COVID-19's Effect on Criminal Administration in the Era of Mass Incarceration

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- Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, __ **Nw. U. L. Rev. Online** __ (forthcoming 2020), available at SSRN.
- Benjamin Levin, *Criminal Law in Crisis*, __ **Colo. L. Rev. Forum** __ (forthcoming 2020), available at SSRN.

The novel coronavirus and its attendant disease, COVID-19, have created a pandemic in 2020. Mass incarceration and the attendant expansion of the carceral state is an epidemic in the United States. The intersection of the pandemic and this epidemic is proving toxic. Prisons and jails are emerging as hot spots for infection across the country. Incarcerated persons, employees at jails and prisons, the family members of both, and those who come in contact with those family members are all affected by the crisis. Demands for change are growing. Like so many other facets of our daily lives, COVID-19 promises to leave its mark on the administration of criminal law. The only question remains – how?

Two new essays begin to grapple with that question. In her essay, *Pretrial Detention in the Age of COVID-19*, forthcoming in the Northwestern University Law Review Online, Jenny Carroll highlights how the pandemic exacerbates the threat of unnecessary incarceration and exposes an inaccurately narrow conception of "community" in relation to pretrial detainees in criminal administration. In his essay, *Criminal Law in Crisis*, forthcoming in the Colorado Law Review Forum, Benjamin Levin suggests that, through the prism of the pandemic, flaws of the ordinary administration of criminal law become visible and doubt creeps in as to whether those features make sense, or if they ever did. Because these essays together bring forward hopeful possibilities in this moment for criminal administration, each is a must-read piece for those concerned about mass incarceration, the pandemic, or both.

The pandemic occurs at a moment when bipartisan enthusiasm to address the United State's reliance on incarceration is high. Among other popular reforms, enthusiasm has developed around changing pretrial detention determinations. Defendants are often held before trial in jails because they cannot pay bail. Reformers urge states to abandon money bail. In its place, states are adopting technical, actuarial risk assessments to shape decision making around statistical predictions of a defendant's flight risk and future dangerousness. The tools may assist judges in determining which defendants to release or detain in jails while awaiting trial. Reformers hope such reforms will encourage meaningful and feasible reductions in pretrial incarceration.

Carroll warns that, despite recent changes hailed as successes by many, COVID-19 exposes a deleterious pretrial detention system that fundamentally miscalculates the balance between public safety and individual liberty. Even before COVID-19, pretrial release determinations have been flawed. Defendants lack robust procedural protections, release determinations are deeply inflected with racial and economic biases from various criminal justice actors, and decisionmakers fail to account for the significant downstream consequences of pretrial detention like job loss and child custody issues when making their determinations. COVID-19 exacerbates these concerns. Defendants and the communities they live in (including the jails themselves) face significant hardship – the threat of fatal contagion – when judges detain an individual pretrial. Court closures and trial delays extend the time defendants are being held in jails, which also prolongs exposure to the threat of infection. The costs of medical care are rising while jail facilities are resistant to adopting stringent health protocols. This suggests that the calculation between the individual's interest in release and the community interest in public safety is dynamic. The actuarial risk assessments central to recent pretrial reforms are not.

Carroll looks to the courts to rebalance this calculation on an individual basis. COVID-19, she suggests, raises the

specter of a potential substantive due process claim from individual defendants held pretrial. At the very least, it requires courts to balance the state's interest in preserving safety versus an individual's interest in liberty when making pretrial release determinations. COVID-19 enhances the defendant's interest in liberty in release or additional medical care because the threat of infection in jail is high. COVID-19 also demonstrates that "safety" for the community might mean keeping individuals out of jail rather than putting individuals in it. Incarceration increases threat of infection to defendants, their families, jail employees and their families, too. Though not everyone should be released, COVID-19 illuminates the persistent disconnect between community and individual in calculating detention or release determination. Carroll urges courts to adopt a broader and more fluid view of community going forward. Her essay cautions against complacency: this extraordinary pandemic may exacerbate existing flaws in the ordinary pretrial detention system and illuminates the shortcomings of recent reforms.

Where Carroll offers a path to legal transformation, Levin shows the promise of conceptual change in this moment of crisis. He argues that the pandemic sheds light on the irrationality of some ordinary features of criminal administration. He points to two examples. First, it urges "sentencing realism." Currently, criminal administrators discuss punishment in the abstract as finite chunks of time or bimodal determinations of location. For example, one is sentenced to 60 months imprisonment or two years on probation. COVID-19 demands recognition that these metrics obscure how the experience of punishment is far more complex, with effects that linger long after an individual serves a term of incarceration. Second, the pandemic illuminates how very localized criminal administration truly is. Rather than a "system" influenced heavily by federal policy, criminal administration is a "carceral archipelago" with multitudes of local administrators implementing localized policies. Different states, counties, and municipalities have adopted different responses to criminal administration in the pandemic. That COVID-19 focuses so precisely on local decisionmakers only emphasizes what scholars of mass incarceration increasingly note: resistance to problematic criminal law enforcement practices often generates from the local level. Perhaps COVID-19 makes more space to see that now.

Levin's contribution is primarily concerned with rhetoric, so it bears implications for many different points in criminal administration including pretrial release determinations. The way we speak about punishment is important. The way we speak about the intersection of the pandemic and criminal justice is important, too. The pandemic is a crisis, but criminal administration creates crisis, too. And while crisis can provide a basis for transformation, Levin warns that wholesale adoption of a crisis mentality has its flaws. We may yearn for the "normal" again as if it were not already deeply flawed. The crisis may also obscure "structural and systemic pathologies" as aberrations rather than the norm, thus legitimating different features of criminal administration. Levin's essay advises against that path.

It would be easy to characterize these contributions as pragmatic versus aspirational takes on the effect of COVID-19 on criminal administration. Yet both essays offer similar, substantive takeaways about this moment for criminal administration. These authors reflect on the corrosive intersection of punishment and society laid bare by the coronavirus. They weave into discussion not only what could be about criminal administration, but what already *is* – how criminal administration operates in society, what's its impact, and on whom. They emphasize the structural realities of the carceral state as an epidemic upon which COVID-19 as a pandemic expands. Rather than invite despair in those realities, however, both Carroll and Levin give the reader reason to find hope in change.

Surely, this pandemic intersects with criminal law along many dimensions. Highlighting these timely essays only skims the surface of issues to consider. Still, these essays offer an exciting frame upon which future legal scholarship promises to build. Both essays resist the temptation to conclude that COVID-19 is wreaking havoc on criminal justice. Rather, they emphasize that criminal administration wreaks havoc in a stratified society, and COVID-19 provides a window to see that havoc in a new light. Far from calling for fixes that keep the "system" operating with business as usual, these essays demand that we question business as usual in criminal administration. Both remind us that this critical reflection is imperative not because it is convenient or efficient, but because it is necessary. COVID-19 illuminates that necessity.

Jessica Eaglin, COVID-19's Effect on Criminal Administration in the Era of Mass Incarceration, JOTWELL (July 30, 2020) (reviewing Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, __ **Nw. U. L. Rev. Online** __ (forthcoming 2020); Benjamin Levin, *Criminal Law in Crisis*, __ **Colo. L. Rev. Forum** __ (forthcoming 2020)), https://crim.jotwell.com/covid-19s-effect-on-criminal-administration-in-the-era-of-mass-incarceration. .