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Safety, Crisis, and Criminal Law

Jenny E. Carroll

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INTRODUCTION

Concepts of safety and prevention of danger pervade the criminal law canon.[1] Arizona is no exception.[2] The state's criminal systems[3] pivot around central and entwined goals of protecting public safety and preventing danger. The state constitution permits pretrial detention both for the most serious offenses and when no other condition of release will adequately protect the community from the danger the accused's freedom might pose.[4] The rules of criminal procedure and the criminal code designate some offenses and actors "dangerous"[5] and urge judges to weigh not only the accused's risk of flight,

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1. *See, e.g.*, MODEL PENAL CODE § 1.02(1)(a) (AM. LAW INST. 2019).

2. *See* ARIZ. REV. STAT. ANN. §§ 13-101-1, -5, -6 (2020) (listing iterations of public safety as goals of the criminal code). A search of the term "safety" in Arizona's Criminal Code (Title 13) and Rules of Criminal Procedure reveals it appears 212 times. *See generally* ARIZ. R. CRIM. P.; ARIZ. REV. STAT. ANN. § 13 (2020).

3. I use the term criminal systems to describe the bodies of state and federal substantive and procedural laws and the discretionary decision-makers who interact with those bodies. I use this term fully cognizant of the critique that this is no system at all, but a discordant mass composed of many moving parts. As Lawrence Friedman noted, "the criminal justice 'system' is not a system at all." *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 461 (1993). John Pfaff added to Friedman's observation, writing "[t]he criminal justice 'system' in the United States . . . is not a 'system' at all, but rather a chaotic swirl of local, county, state, and (less frequently) federal actors, all with different constituencies and incentives." John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1089 (2013). I have no quarrel with this critique. In fact, I find it accurate; I too believe the "system" is not a singular entity but plural entities and not a system at all. I also believe that the characteristics I am describing transcend these multitudes, and so, I group them as systems for the purpose of this discussion and leave to a later work a more nuanced analysis of their "chaotic swirl." *Id.*

4. ARIZ. CONST. art. II, § 22(A)–(B).

5. *See* ARIZ. R. CRIM. P. 4.2(a)(8)(A), 7.2(b)(1) (designating offenses as ineligible for release); ARIZ. R. CRIM. P. 4.2(a)(8)(B), 4.2(a)(9) (designating some offenders as ineligible for release); ARIZ. REV. STAT. §§ 13-105-11, -13 (2020) (designating dangerous offenses).

but also his future dangerousness in making decisions to release or detain pretrial.[6] On the other end of the criminal law continuum, post-conviction considerations follow suit. Arizona's sentencing guidelines permit enhancements of the ordinary term of imprisonment in the face of dangerousness.[7]

Those with the power to create, enforce, and interpret the law demonstrate a similar allegiance to goals of safety and protection. The criminal code designates state law enforcement officers "public safety officers" and charges them with protecting and serving the community.[8] State prosecutors share this commitment. The Maricopa County Prosecutor's Office is not unique when it proclaims online that it is "dedicated to keeping families safe."[9] The Pima County Attorney's office's website echoes the sentiment, promising a trifecta of "Pursuing Justice. Prosecuting Criminals. Protecting the Community."[10] The rhetoric of waging a war on crime to promote safety permeates electoral politics in the state.

None of this is unusual or surprising. Criminal law has long claimed the joined realms of safety and protection as its own.[11] The narrative of these concepts, however, is deceptively complex. Despite their historical centrality to criminal law, the precise meaning of these terms remains elusive. Who warrants protection and how that protection is realized is obscure—its precise calculation a mystery. Likewise, outside of designating some crimes or actors dangerous, the code and rules define safety or the prevention of danger not by what they *are*, but by what they *are not*. The task of crafting a more precise definition of safety or protection is left to discretionary decision-makers, who in an effort to lend meaning to the written law layer it with acts of application and interpretation.[12] As formal discretionary decision-makers such as police,

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6. *See* ARIZ. R. CRIM. P. 7.2(b)(3).

7. *See* ARIZ. REV. STAT. ANN. §§ 13-701, -704, -706, -751 (2020).

8. *See History*, ARIZ. DEP'T OF PUB. SAFETY, https://www.azdps.gov/about/history [https://perma.cc/R3VH-ZQQD].

9. *See* MARICOPA CNTY. ATT'Y'S OFF., https://www.maricopacountyattorney.org/ [https://perma.cc/HF34-Y5SU]. Every prosecutor's website I was able to locate had some variation on safety or protection in its home page.

10. *See* BARBARA LAWALL PIMA CNTY. ATT'Y, https://www.pcao.pima.gov/ [https://perma.cc/7Q4M-U3MG].

11. *See, e.g.*, Claire Oakes Finkelstein, *On the Obligation of the State To Extend a Right of Self-Defense to Its Citizens*, 147 U. PA. L. REV. 1361, 1401 (1999); Henry P. Chandler, *Latter-Day Procedures in the Sentencing and Treatment of Offenders in the Federal Courts*, 37 VA. L. REV. 825, 828 (1951); State v. Gross, 110 N.E. 466, 467 (Ohio 1914) (all noting the historical goal of criminal law is to promote safety).

12. *See, e.g.*, Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 427 (2016) (discussing this reality in the context of bail reform and pretrial decision-making); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 345–46 (arguing that strict construction serves a vital role of constraining discretion of law enforcement officials).

prosecutors, and judges interpret and apply law, they construct the previously absent or obscure borders of law's underlying principles.[13] These discretionary moments matter, not only because they animate the law, but because they occur with far greater frequency than other moments of law creation.[14] Legislation occurs infrequently[15] and seeks to establish baseline policies that are, by their nature, sufficiently general to apply broadly.[16] In contrast, discretionary moments of policing, prosecuting, or judging, happen in the lived trenches and represent moments of contact between the governed and the governing. For their part, those who live under the law—informal actors—may enjoy moments of discretionary decision-making when they vote as citizens or jurors, though these may be limited, literally and figuratively.

In ordinary times, the discretionary decisions of formal actors shape law on a daily basis.[17] In ordinary times, these decisions are made with little input from informal, citizen actors, and often without the public even being aware they are being made.[18] Police, prosecutorial, or even judicial decision-making policies are rarely available for public consumption. When they do emerge—through litigation or outcry over their failings—they all too often quickly retreat into the shadows.[19] Public presentation of such policies is often limited to the rhetoric of power maintenance.[20] Under modern criminal canons, formal actors pursue safety and protection as the products of tough-on-crime policies that promote robust policing, prosecution, and pre- and post-trial detention.[21] These policies perpetuate existing power dynamics within systems by preserving the maintenance of a top-heavy status quo in which

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13. *See* Jenny E. Carroll, *Nullification as Law*, 102 GEO. L.J. 579, 581 (2014).

14. *Id.* at 613.

15. *See* ARIZ. CONST. art. IV, pt. 2, § 3 (establishing that the Arizona State Legislature will meet once a year and by special session at the discretion of the governor).

16. *See* Darryl K. Brown, *How Criminal Law Dictates Rules of Criminal Procedure*, 70 RUTGERS U. L. REV. 1093, 1109 (2018) (noting that legislatures adopt overly broad criminal policies and rely on prosecutorial discretion to fine tune the application of the law).

17. *See* Sanford H. Kadish, *Legal Norm and Discretion in Police and Sentencing Processes*, 75 HARV. L. REV. 904, 904–05 (1962) (warning that such discretionary acts undermine due process protections).

18. *See, e.g.*, William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2548 (2004) (arguing that such discretionary decisions by prosecutors are as much a product of "preferences, budget constraints, and political trends" as public good).

19. *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 12 (2007); Jenny E. Carroll, *The Jury as Democracy*, 66 ALA. L. REV. 825, 833–34 (2015).

20. *See* Sara Sun Beale, *What's Law Got To Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 49–51 (1997).

21. *See* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 817–18 (2015).

citizens live under the law but only those in positions of power *make* the law.[22] In ordinary times, even as they render static law fluid through application and interpretation, these discretionary moments are bound and limited in their exclusivity.

But this Essay was not written in ordinary times. It was written in the midst of upheaval surrounding one more death of a Black person at the hands (or knee) of police officers[23] and the pandemic of COVID-19.[24] These crises of 2020 carry with them meaning and consequence tethered to race and socio-economic class that push against long-accepted formal constructs of safety and protection in criminal law. Just as COVID-19 has ravaged Black, Brown, and poor communities,[25] so too has over-policing and police violence hovered like a uniformed human plague over the same marginalized communities.[26]

In this time of crisis, existing definitions of safety and protection expose dysfunction in criminal systems. In the time of COVID-19, detained populations in criminal systems across the nation literally risk their lives in jail and prison environments whose susceptibility to the contagion is beyond their control.[27] In the time of COVID-19, reliance on pretrial detention and lengthy sentences undermines safety and creates danger.[28] In the time of civil unrest surrounding policing, protesters literally take their lives into their own

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22. *See* Carroll, *supra* note 19, at 829–30, 837.

23. *See* Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Nov. 5, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/D2BD-YYXK].

24. *See Rolling Updates on the Coronavirus Disease (COVID-19)*, WORLD HEALTH ORG. (July 31, 2020), https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen [https://perma.cc/DE9P-SB89].

25. *See Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html [https://perma.cc/WU2B-US5R] (July 24, 2020); Maria Godoy & Daniel Wood, *What Do Coronavirus Racial Disparities Look Like State by State?*, NPR (May 30, 2020, 6:00 AM), https://www.npr.org/sections/health-shots/2020/05/30/865413079/what-do-coronavirus-racial-disparities-look-like-state-by-state [https://perma.cc/V59Y-RGA9].

26. *See* German Lopez, *There Are Huge Racial Disparities in How US Police Use Force*, VOX, https://www.vox.com/identities/2016/8/13/17938186/police-shootings-killings-racism-racial-disparities [https://perma.cc/9NMS-PA6M] (Nov. 14, 2018, 4:12 PM).

27. *See* Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 NW. U. L. REV. ONLINE 59, 77 (2020), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1291&context=nulr_online [https://perma.cc/BUY3-VSS9]; Laura Hawks et al., Opinion, *COVID-19 in Prisons and Jails in the United States*, 180 JAMA INTERNAL MED. 1041, 1041 (2020), https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2765271 [https://perma.cc/BWA2-RMCY].

28. *See* Carroll, *supra* note 27, at 85–87; Benjamin Levin, *Criminal Law in Crisis*, U. COLO. L. REV. F., August 16, 2020, at 6–7, https://lawreview.colorado.edu/wp-content/uploads/2020/08/Criminal-Law-in-Crisis-Levin.pdf [https://perma.cc/FHK7-2TUU].

hands—risking arrest, police violence, and exposure to COVID-19—to speak out against police violence that undermines safety and leaves disrupted communities in its wake.[29] This Essay bears witness to the shifting definitions of safety, danger, and community wrought by the concurrence of a pandemic and the killings of Breonna Taylor, Rayshard Brooks, George Floyd, and others.

These crises are not separate events. They are joined as they lend meaning to the systematic failure of criminal law to conceptualize safety sufficiently broadly to encompass the very stakeholders the law would govern. Their awful convergence illuminates the consequences of vesting the power to define the "driving goals" of criminal law in limited and formal stakeholders—the simultaneous failure of too much and too little discretion in the hands of those too distant from the communities the law should serve. Seen through the lens of these crises, criminal law emerges not as a force that might promote safety, but one that stumbles toward control as it endangers the people it might protect. It emerges as a series of discordant systems burdened and top-heavy under the weight of a false dichotomy between the police and the policed, a dichotomy that undermines the legitimacy and one of the identified purposes of criminal law—to protect the most vulnerable citizens from harm.

The need for criminal law to construct a definition of safety and protection that includes the rights and interests of those affected by the law is not the only lesson to take away from the crises of 2020. But it is one. Written in the midst of these events, this Essay calls for alternative conceptions of safety and protection both as substantive matters (what does it mean to say criminal law promotes safety? or protects a community?) and as matters of construction (who are the relevant stakeholders to the construction and interpretation of criminal law?).

Such an undertaking is a departure from traditional conceptions of criminal law—including the one currently employed in Arizona. Such traditional conceptions rely on limited discretionary moments, granted to formal actors, that result in policies that pit in opposition the interests of the accused and the community and utilize detention—whether actual or threatened, investigatory, pretrial, or post-conviction—as a means to promote compliance and to improve public safety. The 2020 crises lay bare the reality that these traditional conceptions have failed large swaths of the community. Decision-makers have emerged as out of touch and rigid in their allegiance

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29. *See* Michael Sainato, *'They Set Us Up': U.S. Police Arrested over 10,000 Protestors, Many Non-Violent*, GUARDIAN (June 8, 2020, 6:00 PM), https://www.theguardian.com/us-news/2020/jun/08/george-floyd-killing-police-arrest-non-violent-protesters [https://perma.cc/AVN4-XETU].

to previously established norms. Jails and prisons have emerged as COVID-19 hotspots. Reliance on policing to promote safety has raised concerns about the rise of the warrior enforcement culture and police brutality and indifference in marginalized communities. Division between the community and the accused's interests presents as an antiquated and false dichotomy. In the end, the very tools that have long been viewed as vital to criminal law's purported purposes are exposed as threats to criminal systems' articulated primary goals of promoting safety and preventing danger.

This Essay echoes calls to rethink criminal law that include reductions in pretrial detention,[30] removal of mandatory minimums in sentencing,[31] decriminalization of some offenses,[32] and defunding police departments in favor of expanded funding to services that create opportunities and provide support both prior to and following entry into criminal systems.[33] Such reconstruction of criminal law reduces the risk of contagion spread among detained populations by reducing jail and prison populations—first by reducing the likelihood of entry either as an arrestee or following conviction, and second by providing needed re-entry support to ensure that those leaving the system have safe spaces to return to.

Such calls to reconstruct criminal law are also critical as they draw on the vital and shared lesson of the COVID-19 pandemic and current protest movements: systematic assumptions that equate safety and protection with a punitive, tough-on-crime approach create risks to policed populations and undermine community faith in the legitimacy of the law. Overreliance on police to promote safety, criminalization of a myriad of non-violent and petty offenses, detention-heavy sentencing policies, and high rates of pretrial detention not only create dangers to the individuals they impact as arrestees, detainees, and inmates, but they endanger the communities that rely on those

30. *See, e.g.*, Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 681 (2018); Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 591 (2017).

31. *See, e.g.*, Stephen Dinan, *Leahy: Abolish Mandatory Minimum Sentences*, WASH. TIMES (Jan. 16, 2013), https://www.washingtontimes.com/news/2013/jan/16/leahy-abolish-mandatory-minimum-sentences/ [https://perma.cc/WH2Q-JL5A]; Linda Greenhouse, *Guidelines on Sentencing Are Flawed, Justice Says*, N.Y. TIMES (Nov. 21, 1998), https://www.nytimes.com/1998/11/21/us/guidelines-on-sentencing-are-flawed-justice-says.html [https://perma.cc/P6XE-MSG5].

32. *See, e.g.*, Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1055 (2015); Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 672 (2015).

33. *See, e.g.*, Rashawn Ray, *What Does 'Defund the Police' Mean and Does It Have Merit?*, BROOKINGS INST. (June 19, 2020), https://www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit/ [https://perma.cc/WAT5-QL3S]; Derek Thompson, *Unbundle the Police,* ATLANTIC (June 11, 2020), https://www.theatlantic.com/ideas/archive/2020/06/unbundle-police/612913/ [https://perma.cc/9JB5-RT8Y].

individuals and on whom those individuals rely—the very communities criminal law claims to protect and serve. Beyond this, the reliance on designated formal decision-makers external to the community to lend meaning and nuance to the law through their exercise of discretion has failed.[34] To align the meaning of safety promised by the law with the community's own expectation of safety is to renew law's legitimacy and to achieve its goals. To do so will require a reconception of the meaning of safety itself away from a top-down construction toward a community-based one. This, in turn, will require empowering citizen decision-makers to serve alongside—and as checks on—their formal counterparts.[35]

This is a lot. It is all a lot. This Essay will begin the process of unpacking the meaning of and need for such changes. The suggestions contained in this Essay are by no means meant as an exhaustive list. Like much reconstruction and restoration work, criminal law's reconceptualization is, and will be, a work in progress and one that shifts as new concerns emerge and others resolve. This Essay is meant to offer a start—to consider the role of different stakeholders in criminal processes, imagine different definitions of safety and dangerousness that come into play (and how and when they do), and craft different discretionary moments between and among stakeholders—in the hopes of charting a path toward meaningful reconstruction of criminal law.

In charting this path, this Essay engages in a three-part analysis. Part I establishes the lay of the criminal law land—examining Arizona's criminal law and procedure as they relate to purported goals of promoting safety and protecting the community. This Part is not an examination of the minutiae of the code or rules—such an examination, while undoubtedly valuable and informative, is beyond the scope of this piece. Instead, Part I is meant to offer a bird's-eye view of the code and rules that explores and at times imagines their underlying norms and goals. This Part also attempts to situate those goals in larger national conversations surrounding substantive criminal law and procedures. Part II pivots to the state of the world at the time of this writing—describing the simultaneous realities of a nation and world gripped by both a biological contagion that flourishes in carceral systems (COVID-19, for anyone who stumbles on to this piece twenty years from now when hopefully COVID-19 will seem a quaint historical artifact) and a normative contagion that flourishes in criminal systems that uses force and incarceration disproportionately against poor and Black and Brown people in the name of

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34. *See* Amelia Thomson-DeVeaux & Maggie Koerth, *Is Police Reform a Fundamentally Flawed Idea?*, FIVETHIRTYEIGHT (June 22, 2020, 6:00 AM), https://fivethirtyeight.com/features/is-police-reform-a-fundamentally-flawed-idea/ [https://perma.cc/4YPS-XNLS].

35. *See* Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1750 (2005).

law and order. This Part teases sustaining lessons and commonality from these crises. While each is distinct, both carry a common thread, and both offer insights into systems in desperate need of reconstruction. Finally, Part III offers suggestions for rethinking criminal law. It pushes against constructs described in Part I and draws on the desperation and struggle described in Part II to imagine criminal systems that are more about justice, community, and healing.

I. THE VIEW FROM THE GROUND

Safety is often identified as an animating goal of criminal law. Arizona's criminal canon is no different. The modern manifestation of that goal is built on a rhetoric of order through law enforcement and powerful executive and judicial actors.[36] These executive actors—police and prosecutors—purport to protect individual citizens through the investigation, arrest, charging, and conviction of law violators. For their part, these judicial actors impose pretrial detention and sentences designed to maintain obedience and, in theory, in the process, order.[37]

The veneer of this ideal is the stuff of political campaigns and imagined conformist utopias.[38] The lived reality is more dystopic. As a construct, "law and order" promotes safety by ensuring that law is followed and that those who deviate from legal norms are punished. In this vision, law is a focused actor—targeting violators while protecting all others. In reality, visions of law and order are often built on the backs of marginalized and over-policed populations. Poverty, disability, addiction, mental health issues, and violence are swept together as a singular disorder of disobedience—criminality that disrupts order and safety that can only be remedied through the government's swift and punitive actions.[39] This is not to say that criminal law does not at

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36. *See* KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 30–32 (1997).

37. *Id.*

38. In 1964 Barry Goldwater accepted the Republican Presidential Nomination promising to restore law and order in response to the menace of "violence in our streets." Barry M. Goldwater, Senator, U.S. Senate, Acceptance Address at the 1964 Republican National Convention (July 16, 1964). Fifty years later, Donald Trump promised in his inaugural speech to restore law and order through the rigorous enforcement of criminal law. Donald J. Trump, President, United States, Inaugural Address (Jan. 20, 2017); Katherine Beckett & Theodore Sasson, *The Origins of the Current Conservative Discourse on Law and Order*, *in* CONSERVATIVE AGENDAS AND CAMPAIGNS: THE RISE OF THE MODERN "TOUGH ON CRIME" MOVEMENT 44, 44 (2005).

39. *See, e.g.*, Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 839 (2017); Paul Butler, *The System Is Working the Way It Is Supposed*

times promote safety—it clearly does, but this is not the whole picture. Allegiance to a narrow construct of safety—one premised on policing, prosecution, and detention—even if it sometimes gets a safety calculus "right," is also problematic.[40]

In the wake of this narrow construct, incarceration rates among poor and minority citizens across the nation rise.[41] Arizona is no exception.[42] Across the nation, police forces are funded and trained to serve in a domestic war on crime.[43] Arizona is no exception.[44] Criminal systems burst at their figurative seams in pursuit of law and order, yet even as crime rates recede, police budgets remain high[45] and sentences rise.[46] Communities lose defendants and defendants lose communities.

The Arizona criminal code and rules of criminal procedure are replete with references to safety. Policing and prosecutorial rhetoric in the state focus on safety and protection achieved through robust policing and rigorous prosecution and incarceration. State and local budgets for law enforcement—through police, prosecutor's offices, or jails and prisons—reflect this commitment.[47] These budgets grow even as other social safety budgets such

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To: The Limits of Criminal Justice Reform, 104 GEO. L.J. 1419, 1425–26 (2016); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1485–86 (2016).

40. *See* Allegra M. McLeod, *Confronting the Carceral State*, 104 GEO. L.J. 1405, 1407 (2016); Butler, *supra* note 39.

41. *See* Eli Day, *The Race Gap in US Prisons Is Glaring, and Poverty Is Making It Worse*, MOTHER JONES (Feb. 2, 2018), https://www.motherjones.com/crime-justice/2018/02/the-race-gap-in-u-s-prisons-is-glaring-and-poverty-is-making-it-worse/ [https://perma.cc/AE66-522E].

42. For a breakdown of Arizona's detention rates by race and class, see *Arizona Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/AZ.html [https://perma.cc/5TF5-B3AC]; FWD.US, ARIZONA'S IMPRISONMENT CRISIS: THE COST TO COMMUNITIES 2, 4–10 (2018), https://36shgf3jsufe2xojr925ehv6-wpengine.netdna-ssl.com/wp-content/uploads/2018/11/PART-2-The-cost-to-communities-1.pdf [https://perma.cc/R2ZX-8J29].

43. *See* RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES, at xi–xii (1st ed. 2013).

44. *See* Emily Badger & Quoctrung Bui, *Cities Grew Safer. Police Budgets Kept Growing.*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/interactive/2020/06/12/upshot/cities-grew-safer-police-budgets-kept-growing.html [https://perma.cc/9EMF-V235] (noting the Mesa police budget represents thirteen percent of the total municipal budget).

45. *Id.*

46. *See* Marc Mauer, *Long-Term Sentences: Time To Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 113–114 (2018).

47. *See* Meg O'Connor, *How the Phoenix Police Spends Its $745 Million Budget*, APPEAL (June 17, 2020), https://theappeal.org/how-phoenix-police-department-spends-its-budget/ [https://perma.cc/F5GF-3QR4]. It should be noted, in their most recent budget the City included $3 million for a police oversight board. *See* Jessica Boehm, *Phoenix Approves Budget with Fully-Funded Police Civilian Oversight Office*, AZCENTRAL (June 8, 2020, 2:00 PM),

as health care, education, and re-entry budgets lag behind.[48] Arizona boasts a high rate of detention, pre- and post-trial, and an equally impressive rate of recidivism.[49] The criminal code reveals criminalization of a variety of minor and non-violent offenses[50] and offers few defenses premised on the existence of underlying and perhaps contributing conditions.[51]

A further examination of Arizona's criminal canon reveals the narrow and exclusive circles in which the law's purported goal—safety—is defined. The criminal code refers to state law enforcement officers as public safety officers.[52] They enforce law in an effort to promote safety.[53] By extension, suspects are investigated and arrested because they undermine safety. Prosecutors not only control charging decisions[54] but oversee victim advocacy units—designating both when a crime (an affront to safety norms) has occurred and who an eligible victim is.[55] Defendants are charged and prosecuted because these actions promote the safety of the community.

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https://www.azcentral.com/story/news/local/phoenix/2020/06/08/phoenix-approves-full-funding-civilian-oversight-police-department/5320152002/ [https://perma.cc/7922-XWNH]. The Department of Public Safety had an estimated $430,485,500 for 2020 and a $497,243,500 estimated budget for 2021. *See* ARIZ. DEP'T OF PUB. SAFETY, FY 2020 BUDGET REQUEST 1, 498, 555 (2018), https://www.azdps.gov/sites/default/files/media/budget-request-2020_0.pdf [https://perma.cc/VE7E-HMB2].

48. *See* O'Connor, *supra* note 47; Jim Small & Jerod MacDonald-Evoy, *Ducey's $12.3B Budget Seeks New K-12, Public Safety Spending*, AZMIRROR (Jan. 17, 2020, 2:32 PM), https://www.azmirror.com/2020/01/17/ducey-budget-12-5-billion-new-education-public-safety-spending/ [https://perma.cc/J82D-TK6R].

49. *See* O'Connor, *supra* note 47; FWD.US, ARIZONA IN CRISIS: A CRIMINAL JUSTICE SYSTEM FALLING BEHIND THE REST OF THE NATION (2019), https://36shgf3jsufe2xojr925ehv6-wpengine.netdna-ssl.com/wp-content/uploads/2019/07/AZ_Wrapup_8.511_RD4.pdf [https://perma.cc/PD5J-SE46]; FWD.US, ARIZONA'S IMPRISONMENT CRISIS: THE HIGH PRICE OF PRISON GROWTH 2, 13 (2018) [hereinafter FWD.US, THE HIGH PRICE], https://36shgf3jsufe2xojr925ehv6-wpengine.netdna-ssl.com/wp-content/uploads/2018/09/The-High-Price-of-Prison-Growth.pdf [https://perma.cc/6FLG-NBDV].

50. *See* ARIZ. REV. STAT. ANN. § 13 (2020). This in turn produces a high rate of imprisonment of these non-violent and relatively minor offenses. *See* FWD.US, THE HIGH PRICE, *supra* note 49, at 9–11.

51. The obvious exception to this is the insanity defense, though it is limited. *See* ARIZ. REV. STAT. ANN. § 13-502.

52. *See id.* §§ 13-1210, -2922 .

53. *Commitments*, ARIZ. DEP'T. OF PUB. SAFETY, https://www.azdps.gov/commitments [https://perma.cc/5P9K-YA99] (listing the department's mission as "[t]o protect human life and property by enforcing state laws, deterring criminal activity, and providing vital support to the State of Arizona and its citizens").

54. State v. Hankins, 686 P.2d 740, 744 (Ariz. 1984) ("It is clearly within the sound discretion of the prosecutor to determine whether to file charges and which charges to file."); *see also* ARIZ. CONST. art. III.

55. *See, e.g.*, *Victim Services*, ARIZ. ATT'Y GEN. OFF., https://www.azag.gov/criminal/victim-services [https://perma.cc/VL7F-HZQF] (describing prosecutor and police run victim services divisions in Arizona).

Courts make pretrial detention and post-conviction sentencing decisions based on perceptions of the risk the defendant poses to safety.[56] In each of these instances, formal actors define safety in opposition to the accused. Safety is equated with the detention or restraint of the defendant.

There are few opportunities for direct citizen decision-making within this canon. While Arizona's criminal law requires discretionary acts to function, for the most part, discretionary decision-making is confined to formal realms. Police make decisions about where, who, and what to investigate. They may receive benefit from citizen input, but the ultimate decision about law enforcement lies with Arizona's public safety officers, not the people. Prosecutors make decisions about who and what to charge. Again, they likely benefit from direct citizen input, but the avenues of that input are narrow and leave the ultimate decision-making power of the prosecutor largely intact. Judges too engage in discretionary decision-making in a variety of ways. From monumental decisions such as pretrial detention to sentencing to more mundane decisions such as evidentiary rulings or scheduling, in large and small ways, judges craft criminal law's application and narrative through their discretion. Like other formal actors, they too may receive and benefit from community input, but the ultimate power of decision lies with them.

For the most part, citizens are witnesses rather than active participants in the construction of law. They may vote or serve on juries or mob in the street, but as will be discussed in Part III, these mechanisms of direct engagement may be insufficient to express dissent and/or drive change. For many citizens, this system may be "right." They may view the discretionary decisions of formal actors as both properly reflecting the majority of the citizens' collective will and correctly striking a balance between arrest, prosecution, and conviction, and maintenance of community safety.

That discretionary decision-makers may get their safety to law enforcement calculations "right," however, is to overlook the lingering danger of criminal systems. Simply put, discretionary decisions matter in different ways. First, their daily occurrence may serve to obscure the bias such decisions enforce.[57] Disproportionately high arrest and conviction rates among poor and minority populations, for example, are often equated with high crime rates rather than disproportionately high rates of policing and prosecution of those populations.[58]

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56. *See* §§ 13-3961.01, -3967(B), -3705, -3706.

57. *See* FWD.us, *supra* note 42, at 2.

58. *See, e.g.*, Rich Lowry, *Elizabeth Warren's Lie*, NAT'L REV. (Aug. 7, 2018, 6:30 AM), https://www.nationalreview.com/2018/08/elizabeth-warren-lies-about-criminal-justice-system-racism/ [https://perma.cc/G4LC-UWE9]. *But see, e.g.*, Radley Balko, Opinion, *There's*

Second, these discretionary decisions often undo, rather than promote, citizen-driven reforms.[59] Consider the example of Arizona's recent reform in the arena of bail. In response to outcry over high rates of pretrial detention particularly among poor populations, Arizona implemented a variety of reforms designed to reduce bias and reliance on cash bail in pretrial decision-making.[60] Toward that end, judges were instructed that cash bail was disfavored and that they should consider indigency in setting bail amounts to ensure that defendants were not held as a result of their poverty. In addition, judges were provided with a bail schedule to promote uniformity.[61] The state implemented an actuarial based pretrial risk assessment tool to determine risk of flight or future dangerousness.[62] These measures were designed to serve as checks on potential bias in judges' discretionary decisions surrounding bail and to curb the influence of prosecutors and police on such decisions.[63] Simply put, these reforms were designed to reduce pretrial detention.[64]

A post-implementation view of pretrial detention tells another story, however. Rates of pretrial detention have still risen relative to new arrest and charging rates, particularly among marginalized defendants.[65] Judges continue to exercise their discretion to detain and do so at a higher rate.[66] This trend may be a product of bias embedded in the state's risk assessment tool.[67] The lack of a right to appointed counsel in the pretrial setting also renders the defendant at a clear disadvantage.[68] In the end, however, it is difficult to escape the reality that as judges make daily decisions about who to detain pretrial and who to release, they apparently are exercising their discretion in ways that undo reforms.

Third, reliance on formal actors to make critical discretionary decisions can entrench both the motivating forces behind the law and the means of that enforcement. Law, already static in its written construct, becomes further

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Overwhelming Evidence that the Criminal Justice System Is Racist. Here's the Proof., WASH. POST (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/ [https://perma.cc/9QPG-K3Y2].

59. *See* FWD.us, *supra* note 42, at 2.

60. *See* Henry F. Fradella & Christine S. Scott-Hayward, *Advancing Bail and Pretrial Justice Reform in Arizona*, 52 ARIZ. ST. L.J. 841, 860–61 (2020).

61. *See id.* at 854–55.

62. *Id.* at 870–71.

63. *See id.* at 855–56.

64. *See id.*

65. HUM. IMPACT PARTNERS, LIBERATING OUR HEALTH: ENDING THE HARMS OF PRETRIAL INCARCERATION AND MONEY BAIL 6 (2020), https://humanimpact.org/wp-content/uploads/2020/02/HIP_HealthNotBailNationalReport_2020.02_reduced.pdf [https://perma.cc/C5X4-RCVE].

66. Fradella & Scott-Hayward, *supra* note 60, at 871.

67. *Id.* at 869, 872–73.

68. *Id.* at 874–75.

entrenched as each discretionary decision reinforces animating principles to the exclusion of others. In Arizona, even as rates of COVID-19 have risen alarmingly,[69] and even in the face of verified massive infection rates in jails and prisons in Ohio[70], Illinois,[71] New York,[72] and California,[73] discretionary decision-makers in Arizona have not sought increased testing, precautionary actions such as access to personal hygiene products, or mandated social distancing in carceral facilities.[74] Nor have they moved to release vulnerable or low-risk populations in those facilities.[75] For their part, courts have shut down, and prophylactic measures, such as access to counsel and speedy trial clocks, have been rendered non-existent by the contagion.[76] As will be discussed in Part III, in the face of the COVID-19 crisis, a reorientation of

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69. *See Data Dashboard*, ARIZ. DEP'T OF HEALTH SERVS., https://www.azdhs.gov/preparedness/epidemiology-disease-control/infectious-disease-epidemiology/covid-19/dashboards/index.php [https://perma.cc/5ETK-WTVF].

70. *See* Sarah Volpenhein, *Marion Prison Coronavirus Outbreak Seeping into Larger Community*, MARION STAR (Apr. 26, 2020, 10:45 AM), https://www.marionstar.com/story/news/local/2020/04/25/marion-prison-ohio-coronavirus-outbreak-seeping-into-larger-community/3026133001/ [https://perma.cc/BFW3-4AUB].

71. *See* Cheryl Corley, *The COVID-19 Struggle in Chicago's Cook County Jail*, NPR (Apr. 13, 2020, 6:09 PM), https://www.npr.org/2020/04/13/833440047/the-covid-19-struggle-in-chicagos-cook-county-jail [https://perma.cc/C4DL-4VTG].

72. *See* Jonathan Stempel, *Rikers Island Jail Officers Union Sues New York City over Coronavirus*, REUTERS (Apr. 2, 2020, 4:18 PM), https://www.reuters.com/article/us-health-coronavirus-new-york-rikersisl/rikers-island-jail-officers-union-sues-new-york-city-over-coronavirus-idUSKBN21K3KR [https://perma.cc/GHM7-77WJ] (explaining that The Legal Aid Society found that "the 5.1% infection rate [in Rikers Island] was nine times higher than in all of New York City, 11 times higher than in Italy's Lombardy region, and 44 times higher than in China's Hubei province, all major areas for the coronavirus outbreak").

73. *See COVID-19 Preparedness*, CAL. DEP'T OF CORR. & REHAB. (Sept. 18, 2020), https://www.cdcr.ca.gov/covid19/ [https://perma.cc/Q3MJ-NY4V].

74. *See* Kurtis Lee & Jaweed Kaleem, *Coronavirus Has Led to Thousands of Early Releases from Prisons and Jails. Not in Arizona*, L.A. TIMES (Apr. 8, 2020, 10:12 AM), https://www.latimes.com/world-nation/story/2020-04-07/coronavirus-prisons-arizona-covid19 [https://perma.cc/DF39-NAFU].

75. *Id.*

76. General Order 20-20 (D. Ariz. Apr. 16, 2020), http://www.azd.uscourts.gov/sites/default/files/general-orders/20-20.pdf [https://perma.cc/EMT7-S5RU]; General Order 20-17 (D. Ariz. Mar. 27, 2020), http://www.azd.uscourts.gov/sites/default/files/general-orders/20-17.pdf [https://perma.cc/K3GS-AT8B]; General Order 20-15 (D. Ariz. Mar. 20, 2020) https://www.azd.uscourts.gov/sites/default/files/general-orders/20-15.pdf [https://perma.cc/UPF5-VS67] (for federal courts); Administrative Order 2020-70 (Ariz. Apr. 24, 2020), http://www.azcourts.gov/Portals/22/admorder/Orders20/2020-70.pdf [https://perma.cc/JLJ9-45EL] (governing state courts); Jacob Gershman & Byron Tau, *Coronavirus Disrupts U.S. Court System*, WALL ST. J. (Mar. 17, 2020, 7:40 AM), https://www.wsj.com/articles/coronavirus-disrupts-u-s-court-system-11584445222 [https://perma.cc/4K8M-8DV8].

discretionary decision-making would have promoted safety, as would a willingness to reconsider previously made decisions in the face of a mounting crisis.

This Part has sought to sketch, in the broadest terms, Arizona's construction of safety in the realm of criminal law. As we turn away from this view toward the crises facing the state and the nation, this aerial view of the lay of the criminal landscape can inform a path going forward—one that reconceives of safety as something defined not in opposition to the people, or at least some people, but by and for all people.

II. THE PANDEMIC AND THE PROTESTS

On January 20, 2020, the first case of COVID-19 in the United States was confirmed in Snohomish County, Washington.[77] In the weeks and months that followed, as the virus spread across the country, communities attempted to flatten the viral curve.[78] On March 11, 2020, the World Health Organization officially classified COVID-19 as a pandemic.[79] State and local governments declared states of emergency and urged citizens to practice social distancing.[80] Schools, bars, restaurants, and entertainment venues closed.[81] Non-essential workers were ordered to stay at home.[82] Group gatherings were prohibited.[83] With no vaccine in sight and uncertainty

77. *See* Michelle L. Holshue et al., *First Case of 2019 Novel Coronavirus in the United States*, 382 NEW ENG. J. MED. 929, 929 (2020).

78. Chris Wilson, *The U.S. Has Flattened the Curve. Next Up Is 'Squashing' It—and That's Not Going Well*, TIME (Aug. 22, 2020, 11:19 PM), https://time.com/5827156/squashing-squash-curve-coronavirus-covid19/ [https://perma.cc/TD7U-MQNU].

79. Tedros Adhanom Ghebreyesus, Director-General, World Health Org., Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020), https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 [https://perma.cc/RKE4-65JW].

80. *White House Adviser Warned of Risks of Pandemic; Trump Misleads on Testing*, N.Y. TIMES (Apr. 14, 2020), https://www.nytimes.com/2020/04/06/world/coronavirus-live-news-updates.html [https://perma.cc/5A3E-792F] (chronicling the worldwide response to the disease).

81. *See C.D.C. Gives New Guidelines, New York To Close Restaurants and Schools and Italian Deaths Rise*, N.Y. TIMES (Mar. 25, 2020), https://www.nytimes.com/2020/03/15/world/coronavirus-live.html [https://perma.cc/D6EJ-7536] (tracking closures).

82. *See COVID-19 State and Territory Actions Tracker*, NAT'L GOVERNORS ASS'N, https://nga2.maps.arcgis.com/apps/MapSeries/index.html [https://perma.cc/Z9YN-GEHT] (tracking each state's orders regarding non-essential workers).

83. *See, e.g.*, CTRS. FOR DISEASE CONTROL & PREVENTION, INTERIM GUIDANCE: GET YOUR MASS GATHERINGS OR LARGE COMMUNITY EVENTS READY FOR CORONAVIRUS DISEASE 2019 (COVID-19) 2 (2020), https://www.cdc.gov/coronavirus/2019-ncov/downloads/Mass-Gatherings-Document_FINAL.pdf [https://perma.cc/M6TS-LV3A] (recommending canceling or

regarding transmission mechanisms and acquired immunity, fear persists that efforts to "reopen" have been premature as infections rates continue to climb.[84]

Inside the nation's jails and prisons, the current health crisis presents heightened risks.[85] Free people were told they could flatten the curve through social distancing, engaging in self-quarantine, and deployment of masks and hand sanitizer—but such prophylactic options are unavailable to those in jails and prisons.[86] Instead, the structure of jails and prisons across the country—facilities already plagued by overcrowding, shared spaces, lack of personal hygiene products and adequate medical care, and an increasingly aging and vulnerable population—only exacerbates the spread of COVID-19.[87] Medical experts and inmate advocates alike warned that the contagion would travel quickly through these facilities, with devastating effect on inmates and those who work with the incarcerated population.[88]

Even as concerns continued to grow over the lack of preparation, rising rates of infection among incarcerated populations, and the inadequate response of the nation's carceral systems to the COVID-19 threat, a new crisis went viral in its own way. On May 25, 2020, George Floyd died on the

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postponing gatherings of ten or more people); *Considerations for Events and Gatherings*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/mass-gatherings-ready-for-covid-19.html [https://perma.cc/Y6NJ-TPNB] (July 7, 2020) (recommending limiting gatherings).

84. *See Arizona Faces Spike in Coronavirus Cases as Top Health System Runs Low on ICU Beds*, NPR (June 11, 2020, 4:03 PM), https://www.npr.org/2020/06/11/875311136/arizona-faces-spike-in-the-coronavirus-cases-runs-out-of-icu-beds [https://perma.cc/5XJK-THTR]; Amanda Mull, *The Horror of the Coronavirus Data Lag*, ATLANTIC (May 15, 2020), https://www.theatlantic.com/health/archive/2020/05/is-reopening-safe-after-covid-19-we-wont-know-for-weeks/611743/ [https://perma.cc/3A76-46U9].

85. *See, e.g.*, Megan Crepeau & Jason Meisner, *Cook County Jail Detainee Dies of COVID-19*, CHI. TRIB. (Apr. 7, 2020, 6:30 AM), https://www.chicagotribune.com/coronavirus/ct-coronavirus-cook-county-jail-death-20200406-42b3dkcqsbeyzflsmso6s2j4wi-story.html [https://perma.cc/N9NG-RBJM] (reporting 234 detainees infected at Cook County Jail); Miranda Bryant, *Coronavirus Spread at Rikers Is a 'Public Health Disaster', Says Jail's Top Doctor*, GUARDIAN (Apr. 1, 2020, 10:36 AM), https://www.theguardian.com/us-news/2020/apr/01/rikers-island-jail-coronavirus-public-health-disaster [https://perma.cc/92E2-QJ6J] (estimating the rate of infection in New York City jails at 3.91 percent compared to 0.5 percent of the total New York City population).

86. *See* Talha Burki, *Prisons Are "in No Way Equipped" To Deal with COVID-19*, 395 WORLD REP. 1411, 1412 (2020), https://www.thelancet.com/action/showPdf?pii=S0140-6736%2820%2930984-3 [https://perma.cc/6NG3-5M2W]; Lipi Roy, *Infections and Incarceration: Why Jails and Prisons Need To Prepare for COVID-19 Now*, FORBES (Mar. 11, 2020, 5:08 PM), https://www.forbes.com/sites/lipiroy/2020/03/11/infections-and-incarceration-why-jails-and-prisons-need-to-prepare-for-covid-19-stat/ [https://perma.cc/ZVX4-GS2H].

87. *See* Carroll, *supra* note 27, at 66.

88. *Id.* at 73.

Minneapolis pavement as Officer Derek Chauvin kneeled on his neck.[89] Floyd repeatedly stated that he could not breathe, begged the officer to release him, called for his mama, and eventually lost consciousness.[90] Floyd was Black.[91] Chauvin and his fellow officers who were present as Floyd died were white and Hmong.[92] In eight minutes and forty-six seconds, an arrest for passing a counterfeit twenty-dollar bill became an international cry against police violence directed at Black and Brown people.[93] In the days of protest that followed, a shocked and angry public noted not only that Black lives mattered but that the construction of law and order that had produced Floyd's death—one death in a long line of fatalities[94]—was broken beyond repair.[95]

It would be easy to succumb to the temptation to treat these two events—a biological contagion and an act of police violence—as an unrelated concurrence of tragedy and horror. It would be easy to analyze one or the other as distinct with little in common but timing. Yet this ease would belie the lurking commonality of these crises. It is no accident that jail and prison populations are especially vulnerable to COVID-19, just as it is no accident that George Floyd, a Black man accused of a non-violent and minor offense, would die on the ground with a white officer kneeling on his neck. Both are the products of a construction of safety in need of re-examination reconstruction. This Part examines both crises. This Part feels short. It is short. I cannot do justice to either crisis in these pages. It does, however, draw to the surface salient concerns and lessons that others have identified in the hopes of charting a path forward.

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89. *See* Hill et al., *supra* note 23.

90. *Id.*; *see* Lonnae O'Neal, *George Floyd's Mother Was Not There, but He Used Her as a Sacred Invocation*, UNDEFEATED (May 28, 2020), https://theundefeated.com/features/george-floyds-death-mother-was-not-there-but-he-used-her-as-a-sacred-invocation/ [https://perma.cc/7M5P-AZY5].

91. *See* Hill et al., *supra* note 23.

92. *Id.*; *see* Kimmy Yam, *Officer Who Stood by as George Floyd Died Highlights Complex Asian American, Black Relations*, NBC NEWS (June 3, 2020, 9:56 PM), https://www.nbcnews.com/news/asian-america/officer-who-stood-george-floyd-died-asian-american-we-need-n1221311 [https://perma.cc/4VXZ-VT9M].

93. For a visual gallery of such protests, see, for example, *Protests Across the Globe After George Floyd's Death*, CNN, https://www.cnn.com/2020/06/06/world/gallery/intl-george-floyd-protests/index.html [https://perma.cc/SJ9Z-T4WS] (June 13, 2020, 3:22 PM).

94. *See* Mike Baker et al., *Three Words. 70 Cases. The Tragic History of 'I Can't Breathe.'* N.Y. TIMES (June 29, 2020), https://www.nytimes.com/interactive/2020/06/28/us/i-cant-breathe-police-arrest.html [https://perma.cc/32X2-HLVU].

95. *See, e.g.*, Abby Phillip, *George Floyd Protests Have Made Police Reform the Consensus Position*, CNN, https://www.cnn.com/2020/06/09/politics/police-reform-consensus-floyd-protest/ [https://perma.cc/4FJF-N9FX] (June 9, 2020, 7:32 PM).

A. COVID-19 and Jails and Prisons

Long before the first confirmed case of COVID-19 in the United States, the nation's jails and prisons were particularly susceptible to contagions.[96] Previous MRSA and hepatitis C outbreaks demonstrated in real terms how difficult it is to contain contagions in closed environments like jails and prisons.[97] COVID-19 proved no exception. As federal, state, and county actors were slow to react to the pending public health crisis, jails and prisons became COVID-19 hotspots.[98] As I and others have written, the failure to quickly release inmates, reduce sentences, and take necessary precautions in the face of COVID-19 ensured outbreaks and deaths among those incarcerated, those who work in carceral facilities, and their communities.[99] COVID-19 didn't break the carceral systems through which it spread. Instead it took advantage of underlying weaknesses to create an ongoing health catastrophe.

To unpack the susceptibility of jails and prisons to contagions like COVID-19 is to confront carceral systems that have long been broken. Overcrowding in facilities, an aging and vulnerable prison population, inadequate medical resources, and scarcity of re-entry programs are not accidental concurrences.[100] These realities are the product of a state that in the name of promoting safety has long over-criminalized, over-policed, and over-detained populations too marginalized to meaningfully and consistently resist.

There are many ways to consider the realities of criminal law's enforcement, but for the sake of this Essay, consider two extreme ends of the spectrum: pretrial detention and sentencing. Historically, pretrial detention

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96. *See* Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 CLINICAL INFECTIOUS DISEASES 1047, 1047 (2007). For scientific reports on specific contagions in jails and prisons, see *Scientific Reports and MMWRs*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 21, 2017), https://www.cdc.gov/correctionalhealth/SR-MMWR.html [https://perma.cc/YY3F-V6S5].

97. Bick, *supra* note 96, at 1047, 1049–51, 1053.

98. *See, e.g.*, Eric Westervelt, *COVID-19 Outbreak Devastates California's San Quentin Prison*, NPR (July 4, 2020, 7:58 AM), https://www.npr.org/2020/07/04/887239267/covid-19-outbreak-devastates-californias-san-quentin-prison [https://perma.cc/3X9Q-FE9Y]; Jacques Billeaud, *Virus Cases Rise Sharply in Metro Phoenix County Jails*, AZFAMILY (June 10, 2020), https://www.azfamily.com/news/ap_cnn/virus-cases-rise-sharply-in-metro-phoenix-county-jails/article_fdc82d80-ab30-11ea-86f6-13c77cd30c3d.html [https://perma.cc/9GTC-YPCQ].

99. *See, e.g.*, Carroll, *supra* note 27, at 81–83; Levin, *supra* note 28, at 1–3; Volpenhein, *supra* note 70.

100. *See* E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUST. STAT., NCJ248766, AGING OF THE STATE PRISON POPULATION, 1993–2013, at 1–2 (2016), https://www.bjs.gov/content/pub/pdf/aspp9313.pdf [https://perma.cc/T4QM-RC23].

was rare.[101] Those accused of offenses were detained prior to trial *only* if no conditions of release could assure their reappearance at future court proceedings.[102] Later, public safety was added to pretrial considerations.[103] Even with this additional consideration, ostensibly, pretrial *release* remained the policy norm, with conditions of release or detention imposed only as necessary to mitigate flight and future dangerousness risks.[104] Yet, today, local jail populations are overwhelmingly composed of pretrial detainees.[105]

The rhetoric of rising pretrial detention rates is easy to come by. In the name of promoting public safety, prosecutors and judges engage in a series of discretionary decisions that end in pretrial detention, either as a result of unaffordable bail or conditions of release, or the outright denial of release.[106] For its part, buoyed by safety rhetoric, pretrial detention falls more harshly on poor and minority defendants, raising accusations of bias. In the name of public safety, pretrial detention systems swell local jail populations, incentivize guilty pleas (thereby contributing in their own right to jail and prison overcrowding),[107] strain county and community resources that are often stretched perilously thin already,[108] and often serve as a holding mechanism for those most in need of social support. Estimates of pretrial detention of mentally ill and addicted people are staggering. [109]

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101. SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM 20 (2018).

102. *See id.*; Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (1789) (providing that "bail shall be admitted[ ] except where the punishment may be death").

103. *See* United States v. Salerno, 481 U.S. 739, 739–43 (1987); Schall v. Martin, 467 U.S. 253, 264 (1984); BAUGHMAN, *supra* note 101, at 19–27.

104. *See Salerno*, 481 U.S. at 746–47; Stack v. Boyle, 342 U.S. 1, 5–6 (1951).

105. *See* Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 551 (2012).

106. *See* Jenny E. Carroll, *Beyond Bail,* 73 FLA. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678992 [https://perma.cc/W7EN-8CAF].

107. Pretrial detainees are more likely to accept a plea deal than a released defendant. *See* Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713–14 (2017). Pretrial detention also likely worsens case outcomes by hindering the defendant's ability to prepare his defense. *Id.*

108. *See* Margaret Elizabeth Sparks, *Bailing on Bail: The Unconstitutionality of Fixed, Monetary Bail Systems and Their Continued Use Throughout the United States*, 52 GA. L. REV. 983, 1004 (2018); Alexi Jones, *Does Our County Really Need a Bigger Jail?*, PRISON POL'Y INITIATIVE (May 2019), https://www.prisonpolicy.org/reports/jailexpansion.html [https://perma.cc/7LQR-NMAB]; Natalie Ortiz, *Pretrial Population and Costs Put County Jails at a Crossroads*, NACO (June 29, 2015), https://www.naco.org/articles/pretrial-population-and-costs-put-county-jails-crossroads-0 [https://perma.cc/JKX3-TXR8].

109. *See* Henry J. Steadman et al., *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 PSYCHIATRIC SERVS. 761, 761–65 (2009); *Serious Mental Illness Prevalence in Jails and Prisons*, TREATMENT ADVOC. CTR. (Sept. 2016), https://www.treatmentadvocacycenter.org/evidence-and-research/learn-more-about/3695 [https://perma.cc/4ERL-WVFC].

These pretrial detention systems carry with them a myriad of downstream consequences for detainees and their communities.[110] In the name of public safety, jailed defendants lose jobs, homes, custody of their children, educational opportunities, access to mental health and substance abuse treatment, and the ties to the very communities they depend on.[111] Deprived of the defendant's presence, his community loses not only his economic power, but all he might have sustained in their midst.

Sentencing may pose similar risks and be driven by similar motives. While sentencing carries the distinction of imposition following convictions (as opposed to pretrial detention, which occurs only after arrest and/or accusation) and carries a punitive component, concern over public safety or avoiding dangerousness likewise animates sentencing policies.[112] Abolition of parole in Arizona, coupled with increasingly long sentencing ranges, has produced an aging prison population.[113] Even with efforts to consider compassionate release and appropriate sentencing reductions, the United States still boasts some of the most punitive sentencing regimes in the world.[114]

I have argued elsewhere in more detail that during ordinary times, pretrial detention systems fundamentally miscalculate safety by imagining the defendant's interest as diametrically opposed to the community's interests.[115] The same can be said in the context of sentencing—where prolonged periods of imprisonment are touted as promoting public safety by removing the defendant from the community. The COVID-19 crisis amplifies this miscalculation in both contexts, demonstrating not only the interconnected nature of a defendant's and the community's safety interests but also the shifting borders of that community. This is not to say that in every case the community is better off when a defendant is released or that every member

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110. *See* BAUGHMAN, *supra* note 101, at 82–91; Paul Heaton et al., *supra* note 107, at 713–14; Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1417–27 (2017).

111. *See* Yang, *supra* note 110, at 1405, 1427, 1446, 1453.

112. *See* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (AM. L. INST., Tentative Draft No. 2, 2016); *see* MODEL PENAL CODE: SENTENCING (AM. L. INST., Tentative Draft No. 3, 2014), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/mpc-tentative-draft-no.-3-final.pdf [https://perma.cc/F7T9-P4UB].

113. *See* Fox Butterfield, *Eliminating Parole Boards Isn't a Cure All, Experts Say*, N.Y. TIMES (Jan. 10, 1999), https://www.nytimes.com/1999/01/10/us/eliminating-parole-boards-isn-t-a-cure-all-experts-say.html [https://perma.cc/2BZU-AT5D]; *see also* CARSON & SABOL, *supra* note 100.

114. *See* Lynn Adelman, *How Congress, the U.S. Sentencing Commission and Federal Judges Contribute to Mass Incarceration*, AM. CONST. SOC'Y (Jan. 23, 2018), https://www.acslaw.org/expertforum/how-congress-the-u-s-sentencing-commission-and-federal-judges-contribute-to-mass-incarceration/ [https://perma.cc/B2GU-FSC6].

115. *See* Carroll, *supra* note 27, at 81–86; Carroll, *supra* note 106 (manuscript at 12).

of the community may benefit or suffer in the same ways when a defendant is detained. But it is to say that separating the defendant's and the community's interests either in a pretrial or sentencing context may fail to properly appreciate the complex dynamics of "community safety."

The COVID-19 crisis raises the possibility that detaining a defendant for any period creates so significant a communal risk that community safety counsels toward release in all but extreme cases.[116] The contagion-rich environment of jail and prison means a detained defendant may never come home, and his community may suffer the long-term effects of his permanent absence.[117] Or, if left to linger in these facilities, he may spread the contagion to the staff and their community or may bring the contagion back to his own community upon release, creating a new infection source.[118] From the perspective of the community, an outbreak in a jail or prison poses a secondary risk—that sick and dying detainees, unable to receive sufficient medical care in custody, will seek treatment in already overtaxed hospitals, creating further resource scarcity in an already overburdened healthcare system.[119] In any of these scenarios, pretrial release and sentencing reduction become a means of preserving not just the defendant's health and safety but the community's.

B. George Floyd

In the days that have followed George Floyd's death, the nation and the world have witnessed sustained activism surrounding criminal law reform. The eight minutes and forty-six seconds of recorded brutality that deprived Floyd of breath—and later life—inducted him into an ignoble rank of men and women killed by police who are disproportionately Black and Brown.[120] It would be easy to speak of Floyd's death as brutality or rogue actions by

116. *See* Carroll*, supra* note 27, at 79–80.

117. *Id.* at 80–81.

118. *Id.* at 80.

119. *See, e.g.*, Connor Sheets, *Alabama Prison System's COVID-19 Plan Anticipates Widespread Infection, Deaths, National Guard Intervention*, AL.COM (Apr. 7, 2020), https://www.al.com/news/2020/04/alabama-prison-systems-covid-19-plan-anticipates-widespread-infection-deaths-national-guard-intervention.html [https://perma.cc/ZP2L-WJ7M].

120. *See* Mark Berman et al., *Protests Spread over Police Shootings. Police Promised Reforms. Every Year, They Still Shoot and Kill Nearly 1,000 People*, WASH. POST (June 8, 2020, 8:44 AM), https://www.washingtonpost.com/investigations/protests-spread-over-police-shootings-police-promised-reforms-every-year-they-still-shoot-nearly-1000-people/2020/06/08/5c204f0c-a67c-11ea-b473-04905b1af82b_story.html [https://perma.cc/C7XE-6RH9].

single bad actors.[121] To date, activists have resisted this siren call. Instead, they have recognized, and pushed the nation to recognize, that Floyd's death is the product of criminal justice systems that not only militarize policing but turn a blind eye, at best, and encourage and support, at worst, the systematic racism and classism that animates those systems.

It is not just that Black and Brown men are more likely to be stopped, harassed, arrested, brutalized, or killed by police.[122] It is that George Floyd joined the ranks of Eric Garner and others before him, who had suffered contact with the police as a result of state decisions to over-criminalize behavior and then to over-police non-violent, misdemeanor, and infraction offenses in poor and minority-majority neighborhoods. Eric Garner died in a chokehold administered by Staten Island police officer Daniel Pantaleo after he reportedly sold loose or unpackaged cigarettes, commonly referred to as loosies.[123] Selling loosies may seem trivial, but it is criminalized in New York State.[124] Selling loose cigarettes circumvents cigarette taxes and thereby reduces the state's revenue.[125] The cigarette tax in New York at the time Eric Garner was allegedly selling his loosies on the streets of Staten Island was $5.85 on a pack of cigarettes.[126] Before turning to the question of why the state would want one of its actors to engage in an encounter that might result in arrest and detention of a man over $5.85 or less worth of taxes—not to mention in this case that produced his death—the more fundamental question might be why criminalize the sale of loose cigarettes in the first place?

Taxes matter to states and cities, but the value of the tax ($5.85) is clearly less than the value of the encounter itself—even if it had not resulted in Eric Garner's death. Is the state policing tax revenue with this type of criminalization, or is it policing poverty? Would Eric Garner, or any of his potential customers, have risked this criminal conviction if they could easily

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121. *See, e.g.*, *Trump Cites 'Bad Apples' but Defends Nation's Police*, N.Y. TIMES (June 11, 2020), https://www.nytimes.com/video/us/100000007187411/trump-cites-bad-apples-but-defends-nations-police.html [https://perma.cc/A34J-5RNY].

122. *See* Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PNAS 16793 (2019), https://www.pnas.org/content/pnas/116/34/16793.full.pdf [https://perma.cc/Y4XL-UARG].

123. *See* Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html [https://perma.cc/27UX-5ME5].

124. *Id.*

125. *Id.*

126. *A Year After Eric Garner's Death, Sales of Loose Cigarettes Continue*, WNYC (July 16, 2015), https://www.wnyc.org/story/year-after-eric-garner-death-sale-loose-cigarettes-continues/ [https://perma.cc/X587-TKYS]; Liz Emanuel & Richard Borean, *State Cigarette Tax Rates in 2014*, TAX FOUND. (July 2, 2014), https://taxfoundation.org/state-cigarette-tax-rates-2014/ [https://perma.cc/9CD5-TE9Y].

afford the tax? Maybe. But more likely there is a market for loosies because there is a population that both needs and wants cigarettes and cannot afford the tariff on them. The state's tax and criminalization of the avoidance of that tax may be designed to support care and treatment for smokers or to discourage the habit,[127] but its execution will inevitably target the very populations least able to afford the tax, criminal crackdowns, or private smoking cessation programs.

Now place regulation of loosies in the context of other crimes such as narcotic possession or petty theft. Again, it is not hard to imagine reasons the state might articulate as to why such acts should be prohibited.[128] It is also not hard to imagine that criminalization of such acts is little more than a mechanism to control behavior of the poor or addicted populations in the state regardless of the state's articulated reasons for that criminalization. This in turn raises secondary questions about enforcement. Overcriminalization of behavior may create its own disparate impact on marginalized populations, but this impact is amplified by downstream executive decision-making to over-police and over-prosecute those same populations. This implicates not only the way police interact with those they arrest on minor offenses—eight minutes and forty-six seconds of kneeling on the neck of a man accused of passing a counterfeit twenty dollar bill seems extreme even if the man doesn't die, but especially so given that George Floyd *did* die—but also quieter acts of violence embodied in the secondary decision to endorse such police encounters by prosecuting those who suffer them.

This reality is aggravated not only by the tremendous power police and prosecutors enjoy but by the reality that their discretion in exercising that power is largely obscured from the public eye. Decisions about where to police and what (or if) to charge are made with little community input (outside of voting and the occasional public meeting). Yet these decisions directly impact community members and become acts of self-confirmation for formal actors.[129] Decisions to police communities—both in terms of what types of crimes to police and where to police—not only drive arrest rates but also may affect the community's perception of the police. If police focus on misdemeanor and non-violent offenses or target populations that may be particularly vulnerable because of poverty, addiction, disability, disease, or

127. Daniel Robison, *Advocates: N.Y. Cigarette Tax Could Go Further To Snuff Out Smoking*, NPR, https://news.wbfo.org/post/advocates-ny-cigarette-tax-could-go-further-snuff-out-smoking [https://perma.cc/EK4F-WFF4].

128. Even if you don't agree with the reasons for such regulation, they are not difficult to imagine.

129. *See* Tracey L. Meares, *Synthesizing Narratives of Policing and Making a Case for Policing as a Public Good*, 63 ST. LOUIS U. L.J. 553, 554 (2019).

some other factor or identity, the community in turn may view the police as anti-community. If the police use force to arrest minor offenders or target young men in the community, but fail to respond to or prevent serious offenses, or even to engage in anything beyond superficial contact with the citizens they police, the police become an occupying force, and the communities they patrol become foreign territories.

One way to think of this is, as many have described, an over-subscription to the power and value of policing.[130] Every day, the citizens of the larger community ask police officers to do hard jobs that they are not adequately trained for.[131] We ask them to serve as mental health and substance abuse counselors, saviors and guardians, when we have trained and equipped them to be soldiers who police marginalized neighborhoods in the name of safety.[132] In this, George Floyd's death emerges not only as a product of an officer's overt use of force and the callous indifference of his fellow officers (though it surely was all of that), but as a product of policing that was built for and around such events.

It is policing tied to a legislative vision that over-criminalizes behavior and a prosecutorial machine that uses its discretion to charge, detain, and seek conviction of Black and Brown people at a disproportionate rate. It is a self-perpetuating cycle—justifying its existence by pointing to the products of its own discretionary decision-making. Higher arrest rates lead to higher rates of prosecutorial referral. Higher prosecutorial referral rates beget higher rates of charging. Higher rates of charging create greater justification for pretrial detention. Greater pretrial detention carries downstream consequences that include a higher incentive to plead guilty and a higher probability of conviction if you go to trial. A conviction carries its own consequences, from a burgeoning criminal history, to a term of incarceration, to monetary burdens, to all-too-real social and economic consequences that increase the likelihood of recidivism and cycles of poverty.[133] The very ideal that promises safety through the maintenance of and obedience to law and order underestimates the cruel force it employs in an effort to perpetuate itself and subjugate the communities it was meant to serve.

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130. *See* Barry Friedman, *Disaggregating the Police Function*, U. PA. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3564469 [https://perma.cc/EW46-CDFN].

131. *Id.* (manuscript at 5–6).

132. *Id.*

133. *See* Tina Rosenberg, Opinion, *Have You Ever Been Arrested? Check Here*, N.Y. TIMES (May 24, 2016), https://www.nytimes.com/2016/05/24/opinion/have-you-ever-been-arrested-check-here.html [https://perma.cc/ECC2-RR8H].

C. Commonality of Crisis

In all this, there are shared traits of these 2020 crises. In each, questions about how we define safety and why we expect the criminal law to deliver it are central. Each suggest shifting sands. And each crisis suggests that in calculating safety, the status quo has misjudged the parameters of the concept. This requires a common reckoning on two accounts. First, it requires a reassessment of the means by which safety is actually realized[134]—whether by redefining the terms of safety in the face of a public health crisis such as COVID-19, or by questioning the ability of the police or criminal law to realize that safety in the face of disproportionate policing, arrests, charges, convictions, and brutality against Black and Brown people. Second, it requires a reexamination of who wields power and how that power is administered in the face of an increasing discordance between the rhetoric of criminal law—to ensure public safety—and the reality of mass incarceration and its myriad downstream consequences.

In all this, these crises emerge not as alarming and unexpected moments in our recent and current history, but as part of an arc of criminal systems that rely on policing, prosecution, detention, and punishment to achieve safety. In either discussions about COVID-19 or discussions surrounding recent killings of Black men and women by police, a common cry is raised to rethink the criminal law. Much of that discussion in popular media has focused on policing and sentencing discretion, but other moments of discretion by formal actors fuel the crises. It is not hard to imagine, in course of the outcry, how different a COVID-19 pandemic might have appeared had actors in criminal law systems devalued pretrial detention, relied on alternative adjudicatory options that addressed underlying issues present in the accused, curtailed sentence lengths, and offered robust re-entry programs. Likewise, in the face of outcry over George Floyd's death, it is not hard to imagine how different the national conversation might be had actors in criminal law systems drawn the law's legitimacy from the people rather than imposing its force upon them—a conception of law that created spaces for real community feedback and moments of meaningful community discretion that could supplement or even override formal discretionary power.

These possibilities will be discussed in the next Part as this Essay turns toward reconstruction possibilities. But before moving to the final pivot of this piece, we do well to remember that while the criminal code may utilize the language of safety, the implementation of that law and its rhetorical ideals have too long relied on fear. If the streets now burn and people now die in our jails and prisons from a contagion that the very structure of carceral

134. *See* Friedman, *supra* note 130 (manuscript at 4–5).

systems rendered them vulnerable to, or die face down in the street with a knee to their neck, this is the legacy of safety enforcement built on that fear. To imagine a new criminal law is not to argue that safety is irrelevant or unimportant, but it is to say that safety must be redefined and that different stakeholders must have a space at the table where the definition is reconstructed. COVID-19 did not break criminal law or the systems that enforce it. Neither did the killings of George Floyd, Breonna Taylor, Eric Garner, Rayshard Brooks, or countless others. What these crises did do is reveal with alarming clarity the flaws and failures of criminal systems as they exist and so can offer clarity for their re-imagination.

III. WHAT TO DO

With the lay of the land described in general terms in Part I and as seen through the lens of concurrent crises in Part II, this Part turns to the path forward. In the last months, the necessity of a reconstructed criminal law and criminal systems has flooded the national conscience. From calls for immediate reforms in the realm of detention and policing,[135] to calls for long-term restructuring or dismantling of the current systems,[136] the crises of 2020 have highlighted failing and inadequate systems of law. This Part focuses on three global ideals, each driven by the underlying belief that criminal law draws legitimacy from the people who live under it. These suggestions are not exclusive or offered as a panacea. Instead, they are starting places that recognize the interplay between community responsiveness and maintenance of safety in the criminal arena.

A. Community Centric Safety

While safety is a central articulated tenet of criminal law, both crises expose a misalignment between safety as a goal and safety as a realized concept. In the context of COVID-19, defining safety in terms that produce prolonged periods of detention—whether pretrial or post-conviction—serves to undermine actual safety by creating heightened risk of exposure among inmates and those who have contact with them.[137] Outside the context of a public health crisis, prolonged periods of detention produce significant

135. *See, e.g.*, Use of Force Policies Enacted in America's 100 Largest Cities Since June, #8CANTWAIT, https://8cantwait.org/ [https://perma.cc/9Z4J-PHVJ].

136. *See* Giovanni Russonello, *Have Americans Warmed to Calls To 'Defund the Police'?*, N.Y. TIMES (Aug. 4, 2020), https://www.nytimes.com/2020/07/03/us/politics/polling-defund-the-police.html?login=email&auth=login-email [https://perma.cc/PMU8-DATY].

137. *See* Carroll, *supra* note 27, at 81.

downstream consequences.[138] Detained individuals are absent from communities and lose ties that might sustain them upon release. Simply put, the ends of safety are often served not by detention, but by support within a community.

Responses to recent killings of Black men and women by police once again implicate safety calculations—this time in the context of policing itself. As Professor Barry Friedman has noted, asking police to serve safety-keeping functions may work in some contexts but clearly does not work in all.[139] Accepting that police are trained to combat and investigate crime, the notion that such training will *always* promote or perpetuate safety is misguided.[140] The death of George Floyd over a twenty-dollar bill underscores this proposition: safety is not always furthered by police tactics that prioritize enforcement and obedience above all else.

Both crises demonstrate, in ways previously obscured or ignored, that the current top-down system of defining safety has failed. In the lives of those who live under the law, community safety cannot and is not defined in opposition to the accused's own interests. The current crises shine light on the shared concern over the suspect's and detainee's well-being and the community's interest—preventing death whether caused by contagions or police action. These shared concerns extend beyond the shadow of these crises. They are a constant. Downstream consequences of over-policing, over-criminalization, over-prosecution, and over-detention affect not only potential defendants but also the communities that depend on them.[141]

The task of redefining safety in recognition of this shared interest is no small task. Communities, after all, are not monoliths. They are living bodies—shifting and multi-faceted. A defendant's community is no different. A defendant may call a particular community his home, but during a period of contact with criminal law, multiple and overlapping communities may be implicated.[142] Likewise, the larger community may shift in its perception of a defendant. Fear of immediate risk may dissipate in the wake of the realities of an underlying condition or prolonged periods of detention. Finally, imagining a community as a country, state, or even county may fail to account for the interests of more compact vicinages that may have more to win or lose in criminal law's efforts to define safety. A true community-centric safety

138. *See* Yang, *supra* note 110 and accompanying text.

139. *See* Friedman, *supra* note 130 (manuscript at 52).

140. *Id.* (manuscript at 16).

141. *See* Yang, *supra* note 110, at 1417–29.

142. A defendant's community may likewise shift. Members of a defendant's community may both value and fear his presence. Criminal law may be one way to reconcile these perspectives, but may not be the only, or even the most useful, forum.

calculation, therefore, must contemplate these diverse, overlapping, and changing interests.

Current calculations make a potentially unsupportable assumption that the community requires protection from the defendant—protection that can only be realized through arrest, prosecution, conviction, and detention. However, these calculations often fail to take into account the community's own perceptions of the risk the defendant poses or the hardship that the loss of the defendant may produce in the lives of those around him.[143] In fact, the community interest in safety is often entwined with the defendant's. The defendant and the community are safe when the defendant is allowed to remain in, receive support from, and/or support his community.[144]

To be sure, rethinking community safety, whether generally or in the context of current crises, raises broad logistical questions and implicates more than questions of detention or arrest. It will require a reassessment of how and when communities access decision-making moments in which safety is defined.[145] It will require both an expansion of discretionary decision-making and also the creation of meaningful spaces for dissent and localized decision-making (all of which will be discussed in the next sections).

It will also require criminal law and those who act within it to cede power in some realms. For example, a community-centric definition of safety may drive decriminalization of some offenses—rendering arrest, prosecution, and detention unnecessary while opening the possibility of alternative mechanisms of addressing underlying conditions or concerns. It may also call for the removal of mandatory minimums and long periods of pretrial detention as punishment. Regardless of its precise form, it will require reallocation of community resources to address underlying challenges of poverty, disability, addiction, and scarcity of opportunity. But most of all, shifting safety calculations away from formal actors toward informal ones will require a recognition that criminal law (or safety) is not a one-size-fits-all proposition. To imagine safety fully is to hold competing and often contradictory narratives that require a nimble and responsive law to reconcile them, if they can be reconciled at all. It requires considering not only the risk defendants present, but the risk of law's work to detain them—the risk their detention poses both to themselves and their community.

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143. *See* Carroll, *supra* note 106 (manuscript at 14–15).

144. *See id.*

145. *See* K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 709–10 (2020).

B. Expanding Decision-Making

If criminal law is to be serious about redefining safety as described above, it will also have to be serious about opening decision-making corridors. Current criminal systems rely heavily on varying formal actors to drive decision-making.[146] These formal actors include elected officials such as legislators, judges, and district attorneys, but may also include unelected officials such as line prosecutors and law enforcement officers. These actors are assigned varying degrees of discretionary power. This discretionary power in turn carries lawmaking power directly or circuitously. Legislative actors—whether at a national, state, or local level—have direct lawmaking authority. They decide what will be criminalized and how it will be prioritized. In many jurisdictions, including Arizona, this involves designating, either directly or indirectly, sentencing ranges for offenses based on the seriousness of the offense and the defendant's past criminal history.[147]

But other formal actors wield lawmaking authority as well. Through their discretionary decisions, police officers, prosecutors, and judges lend the law meaning through their application and interpretation of law. In the process, they nullify some law. They also, in their discretionary decisions, decide who is empowered and who is disenfranchised as they define suspects and victims within law's account. Police make discretionary decisions about what and whom to investigate.[148] Prosecutors make discretionary decisions about which cases or types of crimes to prioritize, what charges to bring, what pleas or alternative dispositions may be offered, or even whether to prosecute at all.[149] Judges make discretionary decisions from pretrial through post-conviction that affect detention, trial timing, evidence that may be admitted or excluded, legal theories that may be advanced, sentencing, and more.[150] Each of these moments of discretionary decision-making, whether they involve application or interpretation of the law, lend meaning to law in a lived context. In short, they serve a law construction function as surely as the overt construction function of legislative actors. Unlike their legislative

146. *See* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1698 (1992); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 594 (2001).

147. *See* ARIZ. REV. STAT. ANN. §§ 13-3961.01, -3967(B), -705, -706 (2020).

148. *See* George C. Thomas, III, *Discretion and Criminal Law: The Good, the Bad, and the Mundane*, 109 U. PA. L. REV. 1043, 1044–45 (2005).

149. *See* Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1244 (2011).

150. *See* Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 91 (1984).

counterparts, however, these acts of discretion are often obscured from the public eye. They are everyday decisions that roll on largely unwitnessed and relatively unchecked.[151]

In contrast, informal actors tend to wield relatively little decision-making power, discretionary or otherwise. Informal actors are the people to whom the law applies, but who bear little role in its construct.[152] Citizens can elect officials who make and interpret law or take to the streets to protest.[153] They can serve on juries or engage in court- or cop-watching to bear witness to the process.[154] But these moments—whether small and isolated or part of larger social movements—serve as limited forums to express dissent or achieve true empowerment.[155] This is not to say either that they don't affect discretionary decision-making by formal actors or that they can't drive global change. They do and can. It is to say that they often don't carry the same power or immediate large-scale impact.[156]

Unlike their formal actor counterparts, the citizen is often relegated to be a passive participant in whatever process drives criminal law's decision-making. A voter casts a single ballot and has a limited array of choices. With few direct referendums on law, voters choose not the law itself, but the formal actors who will interpret, apply, and construct the law in the voter's name. A voter may work to vote a discordant representative out of office, but, in all but rare circumstances, only at two-, four-, or six-year designated intervals. Voting is powerful, but it is also passive. Ours is a representative democracy that, often through compromise or distance, distills dissenting and marginalized community voices out of the lawmaking process.[157]

Voting is important, but it offers a limited type of participation and is rarely a nimble or nuanced response. Reliance on majority-rule models of voting often excludes minority, marginalized, and dissenting voices. Movements to alter voting mechanisms or forums to produce minority–majority voting blocs and to promote dissenting votes address some issues. But even with such representation, elective models may remain poor forums for dissent. These movements are undercut by post-*Shelby County* voting requirements that may exclude or render registration or voting difficult for

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151. This is not to say outliers do not get noticed. They clearly do. But everyday decisions go unannounced, and in their commonality, they carry a power to craft law.

152. *See* Rahman & Simonson, *supra* note 145, at 711, 741–42.

153. Gerken, *supra* note 35, at 1758.

154. *Id.*

155. *Id.* at 1760–63.

156. *Id.* at 1748; Rahman & Simonson, *supra* note 145, at 722.

157. Gerken, *supra* note 35, at 1747.

marginalized populations, particularly Brown, Black, poor, and rural populations.[158]

Even if an individual is able to vote, voting may still fail to open space for dissent. At its core, voting in a representative democracy relies on the construction of consensus. Arriving at such a consensus may require accounting for diversity of perspective by producing an outcome that either reflects the collective will of the majority and/or represents a least-offensive common policy goal or strategy. In this, the road to a vote may allow for dissenters to object to or try to drive policy. In the end, however, voters may accept the absence of a perfect candidate or policy in favor of consensus. That consensus (whether as a compromise candidate or policy), while able to garner a majority of votes, may fail to reflect any *actual* voters' perspectives or desires, to say nothing of those excluded from voting or voters who dissent from the consensus driven majority.

Citizens may also have trouble accessing corridors of more direct decision-making. Take, for example, jury service. Unlike voting, jurors in criminal cases are empowered with direct decision-making capabilities.[159] A verdict can serve not only as an assessment of factual proof but a referendum on law itself.[160] Yet opportunities for jury service are rare and acts of dissent through juries rarer still.[161] This is not surprising.

Trials in criminal cases are the exception not the norm. This is not accidental. Trials are inefficient. They take time and resources. Prioritizing plea bargains, in contrast, is efficient from the perspective of law enforcement.[162] As rare as trials are, criminal *jury* trials are even rarer. Even if a jury trial occurs, methods of locating and empaneling jurors often exclude poor and minority jurors by design.[163] Jury summons are sent through state-kept records that assume housing security.[164] Jury service requires an outlay

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158. *See* Shelby Cnty. v. Holder, 570 U.S. 529 (2013); *The Effects of* Shelby County v. Holder, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder [https://perma.cc/8PLW-EMWL].

159. *See* Jenny E. Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657, 663–64 (2012); Carroll, *supra* note 13, at 582.

160. *See* Carroll, *supra* note 159, at 663–64; Carroll, *supra* note 13, at 582.

161. *See* Gerken, *supra* note 35, at 1768.

162. *See* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000).

163. *See* Carroll, *supra* note 19, at 849–50; *see also* Ashish S. Joshi & Christina T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, A.B.A. (Sept. 1, 2015), https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences/ [https://perma.cc/U62U-D8EB].

164. *See* Joshi & Kline, *supra* note 163; *Juror Selection Process*, MARICOPA CNTY. SUPERIOR CT., https://superiorcourt.maricopa.gov/jury/juror-selection-process/ [https://perma.cc/8Y7Y-NGE3] (Dec. 11, 2019, 10:06 AM).

of expenses (to get to the courthouse and miss paid work or unpaid caretaking obligations, to name just two) and is not well-compensated.[165] Jury selection often excludes those who have had past contact with the criminal system or who question police or disfavor types of punishment.[166]

Once empaneled, jurors are asked to engage with the case through expert intermediaries in the form of the judge who presides over the proceeding and the lawyers who control the narrative of the case through argument and witnesses. Finally, the jury's deliberation and general verdict are poor spaces for dissent.[167]

Beyond the confines of voting or the court, protesting or mobbing offers an alternative mechanism of direct dissent for informal actors. Professor Larry Kramer describes mobbing as a form of direct democracy in which ordinary people drive law reform by taking to the streets to protest.[168] Recent protest movements demonstrate the power of literal bodies in the street to redirect formal actors' construct of law.[169]

This is hardly a new revelation. The history of the nation is arguably written in the ebb and flow of mass protest.[170] Even in this ebb and flow, the ethos of such movements linger and may animate change.[171] Protest movements emerge now and in the past as mechanisms of direct citizen action

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165. *See* Joshi & Kline, *supra* note 163; *Juror Compensation*, MARICOPA CNTY. SUPERIOR CT., https://superiorcourt.maricopa.gov/jury/juror-compensation/ [https://perma.cc/UXY9-Q2SZ] (June 4, 2020, 11:17 AM).

166. Hong Tran, *Jury Diversity: Policy, Legislative and Legal Arguments To Address the Lack of Diversity in Juries*, DEFENSE, May 2013, at 6, http://www.wacdl.org/files/jury-diversity-article [https://perma.cc/9CG6-6PAX].

167. Gerken, *supra* note 35, at 1768.

168. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 156–58 (2004).

169. *See* Eric Westervelt, *Amid Brutal Responses to Protesters, Will Moments of Solidarity Bring Real Change?*, NPR (June 6, 2020, 8:00 AM), https://www.npr.org/2020/06/06/871018949/amid-brutal-responses-to-protesters-will-moments-of-solidarity-bring-real-change [https://perma.cc/SG8M-DNVH]. For an excellent description of how such protests can move the political process, see DANIEL Q. GILLION, THE LOUD MINORITY: WHY PROTESTS MATTER IN AMERICAN DEMOCRACY (2020).

170. Consider early colonial protests that drove calls for revolution, abolitionist actions that pushed for the end of slavery, the suffragette movement that advocated for the Nineteenth Amendment, or the Civil Rights Movement of the 1960s to name a few. *See generally* Nicole Dudenhoefer, *7 Influential Protests in American History*, UCF TODAY (July 2, 2020), https://www.ucf.edu/news/7-influential-protests-in-american-history/ [https://perma.cc/7UPT-XXY6].

171. *See* Michael Levitin, *The Triumph of Occupy Wall Street*, ATLANTIC (June 10, 2015), https://www.theatlantic.com/politics/archive/2015/06/the-triumph-of-occupy-wall-street/395408/ [https://perma.cc/T4H8-9SAG] (noting that the Occupy movement split apart with various actors working on different fronts to bring about meaningful change); GILLION, *supra* note 169.

to lend meaning to law. Even as mobbing may push against an unrepresentative representative democracy, it may share some of the fundamental failings of its formalistic counterpart. First, constructing reform out of the movement's ideals may inevitably result in coalescing around a consensus or majority position that may be blind to or exclude marginalized voices.[172] Second, and not unrelated, mobbing requires a mob—a critical mass of bodies to lend urgency to its cause. If the cause does not resonate with the critical mass, the movement may falter. Thus, while mobbing may open spaces for previously un- or under-represented portions of the population, it may also serve as a poor tool for insular or marginalized populations. Finally, the utility of mobbing is complicated by the fact that it is not change in and of itself—movements require access to formal actors to enact change.[173] Current protests are no different. The point of the protests is not just to express outrage or call for change, but to *effectuate* it through executive and legislative action.[174]

Thus, these informal mechanisms of power—voting, jury service, or mobbing—may still depend on access to moments of discretionary decision-making. Even as they drive change, they leave intact the fundamental construct that the people are subject *to* the law and must move for change within the limited realms afforded to them by formal actors who still control a disproportionate share of lawmaking authority.[175]

This lack of independent and meaningful corridors for informal actor participation renders law an external and foreign force that draws meaning and carries consequence from sources outside of the communities to whom it is applied.[176] Law enforcement becomes an occupying force as much as a guarantor of security. Statehouses, courthouses, and police stations become landscapes of exclusion, not conduits of collective will. It is of little surprise in this world that definitions of safety lack nuance and often fail to consider the array of interests they may implicate. It is of little surprise that

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172. Exclusion and subordination of women in Civil Rights Movements is a prime example of such a phenomenon. *See* Beth Olanoff, *The Invisible Women of the Civil Rights Movement*, NPR (Jan. 20, 2015), https://whyy.org/articles/the-invisible-women-of-the-civil-rights-movement/ [https://perma.cc/2QET-FG9T]. The movement for women's suffrage demonstrated a similar phenomenon, ignoring Black suffragettes for the accomplishments of white protesters. *See Between Two Worlds: Black Women and the Fight for Voting Rights*, NAT'L PARK SERV., https://www.nps.gov/articles/black-women-and-the-fight-for-voting-rights.htm [https://perma.cc/5AMY-M78G] (June 10, 2020).

173. Consider such triumphs of the Civil Rights Movement as the Voting Rights Act of 1965 or the passage of new minimum wage laws for the Occupy Movement for evidence that even moments of mobbing depend on formal actors to effectuate change.

174. *See* Phillip, *supra* note 95.

175. *See* Rahman & Simonson, *supra* note 145, at 682.

176. *See* Carroll, *supra* note 159, at 690.

marginalized citizens distrust police, lawyers, judges, and legislators—formal actors that might empower them or at least represent them.[177] It is of little surprise that the law, in the words of one of my former public defense clients, is something that happens *to* you as opposed to works *for* you. To reimagine safety is therefore to reimagine discretionary decision-making within the law to encompass the power not only of formal actors, but informal actors. It requires shifting power away from police, prosecutors, and even judges toward the people themselves.

This shift is challenging—as a practical or logistical matter, but also as a conceptual matter. As a practical matter, creating spaces for community voices raises complex questions: how can stakeholders' voices be reconciled toward policy? What will that policy look like? And, even more fundamentally, whether the reconciliation is necessary or helpful in the first place? Experiences in community policing reveal broken systems replaced by admittedly more diverse, though equally problematic ones.[178] Even as practitioners of community policing sought increased contact with the community they policed, they still exercised an identity and authority over the people they interacted with and wielded discretion that the policed lacked access to.[179]

In the context of police oversight boards, the police's newfound community perspective was driven by who showed up to meetings, how loudly and often they spoke up, and what consensus they could muster.[180] In many ways, even as these oversight boards brought new voices to policing movements, they fed into preexisting constructs of police, power, and law.

The police may "protect and serve" the community, but they protect and serve through enforcement of laws constructed and interpreted in spaces outside of the communities to which they are applied. They protect and serve through demonstrations of authority and force and through arrest and detention. Even in a community policing model, they protect and serve on the backs of those least able to resist or coalesce around a majority perspective.

This is not to say that calls for alternatives to police or alternative policing are not valuable—unquestionably they are. But it is to say that the devil is

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177. *See, e.g.*, Laura Santhanam, *Two-Thirds of Black Americans Don't Trust the Police To Treat Them Equally. Most White Americans Do*, PBS (June 5, 2020, 12:00 PM), https://www.pbs.org/newshour/politics/two-thirds-of-black-americans-dont-trust-the-police-to-treat-them-equally-most-white-americans-do [https://perma.cc/45D2-GMKK].

178. *See* Philip V. McHarris, *Community Policing Is Not the Answer*, APPEAL (Dec. 2, 2019), https://theappeal.org/community-policing-is-not-the-answer/ [https://perma.cc/5FFC-HJ2M]; Debra A. Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 577–78 (1997).

179. *See* McHarris, *supra* note 178.

180. *See* Rahman & Simonson, *supra* note 145, at 703–04.

always in the details. To replace police with unarmed mental health responders whose goals are to investigate individual welfare and de-escalate crisis, for example, will undoubtedly reduce the all-too-real physical and psychological trauma associated with police contact.[181] This is a net gain. However, if the mental health responders either lack meaningful resources to address underlying issues or rely heavily on existing evaluation hold protocols,[182] they may represent merely a less violent and slightly less carceral model than the one they replaced. They are a victory, but a small one. They are not harbingers of systematic change who might address underlying causes of crime or needs in a community, but merely a small fix to a seething problem.

Returning to the community policing model, increased community participation in some neighborhoods shifted perspectives from one majority-dominated decision-making process to another—leaving some still marginalized.[183] As others have noted in the community policing literature, community meetings became forums for particular and dominant perspectives and did not always offer an opportunity for meaningful and diverse community dialogue.[184] Again, this in and of itself may represent an improvement over alternative models. These perspectives were often excluded altogether under traditional and broader majority-rule models. In this sense they produce a benefit, but it may be a benefit that either is not realized or not capable of being realized by all in a diverse community. As a result, even well-meaning or promising community-based processes may become one more mechanism for exclusion. As Professors Rahman and Simonson note, there is a "distinction between mere input and actual power."[185]

To imagine a community-based model of criminal law requires active recruitment of and spaces for voices that may never form a majority. Conceptually, this requires thinking of current systems, with their distilled and formal decision-making arenas, as anti-democratic. It also requires thinking of traditional majority rule as harmful to democratic goals of promoting citizen-based decisions. It requires an abandonment of faith in finality and majority rule. It requires hearing voices and decision-makers not ordinarily included in the formal and formalizing process that is law. It

181. *See* Friedman, *supra* note 130.

182. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-524 (2020).

183. McHarris, *supra* note 178.

184. *See* Rahman & Simonson, *supra* note 145, at 721–22; Abolition Rsch. Grp., *The Problem with Community Policing*, FOR A WORLD WITHOUT POLICE (Oct. 8, 2017), https://aworldwithoutpolice.org/2017/10/08/the-problem-with-community-policing/ [https://perma.cc/6GBL-LETV].

185. *See* Rahman & Simonson, *supra* note 145, at 720.

requires a recognition that criminal law is fundamentally local and requires local conversations.[186] This is a heavy lift. It is a lift criminal law alone cannot manage, even as it must be part of the shifting force.

C. Creating Meaningful Spaces for Ruling Through and by Dissent

Thinking of inclusion as a component of criminal law also requires reimagining spaces for dissent. As discussed above, current mechanisms for community participation from voting to jury service to protests may offer limited forums for dissent and resistance from informal actors. Non-institutionalized mechanisms of dissent may offer greater promise for non-majority voices to drive policy creation or application within their communities.

Movements such as cop- and court-watching and bail funds rely heavily on local dissenting action to effectuate change.[187] Each of these movements allows citizens to directly engage with formal actors—either as witnesses to the process or as discretionary decision-makers. Through this direct engagement, citizens may push back against formal discretionary decisions that exclude or misjudge community perspectives. For their part, formal actors such as police, prosecutors, and judges may alter behavior or risk community protest in the face of scrutiny and documentation of their actions.[188] These movements serve another function as well, moving formal discretionary decision-making out of the shadows and into the public eye.

Like other mechanisms of engagement, these movements are not without flaws. By their very nature, these movements rely on the resources of their communities to function. They entail commitments of time and money and may entail risk. (Think of Derek Chauvin reaching for his pepper spray as seventeen-year-old Darnella Frazier filmed the encounter with George

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186. *See generally From Cincinnati, Fort Worth and Montgomery: Three Mayors on Meeting This Moment*, NPR: 1A (June 17, 2020, 3:05 PM), https://www.npr.org/2020/06/17/879584324/from-cincinnati-fort-worth-and-montgomery-three-mayors-on-meeting-this-moment [https://perma.cc/2G7D-THVB] (discussing how three mayors across America are handling recent protests and health issues).

187. Professor Jocelyn Simonson has written extensively about these movements. *See* Jocelyn Simonson, *The Place of "the People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 270 (2019) [hereinafter Simonson, *The Place of "the People"*]; Simonson, *supra* note 30, at 604–05; Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 393, 439 (2016) [hereinafter Simonson, *Copwatching*]; Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173 (2014).

188. *See* Simonson, *Copwatching*, *supra* note 187, at 416; Simonson, *The Place of "the People," supra* note 187, at 269–70; Simonson, *supra* note 30, at 623.

Floyd[189] or Daniel Pantaleo threatening Ramsey Orta as he filmed Eric Garner gasping in police custody.)[190] They also succeed or fail to some extent based on their ability to resonate with the formal actors they encounter and the larger populace. Consider recent protests. Part of the power of the recent protests is their depth and breadth. They encompass thousands of people from multicultural identities—including prominently those most associated with the existing power dynamic, white citizens.[191] The presence of white protesters in support of the Black Lives Matter movement does not necessarily change the message of the protest (though this is admittedly a contested proposition),[192] but it does change the power dynamic by "majoritizing" the dissent of the protesters. Their power to effectuate change is linked to the movement's ability to claim representation of a swelling majority or near majority of the people. Likewise, the reaction of formal actors may affect the success of the movement. Some formal actors may alter their behavior, but others may strike a defiant, tone-deaf, or indifferent tone.[193] When and if this happens, without an avenue to engage in the formal process, such movements, even in their power, are cast as outsiders looking in. They are moments of protest as opposed to moments of change.[194]

The irony of this characterization is not lost. Those community members who drive these movements are the ultimate insiders. They are the men and women who live everyday under the grace or tyranny of formally constructed, interpreted, and applied law. Their resistance is a product of the discordance—the utter foreignness—of this law in their lives. Yet in the

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189. *See* Joshua Nevett, *George Floyd: The Personal Cost of Filming Police Brutality*, BBC (June 11, 2020), https://www.bbc.com/news/world-us-canada-52942519 [https://perma.cc/FMQ8-TKY6]. Frazier received widespread condemnation for not doing more to stop Floyd's treatment. She is a high school junior. *Id.*

190. *See* Josh Sanburn, *The Witness: One Year After Filming Eric Garner's Fatal Confrontation with Police, Ramsey Orta's Life Has Been Upended*, TIME, https://time.com/ramsey-orta-eric-garner-video/ [https://perma.cc/6QW8-X8U9]. Like Frazier, Orta complained of repeated police harassment following his release of the Eric Garner video. *Id.*

191. *See* Amy Harmon & Sabrina Tavernise, *One Big Difference About George Floyd Protests: Many White Faces*, N.Y. TIMES (June 17, 2020), https://www.nytimes.com/2020/06/12/us/george-floyd-white-protesters.html [https://perma.cc/SXB5-U3MK].

192. *Id.*

193. This was evident as the police response to recent protests against police violence ignited, ironically, police violence. *See* Shaila Dewan & Mike Baker, *Facing Protests over Use of Force, Police Respond with More Force*, N.Y. TIMES (June 2, 2020), https://www.nytimes.com/2020/05/31/us/police-tactics-floyd-protests.html [https://perma.cc/3J3D-286X].

194. This is not to say that moments of protest, even if rejected by formal actors, cannot grow to be moments of change. But they alone cannot effectuate change within the system until this metamorphosis happens.

cleverest and cruelest twist, they are cast as the outsiders and the law and its power structure as the insider. The greatest reform suggestion in the wake of the 2020 crises therefore comes in the challenge to flip that narrative by creating meaningful spaces for dissent, made real through community-based mechanisms of discretion.

Before considering some manifestations of community-based mechanisms of discretion, it is important to recognize there are hazards to this approach. Discretion carries risk. Discretion driven by informal actors may carry magnified risks. Past criminal reform efforts have pushed to reduce rather than amplify discretion. Sentencing guidelines[195] and the adoption of actuarial risk assessment tools[196] were viewed as mechanisms to reduce bias by ensuring uniformity. Past criminal reform movements have also been especially wary of discretionary decision-making by informal actors. Efforts to curtail jury nullification were in no small part efforts to reduce verdicts based on race or gender.[197] These reforms, however, merely shifted the discretionary moment and in the process replaced one manifestation of bias with another. Risk assessment tools suffer the embedded bias of their creators.[198] Sentencing guidelines may render the back-end process uniform but fail to control for front-end bias in charging discretion.[199] Efforts to eradicate jury nullification have merely pushed it to the shadows and crippled the jury's role as a historically robust check on formal actors' power.[200] In each of these reforms, reduction of discretion has either fueled new types of bias or further removed citizen input. In addition, each of these reform movements resulted in criminal systems rendered *less* flexible and responsive than the ones it sought to replace.

In this, the inclination to reduce discretion, and particularly citizen-based discretion, may be misguided. Instead, concerns around bias may be better addressed through greater, rather than less, discretion and a commitment to include diverse perspectives to serve as a check on potential bias in construction, application, or interpretation of law. Layered with the lessons of the COVID-19 public health crisis, the availability of multiple

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195. *See* Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1192 (2005).

196. *See* ADVANCING PRETRIAL POL'Y & RSCH., PUBLIC SAFETY ASSESSMENT: HOW IT WORKS (2020), https://advancingpretrial.org/psa/factors/ [https://perma.cc/5R63-XURT].

197. *See, e.g.*, W. William Hodes, *Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075, 1088–89 (1996) (citing examples of race-based nullification).

198. *See* Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2218 (2019).

199. *See* Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 108 (1994).

200. *See* Carroll, *supra* note 159, at 688.

discretionary perspectives and moments can ensure that safety is defined in ways that are both meaningful and responsive to current and changing community needs.

Consider this in the context of pretrial decision-making. Taking community voices into account in this moment of discretion would mean not only that discretionary decision-makers need to heed current calls to deemphasize incarceration pretrial and invest in community-based resources to treat underlying concerns, but that those decision-makers need to consider the input of the community in assessing the *need* for detention in the first place and to revisit decisions as community dynamics shift. In practical terms, this might mean that a pretrial decision to detain would require a robust hearing in which a defendant would be represented by counsel and community members might offer information about the costs and benefits of detention decisions in their lives. A judge would consider as relevant not only traditional factors such as length of residency, employment, criminal history or indigency, but also factors previously excluded as irrelevant such as who will suffer if a defendant is detained.[201] Others have suggested that a pretrial jury might be appropriate—to literally place release decisions in the province of the people.[202]

Taking community voices into account also requires that the decision to detain be one that could be revisited as circumstances change due to the passage of time or other factors. It would recognize that such a decision may affect a community differently as time passes or circumstances change. The calculation of safety or even flight risk itself might also change with time or shift of circumstances. The decision-making process must offer an opportunity for that change to be recognized and acted upon.

This treatment of pretrial detention hearings is not dissimilar to a request to reconsider detention for a released defendant. Procedures already exist that allow a defendant who was released to be re-detained upon violation of conditions of release.[203] Yet few procedures exist for at-will reconsideration of decisions to detain. Those procedures that do exist require either the passage of a designated period of time or a change in relevant circumstances that did not exist at the time of the original decision. Such processes often fail to contemplate the downstream consequences of detention on defendants and their communities. This is true in the best of times, but especially so in the midst of a public health crisis that is exacerbated by jail overcrowding.

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201. *See* Gouldin, *supra* note 30, at 710.

202. *See* Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1366 (2012).

203. ARIZ. R. CRIM. P. 7.4.

Finally, a reconstruction of criminal law that fully accounts for community interests would consider the adoption of flexible consequences in the face of violations that trigger re-arrest and detention. Currently, violations of pretrial release can trigger twenty-four-hour holds at the discretion of a pretrial services officer, the prosecution, or other law enforcement officials.[204] These holds in turn can trigger revocation of pretrial release. The adoption of simple measures such as grace periods for nonappearance and even reminders of upcoming court dates or pretrial obligations reduce such violations and allow defendants to remain out of custody pretrial.[205] These measures are borne out of a recognition that the community's interests are as often served by flexible rather than rigid procedures.

Much the same argument could be made in the context of sentencing, where similar alignment of detention and punishment with safety creates a system that not only harms marginalized communities but contributes to their marginalization while ignoring their input. Although the deterrent effect of longer sentences and sentencing guidelines remains a contested proposition,[206] the value of sentencing reconsideration—whether out of compassion or out of recognition that social goals may be better served through alternatives to detention—has become increasingly clear in the face of COVID-19.[207] Again, the adoption of procedures around such reconsideration not only creates secondary moments of discretion that may permit more precise honing of the law's purpose, but also opens up forums for community input. Like their pretrial counterparts, these moments of detention are more likely to serve underlying functions of promoting safety if they permit different actors to participate in their construction.

Finally, the crises of 2020 implicate the need for reconsideration of policing and prosecutorial policies that emphasize criminalization, arrest, detention, charging, and conviction over individualized approaches to the myriad of situations police are called upon to confront on a daily basis. The abolition and disaggregation of police function as suggested by Professors

204. *See* Carroll, *supra* note 106 (manuscript at 49); Gouldin, *supra* note 30, at 680.

205. *See* Gouldin, *supra* note 30, at 731–32.

206. *See, e.g.*, Mauer, *supra* note 46, at 113.

207. For a list of sentencing reductions/modifications as a result of COVID-19, see Douglas A. Berman, *Back by Popular Demand, Another VERY Long List of Federal Sentence Reductions Using § 3582(c)(1)(A)*, SENT'G L. & POL'Y (July 19, 2020, 8:24 PM), https://sentencing.typepad.com/sentencing_law_and_policy/2020/07/back-by-popular-demand-another-list-of-federal-sentence-reductions-using-3582c1a.html [https://perma.cc/F75K-3YLP].

Tracey Meares,[208] Barry Friedman,[209] Jocelyn Simonson,[210] Monica Bell,[211] Amna Akbar,[212] Dorothy Roberts,[213] and countless others calls not only for an expansion of non-police, non-criminal engagement between the law and the citizen, but also for a law that is driven and constructed around community goals—not as a matter of consensus, but as a matter of lived reality.

There is so much to do to move forward, systems to reimagine, dismantle, and reconstruct. Here, I have sketched suggestions in the broadest strokes. The road to them will be difficult and nonlinear. Yet to imagine 2020 not as it was, but as it could be—jails and prisons sparsely populated, health care universal and the wellness of even the most marginalized a priority, re-entry programs well-funded (or, in some communities, existing at all), police supported by healthcare providers—physical and mental—who can offer resources or intervention to address citizen needs rather than criminalize citizen existence, community outrage over bias based on poverty and race given space to speak—is to imagine a world where reform is lived and breathed long before it smoldered in the streets.

CONCLUSION

There are wounds created by poverty and racism that are simultaneously a product of and exacerbated by criminal law's indifference in the name of preserving safety. The combined crises of 2020 have highlighted the intersections between detention and safety definitions that isolate defendants and the communities they come from into distinct camps. Whether manifested as the death of a Black man in the street or the quieter death and infection of hundreds of inmates in jails and prisons across the country—these are products of indifference, of a false allegiance to a metric of safety that imagines the world is better when some citizens are over-policed, over-

208. *See* Tracey L. Meares, *Policing: A Public Good Gone Bad*, BOS. REV. (Aug. 1, 2017), https://bostonreview.net/law-justice/tracey-l-meares-policing-public-good-gone-bad [https://perma.cc/L649-TFUM].

209. *See* Friedman, *supra* note 130.

210. *See* Jocelyn Simonson, *Power over Policing*, BOS. REV. (June 8, 2020), http://bostonreview.net/law-justice/jocelyn-simonson-power-over-policing [https://perma.cc/5GWS-W7GU].

211. *See* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2126–49 (2017).

212. *See* Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. (forthcoming 2020); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 460–72 (2018).

213. *See* Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019).

prosecuted, and over-convicted. The crises of 2020 did not break criminal law or the systems in which the law operates. They are, however, the products of these broken systems, and they carry a collective cry to tear down what is and to imagine what could be.