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# **COVID-19 SHOULD NOT CREATE A NEW CLASS OF CRIMINALS**

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## Abstract

This paper offers a critique of the punitive response to COVID-19 in the United States and argues that punitive resources must be redistributed. Specifically, this paper suggests that no criminal charges be brought related to the novel disease transmission because policing and arrests related to COVID-19 exposure crimes are counterproductive. Defunding these punitive efforts and reallocating funds towards virus containment, the spread of factual information about disease transmission, vaccine research, the delivery of resources to communities in need, and support for victims of crimes in alternative ways is a more effective strategy to support public health and safety. To make progress towards prison abolition in the United States, COVID-19 must not be viewed as a new opportunity to prosecute, dehumanize and cage individuals. Rather than bring criminal charges that perpetuate the permanence of prison, the nation has an opportunity to demonstrate that proper redistribution of resources can be a more effective way of protecting the public in the face of any new crisis.

Keywords: COVID-19, criminal charges, arrest, disease transmission, punitive response, prison abolition.

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## Introduction

Can speaking to a supermarket cashier make you a terrorist? What if you are shedding a virus that has the potential to kill the employee? Does it matter if you know you are infected? What if you do not have the virus but you claim you do? What if you spit on the employee? What if the employee consents to the interaction? The COVID-19 global pandemic has made each of these questions a daunting reality. The public response to the outbreak has been varied. In an already divided political climate, COVID-19 has exacerbated existing tensions between political parties. Wearing a mask or other personal protective equipment is seen as a political statement to some and as a simple step in controlling a public health crisis to others. Across the United States, stores have mandated patrons wear masks, schools have shifted to online instruction and local governments have implemented stay-at-home orders. Moreover, people have been arrested and charged for allegedly spreading or claiming to spread the virus. The outbreak has tested both the people and the institutions of America. An effective solution in response to the pandemic must carefully allocate resources and remain focused on public health. The use of criminal sanctions as a tool to combat COVID-19 is inappropriate, counterproductive and contributes to the permanence of prison in the United States.

Globally, COVID-19 has infected over 20,439,000 people and upwards of 744,000 people have died from the disease.<sup>2</sup> In the United States alone, infections have surpassed five million and the number of deaths has nearly eclipsed one hundred and seventy thousand.<sup>3</sup> As is the case with other infectious diseases such as HIV, hepatitis, or syphilis, the spread of COVID-19 from person to person presents an opportunity for the government to characterize certain

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<sup>2</sup> World Health Organization Coronavirus Disease (COVID-19) Dashboard, [https://covid19.who.int/?gclid=EAIaIQobChMIvviyrm6gIVEfDACH2WVQZOEAAAYASAAEgLLXfD\\_BwE](https://covid19.who.int/?gclid=EAIaIQobChMIvviyrm6gIVEfDACH2WVQZOEAAAYASAAEgLLXfD_BwE).

<sup>3</sup> Centers for Disease Control and Prevention, *Cases and Deaths in the U.S.*, Cases, Data & Surveillance, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/us-cases-deaths.html>.

activities that pose a risk of transmission as criminal behavior. 2.3 million people are held in prisons and jails across the United States.<sup>4</sup> This incarceration rate far outnumbers every other country.<sup>5</sup> The use of police force to restrain individual liberties is not a strategy that attacks the issue at its core. Instead, this approach perpetuates the myth that peace and justice can only be achieved when individuals are placed behind bars and eliminated from society. In the face of this new societal dilemma, we must remain skeptical about the use of criminal sanctions as an effective tool. The goal of every strategy must be to slow the spread of the deadly virus and protect public health. Calls for prison abolition are not new, but they have not been widely accepted. This pandemic is an opportunity for governments and law enforcement to evaluate the effectiveness of punitive measures, reassess how their resources may be better allocated and be proactive in defunding and dismantling any program, department or institution that no longer protects the public interest.

This paper explores past criminalization of disease transmission and advocates for a different strategy to be implemented in COVID-19 related cases. In the face of a public health crisis, the United States must seize the opportunity to effectively allocate resources to eliminate the novel virus and ensure a new class of criminals is not created. A proper response to COVID-19 can demonstrate an effective solution to crime that does not perpetuate the permanence of prison and dehumanize and dispose of individuals. In part I, the paper discusses the basics of COVID-19 and provides insight on the scale and spread of the virus. Part II examines the history of criminal law with respect to disease transmission and evaluates the effectiveness of past strategies to protect public health. Part III addresses the current punitive response to COVID-19 across the United States. In part IV, the paper reviews the United States prison industrial

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<sup>4</sup> The Sentencing Project, *Criminal Justice Facts*, <https://www.sentencingproject.org/criminal-justice-facts/>.

<sup>5</sup> *Id.*

complex. Further, this section discusses the prison abolition movement and aims to debunk the idea that prison abolition is a “radical” concept. Finally, part V calls for a redistribution of punitive resources. The proposed solution demands that no new COVID-19-specific criminal laws are created, and that the time and money spent on criminalizing behavior is reallocated to protective equipment for healthcare professionals, development of a vaccine, and increased evidence-based awareness about the virus.

## **I. WHAT IS COVID-19?**

It is common for people around the world to be infected with human coronaviruses that cause mild illness.<sup>6</sup> However, a novel coronavirus that spreads more quickly, originally identified in Wuhan China, was officially named COVID-19 by the World Health Organization on February 11, 2020.<sup>7</sup> As of August 14, 2020, the United States has surpassed five million positive COVID-19 cases and over one-hundred and sixty thousand deaths.<sup>8</sup> COVID-19 has not only tested the healthcare system in the United States; the virus has challenged the education system, economy, entertainment industry, transportation infrastructure, criminal justice institutions, and other societal structures. COVID-19 is a new disease that is thought to spread primarily through respiratory droplets from person to person.<sup>9</sup> Because COVID-19 is a novel virus, questions about the source, risk factors, treatments, symptoms, and incubation periods are being investigated by researchers around the world.<sup>10</sup> Experts believe that the virus is most commonly spread by an infected person coughing, sneezing, spitting, etc. on another individual.<sup>11</sup> In order to slow the

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<sup>6</sup> Centers for Disease Control and Prevention, *COVID-19 Frequently Asked Questions*, <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Basics>.

<sup>7</sup> Id.

<sup>8</sup> World Health Organization Coronavirus Disease (COVID-19) Dashboard.

<sup>9</sup> Id.

<sup>10</sup> Centers for Disease Control and Prevention, *COVID-19 Frequently Asked Questions*.

<sup>11</sup> Lauren M. Sauer, *What is Coronavirus*, John Hopkins Medicine (2020) <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus>.

infection rate, medical professionals urge anyone who feels sick or has symptoms such as a fever, cough, or shortness of breath to stay home and call a health care provider before seeking treatment.<sup>12</sup> Unfortunately, COVID-19 is especially prone to spreading quickly because not everyone who is infected shows symptoms.<sup>13</sup> There has not been a vaccine developed yet; therefore, current prevention methods include physically distancing from others, wearing masks in crowded spaces, and frequent hand-washing.<sup>14</sup> The Center for Disease Control (CDC) recommends staying home when sick, utilizing online services when available, and staying at least six feet away from others.<sup>15</sup> In addition to these recommendations, some state and local governments have implemented stay-at-home-orders, mandated quarantines, and state border closures.<sup>16</sup> Over 80% of adults who were surveyed agree that restrictions on travel, unnecessary gatherings, entertainment events, and schools are necessary steps to address the outbreak.<sup>17</sup> However, 53% of adults report it is difficult to determine what coronavirus news information is true and not true.<sup>18</sup> Tensions are rising in the United State as people grow frustrated staying home from work, cancelling planned vacations, and mourning the loss of loved ones. New societal issues arise during any public health crisis and COVID-19 has been no exception to these problems. People seek and consume information about coronavirus through various news sources and social media platforms.<sup>19</sup> Even political leanings have impacted risk perception and

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<sup>12</sup> Id.

<sup>13</sup> Centers for Disease Control and Prevention.

<sup>14</sup> Sauer *supra* note 11.

<sup>15</sup> Centers for Disease Control and Prevention, *Running Essential Errands, Your Health*, <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html>.

<sup>16</sup> Centers for Disease Control and Prevention, *State & Territorial Health Department Websites*, Public Health Professionals Gateway, <https://www.cdc.gov/publichealthgateway/healthdirectories/healthdepartments.html>.

<sup>17</sup> Pew Research Center, *American News Pathways Project*, [https://www.pewresearch.org/pathways-2020/COVID\\_RESTRICTION\\_d/total\\_us\\_adults/us\\_adults](https://www.pewresearch.org/pathways-2020/COVID_RESTRICTION_d/total_us_adults/us_adults).

<sup>18</sup> Id.

<sup>19</sup> Cinelli, M., Quattrocioni, W., Galeazzi, A., Valensise, C. M., Brugnoli, E., Schmidt, A. L., Zola, P., Zollo, F., & Scala, A. (2020). *The COVID-19 Social Media Infodemic*. <http://arxiv.org/abs/2003.05004>.



behavioral choices.<sup>20</sup> It may be challenging to implement minimal safety measures for many of these reasons. Many people believe conspiracy theories that the entire virus is a hoax. As the United States struggles to flatten the curve, shaping the perception of the public will be important as national leaders strive to resolve the current crisis.

## II. CRIMINAL LAW AND DISEASE TRANSMISSION

Criminal law has been used as a regulatory tool for decades in response to dangerous diseases.<sup>21</sup> There are several types of laws and guidelines that have been utilized during public health crises. These regulations range from stay-at-home quarantine orders to criminal murder charges. Quarantine laws are typically not categorized as criminal.<sup>22</sup> However, even though these laws may be considered civil, they may restrict individual freedoms.<sup>23</sup> Although an analysis of the current quarantine orders in place is beyond the scope of this paper, it is important to note there has been discussion about discriminatory enforcement of stay-at-home orders by law enforcement.<sup>24</sup> This concern intersects with the history of disproportionate enforcement of criminal laws against drug users and the queer community for disease transmission in the HIV/AIDS context.<sup>25</sup>

The decision to prosecute individuals for transmitting, or sometimes just exposing, another to a sexually transmitted disease has been controversial.<sup>26</sup> There are many logistical issues when it comes to the criminalization of spreading an infectious disease. At the forefront are questions of

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<sup>20</sup> Barrios, J. M., & Hochberg, Y. V. (n.d.). RISK PERCEPTION THROUGH THE LENS OF POLITICS IN THE TIME OF THE COVID-19 PANDEMIC. 26.

<sup>21</sup> Lazzarini, Z., Bray, S., & Burns, S. (2002). *Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, *The Journal of Law, Medicine & Ethics*, 30(2), 239–253. <https://doi.org/10.1111/j.1748-720X.2002.tb00390.x>

<sup>22</sup> Kirby, M. (1989). AIDS and Law. *Daedalus*, 118(3), 101–121. JSTOR.

<sup>23</sup> Id.

<sup>24</sup> <https://www.washingtonpost.com/outlook/2020/06/03/stay-home-order-racism/>

<sup>25</sup> Lazzarini supra note 21.

<sup>26</sup> Stanton, C. (2014) *Criminalising contagion*, *Journal of Medical Ethics*, 40(12), 792–792. JSTOR.

culpability.<sup>27</sup> The risk an individual foresees before engaging in conduct that could lead to exposure would be critical to their culpability.<sup>28</sup> It is the connection between intention and the furtherance of that intention that the United States legal system bases most criminal convictions on.<sup>29</sup> Should intentional, reckless, and/or negligent conduct that may potentially transmit a disease be punished? Regardless, any level of disease transmission culpability is extremely difficult to prove. Proof that one specific individual caused an infection or exposed another can be near impossible.<sup>30</sup> Another highly debated topic in the context of sexually transmitted diseases is whether a medical professional with knowledge of a patient's status has an obligation to share that information with the patient's sexual partner.<sup>31</sup> Furthermore, statutes have been criticized for vague definitions and broad semantics of phrases such as “*could* result in transmission” and “body fluid.”<sup>32</sup>

As of 2019, 34 states had laws that criminalized HIV exposure, some regardless of transmission.<sup>33</sup> The CDC has categorized these laws into five categories: HIV-specific criminal laws, STD/communicable/infectious disease criminal laws, sentence enhancement specific to HIV, sentence enhancement specific to STD, and no criminalization laws.<sup>34</sup> Additionally, in most states, general criminal statutes of attempted murder and reckless endangerment can be utilized to charge individuals who behave in a way that can potentially expose another to a sexually transmitted disease.<sup>35</sup> Some behaviors that are criminalized across the United States in

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<sup>27</sup> Id.

<sup>28</sup> Id.

<sup>29</sup> Lazzarini supra note 21.

<sup>30</sup> Centers for Disease Control and Prevention.

<sup>31</sup> Kirby supra note 22.

<sup>32</sup> Linden, E. O. (2002) *HIV Transmission, Is it a Crime?* AMA Journal of Ethics, 4(6)  
<https://doi.org/10.1001/virtualmentor.2002.4.6.hlaw1-0206>.

<sup>33</sup> HIV-Specific Criminal Laws | Law | Policy and Law | HIV/AIDS | CDC. (2020, May 12).  
<https://www.cdc.gov/hiv/policies/law/states/exposure.html>

<sup>34</sup> Id.

<sup>35</sup> Id.

this manner are blood donation, needle sharing, prostitution, biting, spitting, sex of all kinds, and sharing sex objects.<sup>36</sup> Several states also have disclosure requirements that mandate a person who is aware that they are infected to disclose their status to sexual or needle sharing partners.<sup>37</sup> These criminal laws are mainly created and implemented state by state.<sup>38</sup> Punishments for people who violate HIV-specific statutes also vary by state and range from a few years to life in prison.<sup>39</sup> Three main criminological theories that are used to justify criminal punishment for disease spreading behavior are deterrence of unsafe behavior, support of a social norm that the behavior is wrong, and incapacitation of people who are likely to behave unsafely.<sup>40</sup>

In California, Health and Safety Code 120290 makes it a crime for a person to intentionally transmit an infectious or communicable disease.<sup>41</sup> Violation of the law is punishable by imprisonment up to six months and/or a one thousand dollar fine.<sup>42</sup> In Illinois, criminal transmission of HIV is a Class 2 felony with a possible sentence of three to seven years.<sup>43</sup> This statute does not require actual transmission take place; a person can be charged if they have “intimate contact with another” which is defined as “exposure of the body of one person to bodily fluid of another person in a manner that could result in the transmission of HIV.”<sup>44</sup> These are a few examples comparable to many state criminal laws that criminalize behaviors that risk disease transmission. Another punitive tactic used to target disease transmission is penalty enhancement.<sup>45</sup> In California, three years will be added to the sentence of a person who

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<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> Lazzarini supra note 21.

<sup>41</sup> Health & Safety Code 120290 HS - *Willful Exposure To Disease*. (n.d.). Shouse Law Group. Retrieved July 2, 2020, from <https://www.shouselaw.com/ca/defense/health-and-safety-code/120290/>

<sup>42</sup> Id.

<sup>43</sup> Linden supra note 32.

<sup>44</sup> Id.

<sup>45</sup> Health & Safety Code 120290 HS.

committed certain sex crimes if the person was infected with HIV/AIDS.<sup>46</sup> Some advocates agree that treatment of HIV transmission as an aggravating factor is “understandable.”<sup>47</sup> Justification for this enhancement includes the desire to protect survivors and reduce the spread of HIV.<sup>48</sup>

Hepatitis C is a viral infection that passes through blood and therefore mainly through sharing needles and less frequently through sex.<sup>49</sup> In around a dozen states, a person living with hepatitis C can face criminal prosecution for “knowingly exposing” others.<sup>50</sup> Even in states without disease-specific exposure laws, general criminal law can sometimes suffice to prosecute an individual for disease transmission as it does with HIV.<sup>51</sup> Several states recognize legal defenses to the crime of infectious disease transmission.<sup>52</sup> Some of these defenses include no knowledge of infectious disease, no intent to transmit (attempts to take practical means to prevent transmission), consent, and no transmission of the disease.<sup>53</sup> No knowledge, no intent, and/or no transmission are valid legal defenses to the aforementioned California misdemeanor charge.<sup>54</sup>

There has been mixed analysis of the effectiveness of a punitive response to the spread of disease. Public health officials have found provisions that criminalize the spread of disease to be counterproductive.<sup>55</sup> If—to avoid criminal prosecution—you are required to disclose your status to someone before engaging in activity that may transmit the virus, why would you get tested in the

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<sup>46</sup> Id.

<sup>47</sup> Brown, W., Hanefeld, J., & Welsh, J. (2009). *Criminalising HIV transmission: Punishment without protection*. *Reproductive Health Matters*, 17(34), 119–126. JSTOR.

<sup>48</sup> Id.

<sup>49</sup> Radio, S. C. P. (700, 00:09). *Laws That Criminalize Spread Of Infectious Diseases Can Increase Their Stigma*. Southern California Public Radio. <https://www.scpr.org/news/2018/06/22/84215/laws-that-criminalize-spread-of-infectious-disease/>

<sup>50</sup> Id.

<sup>51</sup> Id.

<sup>52</sup> Health & Safety Code 120290 HS.

<sup>53</sup> Id.

<sup>54</sup> Id.

<sup>55</sup> Radio, S. C. P. *supra* note 49.

first place? On the other hand, politicians have raised concerns about the threat to society intentional and negligent infection creates.<sup>56</sup> Advocates for decriminalizing HIV/AIDS believe that disease-specific laws should not exist, and that existing legislation is sufficient to prosecute in any rare case of intentional disease infection proven beyond a reasonable doubt.<sup>57</sup> Others argue that even intentional disease transmission should not be punished under criminal laws if a person is “blamelessly ignorant.”<sup>58</sup> Access to public information about disease transmission, false beliefs about transmission, moral ignorance or belief that disease is a divine punishment, and consent to unprotected sex are all factors to consider when examining culpability.<sup>59</sup> Although concerns about the safety of society are legitimate, many are skeptical that punitive laws will help reach intended goals of protection, justice, and diminishing the spread of the disease.<sup>60</sup>

An Australian study examined the most important factors in influencing human behavior to change in response to the AIDS epidemic. These factors included direct knowledge of someone who was sick with the virus, barriers to protective equipment, drug and alcohol use, relationship to the person they are at risk of infecting, psychological characteristics, knowledge of their infection status, and age.<sup>61</sup> Notably, none of the factors were fear of criminal prosecution. Public health experts have not found any evidence to support that criminalizing activities that risk disease transmission are an effective strategy to control disease transmission.<sup>62</sup> One study found that there was minimal difference in risk behaviors between states with HIV-specific laws and

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<sup>56</sup> Id.

<sup>57</sup> Brown supra note 47.

<sup>58</sup> Flanigan, J. (2014). *Non-culpable ignorance and HIV criminalisation*. *Journal of Medical Ethics*, 40(12), 798–801. JSTOR.

<sup>59</sup> Id.

<sup>60</sup> Brown supra note 47.

<sup>61</sup> Kirby supra note 22.

<sup>62</sup> The Verge. (n.d.). *Arresting people for coughing won't keep communities safer*, Retrieved July 8, 2020, from <https://www.theverge.com/2020/4/7/21211992/coughing-coronavirus-arrest-hiv-public-health-safety-crime-spread>.

states without such laws.<sup>63</sup> Attempts to deal with syphilis through punitive methods also did not provide effective societal protection.<sup>64</sup> A few negative consequences attached with disease-specific criminal laws include increased stigma, discrimination, and harassment through law enforcement.<sup>65</sup> Early reports from the Presidential Commission on HIV suggested criminal sanctions for transmission should be based in science and “should be employed only when all other public health and civil actions fail to produce responsible behavior.”<sup>66</sup> To avoid criminal punishment for potential transmission, another suggested policy is to promote disease transmission awareness and spread information on safe behavior practices that mitigate transmission.<sup>67</sup>

Although COVID-19 is not a sexually transmitted disease, there are many parallels to explore. To create a similar list of behaviors that may be criminalized for potential COVID-19 transmission would be extensive and could include behaviors such as speaking too close to another or sneezing within six feet of a person outside your household. Disclosure in the COVID-19 context could hypothetically require disclosure of status to any person you may come within six feet of. The issues faced in the STD context are even more pertinent with COVID-19 and seem infeasible. Because COVID-19 does not require sexual contact or body fluid to be transmitted, the pool of possible people that may be infected is much larger. It would be near impossible for a medical professional, or anyone with knowledge of another’s COVID status, to bear the responsibility of protecting others by informing them of an individual’s status. Vague language about the possibility of disease transmission would further expand the number of

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<sup>63</sup> Lehman, J. S., Carr, M. H., Nichol, A. J., Ruisanchez, A., Knight, D. W., Langford, A. E., Gray, S. C., & Mermin, J. H. (2014) *Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States*. *AIDS and Behavior*, 18(6), 997–1006. <https://doi.org/10.1007/s10461-014-0724-0>

<sup>64</sup> Kirby supra note 22 at 117.

<sup>65</sup> Brown supra note 47.

<sup>66</sup> Lehman supra note 63.

<sup>67</sup> Flanigan supra note 58.

people potentially engaged in criminal activity. All of these factors are applicable to decisions individuals are making in response to COVID-19. Lawmakers and law enforcement now must keep in mind the effectiveness of past punitive responses to disease transmission and decide how to proceed in the face of COVID-19.

### **III. A PUNITIVE RESPONSE TO COVID-19**

Criminal law can often have symbolic value by demonstrating certain behaviors are not condoned by society.<sup>68</sup> The stigmatization of conduct theory suggests it enough to punish conduct that is morally offensive.<sup>69</sup> Since exposure to COVID-19 may lead to serious injury or death<sup>70</sup> there is a legitimate desire for the law to protect communities and individuals from the spread of the virus. Depending on the circumstances, actions related to the spread of COVID-19 may result in charges as serious as murder, manslaughter, attempted murder, or assault.

“There is no human right to spread a deadly virus,” but this does not mean the protection of life can be achieved by disregarding other rights such as privacy, security, education, liberty, and freedom from cruel and unusual punishment.<sup>71</sup> COVID-19 is spread by less intimate activity than HIV or hepatitis, which increases the opportunity for prosecution. More people will be infected with COVID-19 and therefore more people who merely breathe less than six feet away from another may engage in criminal activity. Like hepatitis C, most cases of COVID-19 will go unreported because individuals are not aware they carry the virus.<sup>72</sup> For example, Kentucky Senator Rand Paul did not show any symptoms, took a test, did not self-quarantine, and the test

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<sup>68</sup> Kirby *supra* note 22.

<sup>69</sup> *Id.*

<sup>70</sup> Centers for Disease Control and Prevention.

<sup>71</sup> Kirby *supra* note 22.

<sup>72</sup> Radio SCP *supra* note 49.

results came back positive six days later.<sup>73</sup> Because a person who is aware of their positive COVID-19 status could face criminal charges if they choose to expose others, they may be discouraged to get tested. Especially because many infected persons like Senator Paul do not feel that they are sick, it is unlikely they would choose to be tested— even more so for average citizens who do not face criticism or pressure from the public to do so.

In the United States, several individuals have already been arrested and face criminal charges related to COVID-19. In a memo to all United States attorneys, the attorney general directed every office “to prioritize the detection, investigation, and prosecution of all criminal conduct related to the current pandemic.”<sup>74</sup> He further elaborated that the virus could be considered a “biological agent” and therefore invoke terrorism statutes.<sup>75</sup> This memo reinforces the “tough on crime” attitude many Americans buy into. By sending this message to the public, the Attorney General suggests that a punitive response to COVID-19 related incidents is appropriate, necessary, and encouraged.

In Texas, an 18-year-old was charged with a third-degree felony of “making a terroristic threat” after she posted videos to her Snapchat account claiming she was spreading the virus.<sup>76</sup> In North Dakota, a man was arrested for allegedly intentionally coughing on a Walmart employee.<sup>77</sup> In Missouri, a man who coughed and said he had a high fever was arrested after police claimed

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<sup>73</sup> What Are the Legal Consequences if You Knowingly Infect Someone With COVID-19? - FindLaw. (n.d.). Retrieved July 8, 2020, from [https://blogs.findlaw.com/law\\_and\\_life/2020/04/what-are-the-legal-consequences-if-you-knowingly-infect-someone-with-covid-19.html](https://blogs.findlaw.com/law_and_life/2020/04/what-are-the-legal-consequences-if-you-knowingly-infect-someone-with-covid-19.html)

<sup>74</sup> Memo from the Attorney General to all United States Attorneys, *COVID-19 Department of Justice Priorities* (Mar. 16, 2020).

<sup>75</sup> Id.

<sup>76</sup> CNN, J. T.-G. and C. M. (n.d.). A Texas woman was arrested for threatening to spread coronavirus, police say. CNN. Retrieved July 12, 2020, from <https://www.cnn.com/2020/04/08/us/texas-spread-coronavirus-arrest/index.html>

<sup>77</sup> Arresting people for coughing won’t keep communities safer—The Verge. (n.d.). Retrieved July 8, 2020, from <https://www.theverge.com/2020/4/7/21211992/coughing-coronavirus-arrest-hiv-public-health-safety-crime-spread>



he threatened to give employees coronavirus.<sup>78</sup> In Florida, a pastor faces two second-degree misdemeanor charges after being arrested for holding services that hundreds attended in violation of local stay-at-home orders.<sup>79</sup> In New Jersey, a man was charged with harassment, obstructing administration of law, and making a terroristic threat after he allegedly coughed on a supermarket employee and said he said the coronavirus.<sup>80</sup> The man could face a fine upwards of twenty-thousand dollars and seven years in prison according to the New Jersey Attorney General's office.<sup>81</sup>

An infectious or communicable disease is one that “spreads from person to person” and has “a significant public health implication.”<sup>82</sup> COVID-19 fits this description and therefore charges can be brought under already existing infectious disease laws. Some scholars believe these arrests would be more difficult to make under coronavirus-specific laws.<sup>83</sup> Lindsay Wiley, the director of the health law and policy program at American university Washington College of Law, recognizes that people may want to see those who do not treat the virus seriously be punished.<sup>84</sup> However, Wiley does not believe this tactic will keep the community safer.<sup>85</sup>

The intentional or negligent spread of COVID-19 should not be celebrated or accepted. However, it does not follow that arrests and criminal convictions are the appropriate solution. To the contrary, placing more people in prisons and jails that are already overcrowded will further

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<sup>78</sup> Press, A. (n.d.). Coronavirus-related crimes are on the rise. MarketWatch. Retrieved July 12, 2020, from <https://www.marketwatch.com/story/coronavirus-related-crimes-are-on-the-rise-2020-03-25>

<sup>79</sup> What Are the Legal Consequences if You Knowingly Infect Someone With COVID-19? - FindLaw. (n.d.). Retrieved July 8, 2020, from [https://blogs.findlaw.com/law\\_and\\_life/2020/04/what-are-the-legal-consequences-if-you-knowingly-infect-someone-with-covid-19.html](https://blogs.findlaw.com/law_and_life/2020/04/what-are-the-legal-consequences-if-you-knowingly-infect-someone-with-covid-19.html)

<sup>80</sup> Id.

<sup>81</sup> Id.

<sup>82</sup> Health & Safety Code 120290 HS.

<sup>83</sup> Arresting people for coughing won't keep communities safer—The Verge. (n.d.). Retrieved July 8, 2020, from <https://www.theverge.com/2020/4/7/21211992/coughing-coronavirus-arrest-hiv-public-health-safety-crime-spread>

<sup>84</sup> Id.

<sup>85</sup> Id.

frustrate the ultimate goal of slowing the spread of the virus. The time and resources that are being spent to process these charges are gravely misplaced. With over 160,000 American deaths and counting, people still recovering months after being infected, no vaccine and intensive care units full across the country, every agency must focus on finding evidence-based solutions to slowing the spread of the virus. Rather than prioritizing the prosecution of all criminal conduct related to the current pandemic, law enforcement agencies should reevaluate their billion-dollar budgets and directly reallocate these resources into the community.

#### **IV. PRISON ABOLITION IN THE UNITED STATES**

Society has relied on prison as the cure for crime since the late 1700s when the prison system was invented.<sup>86</sup> Prison abolition is not a new concept, but it is still often referred to as a “radical position.”<sup>87</sup> Most discussion of prison abolition does not end with an immediate solution or a detailed five step plan. Often, calls to abolish the institution are founded in questions about the disposability of life and why society defends state sanctioned killings.<sup>88</sup> Community safety is often equated to how many “bad” people are placed behind bars to never see the streets again. Because demands for prison abolition are seen as “radical,” rebuttal typically comes in the more palatable semantics of prison reform. However, prison abolition activists point out that prison reform often leads to larger, more funded, “better” prisons.<sup>89</sup> The abolition movement does not reject prison reform entirely; demands for better healthcare, education, and living conditions are a few reforms abolitionists support.<sup>90</sup> These specific reforms are necessary to ameliorate conditions for people who are incarcerated as more elaborate decarceration strategies are

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<sup>86</sup> Davis, A. Y., & Rodriguez, D. (2000) *The Challenge of Prison Abolition: A Conversation*, *Social Justice*, 27(3 (81)), 212–218. JSTOR.

<sup>87</sup> Id.

<sup>88</sup> Id.

<sup>89</sup> Id.

<sup>90</sup> Id.

developed. When new societal issues arise, it is typical for the United States to respond with a plan to eliminate any person linked to the problem through arrest and incarceration. This pattern of behavior teaches people that prison is an effective solution to every challenge to humanity even addiction, racism, and disease.

Language will be a critical tool in a necessary shift towards a world without prison. Currently, society discusses crime and punishment in a way that makes a world without crime only seem possible if all “criminals” are in cages. To the contrary, the discussion should be focused on the lack of resources that leads to behavior that society labels as criminal. Poverty, affordable housing, mental health, resources for disenfranchised communities, racism, and hatred of all forms are a few starting points for conversations that will challenge the permanence of prison. Punishment is not the necessary answer to all violations of the laws we create. The prison industrial complex, school-to-prison pipeline, war on drugs and tough on crime attitudes have not unpacked the roots of societal systems that continually oppress and incarcerate vulnerable populations. Until we undo the societal belief that prison is a permanent fixture and the main solution for dealing with crime, we will not progress our vision of justice. As COVID-19 explodes and creates another issue society seeks to solve, there is an opportunity to demonstrate how effective allocation of resources—as opposed to a punitive response—can alleviate or eliminate the “crimes” that may occur.

While the United States has been in a state of semi-lockdown for several months, protests against police brutality and racial injustice have been ongoing across the nation.<sup>91</sup> This context is critical to bear in mind in order to examine the societal response to the arrest and imprisonment of persons involved in COVID-19 related incidents. United States President Donald Trump

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<sup>91</sup> Id.

nicknamed COVID-19 the “Chinese coronavirus,” adding to racial tensions and exemplifying racist remarks.<sup>92</sup> In the wake of the murder of George Floyd by the Minneapolis Police Department, people of types have been in the streets demanding that the police be defunded. Defunding the police looks like a gradual process of strategically reallocating resources, funding, and responsibility away from police and toward community-based models of safety, support, and prevention. Many critics find issue with a push to abolish the police and prison because it seems drastic. COVID-19 has presented an opportunity for change. This is a moment where local law enforcement can choose not to funnel resources into the arrest and prosecution of individuals for COVID-19 related crimes. Instead, these departments can reflect on the sentiments of millions of Americans demanding that the web of policy, law, and culture that forms our criminal justice system which has destroyed millions of lives and torn apart families reallocate their resources.

## **V. CALL TO ACTION**

This paper calls for the halt of arrests and incarceration of any person in relation to COVID-19. It is time to use this pandemic as an example of more effective ways to eliminate “crime.” Crime is a social construct that we create and condone through punishment and stigmatization. The media tends to incite fear and shape societies view of who commits crime and what behaviors constitute crime.<sup>93</sup> The United States missed the mark with STD transmission and criminalized behavior that disproportionately affected marginalized groups. It is imperative to take different action in the face of COVID-19. The United States prison system cages millions of people day to day.<sup>94</sup> The nation spends hundreds of billions of dollars to keep people locked up

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<sup>92</sup> Press, A. (n.d.). Coronavirus-related crimes are on the rise. MarketWatch. Retrieved July 12, 2020, from <https://www.marketwatch.com/story/coronavirus-related-crimes-are-on-the-rise-2020-03-25>

<sup>93</sup> NCJRS Abstract—National Criminal Justice Reference Service. (n.d.). Retrieved July 26, 2020, from <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=179182>

<sup>94</sup> The Sentencing Project, *Criminal Justice Facts*, <https://www.sentencingproject.org/criminal-justice-facts/>.

each year.<sup>95</sup> These funds must be redistributed appropriately in a direct targeted attack on the root of the issue. Adding to the United States incarcerated population will only increase the spread of COVID-19. Punitive action will not stop COVID-19, a vaccine will. The more we perpetuate the idea that “justice” comes in the form of people behind bars, we continue to dehumanize individuals and desensitize society to institutions that strip individuals of basic human dignity. The only vaccine available right now is knowledge. Criminal punishment cannot be substitute, or even supplement, to a vaccine.

As with any other public health crisis, there are limits to what the law can and should do in response to COVID-19. We must acknowledge the limited function that law plays in the COVID-19 response and ensure any punishment or law is based on data and focused on diminishing transmission. It would be irresponsible to assume that implementing new law will eliminate the problem. Although people may modify their behavior to an extent in response to potential criminal punishment,<sup>96</sup> this cannot be relied on as an effective strategy to control this pandemic. To some, monetary penalties may seem modest for spreading a virus that could have deadly consequences. However, the resources that will be misused to investigate these claims and bring charges against these individuals will directly detract from the ultimate goal of slowing the spread of the virus.

The law does not exist in a bubble— it is only one of many moving parts shaped by social institutions. Law and punishment must aim to eliminate the virus and should intend to operate at the moment when effectiveness matters most. Marginalized groups, who already face various

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<sup>95</sup> Equal Justice Initiative, *Mass Incarceration Costs* (2017) <https://eji.org/news/mass-incarceration-costs-182-billion-annually>.

<sup>96</sup> Kirby *supra* note 22.

legal and social disadvantages in the United States, are at a higher risk of contracting COVID-19 and having more complications. To enact laws against the spread of COVID-19 is to create another obstacle for people who have been marginalized to negotiate, and another tool for law enforcement to use in a discriminatory manner. It must be a priority to ensure we do not create punitive laws that reinforce prejudices vulnerable populations already face. Additionally, it is counterproductive to enforce laws that may discourage testing, reporting, and safe behavior. Creating new laws without institutional reform will perpetuate the United States' obsession with incarcerating people. Any law, even with "good intentions" must be rejected if it does not contain the virus. No new coronavirus-specific laws should be created or enforced.

Additionally, unlike the response to STDs, preexisting criminal laws should not be used to charge and convict people for coronavirus related incidents. Now is a pivotal moment to use COVID-19 incidents as an example of how humane, evidence-based prevention is more effective than punitive enforcement and expansion of the law. It is imperative to emphasize that the health of society, the slowing of the spread of COVID-19, and the prevention of infection is everyone's responsibility. For the legislature to create new laws and for law enforcement to spend time and money on arrests and incarceration is a gross misuse of resources. These resources should be used to fund research for a vaccine which will eliminate the virus at its core. Properly handling individuals during this pandemic can serve as a template to more effective solutions to crime prevention. Eliminating the root of the "crime," the virus itself, eliminates the "criminals" as well. Taking steps to abolish the police and prison system does not need to be difficult. It can happen in our own cities, one dollar at a time, by redirecting budgets to common-sense alternative programs. Focused attention on virus containment, the spread of factual information about disease transmission, the delivery of resources to communities in need, and support for

victims of crimes in alternative ways can serve as a model for a more effective way to deal with social issues than a default punitive response.

### **Conclusion**

While other disease specific laws continue to be of debate, new COVID-19 laws should not be added to this discussion. The United States has the opportunity to respond to the calls for defunding the police and abolishing prison. The response to COVID-19 can be a small step towards a progressive justice model that strives for effective distribution of resources to alleviate challenges humanity faces at the root, rather than continuing to dehumanize people and perpetuate the permanence of prison. Criminal sanctions for COVID-19 transmission cannot be “carefully drawn,” they must *not be drawn at all*.