[64] For example, courts have turned back wholesale relief under Section 1983 because there was no showing of non-compliance with a prior remedial order, and because only a specially convened three-judge panel can order prisoner release after finding both (1) that crowding is the primary cause of the federal rights violation and (2) that no other relief helps.[65] These PLRA restrictions cripple collective discharge as a

[61] The so-called "*Heck* bar" precludes prisoners from using § 1983 to mount challenges that necessarily imply the invalidity of their convictions or sentences. See Heck v. Humphrey, 512 U.S. 477, 487 (1994). To the extent a § 1983 claimant is seeking release without necessarily invalidating the conviction or sentence, the *Heck* bar poses less of a problem than it might initially seem.

[62] 511 U.S. 825 (1994).

[63] Id. at 846 n.9; see also supra notes 48–50 and accompanying text (explaining use of subjective prong of deliberate indifference inquiry in prospective relief requests).

[64] See, e.g., Ruling, Livas v. Myers, No. 2:20-cv-00422, at 19 (W.D. La. Apr. 22, 2020). The PLRA exhaustion requirements apply to any prisoner release orders issued in a civil proceeding, excepting those issuing by way of a habeas corpus writ. See 18 U.S.C. § 3626(g)(1) (2012).

[65] See, e.g., Memorandum Opinion and Order, Money v. Pritzker, No. 1:20-cv-02093, at 29 (N.D. Ill. Apr. 10, 2020); cf., e.g., Coleman v. Newsom, No. 01-cv-01351, 2020 WL 1675775, at *7 (E.D. Cal. Apr. 4, 2020) ("If a single-judge court finds a constitutional violation, it may order Defendants to take steps short of release necessary to remedy that violation. And if that

meaningful Section 1983 remedy because of how long it takes to comply with the PLRA procedure; the leading PLRA prisoner release litigation took *ten years* to wind its way through the federal courts.[66]

* * *

Ultimately, both Section 1983 and the federal habeas statutes are inadequate responses to the systemic risk that COVID creates. The necessary Eighth and Fourteenth Amendment thresholds can be quite difficult for class plaintiffs to clear, and both remedies delay and fragment litigation that should be speedy and collectivized. In fact, any adversarial litigation—with its complex discovery, motion practice, briefing, and appeals—consumes time that is crucial for avoiding systemic loss that grows daily.

III. ADMINISTRATIVE REMEDIES

What about the many state and federal discharge mechanisms that turn on things other than constitutional violations? What I call "administrative remedies"[67] include discretionary pre-trial release;[68] familiar sentence-remission mechanisms such as discharge for good time, work, home detention, facility overcrowding, and terminal illness;[69] outbreak-related release orders for infected and non-infected prisoners;[70] and emergency authority to remove people from certain criminal detention sites.[71] A mix of administrative remedies might look like viable means of securing

less intrusive relief proves inadequate, Plaintiffs may request, or the district court may order sua sponte, the convening of a three-judge court to determine whether a release order is appropriate.").

[66] See Brown v. Plata, 563 U.S. 493, 507 (2011).

[67] See UCLA Law Builds Databases on Prisons and COVID-19, UCLA Law (Mar. 25, 2020), https://newsroom.ucla.edu/releases/prisons-databases-covid-19 [https://perma.cc/-2BUW-CWWN] (housing list of administrative remedies, which site links as "Statutory Release Powers").

[68] See, e.g., Minn. R. Crim. P. 6.01 (setting forth authority for pre-trial release).

[69] See, e.g., Ariz. Rev. Stat. § 11-459 (2020) (work release and home detention); Ga. Code Ann. § 42-9-60 (2020) (overcrowding-based parole); N.C. Gen. Stat. § 15A-1369 (2020) (compassionate release); Okla. Stat. tit. 57, § 20 (2020) (good-time credit).

[70] See, e.g., Mass. Gen. Laws ch. 126, § 26 (2020) (providing for broader removal to a separate facility in the event of a sufficiently dangerous disease); Mont. Code § 50-2-121 (2019) (providing for removal of sick prisoners).

[71] See, e.g., Cal. Gov't Code § 8658 (2020) (empowering wardens to remove endangered prisoners from detention facilities with strong preference for alternate sites of detention).

discharge at the necessary scale, but a peek beneath the hood discloses insurmountable problems with wholesale strategies reliant on such a process.

A. Obstacles

First, there is an eligibility problem: administrative remedies are simply unavailable to most prisoners convicted of crimes. Good-behavior discharge requires the accumulation of good-behavior credits, expedited parole requires parole eligibility, compassionate release requires that a person be severely ill, and so forth. Most high-profile COVID success stories, in which American jurisdictions have quickly and non-trivially reduced prisoner populations, involve jails[72]—which are less constrained by eligibility restrictions than are prisons. Police and custodians can reduce the jailed pre-trial population by booking less and by exercising more flexible discharge powers, and jails are disproportionately home to offenders convicted for low-level crimes and technical parole violations.[73]

A much larger fraction of American detention occurs in prisons.[74] Prison discharge at appropriate scale is much harder to find,[75] in part because a much smaller slice of the prison pie meets the eligibility requirements for administrative remedies.[76] Most people who secured COVID-based discharge from prisons were those whose sentences were

[72] See Responses to the COVID-19 Pandemic, Prison Pol'y Initiative, https://www.prisonpolicy.org/virus/virusresponse.html [https://perma.cc/S45B-F94T] (updated continuously).

[73] See Analise Pruni, Hennepin County Jail Population Cut by 44% in Light of COVID-19, Minn. Spokesman-Recorder (Apr. 22, 2020), https://spokesman-recorder.com/2020/04/22/hennepin-county-jail-population-cut-by-44-in-light-of-covid-19/ [https://perma.cc/37FM-ERVY] (reduced booking); David Sachs, Denver's Jail Population Is Drastically Shrinking, But That Alone Can't Stop Deputies and Inmates from Getting Coronavirus, Denverite (Apr. 20, 2020), https://denverite.com/2020/04/20/denvers-jail-population-is-drastically-shrinking-but-inmates-and-deputies-are-far-from-immune-to-coronavirus/ [https://perma.cc/WS63-C7QP] (pre-trial release and short sentence balances).

[74] See Wendy Sawyer & Peter Wagner, Mass Incarceration: The Whole Pie 2020, Prison Pol'y Initiative (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/9G6D-X42F].

[75] See Sachs, supra note 73.

[76] For example, Iowa's decision to release 800 prisoners nearing the end of their sentences produced a net prisoner population drop of only three percent. See Emily Widra & Peter Wagner, While Jails Drastically Cut Populations, State Prisons Have Released Almost No One, Prison Pol'y Initiative (May 1, 2020), https://www.prisonpolicy.org/blog/2020/05/01/jails-vs-prisons/ [https://perma.cc/V3GV-Y54J].

within several months of completion,[77] who had already been designated as non-violent and parole eligible,[78] or who were serving sentences for minor technical infractions.[79] A recent analysis of discharged prisoners concluded that "state prisons have released almost no one."[80]

Second, most of the post-conviction discharge mechanisms are individualized, meaning that they require case-by-case determinations of risk and reward—for example, what sort of social risk does a prisoner present, how have they behaved in a detention setting, and is there a community support system sufficient to support furlough or reentry?[81] For many of these mechanisms, sufficiently scaled discharge would require decision makers to resolve cases, considered individually, in the same direction.[82] Case-by-case decision making, however, is uncoordinated and time consuming—consider victim notification requirements—and therefore ill-equipped to redress systemic risk. (Perhaps the biggest impediment to even greater relief for jailed prisoners is that, in many jurisdictions, judges must do case-by-case consideration of administrative remedies.[83])

[77] See, e.g., Nick Swartsell, DeWine Authorizes Release of 105 Inmates as Coronavirus Cases in Ohio Prisons Swell into the Hundreds, CityBeat (Apr. 16, 2020), https://www.citybeat.com/news/blog/21128810/dewine-authorizes-release-of-105-inmates-as-coronavirus-cases-in-ohio-prisons-swell-into-the-hundreds (prisoners approaching the ends of sentences).

[78] See, e.g., Linh Ta, Iowa's Prisons Will Accelerate Release of Approved Inmates To Mitigate COVID-19, Times-Republican (Mar. 23, 2020), https://www.timesrepublican.com/-news/todays-news/2020/03/iowas-prisons-will-accelerate-release-of-approved-inmates-to-mitigate-covid-19/ [https://perma.cc/S3CX-BT4V] (parole-eligible prisoners); Heather Walker, Coronavirus Prompts Prisons To Parole Inmates More Quickly, Wood TV (Apr. 14, 2020), https://www.woodtv.com/health/coronavirus/coronavirus-prompts-prisons-to-parole-some-early/ [https://perma.cc/YXA9-AEW6] (parole-eligible prisoners convicted of non-violent offenses).

[79] See, e.g., Leslie Rubin, W.Va. Taking Steps To Reduce Inmate Population amid COVID-19 Pandemic, WCHS-ABC 8 (Apr. 1, 2020), https://wchstv.com/news/coronavirus/wva-taking-steps-to-reduce-inmate-population-amid-covid-19-pandemic [https://perma.cc/VM87-G5PG] (prisoners detained for parole violations).

[80] Widra & Wagner, supra note 76.

[81] For example, upon reentry, those who reoffend tend to recidivate in their home communities. See Barkow, supra note 21, at 46, 48. The sources of information necessary to make discharge decisions also tend to reside with local institutions. See Margaret Colgate Love, Justice Department Administration of the President's Pardon Power: A Case Study in Institutional Conflict of Interest, 47 U. Tol. L. Rev. 89, 105–06 (2015).

[82] The more cases are funneled through common decision makers, the higher the likelihood of correlated decision making.

[83] See, e.g., Ashley Paredez, Officials Release 1,000 Inmates To Ease Crowding, Slow Spread of COVID-19 at Dallas County Jail, Fox 4 News (Apr. 16, 2020),

Third, many administrative remedies present what one might call "multiple-veto" problems that reduce the scale of discharge. A multiple-veto problem exists when more than one entity must concur in order to produce an outcome, such that each decision maker can unilaterally prevent that outcome from materializing. Because administrative discharge often requires several moments of bureaucratic initiative and judicial approval, it is beset by multiple-veto problems.[84] Overcoming those problems requires exceptional political and institutional will that is typically exercised only in favor of prisoners convicted of non-violent, non-sexual, and other non-serious offenses. Jurisdictions were generally unwilling to touch the huge population of "violent offenders," no matter how old or under what circumstances the offense took place.[85]

Finally, the administrative remedies for illness and disease outbreaks do not account for the systemic risk of a pandemic. Individualized discharge orders for sick prisoners were not sufficient to address the systemic risk of COVID contagion,[86] which required preventative release

https://www.fox4news.com/news/officials-release-1000-inmates-to-ease-crowding-slow-spread-of-covid-19-at-dallas-county-jail [https://perma.cc/3HDS-VEZN] (with respect to discharges in Dallas County, "a judge must sign off on each case").

[84] To take Alabama as an illustrative example, restoration of good-time credits necessary to generate an early discharge must be recommended initially by a facility official, pass through a centralized records process, and be adopted by a Department of Corrections commissioner. See Ala. Code § 14-9-41(f)(2) (2020). In North Carolina, a medical release requires a formal request or petition, a referral from the Department of Public Safety based on a medical evaluation and risk assessment, and a favorable determination from a post-release and parole commission. See N.C. Gen. Stat. § 15A-1369 (2020). In Louisiana, the state promulgated rules declaring a prisoner category eligible for furlough, only to see discharge activity slashed by a review panel vested with veto power. See Lea Skene, Release Denied for Most Louisiana Inmates Considered Under New Coronavirus Furlough Program, Advocate (Apr. 30, 2020), https://www.theadvocate.com/baton_rouge/news/coronavirus/article_151f6068-8b04-11ea-9319-17978dff7507.html.

[85] See Brandon Garrett, Five Takeaways from Prison Actions During COVID-19, Duke L. Ctr. for Sci. & Just. Blog (May 22, 2020), https://sites.law.duke.edu/csj-blog/2020/05/22/five-takeaways-from-prison-actions-during-covid-19/ [https://perma.cc/S8NU-AW7Q]; J.J. Prescott et al., It's Time To Start Releasing Some Prisoners with Violent Records, Slate (Apr. 13, 2020), https://slate.com/news-and-politics/2020/04/combat-covid-release-prisoners-violent-cook.html [https://perma.cc/3A7F-73RV].

[86] See, e.g., Mass. Gen. Laws ch. 111, § 108 (2020) ("If a prisoner . . . has a disease which . . . is dangerous to the safety and health of other prisoners or of the inhabitants of the town, the board shall . . . direct his removal to a hospital or other place of safety, there to be provided for and securely kept until its further order."); Mont. Code Ann. § 50-2-121 (2019) ("On written order of a local health officer, a diseased prisoner who is held in a jail and who is considered dangerous to the health of other prisoners may be removed to a hospital or other place of safety.").

and involved substantial asymptomatic transmission.[87] Most wholesale remedies reaching not-yet-infected prisoners, moreover, contemplate removal to some other facility.[88] During a pandemic, however, there is systemic risk at *every* facility that houses prisoners in a confined space. Moving potential infection vectors from old populations to new ones is perhaps the *last* thing jurisdictions should be doing during a nationwide pandemic. The appropriate response to systemic risk is isolation, not shifting the site of contagion.[89]

B. The Federal Example

Section III.A sets forth the problems conceptually, but illustrations help too. The federal attempt to use home confinement, compassionate release, and furloughs to quickly reduce the federal prison population failed rather spectacularly, and those failures were consistent with struggles across state jurisdictions.

Pursuant to March 2020 federal legislation vesting the Justice Department with broad discharge powers,[90] the U.S. Attorney General ("AG") issued a directive to the Bureau of Prisons ("BOP") to increase the use of home confinement for older federal prisoners having pre-existing medical conditions.[91] In an April 3 memo memorializing the directive, the AG singled out three Federal Correctional Institutions ("FCIs"): Oakdale (Louisiana), Danbury (Connecticut), and Elkton (Ohio).[92] The BOP, however, quickly scaled back the scope of the AG mandate—which itself covered only those who were convicted of non-violent, non-sexual offenses—to include only the subset of those who

[87] I use "asymptomatic" colloquially here, because I technically mean to include both asymptomatic and pre-symptomatic transmission.

[88] See, e.g., N.M. Stat. Ann. § 33-2-29 (2020); N.Y. Correct. Law § 141 (2020).

[89] See CDC, Social Distancing, Quarantine, and Isolation, https://www.cdc.gov/-coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html [https://perma.cc/N8S9-4TFH] (last visited May 4, 2020).

[90] See Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Pub. L. No. 116-136, § 12003(b)(2) (2020).

[91] See Clare Hymes, Barr Tells Federal Prisons To Send Inmates Home in Response to Coronavirus Outbreak, CBS News (Mar. 27, 2020), https://www.cbsnews.com/news/attorney-general-william-barr-bureau-of-prisons-send-inmates-home-coronavirus-covid-19/ [https://perma.cc/5ZFC-H8YQ].

[92] See Attorney General William Barr, Memorandum for Director of Bureau of Prisons (Apr. 3, 2020), https://www.politico.com/f/?id=00000171-4255-d6b1-a3f1-c6d51b810000 [https://perma.cc/VXN2-SF8A].

either (1) had served at least half their sentences or (2) had served at least a quarter of their sentences but had fewer than eighteen months left.[93]

Even within the narrowed eligibility band, the AG and BOP still needed the operational compliance of the wardens at individual facilities—and such cooperation was frequently lacking. For example, a month and a half after Congress vested the AG with elevated authority to order federal prison clearance, and a month and a half after the AG exercised it, a federal judge still had to issue a temporary restraining order against FCI Danbury, which failed "to take [the AG's order and corresponding legislation] seriously."[94] Partly due to warden non-compliance, the AG's home-confinement order reduced the federal prison population, across all facilities, by only one-and-a-half percent in the two months following the emergency legislation.[95]

Compassionate release was beset with similar problems. The federal statute also authorized the BOP to reduce a prison sentence upon a showing, by motion of either the Director or the prisoner, that "extraordinary and compelling reasons warrant such a reduction."[96] The BOP, however, issued no updated guidance as to how the compassionate release standard applied to COVID-based proceedings.[97] Prisoner-initiated relief still required exhaustion of individual claims or a month-long wait, and the incumbent compassionate release criteria focused on outlier health conditions affecting elderly inmates—which made prisoner-initiated relief quite difficult to obtain, even in sound procedural postures.[98] Director-initiated relief was subject to an acute multiple-veto problem, with administrative vetoes given to subordinate prison staff, the warden, the BOP General Counsel, and a senior medical officer from the Correctional Programs Division.[99] At FCI Danbury, there were 241

[93] See Clare Hymes, Amid COVID-19 Threat, Inmates and Families Confused by Federal Guidance on Home Confinement Release, CBS News, (Apr. 24, 2020), https://www.cbsnews.com/news/amid-covid-19-threat-inmates-and-families-confused-by-federal-guidance-on-home-confinement-release/ [https://perma.cc/XV3N-4SBQ].

[94] See FCI Danbury Order, supra note 47, at 1.

[95] See Joseph Neff & Keri Blakinger, Michael Cohen and Paul Manafort Got To Leave Federal Prison due to COVID-19. They're the Exception, Marshall Project (May 21, 2020), https://www.themarshallproject.org/2020/05/21/michael-cohen-and-paul-manafort-got-to-leave-federal-prison-due-to-covid-19-they-re-the-exception [https://perma.cc/EZ3S-KUBJ].

[96] 18 U.S.C. § 3582(c)(1)(A)(i) (2012).

[97] See FCI Danbury Order, supra note 47, at 25.

[98] See id. at 24–25.

[99] See id. at 25–26.

outbreak-related applications for compassionate release in the first six weeks of the emergency, and none were granted.[100]

A federal judge called the BOP's process for discharging prisoners "Kafkaesque."[101] Even when subject to a judicial order to expeditiously implement the AG directive, crucial facilities simply "made only minimal effort to get at-risk inmates out of harm's way."[102] A month after a federal judge issued a preliminary injunction against FCI Elkton, the warden had *still* failed to discharge a single offender.[103]

* * *

The federal spectacle was typical. With respect to administrative remedies, empowered decision makers were generally unwilling to spend bureaucratic capital in favor of most prisoners, and the presence of any multiple-veto problem was sufficient to tank discharge for a person convicted of a serious offense. Administrative remedies for infection also under-performed their superficial appeal, because all criminal detention facilities were subject to systemic risk simultaneously. Whatever theoretical combination of administrative remedies might have been used to productively respond, jurisdictions failed to mix and match them to that effect.

IV. CLEMENCY

Clemency has fallen into desuetude in most American jurisdictions.[104] Detainees nonetheless sought COVID-based discharge through pardons, commutations, reprieves, or other relief associated with clemency power.[105] Despite calls from high-profile organizations to dust the power

[100] Id. at 53.

[101] See Opinion & Order, U.S. v. Scparta, No. 18-cr-00578, at 2 (S.D.N.Y. Apr. 19, 2020).

[102] Order, Wilson v. Williams, No. 4:20-cv-00794, at 4 (N.D. Ohio May 19, 2020). In vacating the *Wilson* preliminary injunction, the Sixth Circuit did not dispute the failure to clear prisoners from facilities, but it nonetheless held that the BOP's changed facility policies were sufficiently reasonable responses to the COVID risk. See Wilson v. Williams, 961 F.3d 829, 844 (6th Cir. 2020).

[103] See Wilson v. Williams, 961 F.3d 829, 844 (6th Cir. 2020).

[104] See Rachel E. Barkow, Clemency and Presidential Administration of Criminal Law, 90 N.Y.U. L. Rev. 802, 807 (2015) (federal power); Cara H. Drinan, Clemency in a Time of Crisis, 28 Ga. St. U. L. Rev. 1123, 1124 (2012) (state power).

[105] The best collection of information about executive action taken in response to COVID, including clemency activity, is maintained by the NYU Center on the Administration of Criminal Law. See A Survey of Executive Action Concerning the Spread of COVID-19 in

off and use it aggressively,[106] clemency was largely unable to reduce criminal detention during the peak of the COVID crisis.[107] There was scattered usage across several state jurisdictions,[108] but nothing at the scale sufficient to meaningfully address systemic risk. That jurisdictions did not lean heavily into clemency power as a wholesale discharge mechanism is unsurprising, given its structure, political economy, and history. Even when they did, the results were underwhelming.[109]

With respect to structure, clemency power is not nearly as nimble as some imagine. At the federal level, although the power is formally vested in the President,[110] the clemency process is almost always passed through the DOJ Pardon Attorney's office,[111] which is a sparsely staffed site of prosecutor resistance to clemency power.[112] Less than half the states vest clemency power in a single official capable of acting without consultation with a board.[113] Even when state officials are permitted to act alone, they

State Correctional Facilities, NYU Ctr. on Admin. Crim. L., https://docs.google.com/document/d/1ZOs8LtiPajxjAiKDn4VwDnhng0AkDrMi/edit (last visited May 5, 2020) [hereinafter Executive Action Survey].

[106] See, e.g., Courtney Oliva & Ben Notterman, Governors Must Use Clemency Powers To Slow the Pandemic, Justice Collaborative Inst. 2 (April 2020), http://filesforprogress.org/memos/governors-must-use-clemency-powers-to-slow-the-pandemic.pdf [https://perma.cc/97ZJ-WG6D] (urging states capable of efficiently invoking clemency powers to do so).

[107] See supra note 5.

[108] The leading exception was Kentucky, where the governor used his clemency power to implement a system of review necessary to release over 900 prisoners in its correctional system. See Brian Planalp, Nearly 1,000 Kentucky Prison Sentences To Be Commuted, Beshear Says, Fox19 Now (Apr. 2, 2020), https://www.fox19.com/2020/04/02/watch-live-gov-beshear-provides-update-covid-kentucky/ [https://perma.cc/PNK3-ARWY]. The Oklahoma governor used his clemency power on a smaller but still substantial scale. See Hicham Raache, Gov. Stitt Approves Hundreds of Prison Commutations To Mitigate Coronavirus Spread, KFOR (Apr. 10 2020), https://kfor.com/health/coronavirus/gov-stitt-approves-hundreds-of-prison-commutations-to-mitigate-coronavirus-spread/ [https://perma.cc/MGJ9-EN5S].

[109] For example, with respect to the Kentucky initiative described above, the state was able to reduce the prison population by only 4.35 percent. See Widra & Wagner, supra note 76.

[110] See U.S. Const. art. II, § 2, cl. 1.

[111] See Barkow, supra note 104, at 824. The process proceeds less reliably through that channel under President Donald Trump. See Paul Callan, Trump Should Pick Kim Kardashian West as His Pardon Advisor, CNN (Feb. 19, 2020), https://www.cnn.com/2020/02/19/opinions/trump-new-pardon-adviser-kim-kardashian-west-callan/index.html [https://perma.cc/NEN4-DU7M].

[112] See Paul J. Larkin, Jr., Revitalizing the Clemency Process, 39 Harv. J.L. & Pub. Pol'y 833, 900 (2016).

[113] See Models for Pardon Administration, 50-State Comparison: Pardon Policy and Practice, Restoration of Rts. Project, http://ccresourcecenter.org/state-restoration-profiles/50-

will often decline to do so because they rely on consultation and delegation for political cover.[114] For both state and federal processes then, there are some subtle multiple-veto problems that prevent speedy, broad discharge.[115]

Unfortunately, the political economy of clemency power frustrates wholesale discharge under precisely the circumstances where those multiple-veto problems recede. Although the state of empirical study is imperfect, clemency is generally less robust in jurisdictions where leaders cannot share power—and political blame—with a board or some other bearer of institutional responsibility.[116] Even in a public health environment where the need for discharge seemed pressing, the risk associated with a violent recidivist episode still presented formidable political costs to heads of state and national governments who were not focused on local safety risks and public health benefits. This dynamic probably explains why gubernatorial reprieve mechanisms—which tend to face fewer vetoes than other forms of clemency[117]—have been used in exactly one state (Pennsylvania) during the COVID pandemic.[118]

Finally, the historic vision of clemency power does not align with a model of pandemic risk response. James Madison and James Iredell were the two leading exponents of the pardon (clemency) power at the Constitutional Convention.[119] Their influential framing presents clemency as (1) a device for remitting unjust punishment ("justice function") and (2) a political tool for avoiding various types of social

state-comparisoncharacteristics-of-pardon-authorities-2/ [https://perma.cc/5AQ4-MC6L] (last visited Apr. 19, 2020) (listing only three states as permitting no consultation with a board and twenty more as being permitted to consult with a board).

[114] There are twenty-one states where a governor must share power and twenty-three states where she may. See Margaret Colgate Love et al., Collateral Consequences of Criminal Convictions: Law, Policy and Practice §§ 7:8, 7:10 & 7:11 (2013).

[115] As another example, the Texas governor cannot issue a pardon or commutation without a recommendation from a legislatively appointed board. See Tex. Const. art. IV, § 11.

[116] See Margaret Colgate Love, Reinvigorating the Federal Pardon Process: What the President Can Learn from the States, 9 U. St. Thomas L.J. 730, 743–751 (2012); Mark Osler, Fewer Hands, More Mercy: A Plea for a Better Federal Clemency System, 41 Vt. L. Rev. 465, 493 (2017).

[117] The NYU Center on the Administration of Criminal Law has compiled a state-by-state list of clemency power, with special notation for reprieve power. See NYU Law, https://www.law.nyu.edu/sites/default/files/reprieve%20power%207.pdf [https://perma.cc/FC3S-48QW] (last visited May 8, 2020).

[118] See Executive Action Survey, supra note 105.

[119] See Daniel T. Kobil, The Quality of Mercy Strained: Wresting the Pardoning Power from the King, 69 Tex. L. Rev. 569, 590–92 (1991).

unrest or rebellion ("statecraft function").[120] Neither the justice function nor the statecraft function aligned responsively with the problems that COVID presented. Whether a detention site presents systemic risk is a far cry from a question about whether a single individual "deserves" punishment, so the justice function fits poorly. And although the President has sometimes used the statecraft function to grant wholesale amnesty, the existential imperative for such matters has been political (not for public health).

In sum, clemency power might seem—with enough squinting—like a viable way to discharge prisoners at the speed and scale sufficient to confront systemic risk, but things did not work out that way. Clemency's legacy does not include a public health function, and jurisdictions distribute clemency power in ways that are uniquely ill-suited to speedy discharge of prisoner tranches. As a result, the relief that did materialize was more targeted and curative than prophylactic and preventative, which is a bad skew in the teeth of a pandemic.

V. LOOKING FORWARD

COVID not only exposed the systemic risk that pandemics pose to detainees and adjacent communities, but it also underscored the senselessness of mass incarceration as a justice-and-social-welfare strategy. COVID requires that American jurisdictions rethink the alignment between pandemic risks and criminal justice remedies—and that reassessment should double as a deeper reflection on the set of social, political, and bureaucratic reforms necessary to deal with the 2.3 million people in American criminal detention facilities.

In Part V, I explore basic principles for correcting the remedial deficit that pandemics create, on the premise that the obstacle to sufficiently scaled discharge is not *just* a shortage of political and bureaucratic resolve. Officials make decisions within a broader system of institutionally divided authority, and the current distribution of discharge power is not conducive to speedy, wholesale relief. Consistent with a broader institutional revision I suggest elsewhere,[121] jurisdictions should

[120] See, e.g., The Federalist No. 74 (Alexander Hamilton).

[121] See, e.g., Lee Kovarsky, Mercy, Localism, and the American Prosecutor (unpublished manuscript) (on file with author) (arguing that increased discharge power should be given to locally elected prosecutors); Lee Kovarsky, The Negative Pardon Power, New Crim. L. Rev. (forthcoming 2021) (on file with author) (arguing that constitutionally specified power often does not, and should not, exclude other means of reducing lawfully imposed sentences).

respond by concentrating discharge powers in decision makers that are closer to acutely affected localities.

A. Concentrating and Localizing

The presence of multiple-veto problems throttles the production of legal outcomes that require unanimous agreement. And so it is with respect to speedy discharge at scale—especially during pandemics. For class actions under Section 1983 or the habeas statutes, class-wide discharge requires adversarial litigation and multi-tiered judicial approval.[122] With respect to administrative remedies, most discharge mechanisms require institutional coordination, have a discharge process that is too individuated to achieve scale, or assume excess detention capacity that does not exist during a pandemic.[123]

One puzzle is why clemency is not a more effective response to systemic risk. After all, the relatively greater tendency to concentrate clemency power in a single institution decreases friction and multiple-veto problems, thereby increasing the likelihood that fixed amounts of political will should be able to overcome opposition. Concentrated clemency power, it turns out, has a different problem. The reason that concentrated clemency power underperforms discharge expectations is that *it tends to be concentrated in the wrong entities*. Clemency power presents an institutional competence problem that is particularly acute during a pandemic response.

Specifically, jurisdictions concentrate clemency power in national or statewide officials who are at significant institutional and geographic distance from the localities that experience the social costs and benefits of discharge.[124] In most instances, that distance systematically favors continued incarceration.[125] The discharging clemency institution—a president, a governor, or some centralized board—bears all the political costs of visible discharge but captures little political benefit. To put the

[122] See supra Part II.

[123] See supra Part III.

[124] See supra notes 110–15 and accompanying text.

[125] I discuss political costs and benefits below, but the fiscal cost of prison incarceration is borne by the state. See Robert L. Misner, Recasting Prosecutorial Discretion, 86 J. Crim. L. & Criminology 717, 719–20 (1996).

situation in economic terms, the mismatch between political costs and benefits causes central leadership to skimp on prisoner release.[126]

Closing the remedial deficit requires jurisdictions to address the multiple-veto and institutional competence problems simultaneously. In order to address multiple-veto problems, the state should avoid needless delay and detention by concentrating discharge powers in fewer decision makers. And in order to solve the institutional competence problem, a decision maker closer to the site of systemic risk should own discharge authority.

Decision makers that are maximally sensitive to local costs and benefits of pandemic discharge—that is, *local decision makers*—will probably make better decisions when confronted with systemic risk. Concentrating discharge power in those institutions increases the speed and systemic responsiveness of a discharge remedy. During the pandemic, the systemic risk is to a particular site of detention and its surrounding community. The officials that best reflect the needs and preferences of that population should make the discharge decisions. In fact, similar logic also applies in non-pandemic scenarios, because the social costs and benefits of such incarceration are disproportionately local[127] and because the best information for evaluating risk is available to local networks.[128]

There are also broader dialogic benefits to localized discharge determinations, whether against a pandemic backdrop or not. Professor Heather Gerken has written extensively about the value of localism in generating meaningful policy dialogue—insofar as it facilitates noisy dissent from the carceral orthodoxy of senior political units.[129] I argue elsewhere, and at much greater length than I do here, that such dialogue

[126] See Garcia, supra note 6 (quoting Professor John Pfaff on gubernatorial behavior); see also, e.g., Siegel & Beletsky, supra note 31 (describing phenomenon in context of eleventh-hour Kentucky clemency).

[127] The local costs and benefits I have in mind include the fiscal cost of jails, the social costs to innocent families and local communities of having a member incarcerated, the support systems for and costs of reentry, the risk of recidivism, and the impact on victims. See Kovarsky, Mercy, Localism, and the American Prosecutor, supra note 121 (manuscript at 22–23).

[128] See id. (manuscript at 23).

[129] See, e.g., Heather K. Gerken, Foreword: Federalism All the Way Down, 124 Harv. L. Rev. 4, 10 (2010); Heather K. Gerken, Our Federalism(s), 53 Wm. & Mary L. Rev. 1549, 1556–60 (2012); Jessica Bulman-Pozen & Heather K. Gerken, Uncooperative Federalism, 118 Yale L.J. 1256, 1265–71 (2009).

would be a particularly useful catalyst for criminal justice reform.[130] In fact, thick unilateral discharge power was once a powerful way of introducing innovative criminal justice practices to the broader policy landscape.[131]

Finally, and wholly separate from its usefulness as a pandemic response, localized discharge power better reflects the changing theory of American punishment. During the last forty years of the twentieth century and the first decade of the twenty-first, America's dominant penal orientation was retributivist—punishment was harsh, morally just, and deserved in proportion to the transgression against the state.[132] There was little place for local mercy giving when punishment was the stuff of abstract moral justice. Retributivism's vice-like hold on American punishment is, however, relaxing, and reformist punishment practices are gaining support across the political spectrum.[133] As American punishment paradigms drift in more consequentialist directions, previously unexplored strategies for promoting social welfare—including locally differentiated punishment practices—become increasingly viable.

In the interest of candor, I believe *local prosecutors* to be among the best institutional owners of local discharge power, but I omit a lengthy discussion of that position here because I make that argument comprehensively in another Article.[134] Of all local officials, prosecutors are likely to be most sensitive to shifts in a community's criminal justice preferences, are most likely to possess or are best positioned to acquire critical information about the costs and benefits of discharge in specific cases, and are unaccountable to the very statewide entities that have let clemency power wither on the vine.[135] I harbor no delusions about the

[130] See supra note 121.

[131] See Stanley Grupp, Some Historical Aspects of the Pardon in England, 7 Am. J. Legal Hist. 51, 60–61 (1963).

[132] See Guyora Binder & Robert Weisberg, Response: What Is Criminal Law About?, 114 Mich. L. Rev. 1173, 1199–1200 (2016); Carol S. Steiker & Jordan M. Steiker, Lessons for Law Reform from the American Experiment with Capital Punishment, 87 S. Cal. L. Rev. 733, 781 (2014).

[133] See Lauren M. Ouziel, Democracy, Bureaucracy, and Criminal Justice Reform, 61 B.C. L. Rev. 523, 525–26 (2020); see also, e.g., First Step Act of 2018, Pub. L. No. 115-391, §§ 401–05, 132 Stat. 5194 (2018) (landmark federal legislation with bipartisan support permitting sentence reductions for certain drug sentences).

[134] See Kovarsky, Mercy, Localism, and the American Prosecutor, supra note 121.

[135] See id.; cf. Adam M. Gershowitz, Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?, 51 Wake Forest L. Rev. 677, 680–81 (2016) (arguing in favor of aligning incentives and power to decarcerate jails by giving prosecutors some "skin in the game" after convictions are entered).

attitudes of most prosecutors towards discharge. The point is to create the power so that the growing cohort of reformist district attorneys have something to use, if they so choose.

B. Clemency Exclusivity

I want to answer one doctrinal objection to the concentration-and-localization strategy. One of the greatest obstacles to the restructuring of discharge power is the belief that clemency power is exclusive—that the existence of constitutionally specified clemency power bars other discharge mechanisms.[136] North Dakota, for example, has interpreted its constitutionally specified pardon power to exclude legislative attempts to remit criminal sentences.[137] That concept of exclusivity, however, is reduced to less judicial doctrine than one might think, and jurisdictions have a long history of navigating the issue effectively.

First, the model clemency power—the federal pardon power—is in many respects non-exclusive. Mirroring a British power, Congress almost immediately gave the U.S. Treasury Secretary authority to remit penalties for customs violations.[138] Over a century later, in *The Laura*,[139] the Supreme Court rejected a clemency-exclusivity challenge to such remittitur practice, which had been "observed and acquiesced in for nearly a century."[140] A few years later, in *Brown v. Walker*,[141] the Court upheld legislation that effectively permitted pardons for witnesses willing to provide federal investigative cooperation.[142] Equating the federal pardon power with the more general power to displace lawfully imposed sentences, *Brown* held that the former "has never been held to take from Congress the power to pass acts of general amnesty."[143] The non-judicial branches have certainly acquiesced; in 2018, Congress confronted no

[136] When I use the phrase "lawfully imposed punishment," I do so in order to avoid confusion with habeas remedies, which are directed to punishment that was *unlawfully* imposed.

[137] See State v. Shafer-Imhoff, 632 N.W.2d 825, 838 (N.D. 2001); State v. Cummings, 386 N.W.2d 468, 472 n.2 (N.D. 1986).

[138] See Act of March 3, 1797, Pub. L. No. 4-13, 1 Stat. 506 (assigning Treasury Secretary power with sunset provisions); see also Act of February 11, 1800, Pub. L. No. 6-10, 2 Stat. 7 (extending prior act in perpetuity).

[139] 114 U.S. 411 (1885).

[140] Id. at 414.

[141] 161 U.S. 591 (1896).

[142] See id. at 593–94.

[143] Id. at 601.

exclusivity challenge when it passed the First Step Act, empowering judges to reduce sentences that were lawfully imposed for narcotics offenses.[144]

Second, most states have been fairly creative in narrowing the scope of non-exclusive clemency power—especially when the purpose of discharge is something other than an expression that a lawfully imposed punishment was too harsh. Take Michigan. Its Constitution states that the "governor shall have power to grant reprieves, commutations and pardons,"[145] and it uses a strict separation-of-powers rule under which the pardon power would ordinarily be treated as exclusive.[146] The Michigan Supreme Court nevertheless rejected a separation-of-powers challenge to a statute that permitted a sheriff to address overcrowding through discharge.[147] Indeed, states *must* find ways around clemency exclusivity if they want to preserve judicial authority to modify sentences.[148] The same is true for the powers to parole or to order compassionate release. One way or another, most states simply find a way around the idea that a clemency power precludes other institutions from remitting lawfully imposed punishment. Circumnavigating exclusivity rules should be particularly easy when justified as a public health response.

CONCLUSION

There are lessons in every catastrophe, and COVID's impact on America's prisoner population has been especially catastrophic. Jails and prisons present systemic risks because the health infrastructure is deplorable, social distancing is impossible, and the prisoner community has heightened medical vulnerabilities. Those facilities were pandemic tinderboxes, and COVID was more than enough to kindle the blaze.

There is a tendency to view the staggering infection rates at these facilities as a failure of political and bureaucratic will. And it is that, but not *only* that. The inability to quickly discharge prisoners at the scale necessary to address systemic risk was *also* a result of a deeper structural deficit. Existing discharge mechanisms are too slow, require too much

[144] See First Step Act of 2018, Pub. L. No. 115-391, §§ 401–05, 132 Stat. 5194 (2018).
[145] Mich. Const. art. V, § 14.
[146] See Kent Cty. Prosecutor v. Kent Cty. Sheriff, 409 N.W.2d 202, 205 (Mich. 1987).
[147] See id. at 203.
[148] See, e.g., State v. Stenklyft, 697 N.W.2d 769, 785 (Wis. 2005) (affirming the constitutionality of multiple categories of judicial power to reduce or amend sentences). The logic often tracks that expressed in a federal case, *United States v. Benz*, 282 U.S. 304 (1931).

multilateral unanimity, and concentrate discharge powers in the wrong institutions. To address future waves of pandemic infection, and to accelerate decarceration more generally, American jurisdictions should concentrate discharge powers in decision makers who are closer to acutely affected localities—decision makers who are better equipped to treat discharge as part of a broader public health response.