Justice Involvement During COVID-19 and the Possibility of Transitional Justice

Rachel A. Ponder
rponder1@vols.utk.edu

Follow this and additional works at: https://trace.tennessee.edu/utk_graddiss

Part of the Criminology Commons, Politics and Social Change Commons, Social Control, Law, Crime, and Deviance Commons, and the Social Justice Commons

Recommended Citation
https://trace.tennessee.edu/utk_graddiss/7190

This Dissertation is brought to you for free and open access by the Graduate School at TRACE: Tennessee Research and Creative Exchange. It has been accepted for inclusion in Doctoral Dissertations by an authorized administrator of TRACE: Tennessee Research and Creative Exchange. For more information, please contact trace@utk.edu.
To the Graduate Council:

I am submitting herewith a dissertation written by Rachel A. Ponder entitled "Justice Involvement During COVID-19 and the Possibility of Transitional Justice." I have examined the final electronic copy of this dissertation for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, with a major in Sociology.

Stephanie A. Bohon, Major Professor

We have read this dissertation and recommend its acceptance:

Michelle Brown, Timothy Gill, Wendy Bach

Accepted for the Council:

Dixie L. Thompson

Vice Provost and Dean of the Graduate School

(Original signatures are on file with official student records.)
JUSTICE INVOLVEMENT DURING COVID-19
AND THE POSSIBILITY OF TRANSITIONAL JUSTICE

A Dissertation Presented for the
Doctor of Philosophy
Degree
The University of Tennessee, Knoxville

Rachel A. Ponder
May 2022
ABSTRACT

The COVID-19 pandemic introduced numerous unprecedented political, social, and economic challenges that resulted in unprecedented responses by policy makers. As result, existing inequalities and injustices rooted in a dense history of structural and institutional violence were uncovered and exacerbated. As of June 2021, at least 398,627 people in prison tested positive for COVID-19 and at least 2,715 had died (The Marshall Project 2021). In the United States, the inmate population is disproportionately made up of poor, people of color. This is a pattern that is rooted in the country’s long history of racism and white supremacy. This cycle continues as there have been no meaningful changes to policing practices and no positive changes to policy that could reduce longer prison sentences. Through process tracing and thematic analysis, this dissertation investigates the COVID-19 policy changes under the Trump and Biden administrations related to incarcerated people and measures the impact of these policies. This investigation includes an analysis of state violence through policies directly related to home confinement, vaccine rollouts, and the reduction in cost of communication and medical co-pay in US federal and state prisons. This dissertation questions whether the COVID-19 pandemic could provide the platform for the United States to address mass incarceration, human rights violations, and systematic violence occurring within the criminal justice system through transitional justice. New attempts at justice would entail listening to the voices and demands of the those targeted and harmed by the justice system and dismantling the structural inequalities and discrimination that allow violations to occur in the first place. A transitional justice approach requires “carrying out the necessary reforms of state institutions, such as the judiciary, law enforcement agencies, prisons, and education and health care systems, that reinforce and perpetuate such discrimination” (Travesi, 2020). For the United States, this would be a direct recognition of the ways in which oppression, racism, and discrimination have persisted for centuries and offer new ways to address mass incarceration in the country.
# TABLE OF CONTENTS

Chapter One Introduction and Background ......................................................... 1
   The Pandemic ........................................................................................................ 1
   Mass Incarceration As A Public Health Crisis .................................................... 7
   Transitional Justice .............................................................................................. 11
   Chapter Summary ............................................................................................... 13

Chapter Two Homo Sacer and the State of Exception ........................................... 17
   Arendt .................................................................................................................. 18
   Foucault .............................................................................................................. 19
   Agamben ............................................................................................................. 20
   Mbembe .............................................................................................................. 22
   COVID-19 And A State of Emergency ................................................................. 24
   The State of Exception ....................................................................................... 27

Chapter Three Transitional Justice ....................................................................... 30
   History of Transitional Justice ............................................................................ 33
   “Doing Justice” ..................................................................................................... 39
   Transformative Justice ......................................................................................... 42
   Three Examples .................................................................................................. 45
   The End To The South South African Apartheid ................................................. 45
   The Aftermath of the People’s War in Peru ......................................................... 47
   The Aftermath of the Rwandan Genocide (1994) ............................................... 50
   Transitional Justice and Law in Democratic Countries ........................................ 52
   Recovering From State Violence Through Historic and Transitional Justice ...... 56
   A Model For Transitional Justice in The United States ...................................... 61

Chapter Four Methodology .................................................................................. 68
   Data and Methods ............................................................................................... 70
   Process Tracing ................................................................................................... 72

Chapter Five Law and Governance .................................................................... 80
   Federalism and Its Importance to COVID-19 ..................................................... 83
   Governance and the State of Exception .............................................................. 87

Chapter Six Home Confinement Policy and Prison Release ................................. 89
   Home Confinement Overview ............................................................................. 94
   Former President Donald Trump ........................................................................ 99
   President Joe Biden ........................................................................................... 101
   Federal Bureau of Prisons .................................................................................. 103
   Conclusions ........................................................................................................ 109

Chapter Seven Vaccine Rollout and Testing ....................................................... 112
   Testing and Contract Tracing ............................................................................. 115
   Vaccine Rollout .................................................................................................. 117
   Correctional Staff Responses and State Violence ............................................. 121

Chapter Eight Reducing Cost of Communication and Medical Copayments ....... 128
   Communication Costs ......................................................................................... 131
   Medical Copayment ............................................................................................ 135
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transitional Justice</td>
<td>143</td>
</tr>
<tr>
<td>Chapter Nine Conclusions</td>
<td>147</td>
</tr>
<tr>
<td>The Carceral State And Carceral Citizenship</td>
<td>154</td>
</tr>
<tr>
<td>Presidential Power, Homo Sacer, and the Need for Transitional Justice</td>
<td>160</td>
</tr>
<tr>
<td>Limitations and Directions For Future Research</td>
<td>162</td>
</tr>
<tr>
<td>Conclusions</td>
<td>168</td>
</tr>
<tr>
<td>Bibliography</td>
<td>170</td>
</tr>
<tr>
<td>Vita</td>
<td>205</td>
</tr>
</tbody>
</table>
LIST OF FIGURES

Figure 1.1 COVID Overview........................................................................................................3
Figure 6.1 Home Confinement....................................................................................................90
Figure 7.1 Vaccine Rollout and Testing.......................................................................................113
Figure 8.1 Communication and Copayments.............................................................................130
CHAPTER ONE

INTRODUCTION AND BACKGROUND

The Pandemic

On December 31, 2019, Wuhan, China reported a cluster of pneumonia cases that required the intervention of the World Health Organization (WHO). Within days, as cases continued to quickly rise, WHO reported the cases to social media and published their first Disease Outbreak News, grabbing attention worldwide. On January 12, 2020, China publicly shared that they had discovered the genetic sequence of COVID-19, a severe acute respiratory virus derived from a coronavirus called SARS-CoV-2. Evidence suggested that the new variant of coronavirus was associated with exposures in a Wuhan seafood market—which was immediately closed—and Chinese authorities had no evidence of human-to-human transmission. Therefore, authorities believed the new strain of virus had been contained. The following day, the first recorded case outside of China was confirmed. On January 30, 2020, WHO reported 7,818 confirmed cases worldwide, with 82 cases reported in 18 countries outside of China. They declared the outbreak a Public Health Emergency of International Concern (PHEIC) and issued a Global Health Emergency (WHO 2020). By March, COVID-19 was declared a pandemic and as 2020 ended, cases rose to 83,832,334 with 1,824,590 deaths globally—with over 20 million cases and more than 346,000 deaths in the United States—with cases continuing to rise (AJMC 2021).

The first confirmed case in the United States was on January 21, 2020, and on March 13 the administration of US President Donald J. Trump declared COVID-19 a
national emergency (AJMC 2021). Following the declaration, travel bans were put in place for non-US citizens traveling from Europe, state mandated stay-at-home orders with the exception of essential workers or for essential needs were issued, and emergency financial relief packages were signed into law (see Figure 1.1 for a timeline of COVID-19). By recommendations from the Centers for Disease Control and Prevention (CDC), social distancing measures—maintaining at least 6 feet between people—were put into place, limiting the amount of people able to be in one area at a time (CDC 2019). Restaurants, bars, nightclubs and theaters were either ordered to closed or required to operate at a fraction of regular capacity, depending on state or city ordinances (Moreland et al. 2020). Manufacturing and other industries where staff work in proximity were scaled back or closed for safety concerns. These changes made the impact of COVID-19 reach beyond illness and loss of life to include devastating impacts on people’s livelihoods. The challenges that COVID-19 brought to public health and the global economy left millions of people in the United States without income or jobs (and subsequently without health insurance coverage) or the means to afford necessities such as food and living accommodations.

Since early 2020, the COVID-19 pandemic has been in global headlines and has been the central focus of news, media, and policy. However, some populations were often overlooked during the unfolding of policy responses and vaccine eligibility rollouts in the federal government’s attempts to combat the spread of the virus. According to Amnesty International, inmates around the world have been forgotten during the COVID-19 pandemic (Amnesty International 2021).
Figure 1.1 shows a timeline relevant to the overview of COVID-19 as it reflects my thematic analysis and process tracing.
With over 11 million people imprisoned around the globe, prisons are overcrowded, leaving inmates more susceptible to contracting the virus (United Nations 2021). Additionally, inmates are often left without access to proper sanitation or personal protective equipment (Amnesty International 2021). Furthermore, in the US, the inmate population is disproportionately made up of poor people of color. This is a pattern that is rooted in the country’s long history of racism and white supremacy (Marshall 2013; Smith 2020). This pattern continues as there have been no meaningful changes to policing practices and no positive changes to policy that could reduce long sentences (Smith 2020).

For centuries, viral epidemics and disease have spread through carceral settings like wildfire. Prisons are notorious for overcrowded spaces, limited healthcare, and poor levels of cleanliness, making them hotbeds for disease (Strassle and Berkman 2021). These conditions have been highlighted since at least the 18th century by prison reformers such as John Howard, who visited prisons throughout Europe. In 1777, Howard reported the prison cells as damp, dark, and airless and the prisons being “blighted by diseases associated with filth and overcrowding including goal fever—or typhus—that…destroyed more prisoners than were put to death in all the public executions” (Marland, Anderson and Murphy 2020).

In San Quentin prison, half of the 1,900 inmates contracted influenza and sick calls increased from 150 to 700 per day during the first wave of the Influenza Pandemic of 1918 (Hawks, Woolhandler, and McCormick 2020). The California state prison was struck by three waves of influenza in 1918, each similar to the “widespread visitations of
the respiratory disease which ha(d) attacked the inhabitants of almost every part of the
country during the year” (Stanley 1919, 996). Through these waves of viral infections,
most inmates became so ill they should have been hospitalized, “but it was impossible to
put them there on account of lack of facilities” (Stanley 1919, 996). The first and second
waves broke out in the prison from a newly arriving inmate.

On the day the global influenza pandemic hit Eastern State Penitentiary in the fall
of 1918, Warden Robert McKenty closed the penitentiary to visitors, but the prison
continued functioning as a correctional institution. The prison continued to receive and
discharge people despite the pandemic. As a result, out of 1,350 incarcerated people, 63
contracted the virus and three died (Eastern State Penitentiary 2020). Eastern State
Penitentiary was then placed on a 6-week quarantine which aided in keeping the virus at
bay.

Policy makers and prison administration have acted as if the destruction caused by
the COVID-19 pandemic was new. Yet the Influenza Pandemic of 1918 stands as one of
the primary foci of infectious disease outbreaks in U.S. prisons. However, incarcerated
people in the U.S have shown higher rates of “bloodborne infections, sexually transmitted
infections, and airborne infections, including HIV, hepatitis B, hepatitis C, syphilis,
gonorrhea, chlamydia, influenza, varicella-zoster, MRSA, and tuberculosis” (Strassle and
Berkman 2020, 1088). So, the risk of acquiring an infectious disease while incarcerated
has always been dangerously high. As of June 2021, at least 398,627 people in prison
tested positive for COVID-19 and at least 2,715 had died (The Marshall Project 2021).
However, according to The New York Times, dozens of people died of COVID-like
symptoms, but were not included in official COVID-19 mortality tolls of jails where they were housed (Turcotte, Sherman, Griesback, and Klein 2021).

This dissertation questions if a better attempt by the federal government to protect inmates, a crowded population who were stripped of the opportunities to protect themselves and address the spread of the COVID-19 within prisons, could have reduced the detrimental outcome. Furthermore, could the COVID-19 crisis provide an opportunity to address the root causes of mass incarceration and systematic state violence occurring within the criminal justice system by adopting a move to transitional justice? What could this move to transitional justice look like? New attempts at justice would entail listening to the voices and demands of the those targeted and harmed by the justice system and dismantling the structural inequalities and discrimination that allow violations to occur in the first place. A transitional justice approach requires “carrying out the necessary reforms of state institutions, such as the judiciary, law enforcement agencies, prisons, and education and health care systems, that reinforce and perpetuate such discrimination” (Travesi 2020). For the United States, this would be a direct recognition of the ways in which oppression, racism, and discrimination have persisted for centuries.

Focusing on the rapid spread of COVID-19 in state and federally operated prisons and the slow response by policy makers and administrators, there are three main questions that drive this research:

1. What were the COVID-19 policies under the Trump administration related to incarcerated people? What was the impact of these policies? To what extent do these policies and their impacts constitute state violence?
2. What were the COVID-19 policies under the Biden administration related to incarcerated people? What was the impact of these policies? To what extent do these policies and their impacts constitute state violence?

3. Does the structure of the American government impact response and outcomes during a state of emergency such as a global pandemic? Could COVID-19 offer a platform for social change through transitional justice?

The motivation behind this research is to offer alternative ways to view mass incarceration in the United States as a public health crisis through the implementation of non-traditional mechanisms of transitional justice. The COVID-19 pandemic—and the legal response that followed—is the catalyst to have such a project. This project brings the much-needed questions centered around human rights abuses in US prisons to the surface by first acknowledging the long history of state violence that has led to mass incarceration in the country, followed by suggestions for reconciliation when understanding mass incarceration as a public health crisis. In 2020, at the onset of the COVID-19 pandemic, the American criminal justice system housed nearly 2.3 million people in state and federal prisons, juvenile correctional facilities, local jails, immigration detention facilities, and Indian Country jails (Sawyer and Wagner 2020). Specifically, there are 1,833 state prisons and 110 federal prisons in the United States, which remain the focus of this dissertation. The high number of people incarcerated, and the high number of facilities which house them, alludes to the notion that the United States relies on a punitive, punishment approach to social problems in the country. The United States uses prison as a catch-all solution to crime. The American criminal justice system’s
approach to punishment disproportionately affects marginalized groups by inflicting harsh sentencing for legal infractions that are rooted in social problems, particularly in poor communities of color.

**Mass Incarceration as A Public Health Crisis**

Of the nearly 11 million people held in jails and prisons around the world, more than 2 million are in the United States. The second highest prison population is in China with 1.69 million, followed by Brazil with 811,000, India 478,000, and 309,000 in Russia (Fair and Walmsley 2021). The United States also drastically leads in the highest prison population rate—the number of inmates per 100,000 people in the population—with 629 per 100,000 people, followed by Rwanda with 580 (Fair and Walmsley 2021). This high prison population in the United States disproportionately affects people of color, specifically in communities with higher rates of poverty. Black Americans make up 38% of the incarcerated population but represent only 12% of the US population (Fair and Walmsley 2021). Black Americans are incarcerated in state prisons at a rate of five times the rate of white Americans (Nellis, 2021). Further, Latinx people are 1.3 times more likely to be incarcerated in the United States than non-Latinx white people (Nellis, 2021).

The disproportionately high numbers of people incarcerated in the United States is only the beginning of the mass incarceration story. In an interview with Michelle Alexander, a well-known civil-rights advocate and legal scholar known for her bestselling book *The New Jim Crow*, she defines mass incarceration as a system of racial and social control. Alexander (2014) claims that mass incarceration is a process in which…
people are swept into the criminal justice system, branded criminals and felons, locked up for longer periods of time than most other countries in the world…, and then released into a permanent second-class status in which they are stripped of basic civil and human rights, like the right to vote, the right to serve on juries, and the right to be free of legal discrimination in employment, housing, access to public benefits.

The history of mass incarceration can be traced to the policy implementation and political campaigns of the 1970s forward, beginning with President Nixon’s “war on drugs” and “tough on crime” era to show the trajectory of harmful policies that has led to the high number of marginalized people incarcerated in the United States. The punitive approach to drug charges related to marijuana, heroin, and crack cocaine—drugs associated with Black people during the 1960s—involves targeting poor communities of color and increasing policing and mandatory sentencing which led to a dramatic increase in arrests that led to prison sentences. The number of people incarcerated for nonviolent drug laws in the United States increased from 50,000 in 1980 to over 400,000 by 1997 (Hodge 2021). Still, police make over one million drug possession arrests each year, primarily in over-policed communities—communities of low-income people of color (Sawyer and Wagner 2022).

However, mass incarceration in America is not solely linked to the war on drugs. In fact, ending the war on drugs can be an important step in reducing the number of people incarcerated for drug offenses, but it alone will not end mass incarceration (Sawyer and Wagner 2022). The war on drugs created this unprecedented penal system by drawing from the rhetoric of law and order that evolved from racial segregation in the United States. This rhetoric, riddled with racial overtones, has been the driving force of legal decision-making for decades (Barkow 2019). The tough on crime campaigns push
narratives that poor communities of color have higher rates of drug users, violent gangs, and “illegal” immigrants roaming the streets and harming innocent people (Barkow 2019). This misleading rhetoric pushes public fear emotional responses that drive decision-making about public safety and crime control, therefore leading to high rates of arrests of poor people of color and increased prison sentencing. The war on drugs stands as a primary example in which the way we respond to crime and/or social problems—in this case drug use—often utilizes the justice system in racist ways as a means to control non-white populations.

Implementing laws to address social problems that stem from the social stratification of the United States and the racialized, punitive prison sentences that follow disproportionately affect not only those who are being housed behind bars, but those in the community as well. This dissertation provides a bridge that connects the lives behind bars to the lives outside of those walls, and therefore looks at mass incarceration as a public health concern. Researchers show that experiences of mass incarceration vary by race which, in turn, implies that the impacts of mass incarceration impact health and well-being in ways that vary by race (Blankenship, Gonzalez, Keene, Groves, and Rosenberg 2018). Black people are more likely to report long-term impacts of incarceration on education, employment, and family, and are more likely than white people to avoid getting health and social services for fear of arrest (Blankenship et al.). Overall, incarceration has larger impacts on the health and well-being of people of color.

The effects of mass incarceration become even more detrimental during the COVID-19 pandemic. Incarcerated people in US prisons are made up of an already marginalized
population (Franco-Paredes et. al 2020:1). During the pandemic, this population was stripped of their ability to control exposure and were at the mercy of the state for protection. According to The Marshall Project (2021), as of March 30, 2021, one year into the pandemic, at least 391,782 people in US prisons tested positive for COVID-19. Several environmental conditions of carceral settings—such as overcrowding, insufficient sanitation, poor ventilation, and inadequate healthcare—have contributed to such facilities becoming breeding grounds for COVID-19 outbreaks (Franco-Paredes et. al 2020). While in these facilities, the luxury of social distancing is removed and access to protective equipment such as masks are limited. Investigating the policy implications on this population addresses questions of human rights.

The COVID-19 pandemic quickly became a problem in prisons everywhere, but it was an especially dangerous problem in the United States because of mass incarceration. By late March 2020, within weeks of the World Health Organization’s declaration of a pandemic, prisons around the world began to take measures to reduce the spread of COVID-19 behind bars (Heard 2021). Many countries such as South Africa, India, Iran, Thailand, England and Wales quickly began to suspend social and family visitation, stop temporary leave—such as work release—for inmates, and reduce the amount of daily movement within the prison (Heard 2021). While similar policies were implemented for a short time in US prisons, such policies weren’t enough to deal with the sheer amount of people incarcerated following decades of mass incarceration. The history of mass incarceration that led to the densely packed prisons exacerbated the dangers for transmission of COVID-19 (Herring and Sharma 2021). Nearly two years after COVID-
19 was declared a pandemic, most state departments of corrections, and the Bureau of Prisons (BOP) still fails to protect inmates and successfully reduce infection rates behind bars, and most of the legal system has returned to the same operation standards prior to the pandemic causing the prison population to rise to pre-pandemic levels (Herring and Sharma 2021; Sawyer and Wagner 2022).

**Transitional Justice**

Transitional justice is a framework that is most often associated with international criminal courts and tribunals (Rowen 2017). Transitional justice work is most recognized in societies shaped by widespread violence, polarized politics, and weak institutions. This usually refers to societies well-known globally for atrocities such as mass killings, forced disappearances, genocide, and massive displacement. I question why there seems to be limited transitional justice literature and transitional justice attempts in post-conflict United States, specifically as it relates to Black people and the long history of state violence through slavery, Jim Crow laws, and mass incarceration.

Brants suggests that “transitional justice is concerned with both settling accounts after violent conflict and/or repression and coming to terms with the traumatic damage inflicted on individuals and society” (2013: 1). The latter point of this definition is particularly important in the context of inequality, both in the United States and globally. By coming to terms with the damage inflicted, we may shed light on the social structures and institutions that inequality is rooted in and, therefore, find an avenue for change. One of the main goals of transitional justice is the transition from a society divided by illegality and injustices and to one that offers stability through democracy and rule of
law. Historically in the United States, laws have been written in a manner that utilizes the
criminal justice system as a tool to ostracize or criminalize groups of people (Hodge
2021).

Many definitions of transitional justice include the transition from an authoritarian
state or from armed conflict. However, I argue that we don’t have to be in or have
recently gone through a transition such as those for transitional justice to be seen; rather
transitional justice can be utilized as the platform to create a transition towards social
change. This platform can offer ways to make changes to the structures in place that
maintain hegemony and uphold the white power often found democratic societies. These
structures—in the context of the United States include the implementation of policy
that has the potential to support the needs of the common good to include the
marginalized that are often excluded from the protection of the state. This dissertation
urges for change in structure rather than overthrowing a system as a whole.

Widening the concept of transition also widens the concept of justice and the
function of law. This relates to *homo sacer* as the ways in which law functions is key for
defining bare life and the state of exception. The platform laid by transitional justice
could bring the mistreatment of law to the forefront and bring focus on reforms to the
justice sector of the United States. I, therefore, use transitional justice to question, what
does law offer in the United States and what *can* law offer in the United States? Are we
moving into the direction of new possibilities of law as a tool of aid as opposed to a
mechanism of state violence?
I rely on Sarah Kihiki’s (2012) definition that transitional justice is “confronting the legacies of past human rights abuses and atrocities to build stable, peaceful, and democratic futures” combined with Jamie Rowen’s constructive approach that transitional justice “is better understood as an idea—meaning a thought, a plan or suggestion—about how to redress mass, often state-sponsored violence, and ensure democratic and social change” (2017:3). This dissertation changes the ethos of transitional justice by suggesting that politics do not have to rely on official transitional justice mechanisms, but rather can create their own understandings of social and political change driven by the theoretical underpinnings and ideas that transitional justice has to offer.

Chapter Summary

This chapter introduces the study by elucidating the detrimental effects of mass incarceration on marginalized populations in the United States, particularly during the COVID-19 pandemic, and potential for alternative forms of justice in which the pandemic could have been a catalyst for. Chapters 2 and 3 outline the theoretical frameworks which serve as the foundation for this research. Chapter 2 theoretically situates the incarcerated population as a population that can be considered as taking on the life of the *homo sacer*, a life that is deprived of citizenship and rights and a life that can be—legally speaking—allowed to let die. Chapter 3 offers a detailed understanding of the history and implementation of transitional justice and the ways in which I shift away from the typical understanding of transitional justice mechanisms to apply its goals
to addressing the violence perpetrated against the people incarcerated in the United States, particularly during COVID-19.

Chapter 4 provides an overview of law and governance in the United States. The United States operates under a model of federalism in which there is a separation of political power between federal and state politics. In the absence of a coordinated national response to the COVID-19 pandemic, state officials were pressured to adopt policies to protect inmates incarcerated in their state operated system. Mapping the differences in legal response and protection—or lack thereof—between state and federally operated prisons further solidifies the need for transitional justice mechanisms to identify the unequal treatment among incarcerated peoples. In chapter 5, I outline the methodology behind this project to include a description of process tracing and thematic analysis, which were used to identify key snapshot moments of the COVID-19 pandemic that related to incarcerated peoples.

Chapters 6-8 offer three topics used to analyze the harmful ways in which delayed response to the COVID-19 pandemic had detrimental outcomes for people incarcerated in federal and state prisons across the U.S. Chapter 6 provides an overview of the nuanced ways in which the CARES Act and home confinement policies were used in an attempt to reduce the number of inmates in overcrowded facilities. With the sheer number of people housed within overcrowded living spaces, COVID-19 precautions recommended by the CDC such as social distancing and mask wearing were nearly impossible. However, attempts to reduce the number of people incarcerated did not prove to offer enough refuge from the disease. Chapter 7 addresses the vaccine rollout phases implemented to
combat the spread of the COVID-19 virus and identifies where inmates fell on the level of priority to receive the vaccine. Further, this chapter highlights the lack of cooperation by prison officers and staff to receive the vaccine, which only exacerbated the spread of the virus within prisons. Rather than protecting the inmates, who could not protect themselves, officers and staff played a part in spreading the virus both into and out of the prison. Chapter 8 illuminates the harmful impacts of the high cost of communication and medical copayments for incarcerated peoples and families. The high cost of being incarcerated has been a harmful hurdle for decades, but was brought to light by family and media during the pandemic. What these three chapters have in common is that the narratives—policies around home confinement for elderly or medically fragile inmates, safety and protection protocols for communicable diseases or viruses within prisons, and the call for reduced fines and fees to be housed in state and federal prisons—displayed in this dissertation are not new. The problems laid out in this dissertation are not unique during this pandemic, but the pandemic offers a new way to identify them and address them.

Finally, chapter 9 concludes the dissertation by positioning my work within a larger conversation about transitional justice and mass incarceration as it relates to public health in the United States. With insight into the process of implementing transitional justice mechanisms, I argue that COVID-19 could offer a platform for social change through a transitional justice lens.
CHAPTER TWO

HOMO SACER AND THE STATE OF EXCEPTION

According to Italian philosopher Giorgio Agamben (1995), a key mark of modern democracy is the integration between sovereignty and the biopolitical body brought into being by state power. Agamben distinguishes between two types of life in biopolitics: qualified life (bios) and bare life (zoe). The qualified life is the life of the citizen, a life in which people’s allegiance to the state offers rights and protection, by the state. The bare life is the life of the homo sacer (sacrificed man), a life deprived of rights and deprived of protection. In the bare life the biological life is given precedence over the way of life as defined by citizenship. The person’s political existence has been removed by those who have power to define who is included and who is excluded as worthy human beings.

The distinction between bios and zoe is made by those with judicial power—in the United States this would include all three branches of government—through the state of exception. The state of exception is based on the sovereign’s (or government’s) ability to go beyond the confinements of the rule of law to protect the public good, or to protect those of the qualified life. At the extreme, for example, a leader can impose martial law. In extraordinary times, the law is suspended by the sovereign and this suspension becomes the norm. In a condition he refers to as abandonment the law may technically be in force, but it no longer holds substantive meaning or significance.

Building off Carl Schmitt’s concept of the state of exception (Agamben 2005), Agamben’s idea of homo sacer highlights the government’s ability to transcend the rule of law. To best see how law can surpass its limits to have control over life—and subsequently
death—and define who holds what amount of agency in society and who has the full benefit of citizenship, we must map the theoretical trajectory that led to Agamben’s development of homo sacer. This includes readings from Hannah Arendt (1951;1958) and Michel Foucault (1976). Through these readings we see just how power dynamics control life by not only identifying ways in which law categorizes who is considered a citizen or what is considered citizenship, but how law holds power over life and death and survivability. Agamben builds from Foucault’s concept of the condition of biopolitics, a power that is exerted over a population as a whole. Foucault argues that modern power is characterized differently than sovereign power; sovereign power, for Foucault, is characterized by a right over life and death—or making live or letting die—where modern power is characterized by a productive relation to life. Agamben argues that sovereign and modern power coincide and are fundamentally integrated. Arendt, although writing before Foucault and Agamben, critiques the idea that the rights that empower the role of the nation and the people give us notions of bare life and nothing about the human, which reduces humans to merely human with no exceptional qualities. It is within the qualities that define human, that define citizenship, that this research lies.

Arendt

In her discussion of the emergence of the nation of minorities and the stateless people, Arendt argues that WWI brought inflation, unemployment, civil wars, and migration of groups who were not able to assimilate anywhere (1951). This shift in the idea of nation was described as proliferation of wars between two nations and the division of political communities into four elements: state people, equal partners, minorities, and
stateless people. The *Rights of Man* meant that (a Christian) God’s command and/or customs of history were no longer the source of law, but man was. Before, the source of rights derived from outside of politics and from “social, spiritual, and religious forces” (Arendt, 1951:291). Rights of man had been defined as inalienable because they were supposed to be independent of all governments, “but it turned out that the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them” (Arendt, 1951: 292). Without a government, these rights became unenforceable, regardless of the idea that they are inalienable. The rights that empower the role of the nation and the people give us notions of bare life and nothing about the qualified life about which Arendt is critical. She offers the critique of reducing human beings to merely just a human being with no exceptional qualities.

**Foucault**

In a 1976 lecture, Michel Foucault lays out two theoretical notions of power: disciplinary power and biopower. He identifies the shift between the two paradigms historically through the eighteenth and nineteenth centuries; this was a shift from a disciplinary to a nondisciplinary technology of power. The two are integrated to include *man* as a human, as part of a population rather than an individual. He uses the two notions of power to discuss the discourse of race and wars. Foucault argues that the modern state must at some point become racist in order for the state to function in a biopolitical mode (1976). This justifies killing, not merely murder but also indirect murder, of those that are a threat to the population. Indirect murder, to Foucault, includes
“the fact of exposing someone to death, increasing the risk of death for some people, or quite simply, political death, expulsion, rejection, and so on” (1976:256). Foucault refers to Nazism and the socialism of the Soviet Union as historical examples of this. Foucault uses the term *biopower* as the domain of life in which power has asserted control. The power is that of the sovereign, and to exercise that power is to “exert one’s control over mortality and to define life as the deployment and manifestation of power” (Mbembe 2019: 66). Sovereignty thus holds the power and capacity to dictate who is able to live and who society should let die.

**Agamben**

Agamben pulls in work from Foucault and Arendt as the foundation for his analysis on the politicization of life, biopower and the Rights of Man. Agamben argues that Foucault never brought his insights to bear on the politics of the great totalitarian states of the 20th century as “the inquiry that began with a reconstruction of the grand enfermement in hospitals and prisons did not end with an analysis of the concentration camp” (119). Foucault could have extended his investigation on the process of subjectivity to provide helpful analysis of modern biopolitics. Further, Agamben refers to Arendt’s writings dedicated to the structure of totalitarian states in the postwar period and suggest that they are limited because of the absence of a biopolitical perspective. He uses the concept of bare life and sacred life as the lens through which we can intersect Foucault and Arendt. He writes, “along with the emergence of biopolitics, we can observe a displacement and gradual expansion beyond the limits of the decision on bare life, in the state of exception, in which sovereignty consisted” (122).
The theory of sovereign power is based on the state of exception and the bare life. Sovereign power establishes itself through political order based on the exclusion of bare life by the enactment of the exception in which the law is suspended from the human being who is stripped of legal status and transformed into a bare life, a life without rights. The sovereign exception gives rise to juridical order as “the rule, suspending itself gives rise to the exception and, maintaining itself in relation to the exception, first constitutes itself as a rule” (18).

According to Agamben, all law is situational law that the sovereign can monopolize. The sovereign “creates and guarantees the situation as a whole in its totality” (1998:16). This is where the essence of state sovereignty lies. During a state of emergency, the state creates and guarantees the situation that the law needs for its own validity. In his discussion of European refugees and stateless persons following the First World War, Agamben illustrates this validity by expressing that “the very rights of man that once made sense as the presupposition of the rights of the citizen are now progressively separated from and used outside the context of citizenship, for the sake of the supposed representation and protection of a bare life that is more and more driven to the margins of the nation-states, ultimately to be recodified into a new national identity” (1998:132). This same logic can be seen in modern nation-states attempt to maintain national identity by, for example, violating their own laws and treaties to exclude refugees who are Muslim or Black.

The political response to COVID-19 in the United States brought changes in policy which labeled some sectors of the population as essential workers, restricted
asylum rights to immigrants, and reduced rights to safety and protection for prison inmates. These policy changes reduced these populations to the bare life under the guise of protecting “the nation.” The separation of these marginalized populations highlights the separation between humanitarianism and politics, which Agamben describes as the extreme phase of the separation of the rights of man from the rights of the citizen. In the United States, the political response to COVID-19 which removed protections from “essential” workers, restricted asylum, and reduced inmate safety may not have been a blatant sacrifice of marginalized bodies in that the government did not actively kill these people, but these bodies were allowed to die from lack of protection and justified exposure.

Mbembe

Mbembe’s necropolitics refers to the contemporary forms of subjugating life to the power of death. In response to Foucault, he argues that the notion of biopower is insufficient to this subjugation. Necropolitics, or necropower, considers new ways in which “weapons are deployed in the interest of maximally destroying persons and creating death-worlds,” or new forms of social existence. Within these new forms of social existence, populations are subjected to living conditions equitable to the status of “the living dead” (2019:92). This research highlights ways in which laws and policy in response to the COVID-19 pandemic in the United States acted as contemporary weapon deployed to create death-worlds. Following the trajectory of Arendt, Foucault, and Agamben, Mbembe adds to the contemporary analysis of the power to dictate who may live and who must die in a state of emergency. He raises important questions that
investigate under what conditions the right to kill, to allow to live, or expose to death is exercised.

During the COVID-19 pandemic, marginalized populations were designated as *homo sacer*—as groups that must die to let others live. Defining vast populations as essential workers granted the right to expose them to death in an attempt to keep a society based on continuing economic expansion functioning. These populations were sacrificed to sustain “life” for others. It is both ironic and important to note that those deemed “essential” were already historically marginalized. Their vulnerabilities are what made them more susceptible to be deemed expendable by labeling them as indispensable. The United States has been impacted by the COVID-19 pandemic in ways that reflect past and ongoing social injustices and inequalities related to public health. While the virus was labeled “the great equalizer” that impacted all people, that commonality masked the “underlying social and economic inequalities that make some populations more vulnerable to the disease than others” (Jane Addams College of Social Work 2020). The steps taken in response to COVID-19 such as social distancing measures have showcased inequities in work-related and economic factors resulting in unequal access to decent work and healthcare (Kantamneni 2020). Since the state determines who is deemed an essential worker, who receives aide, and who is neglected during this time of crisis, the outcomes have been lethal for many, but especially for the most marginalized (Robert Wood Johnson Foundation 2020). The COVID-19 crisis has not only exposed the sheer number of human rights violations perpetrated by the US government against marginalized groups but has also exacerbated state crimes of structural violence and
negligence. Mbembe’s necropolitics offers a framework to investigate how the pandemic has produced the conditions for dying.

Mbembe draws upon the state of exception to uphold necropolitics during a time of emergency. However, the necropolitics of global health inequality is driven “not by a perpetual state of emergency, but by a state of chronic acceptance that some have poorer health than others” (Sandset 2021: 1411). Mbembe allows us to see that COVID-19 is more than a health crisis, it is a crisis of sovereignty. The processes of privatization, neoliberalism, and capitalism have created conditions in which minorities—who may be already in poorer health than others—have taken the brunt of the pandemic in the frantic attempt to return to normalcy as quickly as possible. Following the words of Foucault, Agamben, and Mbembe, the sovereign is exercising its power to ‘let die’ through the exposure to conditions that are detrimental to their health and survivability.

**COVID-19 And a State of Emergency**

During a state of emergency, the state of exception allows for an increase of power by government to overlook constitutional rights to extend their control. This process has become apparent in the United States, especially in the face of the COVID-19 outbreak. In an attempt to control the spread of the virus, the US government relied on changes to policy—which often meant the suspension of policy—in search of herd immunity in which the majority of the population would become protected from COVID-19. This protection, however, came at a cost. Through a state of exception, policy in the United States was used as a mechanism to define who is seen as expendable and capable of being sacrificed (i.e., who would take on the life of the homo sacer).
Arendt and Foucault refer to the division of the population into subgroups, which categorizes people as taking on bare life and permits the exercise of biopower. Racial thinking has been prominent in Western political thought and practice, “especially when the point was to contrive the inhumanity of foreign peoples and the sort of domination to be exercised over them” (Mbembe 2019: 71). Arendt’s focus on othering through different subgroups suggests that the politics of race are inherently linked to biopolitics of death. To Foucault, racism is a mechanism through which the sovereign can exercise biopower. Further, he suggests that the modern state can hardly function without becoming involved within racism at some point. Foucault argues that “the death of the bad race, of the inferior race (or the degenerate, or the abnormal) is something that will make life in general healthier” (1976: 255). Killing or letting die, thus, results in the elimination of the biological threat, in this case the threat of the spread of COVID-19 and the goal to reach herd immunity.

Racial and ethnic minority groups are at increased risk of contracting and dying from COVID-19. According to the Centers for Disease Control and Prevention (CDC), non-Latinx American Indian or Alaskan Native people have an age-adjusted COVID-19 hospitalization rate around 5.3 times that of non-Latinx White people and hospitalization rates among Black and Latinx people are about 4.7 times the rate of White people.

Minoritized people are subject to adverse social determinants of health that have “historically prevented them from having fair opportunities for economic, physical, and emotional health” (CDC 2019). Some inequities in social determinants of health include healthcare access and utilization, occupation, education, income and wealth gaps, and
housing opportunities. The conditions of the places where people live, learn, work and play can greatly affect health outcomes (CDC 2021). The partiality in social determinants of health such as poverty and healthcare access greatly influence quality-of-life outcomes, which is why it is imperative to understand the ways in which transitions from one presidential administration to another amidst COVID-19 brought changes in policies related to public health and equity. Although this dissertation is not directly focused on race, it is worth noting that the three groups of interest—meat industry workers, immigrants, and prison inmates—are disproportionately comprised of racialized minority groups.

Arendt (1958) describes how major events permanently alter society—in which there is no going back—as a “chain reaction.” In her accounts of post-WW1 European refugees, this chain reaction led to the emergence of stateless minorities that did not have a government to represent or protect them, forcing them to live under a law of exception. This imperialism worked to uphold the status quo. However, the status quo could not be preserved because Europe had been ruled by a system that never considered the needs of at least 25 percent of the population, the roughly 100 million inhabitants that were officially recognized as exceptions. People without their own national government were deprived of human rights. Trying to define many groups of people led to people falling between the cracks of recognition.

Similarly, the attempt to define so many groups in the United States, as essential and inessential—particularly during COVID-19—has led to people falling between the cracks of recognition and becoming like the stateless minorities in which, they did not
have a government to represent or protect them. Mbembe points to the ways in which power not only continuously “refers and appeals to the exception, emergency, and a fictionalized notion of the enemy,” but also produces these same exceptions, emergencies, and enemies” (2019:70). This brings to question the relationship between politics and death within systems that operate through a state of emergency. It is within these political systems that operate in response of COVID-19 where Foucault’s biopower appears as a function to define people by who must live and who is justified to let die.

**The State of Exception**

The state of exception investigates the increase of power by governments employed in times of crisis. In a state of emergency, states of exception occur when constitutional rights can be diminished, superseded, and rejected in the process of claiming this extension of power by a government for the “good” of its people. The state of exception highlights the sovereign’s ability to transcend the rule of law in the name of the public good, in this case the protection from the global threat that is COVID-19.

It is important to note that the state of exception is not a special or specific type of law, but “as a suspension of the juridical order itself, it defines law’s threshold or limit concept” (Agamben 2005:4). Agamben uses the expression *full powers* to characterize the state of exception and refers to it as “the expansion of the powers of the government” (2005:5). This expansion of power removes the distinction between different powers held by the judicial, legislative, and executive branches of government, and a broad regulatory power is granted to the executive. We see this, for example, in the President’s ability to issue orders that temporarily suspend laws enacted by Congress. The permitted power
under the state of exception provides the grounds for a totalitarian approach to governance in which power is centralized. This centralized power permits the rule of law to be expended and for the distinction to be made between the qualified and bare life.

Modern totalitarianism, by means of the state of exception, acts as a legal civil war that “allows for the physical elimination not only of political adversaries but of entire categories of citizens who for some reason cannot be integrated into the political system” (Agamben 2005:2). During this political war the voluntary creation of a permanent state of emergency, and therefore state of exception, can become an essential practice of modern states (Agamben 2005). Agamben speaks of unstoppable progression as global civil war in which the state of exception appears as a dominant paradigm of government. I question how this relates to the global politics of a worldwide pandemic that carries that magnitude of force as the COVID-19 outbreak. Has the global pandemic created a permanent state of emergency and, furthermore, a new norm in politics? Agamben suggests that the state of exception appears “as an ‘illegal’ but perfectly ‘juridical and constitutional’ measure that is realized in the production of new norms (or of a new juridical order),” in which new juridical order justifiably can be creating through historical eras (2005:28).

Throughout US history, there were moments of politics and jurisprudence that followed a timeline of state of exception proclamations. On September 22, 1862, President Abraham Lincoln proclaimed the emancipation of slaves on his authority alone, ignoring Congress entirely, making the President the sovereign power over the state of exception. During World War One, Congress granted President Wilson complete control
over the administration through the Espionage Act of June 1917 and the Overman Act of May 1918, again, making the President of the United States the sovereign power (Agamben 2005). Because the metaphor for war became part of presidential political vocabulary—War on Drugs, War on Crime, War on Terror—granting full sovereign powers became a normal part of politics. Following the attacks on the United States on September 11, 2001, President Bush made the decision to refer to himself as the Commander in Chief of the Army, attempting to give himself the sovereign powers in a state of emergency. Therefore, the emergency becomes the rule (Agamben 2005) which resulted in the longest war in US history. These moments in history occur as the President defines his own understanding of what is necessary for the safety and protection of the county. Therefore, “necessity acts here to justify a single, specific case of transgression by means of an exception.” During times of threat, governments can use this argument of necessity as legitimation to make exceptions and create these new norms. This dissertation raises the question of how COVID-19 was leveraged as a state of exception to solidify political power under two US Presidents.
CHAPTER THREE
TRANSITIONAL JUSTICE

Transitional justice is often defined as a set of practices implemented to address and redress mass harm and violations of widespread human rights. It is used to raise the question of “punishment or impunity,” (Kritz 1995; Teitel 2000) or “vengeance or forgiveness,” (Minow 1998) following conflict and mass atrocity. For the purpose of my dissertation, I rely on Kihika’s (2012) definition that transitional justice is “confronting the legacies of past human rights abuses and atrocities to build stable, peaceful, and democratic futures” combined with Rowen’s constructive approach that transitional justice “is better understood as an idea—meaning a thought, a plan or suggestion—about how to redress mass, often state-sponsored violence, and ensure democratic and social change” (2017:3). Together, these definitions convey the sentiment that transitional justice is about the recognition of past harm and injustice and working toward righting those wrongs.

The suggestions made by a transitional justice model offer a particular vocabulary unique to transitional justice including truth and reconciliation, tribunals, truth commissions, and reparations programs. These terms address the alternative forms of justice that push goals of “ensuring accountability, improving survivor well-being, and preventing future violence” rather than the traditional model of crime and punishment (Rowen 2017: 3). By defining transitional justice as a set of ideas, plans or suggestions we can also see how it can be defined as a process that is continuously evolving to fit the need of social and political dynamics in a particular time and space.
Emerging in the early 1990s, transitional justice was developed when scholars, policy makers, and advocates were investigating how countries “moving from authoritarianism or armed conflict toward democratic regimes were using law to address human rights abuses under former regimes (Rowen 2017; Arthur 2009). Law professor, Ruti Teitel, coined the phrase in 1991 in her advisory memorandum to the Council on Foreign Relations on challenges facing newly democratized societies (Teitel 2008). She thought of justice in relation to criminal law and, therefore, in relation to crime and punishment. For Teitel, transitional justice was a way of questioning punishment as well as the role of the court and the liberal values associated with due process. Traditional forms of justice that relate to criminal law, which largely relies on punishment, do not address the deep lasting social scars left on a society. Punitive forms of justice, like seen in the United States, puts more emphasis on crime and punishment and less on restoration. Transitional justice is concerned with how to hold societies, and individuals within those societies, accountable for their actions while implementing ways to rebuild societies in the period following human rights violations (Quinn 2016). In doing so, transitional justice focuses on “reforms to the justice sector, working towards re-establishment of the rule of law and assisting in the rebuilding of the system of courts that is required in a functioning, democratic society” (Quinn 2016: 390).

Often transitional justice practices occur after the transition from an authoritarian state or from armed conflict to the aspirational goals of democracy. However, my dissertation aims to illustrate that we don’t have to be in or have recently gone through such a transition for transitional justice to be seen—it is enough to acknowledge
historical and ongoing harm and injustice, and to use that recognition as a turning-point for change; and transitional justice can be utilized as the platform to create a transition towards radical social change. This platform can offer ways to make changes to the structures in place that maintain hegemony and uphold the white, male power often found in democratic societies. These structures—in the context of the US and other developed and established democracies (McAuliffe 2017; Winter 2014)—include the implementation of policy that has the potential to support the needs of the common good to include the marginalized that are often excluded from the protection of the state through the rule of law.

While conventional transitional justice scholarship focused on establishing new regimes after an abusive one had been overthrown (see for example Arthur 2009), I argue that changing the structure of an abusive state may provide the same benefits as establishing a new system altogether. Widening the concept of transition to include newly imposed transitions made possible by transitional justice also widens the concept of justice and the function of law. The platform laid by transitional justice could bring the mistreatment of law to the forefront and bring focus to reforms to the justice sector of the US. I, therefore, use the ideas that prevail in transitional justice scholarship to question what law offers in the US and whether we are moving into the direction of new possibilities of law as a tool of aid as opposed to a mechanism of state violence. This dissertation addresses the ethos of transitional justice by suggesting that politics do not have to rely on official transitional justice mechanisms, but rather can create their own understandings of social and political change driven by the theoretical underpinnings and
ideas that transitional justice has to offer (El-Masri et al. 2020). Conventional methods of transitional justice often fall short in discussing long-term solutions to transforming social and political institutions. Therefore, I include transformative justice practices that are used to respond to violence without creating more violence. I rely on transformative justice policies to identify ways structural and systematic institutions create further criminality and address avenues for institutional change.

**History of Transitional Justice**

The development of transitional justice as a concept and practice occurred in three phases: the first phase considered what are now foundations of international law, the second phase introduced restorative practices such as truth commissions and tribunals, and the third phase broadened the definition of transitional justice to include anything a society implements to deal with a legacy of conflict (Teitel 2003). Transitional justice became understood as international after 1945 in the post-World War II period. This phase narrowly focused on tribunals in Nuremberg, which are now considered the foundation of international law. The aim of transitional justice in this phase was *accountability*. The tribunal in Nuremberg sought justice through punishing those held accountable for war crimes, reaching for “a vision of world order and international justice, characterizing mass violence as crimes of war and crimes against humanity” (Minow 2000:235). However, the development of this phase was not enduring as the political conditions of postwar Germany were unique and would not translate or recur in the same manner transnationally. Nevertheless, the legacy of the postwar trials and sanctions seen in Nuremberg is an important historical precedent that formed the basis of
modern human rights law and jumpstarted the transitional justice movement. Phase one raised two key points that are critical for the following two phases. First, international justice displaced national justice. Prior to Nuremberg, individual states prosecuted their own citizens, but now an international “gold standard” for public response to mass violence is upheld (Minow 2000). However, the national trials following World War I were not successful at deterring future conflict. This leads to the second key point: previous responses to transition not only failed—as shown by the occurrence of the second World War—but “were the sense of economic frustration and resentment that fueled Germany’s role in World War II” (Teitel 2003: 73). This detrimental history laid the groundwork for alternative forms of justice and the further development of the transitional justice movement. This first phase runs through the Cold War, which ends the internationalism of this first, postwar, phase of transitional justice (Teitel 2003).

The second, or post-Cold War, phase began in 1989 with the wave of democratic transitions and modernization. This phase is associated with a period of accelerated democratization and political fragmentation that followed the fall of the Soviet Union, spanning the last quarter of the twentieth century (Teitel 2003). The shift into a new phase of transitional justice came in the 1980s when new democracies emerged in South America. After the collapse of repressive military regimes it was unclear if the same model of justice that was seen in Nuremberg that focused on punishing those responsible for atrocities would be successfully implemented in South America. The Phase 2 model relies on a more diverse rule of law understanding that is tied to particular local conditions as opposed to the international forms of transitional justice seen in phase one.
Modernization and the rule of law were equated with trials and tribunals by the nation-state to support growth and stability in nation-building. In this phase, transitional justice “embodies a liberal vision of history as progress…in which the harms of the past may be repaired in order to produce a future characterized by the nonrecurrence of violence, the rule of law, and culture of human right” (Shaw et. al 2010: 3).

However, it is important to remember that transitional justice is not a field of practice or inquiry, but rather “a label or cloak that aims to rationalize a set of diverse bargains in relation to the past as an integrated endeavor” (Bell 2009: 6). Transitional justice is a suggestion, it is part of an ever-changing global movement. And it is interwoven with political trade-offs that are made to ensure that justice is secured. Where the Nuremberg model of transitional justice defined the rule of law in universalizing terms, it became the standard by which all subsequent transitional justice debates are framed. Therefore, Phase 1 laid the foundation for phase two to debate the tension between punishment and amnesty, challenging the ideal rule of law and raising new conceptions of justice.

Phase 2’s form of justice looked beyond accountability and questioned how to heal a society and incorporate values such as reconciliation. The second phase focused on justice through truth commissions, apologies, and reparations and tribunals such as the International Criminal Tribunals for the Former Yugoslavia and Rwanda. The goal was to introduce a form of justice where justice at local levels had not been present for long periods of time. The forms of justice introduced were aimed toward building peace and reconciliation by offering a space for dialogue between victims and perpetrators. This
was necessary because in these countries, perpetrators and victims would have to live together and learn to co-exist to keep society functioning. Ultimately, the goal was to “reconceive the social meaning of past conflicts, particularly defeats, in an attempt to reconstruct their present and future effects” (Teitel 2003: 87). This goal can be achieved by using “law and state power to address and redress episodes of collective violence” through prosecutions, reparations and truth commissions; only then can we “locate the violations on maps of human comprehensibility, deter future violations of human dignity, and ensure that the ambitions of the agents of violence do not succeed” (Minow 2000: 235).

The third phase, or the “steady-state” phase of transitional justice is associated with contemporary conditions of persistent conflict which lay the foundation for a normalized law of violence (Teitel 2003: 70). This current phase is broader and “involves anything that a society devises to deal with a legacy of conflict and/or widespread human rights violations, from changes in the criminal code…to tackling the distributional inequalities that underlie conflict” (Roht-Arriaza 2006: 2). While Phase 3 shows some similarities to Phase 1 in the form of international justice, internationalism has been transformed by the developments of globalization and “typified by conditions of heightened political instability and violence” (Teitel 2003: 71). Transitional justice has now moved from the exception to the norm to becoming a paradigm of rule of law (UN Secretary General 2011). Phase 3 suggests that contemporary political conditions are characterized by steady and on-going conflict. In other words, conflict is the new normal. Therefore, transitional justice should then be normalized—and it has been; the Secretary
General (2011) indicated that transitional justice is required to remediate all types of conflicts in all cases. The most recognized symbol of the normalization of transitional justice is through the increased use of human rights law that brings the justice and peace debates to the surface. Human rights laws tie together Phase 1’s emphasis on international justice through the implementation of the International Criminal Court and the localized justice models of Phase 2. Phase 3 of transitional justice bridges the previous models and applies human rights policy that attempts to provide the most meaningful justice possible in the political conditions of that time.

In its most current state, transitional justice has become highly malleable which makes its utility aspirational in relation to bridging social and political divides, but also ambiguous for adaptation worldwide in many different scenarios that requires a response to mass violence. Therefore, Rowen (2017) argues that transitional justice may be appealing, but what makes it appealing also makes it problematic. Having a quasi-judicial, and even non-judicial, strategy distinguishes transitional justice from related ideas of rule of law and human rights as “its focus was the contextual nature of justice and the importance of creating laws that would offer more than retributive justice” (Rowen 2017: 26).

Brants describes transitional justice as “a theatre of imagery and memory” in which transitional justice is “concerned with both settling accounts after violence conflict and/or repression and coming to terms with the traumatic damage inflicted on individuals in society” (2013: 1). Transitional justice is bound up with history-telling and attempts to develop shared collective memories that look towards a future made by making sense of
past events. Brants, Hol and Siegel (2013) would argue that transitional justice is needed because “dealing with atrocity within the (narrow) limits of legal discourse implies a reduction of the human experience that can never fully address the multitude of complexity of issues involved in justice—the very meaning and significance of which depend on the historical, social and political conditions in which it functions” (2). Justice itself is more than a legally established procedure, it is a process of remembering and of coming to terms with imageries and histories to set the narrative for a just, post-conflict, future.

Forms of transitional justice are ultimately aimed at the transition from a society divided by chaos, illegality, and injustices to one in which the rule of law provides human rights and binding principles of stability. While Brants and colleagues (2013) focuses on the history-telling and shared collective memories, transitional justice not only operates in truth-finding and bringing justice but is about doing justice. These forms of “doing justice” occur in three forms: retributive justice, restorative justice, and reparative justice (Quinn 2016). Transitional justice does justice by recognizing the broad scope of harm and degradation, the need for rectification, and alternative methods to achieving redress rather than merely practicing law as “too much law, it has been said, skews the truth and brings too little justice” (Brants et al. 2013: 4).
“Doing” Justice

There are three primary approaches to “doing” justice in transitional justice: retributive justice, restorative justice, reparative justice (Quinn 2016). These approaches have been characterized as distinct paradigms, or philosophical or theoretical frameworks, that are useful in explaining and understanding the different ways of approaching alternative forms of justice (Minow 1998). Retributive justice is the kind of justice that people in the West are most accustomed to. Here, justice equates with legal prosecutions and the rule of law. The goal of retributive justice is to correct the perpetrator by means of prosecution and punishment. This is usually accomplished through criminal trials and tribunals. An example of retributive justice can be seen in Cambodia’s Extraordinary Chambers in the Courts of Cambodia established in 2001 to try crimes committed during the Khmer Rouge regime in the mid- to late-1970s (Quinn 2016).

Restorative justice is intended to restore the dignity of the victim and reintegrate the perpetrator back into society, restoring the harmony between them (Krog 2000). The goal is to empower victims. One of the most popularized ways this is accomplished is through the use of truth commissions. Truth commission policies offer alternative judicial sanctions to address cases of mass harm. These bodies are established to look at widespread human rights violations with a much broader focus than trials by offering an inquiry that includes details from victims and a public report that contains a detailed summary that accounts exactly what has taken place (Quinn 2016). Truth commissions have become more popular around the world as they offer recommendations for social
and political change by focusing on the creation of historical records of violence. The appeal of truth commissions lies in the fact that they focus on creating a platform for change rather than prioritizing punishment for perpetrators, as punishing perpetrators through court processes, in theory, could foment divisions (Minow 1998; Rowen 2017). Minow states, “know the truth and it will set you free, expose the terrible secrets of a sick society and heal that society” (2000: 243).

Truth commissions help people who were harmed by violence to locate their experiences within the larger setting of political violence. This process builds autonomy. It can help restore trust in institutions because a commission can enable public acknowledgement of the violence. This acknowledgement, in turn, is a precondition to healing and reestablishing trust in people and trust in the government. With the popularization of this shift through the South Africa Truth and Reconciliation Commission (TRC) and the creation of the International Center for Transitional Justice, truth commissions have become a signature procedure of transitional justice (Teitel 2003; Gready 2010).

While restorative justice focuses on restoring the victim and the perpetrator, the reparative justice paradigm is concerned with making right the things that went wrong. It is intended to repair. Reparative justice is implemented in one of two ways or in a mixture of both: apology and compensation or restitution. An apology can be given by the perpetrator him/herself, or a representative of the perpetrator if the perpetrator is no longer able to apologize, or the perpetrator is a larger entity and not an individual. Apologies provide symbolic acknowledgement of the wrong that the victim(s) suffered
that then allows the victim to move forward in the healing process and lessens the feelings of anger and retaliation felt by the victim (Quinn 2016). The second method of repair—restitution—can be defined as a token paid in compensation for loss or injury. This form of repair attempts to compensate for the wrongdoings. No amount of money can ever fully compensate for the loss and damage suffered, so the “idea of compensation is not completely adequate” (Quinn 2016: 397).

These three paradigms represent different visions of how a society can rebuild in a period of transition. Often, arguments regarding transitions are centered on different conceptions of justice, not simply between justice and redress. Justice itself is a complex and contested concept. In many transitions there are multiple forms of justice at issue that include forms that are retrospective, prospective and “the adjustment of contending legal and political orders” (Webber 2012:99). Debates within the transitional justice literature discuss the tensions between these forms of justice, but those debates often focus on retrospective justice—backward-looking justice as opposed to forward-looking—as the sole form of justice. However, tensions between the range of practices and goals that transitional justice incorporates are also obscured by the interdisciplinary scholarship approach it has grown into (Bell 2009).

I argue that transitional justice is limited if multiple forms of justice are not considered. By considering the examples below, there are benefits and limitations of each approach, and they each serve different purposes for different countries. For transitional justice to be most effective, the interventions should implement a combination of these three paradigms. By utilizing some combination of the three different paradigms,
multiple objectives can be met to push forward the healing process. In some cases, one intervention—such as a truth commission—may fulfill more than one of these objectives on its own. Through three cases studies of transitional justice—South Africa, Peru, and Rwanda—we can see how combinations of the three paradigms are implemented.

**Transformative Justice**

While these measures are intended to address bodily integrity crimes and civil and political harms, there is a body of literature that calls for transitional justice to go further. In doing so, their argument is that there are other levels of criminality that devolve from the structural and systematic institutions that remain in place. This is as true in post-conflict contexts as it is in established democracies. The practice of transitional justice to address institutional and structural change has often been disappointing and enigmatic at best. State-led practices that operate under transitional justice such as trials, truth commissions, and reparations attempts have functioned in a way to treat the symptoms rather than the causes of conflict, suggesting the need for a new agenda. This new approach to conflict resolution allows the platform created by transitional justice to become more transformative. Transitional justice provides a platform for transformative change that prioritizes the process rather than the preconceived outcomes often seen in the implementation of traditional transitional justice mechanisms (Gready and Robins 2014). Transformative justice is not intended to replace transitional justice, but rather works in conjunction to shift the focus from the state to the social and political institutions that address everyday concerns. In other words, by making transitional justice more transformative, a more bottom-up analysis of the harm and impact on the lives of
the marginalized populations can be taken, without the restrictions of trials, truth commissions, and other traditional transitional justice mechanisms.

The move from traditional transitional justice mechanisms to a transformative form of justice is rooted in literature that focuses on peacebuilding. Rama Mani (2002) proposes that peacebuilding is a dynamic process that is essentially a political task, but also “a social and associative process that rebuilds fractured relationships between people” (15). This theory suggests that peacebuilding can be transformative, in which Lambourne (2013) extends to a proposed reconceptualization of transitional justice as transformative justice incorporating political, economic, psychosocial, and legal dimensions. She focuses on peacebuilding as a vital component of conflict reconciliation. She argues that it has short-term and long-term objectives “aimed at ensuring sustainability in the security, political, economic and justice spheres” (21). This includes the promotion of democracy and accountable governance, but also the eradication of poverty and sustainable development, and respect for human rights and the rule of law (Lambourne 2013; Jeong 2005). Therefore, justice must be seen as more than merely transitional and must set up structures, institutions, and relationships to promote sustainability.

Transformative justice assists in reframing the traditional goals of transitional justice to include the need to include critiques of current and ongoing attempts at real change and providing a platform for debate about the meaning of justice and redress. Gready and Robins illustrate that drawing a line under the past, which is core goal of transitional justice, “often amounts to drawing a line under resistance and struggle,”
while drawing a line between the past and the present, which is a core goal of transformative justice, “requires the identification of ongoing channels for resistance in a new dispensation, and discourses of resistance beyond narrow, ‘neutral’ human rights and transitional justice” (2014: 356). Transformative justice allows for a more holistic, big picture approach to change in the social, political, and economic structures that impact those often marginalized. Transitional justice can become more transformative with a critical approach to the reframing of the problem it seeks to address and the responses and interventions that follow. This dissertation relies on transformative justice to offer various alternative forms of justice in the United States that offer restitution or reparation for past violations or crimes (historical justice) and distributive or socioeconomic justice in the future (prospective justice) to ensure that structural violence is minimized (Lambourne 2004; Mani 2002).

Many models of transitional justice focus on historical reparations, but when considering the need for future social, political, and economic justice as structural violence preventive measures often fall short. Making transitional justice more transformative fosters ways to address social and economic justice as well as political and legal justice. Political and legal justice are necessary to ensure that institutional and structural reform are implemented in a manner that include all persons, particularly those that often fall outside of the protection of the rule of law
Three Examples

The End to South African Apartheid

Apartheid, or systematic state-sponsored racial segregation, was practiced from 1948 through the early 1990s in South Africa (Fletcher, Weinstein, and Rowen 2009). The system of institutionalized racial segregation ensured that the political, social, and economic structures of South Africa were dominated by the nation’s minority white population; it was “deeply rooted in the colonial model of governance.” (Fletcher et al. 2009). This white dominant model of governance created conditions that legalized racial discrimination in which Blacks could not vote, were denied access to jobs, could not marry whites, and needed permission from the government to enter parts of the country (Rowen 2017). The Black majority were second class citizens. The courts were used to maintain this oppressive political order, imprisoning, and ordering the death of groups of people believed to be involved in organized opposition to apartheid. Between 1960 and 1990, it is estimated that 135 political prisoners were killed, 21,000 died as a result of political violence, and hundreds more were disappeared (Rowen 2017).

In 1990 newly elected South African President F.W. de Klerk freed long-held political prisoner Nelson Mandela, founder of an armed wing of the resistance movement African National Congress (ANC) to avoid an impending civil war and as part of broad, sweeping liberal reforms. Together they planned for the political future of South Africa that included the development of a new constitution that “would allow equal participate in the political system” and introduce ways to redress the violence and deal with the
perpetrators of violence during the apartheid. Part of their plan was the establishment of the South African Truth and Reconciliation Commission in 1996.

The South African Truth and Reconciliation Commission (TRC) was charged with not only obtaining the facts of what happened during the apartheid, but also with working to overcome ignorance or denial among the general community and among government officials. The biggest objectives were “to express government acknowledgement of the past, to enhance the legitimacy of the current regime, and to promote a climate conducive to human rights and democratic processes” (Minow 1998: 59). With the main goal of gaining public acknowledgement for harms done, the accountability and prosecutorial means of a criminal trial process was an imperfect solution. A better suited solution was the creation of a truth commission that was authorized by and influential with the government which was able to produce a public report. This publicly distributed report highlights what went wrong by helping to frame the events in a new national narrative of acknowledgement, accountability, and civic values, exposing the causes and conditions contributing to the violence (Minow 1998).

The TRC comprised three committees—gross violations of human rights, amnesty, and reparations—reflecting the TRC’s goals (Quinn 2016). To meet their first goal, the commission invited witnesses—both those identified as victims of gross human rights violations and perpetrators—to give statements about their experiences during apartheid. This aided in a more accurate attempt at a shared narrative and allowed the TRC to meet their other goals of offering reparation and rehabilitation to victims and allowing perpetrators to request amnesty from civil and criminal prosecution. The TRC
emphasized reconciliation which was drastically different than what was seen in the Nuremberg Trials. The TRC by design proposed “specific economic reparations and to also assist the development of a society stable enough to pursue land reform, redesign of medical and educational systems, and other reforms to redress the massive economic imbalances in the country,” which has been deemed a successful approach to dealing with human-rights violations after political change (Minow 1998: 83). The final report recommended that the government accelerate closing the gap between the advantaged and disadvantaged by “giving more attention to the transformation of education, the provision of shelter, access to clean water and health services and the creation of job opportunities” (Duthie 2008: 301). Consequently, countries around the world such as Peru and Rwanda have instituted transitional justice based on the South African model.

The Aftermath of the People’s War in Peru

From 1980 to 2000, Peru was embroiled in one of Latin America’s deadliest civil wars. Armed conflict began when the Communist Party of Peru --more commonly known as the Shining Path (from the Spanish sendero luminoso indicating that Marxism-Leninism is a shining path to revolution)--burned ballot boxes in rejection of Peru’s democratic election. This band of revolutionaries “positioned themselves as the vanguard in a revolution to guide the nation toward an imminent communist utopia” drawing upon Maoist theories of guerilla warfare for their tactics to execute a top-down revolution (Theidon 2012: 3). The Peruvian People’s War was fought between the Shining Path and the Peruvian armed forces, with the peasants trapped between the warring factions. (Other guerrilla groups were also operating in Peru during this time, but they played a
more minor role.) As the Shining Path gained control of rural highland areas, they enacted brutal forms of “justice” in the villages. The Peruvian armed forces, in turn, attempted to stop the guerrilla conflict by arresting, interrogating, and torturing scores of innocent peasants. They also organized peasants into anti-guerilla militias (called *rondas*) that also engaged in grotesque acts of violence.

The Shining Path’s attempt to topple the Peruvian government subsided rapidly after 1992 when nearly all of the top leadership were found hiding in a safe house and arrested. However, President Alberto Fujimore’s administration that ended Shining Path’s guerilla movement practiced authoritarian tendencies to remain in power, including arming and giving extensive power to the rondas. In 2000, Fujimori fled the country and faxed his resignation from Japan (Theidon 2012). About that same time, the new leader of the Shining Path was captured, and the group further splintered, losing much of its power and ceding its territory.

Following the years of violent conflict and authoritarian rule, Peru established The Truth and Reconciliation Commission (*Comision de la Verdad y Reconciliacion*--CVR) in 2001 as part of a reconstruction of democratic institutions. It was designed to investigate human rights abuses—including but not limited to assassinations, torture, disappearances, and displacement—committed by guerillas, agents of the state, rondas and other groups during the violent conflict in Peru through the 1980s and 1990s. These investigations raised expectations for future transitional justice attempts. The purpose was to determine the causes of violence, identify the scale of victimization, assess responsibility between terrorist groups and the State, and make recommendations for
necessary reparations and reforms for preventing future violence. Like South Africa’s TRC, the CVR steered a public process. It organized public hearings where victims could share their experiences publicly and it conducted a highly transparent “set of activities aimed at winning public support for the prosecution of those persons who allegedly perpetrated the worst crimes” (Cueva 2006: 70).

One of the main goals of truth commissions is “writing new national narratives that are more inclusive of groups that have been historically marginalized within the nation-state” (Theidon 2012: 105). Commissions are considered victim-centered because they offer an empathetic ear to the victim’s stories. However, in Peru, many victims were forgotten such as the Indigenous Mayan people who make up nearly 47% of the overall population. Truth commissions have often ignored Indigenous people because of their obscure lines of citizenship (Corntassel and Holder 2008). Mandates of the commissions both facilitated national unity and compromised the potential for indigenous justice. Therefore, because the implementation of a truth commission often focuses on reconciling perpetrators and victims, the Peruvian truth commission can be contested on terms of what Theidon calls “narrative capital”. Narrative capital refers to process in which one’s narrative practices is capitalized on by another, more powerful, position. Ignoring the voices of the Indigenous people altered the narrative, silenced their story, creating a different understanding of the past.

Although these strategies fell short of offering avenues for rectifying ongoing injustices, the efforts were worthwhile and important for the overall transitional justice movement. Apologies and commissions can—at the very least—begin the process of
healing and jumpstart avenues for change. In the case of Peru, the failure to address problems specific to state-dominated reconciliation for Indigenous communities led researchers examining transitional justice methods such as truth commissions to de-emphasize and even overlook larger policy implications for indigenous communities. This fails to promote a necessary balance between the realistic implications between restitution and reconciliation strategies and indigenous populations. This realization is important to the transitional justice movement as another tool can be added: efficiency in addressing the history and ongoing injustices committed against indigenous peoples.

Aftermath of the Rwandan Genocide (1994)

Following the genocide of 1994 that killed nearly a million Tutsi and Twa people, along with some moderate Hutu, Rwanda implemented a variety of programs to promote reconciliation, combat impunity, and prevent future communal violence (Longman 2006). By incorporating Gacaca procedures for social healing and community building, the state uses reconciliation as an attempt to rebuild social cohesion and promote unity. On an international level, the creation of the International Criminal Tribunal for Rwanda (ICTR) ultimately led to the conviction of the highest-ranking officials in Rwanda.

Gacaca Community Justice

In an attempt for reconciliation, the government implemented an ad hoc court to try those accused of participating in the genocide. The conventional legal system—local and international—was not capable of prosecuting the hundreds of thousands of people involved in a timely and affordable manner. Rather than putting suspects in front of the statutory-law courts that existed in Rwanda, the government established 11,000 elected
tribunals charged with the task of investigating and trying the crimes that occurred within their jurisdiction. These tribunals were known as Gacaca. The term *gacaca* derived from the Kinyarwanda word meaning *grass*, and drew on a by-then extinct traditional practice of community members sitting together to wrestle with injustices and harms that had taken place and determine a path forward. Here—literally on the grass—is where, as President Kagame puts it, an “African solution to African problems” takes place (HRW 2011). Gacaca community justice is said to be “one of the most ambitious transitional justice experiments in history, blending local conflict-resolution traditions with a modern punitive legal system” (HRW 2011). In this localized court system, judges are ordinary people of the community with no formal legal education. The system was designed to be a platform of reconciliation that encouraged confessions and apologies for a more restorative approach (Waldorf 2006).

Rwanda is an important case study to show how both local, grassroot, attempts at justice can be mixed with contemporary legal responses of the international community. For example following the genocide, the International Criminal Tribunal for Rwanda was established by the United Nations Security Council in 1994 to prosecute persons deemed responsible for the genocide. The international community recognized the “need to strengthen the rule of law” and the opportunity to “show other leaders around the world that they could not get away with such crimes” (Quinn 2016: 394). This ad hoc international tribunal led to the conviction of the highest-ranking government officials of Rwanda, something domestic justice attempts could not accomplish (Minow 1998).
Transitional Justice and Law in Democratic Countries

Debates about transitional justice are “framed by the normative proposition that various legal responses should be evaluated on the basis of their prospects for democracy” (Teitel 2000: 3). Transitional justice offers a conversation between the relation of law and justice to liberalization and democratic development, along with respect for human rights and the restoration of dignity. Teitel suggests moving “away from defining transitions purely in terms of democratic procedures” and toward “a broader inquiry into other practices signifying acceptance of liberal democracy and the rule-of-law” (2000:5).

Teitel (2000; 2005) divides transitional justice into five categories: punitive justice of criminal trials; historical justice of acknowledgment of wrongdoings and reconstruction of narratives through truth commissions; reparatory justice that offers compensation; administrative justice that restructures state institutions; and constitutional justice that redefines the juridical foundations of the state. For state redress in democratic states historical justice, administrative justice, and restorative justice frameworks stand out as most prevalent. The reification of administrative justice describes change to the operation of state institutions, therefore, administrative redress “captures a broad sweep of activities, ranging from mega-constitutional politics to low-level changes in the staffing and operations of local bodies” (Winter 2014).

Similarly, the International Center for Transitional Justice’s four-part taxonomy of transitional justice includes institutional reform which is defined as “the process of reviewing and restructuring state institutions so that they respect human rights, preserve
the rule of law, and are accountable to their constituents’ (United Nations General Assembly 2006). Institutional reform is a way of rectifying injustices and when paired with Teitel’s notion of historical justice, which pinpoints the areas needing rectification the most, restorative justice will fall into place. In the United States this would be mostly accomplished through changes in legislation.

Because the United States has not recently undergone a transition of political power from one group or another, the idea of “transitional” justice seems perhaps inapplicable. Therefore, the transitional justice practices discussed previously have not been thought possible. Most examples of transitional justice occur in countries transitioning between regimes, often through violence.

A common argument for refuting transitional justice practices in established democracies is that if democratic states practice transitional justice and they are not in transition, there can be nothing distinctive about transitional justice. Furthermore, there is no reason to think transitional justice is a special kind of justice or an alternative for traditional forms of justice (Winter 2014). However, I argue that democratic states often go through moments of political transition. Further, these states go through moments where they must strive to maintain political legitimacy.

And of course, there remain historical and on-going abuses and harms to be addressed. Winter argues that “the established settler democracies are clearly using institutions and language shaped by the experiences of paradigmatic transitional practice” (2014: 5). And since paradigmatic political transitions involve the transfer of political power from one group to another (Ní Aolaín and Campbell 2005), by using the
conceptional tools of transitional justice—truth commissions, apologies, reparations, etc.—to describe redress politics in established democracies, especially established settler polities (e.g. United States, Australia, New Zealand, Canada), seems possible. Scholars addressing transitional justice in the United States and elsewhere have instead begun to use the term “historical” justice (Murphy and Zvobgo 2021).

Maintaining political legitimacy, or maintaining political authority and power in the state, allows the state to continue to hold the power to render otherwise wrongful acts permissible. As mentioned previously, the state holds a monopoly position of power to define legal statuses of violence. Consequently, the state holds the power to harm citizens including by removal of rights—such as through incarceration, uneven distribution of resources, or disenfranchisement—and through the creation of unjust laws and policies. This reliance upon law and policy-making as a tool for harm is a prominent way we can see the relationship between transitional justice and law. Transitional justice is the attempt to address the mechanism of harm.

Ndulu and Duthie describe judicial systems in post conflict states as limited because “access to justice in postconflict societies is notoriously hampered by delays in all stages of proceedings in the law courts” (2009: 256). Furthermore, the poor and marginalized groups in society have generally received poor protection from the law and “corruption and economic status play a major role in one’s ability to access justice” (Ndulu and Duthie 2009: 256). Similar problems can be seen in the contemporary United States. These inequalities in the justice system undermine the public’s confidence in the court to uphold justice while challenging the political legitimacy of the criminal justice
system. The mere fact that the court system is unable to adequately serve and protect marginalized populations in the United States is a human rights violation. Without proper knowledge of the workings of the institution, understanding of the laws, and adequate legal representation, marginalized people do not share equal rights to the judicial system. Access to justice means that “justice should be affordable to all, and those who cannot afford it should be provided the means through legal aid assistance” (Ndulu and Duthie 2009: 256). While this requirement of the American criminal justice system is seen through the Sixth Amendment rights of criminal defendants, the execution often falls short.

The making and preserving of law was founded on “exercise of authorized force and administrative oversight, securing private and public property, naturalizing distinctions of race, class, culture, and gender, and delegitimating political rivalry” (Comaroff and Comaroff 2016:10). Law and crime were thus created in the interest of the state, not the people, as a means of control. Today, law and crime are still used to not only protect, but to fund the state. Policing today is primarily dedicated to the preservation of social order with emphasis on the containment of those who are deemed undesirable, or those said to threaten the public tranquility of a community. To address the unequal defining factors of law is to implement a transitional justice paradigm at a new attempt of justice. Alternative forms of justice can acknowledge the inequalities of judicial representation based on socioeconomic statuses.

Transitional justice can help us understand how legal ideas influence politics and how politics influence legal ideas. The circulation of legal ideas is imperative because if
we understand how legal ideas travel, we can better understand how political actors utilize these ideas for specific means. This concept suggests that “rather than focusing on the conceptualization of transitional justice, scholars should redirect their attention toward its instrumentalization” (Rowen 2017:625). Scholars refer to the circulation of legal ideas as vernacularization and focus on how key players mediate the spread of new ideas related to law (Merry 2006b; Merry and Stern 2005). In vernacularization, legal ideas become “decontextualized and recontextualized” in ways that reflect current social structures (Clarke and Goodale 2009, 7). I wonder whether transitional justice can help in framing new ideas of legal intervention in which law recognizes all people rather than prioritizing those who have the greatest economic means to access the legal system, thus opening new ways to think about laws. By looking at the circulation of legal ideas, we can see the power dynamics that influence the meaning-making process, and why certain ideas—and legitimation—of laws and polices take hold. This raises the question of how the idea of justice has been appropriated in the United States. Transitional justice refers to specific processes and unspecific goals about what law offers countries that have experienced mass violence (Arthur 2009; Iverson 2013).

**Recovering From State Violence Through Historical and Transitional Justice**

In examining how transitional justice has been implemented worldwide, we find a common thread that runs through each case: the occurrence of state violence or violence committed by the government including, but not limited to, “actions by police and military forces, or… all forms of politically authorized violence” (Iadicola and Shupe 2013: 313). Weber (1958) characterized the modern state by three dimensions:
territoriosity, legitimacy, and violence. In this definition of the state, violence is understood as necessary and taken for granted. This is possible because only the state has a monopoly on the legitimate use of violence, which raises the question of how we distinguish between legitimate and illegitimate use of violence.

In this dissertation, I define the United States as a liberal democratic state rooted in a history of settler colonialism and racism. American culture emphasizes individualism, liberty, private property, and freedom from the state. However, these ideals are not distributed equally. While liberal democracy focuses on the separation of powers and a system of checks and balances between branches of government, there appears to be little accountability when the government fails to uphold the principle of rule of law equally to all peoples. A large part of this paradox is a two-party system dominated by the Republican and Democratic parties, who seems to agree on some things but not others. Part of the contested topics stem from differing economic, social, and cultural ideas and government regulation. The Democratic Party typically emphasizes community and social responsibility while the Republican Party is more focused on individual rights and justice. These philosophies shape their stance on the economy, military spending, taxes, government regulation, healthcare policy, immigration, criminal justice, and other policies. Democrats, in recent years, have been more willing to embrace an expansion of the state, within some limits. This can be seen, for example, with the logistics of expanding Medicaid in states where GOP officials have refused to do so for several years while grappling with the cost and the how to prevent states from dropping coverage.
The legitimacy of violence is defined by the state, therefore all violence committed by the state—whether legitimate or illegitimate—is deemed legal and justified. The state holds “a monopoly position of power to define legal status of the violence” which, consequently, only labels violence illegal if the act threatens social order and/or the state falls victim (Iadicola and Shupe 2013: 313). If the state is unlikely to define its own acts of violence as illegitimate or illegal, then who will hold them accountable? How will forms of structural and systematic violence be addressed? Transitional justice has much to offer in the way of solutions.

In the pursuit of justice in countries experiencing mass human rights violations through forms of structural and systematic violence, truth commissions could be used for the purpose of restoration. Quinn defines truth commissions as “bodies established to look at widespread human rights violations that took place during a specified period of time…by the state...” that are instructional (2016: 394). Whether abuses are perpetrated by a small group of people representing the state, or the state is committing harm through extralegal forms, the state needs to be investigated. Truth commissions could be implemented by local NGOs, international institutions such as the International Criminal Court, or ad hoc committees if the state is the alleged perpetrator in the case. The instructional effect of putting the state on trial and offering broadcasting of public hearings and testimony or publication and dissemination of a final report is the first step to harm reduction and addressing damage inflicted on the society.

Brants suggests that “transitional justice is concerned with both settling accounts after violent conflict and/or repression and coming to terms with the traumatic damage
inflicted on individuals and society” (2013: 1). The latter point of this definition is particularly important in the context of inequality, both in the United States and globally. There is a significant gap in the transitional justice literature and transitional justice attempts in post-conflict United States. By coming to terms with the damage inflicted, we may shed light on the social structures and institutions rooted in inequality and, therefore, find an avenue for change. Transitional justice can be seen as a toolbox; it is full of different tools that can be used to fit different needs centered around impunity, reconciliation, restoration, and repair. As previously mentioned, one of the main goals of transitional justice is the transition from a society divided by illegality and injustices and to one that offers stability through democracy and rule of law. Historically in the United States, laws have been written in a manner that utilizes the criminal justice system as a tool to ostracize or criminalize entire groups of people such as young, Black men. Using a transitional justice framework, it becomes clearer that justice is not only a matter of law, but of recognition, acceptance, and reconciliation.

Not only does the state have the power to control what is deemed illegitimate violence, but it also controls the narrative around its occurrence. Extralegal forms of state violence, or “the use of violence without justification or legitimization by the laws of the state that is conducting the violence,” are difficult to address because they rely on data that is collected by the very institutions of the state that are conducting the violence (Iadicola and Shupe 2013: 318). For example, deaths at the hands of police in the United States are limited to voluntary reporting and give law enforcement broad powers to interpret what should be reported. The creation of local commissions or tribunals would
allow for a formal investigation that will publicly present a new narrative that points to
the historic use of violence conducted by the state that may not be as obvious as mass
killings or forced migrations.

Following mass violence such as genocide, mass killings, forced disappearances,
and forced migration, countries may rely on international organizations such as the
United Nations or private groups such as Amnesty International or the Human Rights
Campaign to investigate state violence. Unfortunately, how much power they can bear on
states that engage in illegitimate violence is “determined by the distribution of power
within the world system” (Iadicola and Shupe 2013: 313). States with the greatest amount
of power in the world system have the greatest amount of power to define legitimate and
illegitimate violence. One of the strongest international forces that could hold the power
to investigate and prosecute state violence globally is the International Criminal Court
(ICC).

The ICC was established specifically to intercede following times of conflict to
try and convict those responsible for state violence and hold states accountable for
providing basic civil, political, economic, and social and cultural rights to all peoples.
However, to allow the ICC to step-in, the country must have signed and ratified the
International Criminal Court treaty. The United States government—the most powerful
state in the world—has not ratified the treaty. Furthermore, Congress passed the
American Servicemembers’ Protection Act of 2001 that legally prohibits US cooperation
with the International Criminal Court. Specifically, legislation restricts “(1) participation
by covered U.S. persons in the United Nations (UN) peacekeeping and peace
enforcement operations; (2) transfer to the Court of U.S. classified national security and law enforcement information; and (3) the provision of U.S. military assistance, with specified exceptions, to the government of a country that is a party of the Court” (107th Congress 2001). In other words, the US government has taken additional legal measures that exempts government personnel from prosecution and denies military aid to non-NATO signatories of the treaty. Therefore, the United States does not fall within the jurisdiction of International Criminal Court systems and cannot be investigated and/or held accountable for violence it commits by entities outside of the United States.

**A Model for Transitional Justice in the United States**

Transitional justice is conventionally implemented following regime change. However, as I have argued above, it could be used in the context of other, arguably less foundational, societal change. In the United States there is no regime change, but there have been atrocities such as during the Civil War and during Jim Crow that then led to changes in socio-political foundations. While the implementation of a new platform that aims to create possibilities of social and political changes in the United States can offer a new narrative of violence and offer redress for victims, it can also become a way to restore public confidence in the institutions of government (Kritz 1995).

These transitions brought new forms of violence, harming targeted groups in complex and systematic ways. These oppressed people are now experiencing the pain of slow death through structural violence by the hands of the very institutions that claim to aid them such as the criminal justice and the welfare system. If these continuous cycles of harm could be addressed and acknowledged, the state could begin to imagine pathways to
compensation, including compensation. According to Kritz (1995), compensation serves three main functions in the process of reconciliation: aiding victims in managing the material aspect of their loss, officially acknowledging victim’s pain by the nation, and bringing the possibility of deterring the state from future abuses by imposing a financial cost to such misdeeds. The first two facilitate the societal reintegration of people who have long been made to suffer in silence. Compensation can bring voices to the victims to not only be heard, but to find solidarity. This solidarity is important in the United States as we are a country divided, a country that admires individualism. The silence of those trapped in continuous suffering as result of poverty, hunger, poor living conditions, drug addiction, lack of access to healthcare, unemployment, racial classification and so forth become normalized. While transitional justice can be used to address the public health concerns of social inequality, it is important to remember that it is not intended to function as the end-all solution.

In her discussion on torture during the “war on terror,” Rowen discusses problems with taking a transitional justice approach in the United States (2017). She states that “whereas actors in other countries were able to use the ambiguity of the concept of a truth commission, particularly with regard to judicial accountability, to their advantage, that same ambiguity was a liability in the United States, as individuals who were unfamiliar with truth commissions were worried that promoting one was promoting amnesty, or that calling for a truth commission would make an implicit comparison between the United States and places where truth commissions had been created for much more extreme violence” (Rowen 2017:125). She argues that for many US advocates for a truth
commission, the idea was not only a foreign idea, but something that was developed for people and places where “real justice” (i.e., criminal justice) is not possible. This idea, however, ignores the flaws in the US criminal justice and judicial system.

While it may not seem like a transitional justice attempt fits, there are people applying it. Attempts at transitional justice in the United States may be limited, there have been attempts. For decades the United States often failed to acknowledge and address the transitions our country took following the genocide and land removal of Native Americans, the abolishment of slavery and the Jim Crow era, and the cultural and structural harms that followed the rise of the neoliberal carceral state during the War on Drugs era that included increased surveillance and patrol of Black communities and routine police killings, beatings and daily harassment in the form of stop and frisk. However, as the United States is in need for new approaches to justice, it is important to acknowledge the attempts of transitional justice work that have been carried out. (Magarrell and Wesley 2008; Androff 2010; Murphy and Zvobgo 2020). The Greensboro Truth and Reconciliation Commission was launched in 2004 by non-profit and grassroots organizations to address the trauma that stemmed from the violent 1979 Greensboro Massacre In North Carolina (Androff 2010). In 1979, a group of Ku Klux Klan and Nazi Party members fired several rounds of gunfire into a crown of labor union activists killing five people (Androff 2010). The truth and reconciliation commission was the first of its kind in the United States and was to examine the events of that date to offer healing and reconciliation of the community. An official report on its findings and recommendations for the Greensboro community was distributed in 2006 (Greensboro Truth and
Reconciliation Commission 2022). The Iowa City City Council developed an ad hoc Truth And Reconciliation Commission in September 2020 to bear truth to racial injustice in Iowa City and offer restorative justice through testimony and public hearings (Shillcock 2021; Weiner and Bergus 2020). This commission had setbacks, however, including an Iowa City Council vote against the commission because of disapproval from the community, specifically from the Black community, one year after the start of the commission. Other forms of transitional justice have been attempted such as land compensation for Indigenous groups, and lynching memorials at the National Memorial for Peace and Justice in Alabama (Levin 2019; Yang 2022; Robertson 2018). Recognizing these attempts helps to see the moments across the United States that suggest there could be successful transitional justice attempts in the country.

While I have argued that the malleability of transitional justice is an attractive attribute of transitional justice, as mentioned previously, this same malleability is often a point of contestation as there is confusion over what constitutes a universal definition of a truth commission as virtually no two implementations of truth commissions have been identical (Dancy, Kim and Brahm 2010). But it is within this malleability that I recommend an alternative idea to the traditional truth commission in the United States. In the bigger picture, truth commissions can investigate the larger patterns of atrocity and the complex line of responsibility and complicity (Minow 2000). It is within these patterns that I find a form of truth commissions useful in the lives of Americans, particularly those that are minoritized, because they are not only experiencing grave human rights violations today but have been for decades. This dissertation does not argue
for an official, formal truth commission defined in the traditional sense, but for a moment of investigation in which politicians, policy makers, advocates, academics, nonprofits, and others collect, measure, and analyze the grave affects that US laws and policies have on the wellbeing of minoritized groups and implement the ideas of transitional justice to create a platform for change.

Moments through US history have provided ways to see the potential for transitional justice through non-traditional truth commissions and reparations. However, these moments were not labeled as transitional justice attempts. For example, following the Japanese attack on Pearl Harbor in 1941 a wave of anti-Japanese rhetoric swept the nation which led to the Roosevelt administration’s adaptation of violent policies which violated the constitutional rights of Japanese Americans. Under these policies Americans were forced to leave their homes and belongings and were relocated to camps where they were incarcerated until 1944 (Hatamlya 1993). In 1988 Congress passed the Civil Liberties Act that acknowledged the grave injustices against Japanese immigrants and Japanese American during World War II and provided funding for monetary reparations. Additionally, this act provided an official apology from President Ronald Reagan on behalf of the United States for the evacuation, relocation, and internment of United States residents of Japanese ancestry (100th Congress 1987).

More recently, in 2019, The New York Times released a journalism project to commemorate the 400th anniversary of the arrival of the first enslaved Africans in Point Comfort, Virginia. The 1619 Project is designed to “reframe American history…to place the consequences of slavery and the contribution of black Americans at the very center of
the story we tell ourselves about who we are as a country.” (The New York Times 2019). The project acknowledges that the year 1619 is not a year most Americans recognize as an important or notable date in history. It was in 1619 that the system of chattel slavery began, a violent system that lasted for the next 250 years. It was the year 1619 that inaugurated the anti-Black racism that drives racial injustices and inequalities that plague the country to this day. The project allows an investigation into US history to highlight contemporary race relations rooted in slavery. Using essays and literary works to provide a more truthful account of history, the project acknowledges how harmful and violent that history—and its aftermath—is for Black Americans. The 1619 Project addresses the same goals as official truth commissions, without the traditional transitional justice mechanisms.

Following examples such as these, I suggest the COVID-19 pandemic could be the catalyst for a transitional justice project related to mass incarceration and mistreatment of peoples incarcerated in state and federal prisons across the United States. In response to Rowen’s (2017) argument of ‘real justice’ in the United States, I argue that transitional justice could be implemented in the United States by first understanding and acknowledging how transitional justice relies on law. By acknowledging how law is used, law and policy changes could be implemented to accept transitional justice frameworks and processes. The outcome would use transitional justice to highlight structural violence and provide alternative frameworks to explore law and policy changes to effect reparations to social problems.
At present in the United States, the cycles of violence manifested as police use of force, systematic racism, and street protests and riots have highlighted how transitional justice can promote the aims of redress and reconciliation to bring some sense of unity to our country. Laplante proposes that truth commissions “expand their mandates to include a legal framework that examines the socioeconomic root causes of violence in terms of violations of economic, social and cultural rights” (2008: 331). These socioeconomic root causes are implicitly tied to the public health of a society through the institutions that support education, healthcare and criminal justice. If these underlying socioeconomic structures are not addressed, cycles of violence and human rights abuses will continue to filter through the United States. The framework of transitional justice offers a way to address these institutions and jumpstart the process of social change.
CHAPTER FOUR

METHODOLOGY

This project consists of a thematic analysis that compares and contrasts the implications of policy from January 1, 2020 through December 31, 2021 as they relate to the COVID-19 pandemic. This time frame allows for the comparison of federal and state legislation under two presidential administrations—Trump and Biden—and two opposing political parties. Thematic analysis is used to provide a way for understanding when, how and why the government enacts certain policies, particularly in response to a global pandemic, and their affects. Through such an analysis, I will investigate these main research questions:

1. What COVID-19 policies under the Trump administration related to incarcerated people? What was the impact of these policies? To what extent do these policies and their impacts constitute state violence?

2. What COVID-19 policies under the Biden administration related to incarcerated people? What was the impact of these policies? To what extent do these policies and their impacts constitute state violence?

3. Does the structure of the American government impact response and outcomes during a state of emergency such as a global pandemic? Could COVID-19 offer a platform for social change through transitional justice?

To ensure a separation of powers, US federal government is broken down into the legislative, executive, and judicial branches. Federal agencies such as the Department of Justice, Bureau of Prisons, and National Institute of Corrections, fall within the executive branch. Even if the heads of those agencies do not change, policy directions change
which presidential transitions. To best exhibit the ways that inmates are
disproportionately harmed by the federal policy responses to COVID-19, this project
focuses on specific sets of policies at the state and federal level that impact inmates
directly. Because people incarcerated in state and federal prisons are confined to
overcrowded, highly populated areas, they are disproportionately at risk of contracting
COVID-19, and, therefore, in a higher need to of protection that should be provided by
government agencies. Furthermore, these groups are unlikely to have the resources to
manage their illness if they get sick.

Inmates in the US criminal justice system are made up of an already marginalized
population as this population is made mostly of groups from communities with steady
economic and social breakdown including Black, Latinx, and white working-class people
(Franco-Paredes et. al 2020:1). The people incarcerated are stripped of their ability to
control exposure and are at the mercy of the state for protection. According to The
Marshall Project (2021), as of March 30, 2021 at least 391,782 people in prison tested
positive for COVID-19. Several environmental conditions of carceral settings—such as
overcrowding, insufficient sanitation, poor ventilation, and inadequate healthcare—have
contributed to such facilities becoming breeding grounds for COVID-19 outbreaks
(Franco-Paredes et. al 2020). While in these facilities, the luxury of social distancing is
removed and access to protective equipment such as masks are limited. Investigating the
policy implications on this population addresses questions of human rights.
Data and Methods

This project consists of a thematic analysis that compares and contrasts the implications of policy from January 1, 2020 through December 31, 2021 as they relate to the COVID-19 pandemic. I take a comparative historical approach to not only examine both policy change and effect, but to identify the continuing policy themes that have led to an influx in incarceration and prolonged sentencing. I take a top-down approach by first examining policies implemented by the presidential administration and the federal prison system followed by policies implemented at the state level. I began by reviewing each policy implemented under the Trump administration, excluding policies not related to COVID-19. I did the same for policies implemented under the Biden administration. Because President Biden took office on January 20, 2021, Biden’s policies—defined as executive orders, memorandums, proclamations, and press releases from the White House that set policy agendas—were collected from whitehouse.gov. Trump policies were taken from the National Archives at archives.gov. Following the Biden inauguration, official files—including executive orders, memorandums, proclamations, and policy agenda press releases—under the Trump administration were moved to the Executive Office of the President Electronic Records Archive on the National Archives website. It is important to note that under the Trump administration, policies were often announced via Twitter. However, while some Tweets were acted on as policy and some were not, and I have no consistent way to categorize these, I do not analyze Trump’s Twitter feed, which is no longer available anyway.
Because this data is limited, I also rely on secondary data collected from The Marshall Project, Prison Policy Initiative, and The Covid Prison Project to track COVID-19 response policies at the federal and state level. I use this data to map the number of cases and deaths among inmates incarcerated across the United States, differentiating between the 2020 and 2021 presidential administrations. The United States divides political power between the national government and the states in which both political divisions have the power to make laws and policies, and both have autonomy. This creates a divide that allows the federal government to take a hands-off approach to states of emergency such as the COVID-19 pandemic. To analyze the delegation of responsibility away from the federal government and the role of the state in enforcing COVID-19 related policies, I compare data from these nonprofit groups to data from the Department of Justice, Bureau of Prisons, and National Institute of Corrections. I argue that these federal agencies are impacted by change in presidential administration. Even if the head of those agencies do not change under the new administration, policy directions do. Therefore, the polices enacted under these agencies are important to this project.

The policies enacted at the federal level that related to the COVID-19 response in prisons were downloaded and imported to the qualitative analysis software, NVivo. Each policy was labeled as a “case” and then assigned to the “case classification” of either “Trump Policy,” “Biden Policy,” “Department of Justice,” “Bureau of Prisons,” or “National Institute of Corrections.” After compiling a dataset with the policies that I predict impact the spread of COVID-19 in prisons, I coded the data to identify and summarize important themes within the dataset.
Identifying the important themes in the set of policies allows for the analysis of the meaning behind federal policies, specifically as it relates to the research questions. Choosing thematic analysis as methodology allows for the analysis of subjective experiences following policy implementation. Identifying themes led me to question whether the policies, or lack thereof, enacted under the Trump and Biden administrations further harmed incarcerated people and whether that harm could constitute state violence. To measure harm and test cause and effect that could predict state violence, I use process tracing as a methodology. Process tracing is a “within-case” method used to draw causal inferences from a temporal sequence of events and/or political or social phenomena (Collier 2011). More on process tracing to follow. As there is not a direct measure for harm caused by any given policy, I use news reporting and other archival resources to provide data for harm creation. I use national news reports, reports from nonprofit organizations, and lobbyist reports to complete the narrative of the effects caused by COVID-19 response policies.

**Process Tracing**

To determine harm and measure the impact of policy on incarcerated people, I employ qualitative process tracing. Using process tracing as a method for causal inference, I can better answer the research questions by providing more leverage to the examination of the potential onset of state violence through harm caused by policy changes during the COVID-19 crisis, and whether such change in policy can suggest a move to transitional justice in the United States. I rely on Collier’s definition of process tracing that describes this method as “an analytical tool for drawing descriptive and
causal inferences from diagnostic pieces of evidence—often understood as part of a temporal sequence of events or phenomena” (2011:824). Process tracing is fundamental to qualitative research because it can contribute to both describing political and social phenomena and evaluating causal claims. It does so by relying on careful description of trajectories of change and close attention to sequences of independent and dependent variables. Process tracing focuses on the unfolding of events or situations over time. The descriptive component of process tracing involves “taking good snapshots at a series of specific moments” so researchers can characterize the key steps in the process to best describe the changes and sequences in the overall big picture (Collier 2010:824). Relying on details of description and sequences, causal-process observations (CPOs) can be used in testing theories (Mahoney 2010).

CPOs “can be used to develop, elaborate, or specify more precisely a given theory or hypothesis” in both quantitative and qualitative research (Mahoney 2010: 125). CPOs can also be used in theory testing. When testing a theory, process tracing can provide insight about the existence of causes by using particular observations from within specific cases. For the purpose of this project, CPOs will be used to test theories and research questions on the basis of key observations gathered from data collection following policy changes. Using secondary data from federal and nonfederal data sources allowed me to take the necessary snapshots needed to provide an examinable timeline of events following the onset of COVID-19 through the changes in policy under the Trump and Biden administrations and the events that followed. Three relevant snapshot moments defined the timeline of events for inmates during the COVID-19 policy response: home
confinement policies, vaccine rollout phases, and the reduction of cost of communication and medical co-pay for inmates. Relying on these observations as diagnostic evidence allowed me to adequately test whether the policy changes themselves directly impacted incarcerated people, or if there are alternative factors impacting the well-being of this vulnerable group. Furthermore, by successfully determining whether policy changes did or did not have a direct impact on this population I was then able to argue whether these policy changes constituted state violence. Only then can my third research question be addressed: could COVID-19 policies offer a platform for social change through transitional justice? To test my research questions through process tracing, I determined which observations provided diagnostic evidence to support causation. To determine if observations are suitable for diagnostic evidence, the research must rely on prior knowledge (Collier 2010).

Some studies are precise about the prior knowledge used to make inference, while others rely on a wider literature to understand theoretical background. Reconstructing the theoretical starting point of a study can aid in better understanding the framework of the research and determine which CPOs actually predict the outcome of the study. Therefore, I started with a narrative or timeline that listed the sequence of events and explored causal ideas embedded in that narrative. This narrative included the chronology of policy changes during the Trump and Biden administrations that occurred throughout the COVID-19 pandemic from January 1, 2020 through December 31, 2021, in conjunction with prior knowledge of state violence and transitional justice case studies implemented worldwide. I was then be able to consider the kinds of evidence that may confirm or
disconfirm my research questions and identify the appropriate process tracing test to
determine causal inference.

Collier (2010) lays out four empirical tests to determine causal inference that are
classified according to whether passing the test is necessary and/or sufficient for
accepting the inference. These tests include: straw-in-the-wind, hoop, smoking-gun, and
doubly decisive (See Table 1). Straw-in-the-wind tests do not provide a necessary or a
sufficient criterion for accepting or rejecting a hypothesis and they only weaken rival
hypotheses slightly, but they do provide valuable benchmarks by giving an initial
assessment of a hypothesis. Hoop tests do not confirm a hypothesis, but they can
eliminate it. Passing hoop tests has stronger effects on rival hypothesis than the straw-in-
the-wind tests, such as weakening their plausibility. Smoking-gun tests provide sufficient
but not necessary criterion for accepting the causal inference. While the test can strongly
support the hypothesis, failing the test does not reject it but substantially weakens rival
hypotheses. Lastly, the double decisive test has the potential to confirm one hypothesis
and eliminate all others as they meet both the necessary and sufficient standard for
establishing causation. This is accomplished by combining any of the previous three tests
to support one hypothesis and eliminate others (Collier 2010). For this study, I utilize the
double decisive test. Employing multiple tests allows for a stronger examination of
events that follow policy change. Having multiple tests will better allow the investigation
of not only the hypothesis that policy changes through opposing presidential
administrations have measurable impacts on incarcerated populations, but of rival
hypotheses as well. It allows me to consider alternative influences on the well-being of
this population. For example, the straw-in-the wind test is used to provide an initial assessment of the research questions while the smoking-gun test is used to better explore alternative causes of harm while still supporting the hypothesis that the policy changes implement harm. The ‘smoking gun’ metaphor conveys that the suspect holding the gun is presumed guilty but, in this study, we cannot assume that those not holding the metaphoric gun are presumed innocent. Combining these tests allow for the examination of the harm perpetrated against incarcerated people in the United States and provides a stronger investigation to the causation of such harm. The conjunction of tests serves to eliminate alternative hypotheses of harm creation while establishing root causation. Using state and federal level data that tracks the number of cases and deaths inside prisons, I can predict whether policies implemented by the federal government showed an increase in cases or deaths. Or, alternatively, if the lack of government response led to an increase in cases or deaths. Both will be examined through this method of process tracing.

**Positionality and Reflexivity**

Part of the motivation and knowledge that drives this research stems from my own positionality and reflexivity derived from a former career working in law enforcement and corrections. Prior to pursing a doctorate degree, I held several positions in the local level of the criminal justice system, including a few years working in a county level jail. My time in that position provided me with a deeper insight into policies similar to those analyzed in this research. While COVID-19 specific policies may not have been initiated during that particular moment, policies that further criminalized and
penalized certain populations were. Policy allowed for prolonged solitary confinement for people with mental health. Policy related to the 287g agreement that allowed correctional officers to partner with U.S. Immigration and Customs Enforcement (ICE) allowed for Latinx inmates to be detained longer without bond until citizenship was determined, regardless of proof of citizenship they may have had with them. Policy allowed inmates to lie on the floor unable to breathe or bleeding out while one officer waited on another officer to respond. In my role within the jail, I experienced mistreatment and harmful conditions that formulated my use of Agamben’s theory of homo sacer to best view the ways in which inmates are considered a population that is cast aside and deprived of the rights and privileges of citizenship; a population that society can justifiably let die.

From the beginning of that career, in the early days of the Correctional Officer Training Academy, we were taught that inmates are to be referred to as inmate, not by name. Once a person is brought to the jail, they are stripped of their own identity and labeled inmate, a dehumanizing gesture for the correctional officers. The jail was always overcrowded, with people sleeping on the floor as there were more people incarcerated than there were beds. Cells that were meant to hold two were holding four. The common spaces were unclean, trash piled up in cells, and there were rarely attempts to properly sanitize, both by inmates and staff. One night as I came onto shift, the hand sanitizer that was available to staff was removed and we were told we were not able to bring any into the facility because it was a security risk for the inmates. I watched and even participated in restraining and physically dragging people to solitary confinement as a form of mental
health treatment because their mental state was seen as a form of noncompliance. I handed women pieces of food through a pie slot who were stripped naked, put into a cell, and not even allowed a tray of food. I stood by as medical staff refused to speak with an inmate complaining of sickness or pain. I watched as those same inmates spent the night curled up on the cold concrete floor crying out for help, for some relief. Often, staff would comment on how they were just complaining, or how they should not have chosen to do drugs or commit crime. When I was assigned to a pod and would go cell door to cell door for headcount at the beginning of the shift, I would hear the stories of how they were locked down and unable to leave their cell for 24 hours, because there was not enough staff. The staff shortage meant there were not enough officers to provide the supervision required to let inmates out of their cell to throw away trash, to use the phone, to take a shower, or to have recreational time.

The experiences and knowledge gained from my law enforcement career offers a deeper insight and capability to critique the daily operation procedures and policy decisions that impact people incarcerated. Further, through my time on patrol making arrests and in corrections following arrests, I saw the strong arm of the carceral state and the large impacts of mass incarceration on the local level. The more than 3200 local jails in the US and the millions of people that come in and out of those jails each year speak to the role the county jail plays in the overall picture of incarceration in America. With the county jail being the first stop for most people involved in the criminal justice system, it offers the best platform to view the ways in which those incarcerated are exposed to violence.
These experiences have colored how I read policy related to prison and incarcerated people. On the one hand, having seen, heard, and experienced life inside jail, the policies and experiences during the COVID-19 pandemic that I am reading for this research provide me with deeper insight that is more than just a thought exercise. On the other hand, because of seeing, hearing, and experiencing so many bad experiences, it is much more difficult to approach the material dispassionately. Therefore, in doing this research I have a harder time understanding counter-perspectives. Through writing this dissertation I took time to critically reflect on my position as part of the very system that I am critiquing in this work. I consciously worked to remain neutral and to set aside my own views and reactions to listen to the perspectives of the stories I read following policy implementation. It was difficult to remain totally objective and to set aside my personal experience, and to refrain from taking an insider position. Therefore, I relied strictly on the snapshot moments I pulled through thematic analysis and process tracing as the narrative that drove this research.
CHAPTER FIVE

LAW AND GOVERNANCE

The COVID-19 pandemic introduced numerous unprecedented political, social, and economic challenges that resulted in unprecedented responses by policy makers. As result, existing inequalities and injustices rooted in a dense history of structural and institutional violence were uncovered and exacerbated. Social and economic restrictions were put into place to curb the spread of the virus. These restrictions disproportionately affected the most vulnerable populations, particularly populations that have historically held a lower social status such as those incarcerated in US prisons. In the United States, the inmate population is disproportionately made up of poor, people of color. This is a pattern that is rooted in the country’s long history of racism and white supremacy. This cycle continues as there have been no meaningful changes to policing practices and no positive changes to policy that could reduce the longer sentences.

In the absence of a coordinated national response to the COVID-19 pandemic, state officials were pressured to adopt policies to protect inmates incarcerated in their state operated prison system. Because the United States divides political power between the federal government and the states in which both political divisions have the power to make and enforce laws and both have autonomy, the federal government was able to take a hands-off approach to the COVID-19 state of emergency. Further, the US prison system is organized in a way that grants individual states control over state prisons. With the existence of federal, state, and privately owned and operated prisons came a patchwork of uncoordinated response efforts and disjointed information and resource access. As result,
the response to COVID-19 varied across prison facilities and across the states. According to a study by Prison Policy Initiative (2021), in general, lawmakers “failed to slow the spread of the coronavirus, causing incarcerated people to get sick and die at a rate unparalleled in the general public”, but some individual state policy makers did recognize the urgency of the pandemic and took actions slowing the spread and taking steps to reduce mass incarceration (Prison Policy Initiative 2022).

Federal administrative laws—in the form of rules, regulations, procedures, and polices—derive from the President, the Executive Branch, and independent regulatory agencies. Executive agencies are the main agencies of the federal government whose leaders are also members of the president’s cabinet. The cabinet members serve as advisors to the president; therefore, the presidential administration can impact policy directions. Independent regulatory agencies are federal agencies established by Congress that has some independence from the President. These agencies are not represented in the cabinet and are not part of the Executive Office. For this dissertation, I analyze policy implementations from each level of agency such as the President’s executive orders, the Department of Justice, the Bureau of Prisons, and individual state regulatory agencies that operate state prisons.

Under the Tenth Amendment of the US Constitution, states are granted powers that are not reserved for the Federal government (White House 2021). Local law enforcement agencies and some jails, prisons, and correctional facilities fall under the oversight of state governments, which offers its own written constitution and three-branch—executive, legislative, and judicial—system allowing for state specific policies.
and procedure. More specifically, this allowed for differing responses to the COVID-19 outbreaks in state operated prisons across the United States.

The United States has about 18,000 state and federal correctional institutions that take a number of forms and titles (Fuller, 2021). This includes federally operated prisons and a variety of facilities—correctional facilities or institutions, rehabilitative facilities, work camps, prisons, juvenile institutions, etc.—operated at the state level. The difference between state and federal prisons, and ways in which they are ran and operated, is the government bodies that manage them. State prisons operate under the jurisdiction of the state government in which the state manages the facility. This includes funding from state tax money, allocation of resources, daily operating procedures, and—in the case of this dissertation—response to the control of disease and viruses. Simply put, people who have been convicted of violating a state law are sentenced to state prison. The number of facilities vary by state. For example, Michigan has 39 state operated facilities while Delaware has four, with most other states falling somewhere in-between (Fuller, 2021).

People who have been convicted of a federal offense or awaiting trial for federal offenses are housed in federal prisons. Established originally as the Three Prisons Act (1891), the number of federally operated prisons grew as result of law and policy changes. Later, established as the Bureau of Prisons by Congress in 1930 the number of prisons grew from 3 to 14, then to 44 as the Bureau began operating facilities with differing security levels. With changes to federal law enforcement efforts and new legislation in the 1980s, such as the Sentencing Reform Act of 1984 and minimum sentencing provisions in 1986, 1988, and 1990, federal prisons increased to 62. Following
the War on drugs and illegal immigration, conviction rates continued to rise and by the end of 1990s, BOP operated more than 95 institutions (Federal Bureau of Prisons 2021). Today, the federal Bureau of Prisons (BOP) holds America’s largest prison population for one agency at over 157,000 inmates housed in 122 facilities (Federal Bureau of Prisons 2021). The response to COVID-19 cases within its facilities is typical “of the grim conditions and bungled responses at federal lockups across the country” (Blakinger and Hamilton 2020). The Marshall Project found that the BOP was not only ill prepared for the pandemic and slow to respond, but that top officials took measures that contributed to the spread of the virus. Failing to follow a pandemic response plan and concealing the extent of the outbreak by limiting testing are examples of ways policy initiatives, or lack thereof, further harmed people incarcerated during the pandemic.

**Federalism and its Importance to COVID-19**

As the United States operates on this vision of federalism in which both the federal and state governments have the power to make legal decisions in the wake of COVID-19, the politicization of the pandemic and the responses that followed proved to be problematic as shown with the rising cases and deaths. The reliance on state actors was a pragmatic institutional choice because state level initiatives “are by their nature partial and porous” and “hampered by the lack of uniformity and certainty that could come from a federal pandemic response” (Knauer 2020). State actors are ill-suited to respond on their own to a novel virus. However, as we saw during 2020 and 2021 the federal government overlooked the 2 million people incarcerated in the United States, leaving state and local agencies
scrambling to find solutions. Federalism, in this case, provided the platform for new forms of state violence through the lack of protection to an already vulnerable population.

The lived experience of the COVID-19 pandemic for prisoners varied depending on jurisdiction, each having imposed different mitigation efforts. The varying responses highlighted the limitations of federalism and the challenges faced by vulnerable populations when the federal government hands off responsibility to state and local actors. Failing to adopt uniform measures among facilities across the country placed hundreds of thousands of people at risk and contributed to the spread of the virus. For example, for much of the pandemic US Marshals continued to transport inmates to and from prisons across the country, knowingly spreading COVID-19. A worker in the Pollock federal prison reported that there were no COVID-19 positive inmates until a US Marshal transportation van with twelve inmates pulled into their facility. No one in the van wore masks or other protective gear, and the inmates had not been tested for COVID-19 (Hamilton and Blakinger 2020). When tested at the Pollock prison, four of the inmates were positive for coronavirus. The US Marshals Service is responsible for transporting people around the federal prison system, spreading all across the United States. They are not responsible for putting inmates in quarantine or testing them prior to transportation. Therefore, the virus was spread literally around the country. I question whether the spread of the virus could have been greatly reduced if federal laws, such as halting the transportation of inmates were put into place. Regardless of the policies within federal prisons, if state prisons or local jails did not have protective policy in place, the spread
will continue. The transportation by federal agents was merely the vehicle that transported COVID-19 from facility to facility.

The goal of federalism in disaster relief policy and pandemic planning is to take a “all-hands-on-deck” approach in which state authorities take the lead in local emergencies with the federal government’s financial support and resources (Knauer 2020). However, what if the federal government is ill-prepared to respond to the COVID-19 pandemic because of conflicting political priorities and, under federalism, leaves the state without the needed support? With their increase in resources as compared to state agencies, federal agencies such as the Department of Justice (DOJ), Bureau of Prisons (BOP), and the National Institute of Corrections, could offer support by not only doing their part to reduce the spread of COVID-19 outbreaks between facilities, but by offering guidance and resources through consistent, federally supported policy initiatives.

Federalism is central to the plan for disaster relief and emergency responses in the United States, which is organized by a tiered, top-down response that enlists federal, state, and local levels of government. However, these plans often fall short in their execution. Following the terrorist attacks on September 11, 2001, protocols for national preparedness and response were put into place beginning with President George W. Bush’s Homeland Security Presidential Directive-5 (HSPD-5), which was meant to enhance the ability of the United States to manage domestic incidents by incorporating a national incident management system (NIMS) (Knauer 2020; Department of Homeland Security 2003).
HSPD-5 led to the development of a National Response Framework (NRF) and the Emergency Support Functions (ESFs), also through Homeland Security. In 2005, George W. Bush enacted the National Strategy for Pandemic Influenza and it’s coincided 233-page Implementation Plan (2006), along with the 2005 Department of Health and Human Services Pandemic Influenza Plan. Finally, Congress passed, and President Trump signed, the Pandemic and All-Hazards Preparedness and Advancing Innovation Act of 2019. Over the last two decades, plans have been in place to assist and guide the COVID-19 pandemic response. While these plans did not address COVID-19 specifically, the plans did address avian flu, the H1N1 pandemic, Zika virus, and Ebola outbreaks, all of which could have better prepared the United States in responding to and reducing the spread of the coronavirus. However, these plans were overlooked.

Each of these policies, frameworks, and initiatives insinuate a strong federal leadership in a pandemic response. However, in the case of COVID-19 this was not the case. Furthermore, for the purpose of this research, after reviewing each of these policies I found that there was only one plan that even briefly mentioned the handling of inmates, prisons, or other correctional institutions. In the Department of Health and Human Services (HSS) Pandemic Influenza Plan (2005), when setting parameters around outbreak control, they question whether the policy should be implemented in prisons or other settings where high spread may occur as part of their unresolved issues. Further, when laying out the components of the national influenza surveillance system, they define an institution as a “nursing home, hospital, prison, school, etc.” (U.S. Department of Health and Human Services 2005: S1-13). While there is no guidance or
recommendation for addressing the spread of disease or virus within the confinements of prison walls, the mere mentioning of their existence is a step forward for recognition of the needs of over a million people often forgotten and overlooked during states of emergency.

**Governance and The State of Exception**

In the *Origins of Totalitarianism* (1951), Arendt argues that the stateless were without rights, and that it is better to be a criminal who at least had some rights and protections. Specifically, she states that “a criminal offense becomes the best opportunity to regain some kind of human equality, even if it be as a recognized exception to the norm” (286). This exception is provided by law. Law defines social status, who is protected under citizenship and who is the exception. But how much truth is here? While prisoners are still considered citizens of the United States in some respects, many rights are stripped including rights that define our nation as democratic, such as losing the right to freedom and to the right to vote. The criminal legal system deprives inmates of all but the most minimal constitutional protections (Arnold 2018). Further, we have seen historically through the preparedness and response policies implemented to protect citizens from disease and viruses, inmates were often overlooked and even ignored. This was shown again through the COVID-19 global pandemic. Arendt goes on to say that:

“We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights. Our political life rests on the assumption that we can produce equality through organization, because man can act in and change and build a common world, together with his equals and only with his equals” (1951: 301).
The institutions of the United States has systematically left nearly 2 million people incarcerated, losing many rights of citizenship, including the right to be protected during a global pandemic. The lives of inmates have been expended as law has the power to identify the life of *homo sacer*, a life deprived of rights and deprived of protection. Political life, thus, rests on those who have the power to define who is included and who is excluded as worthy human beings, in this case, as labeled as breaking the social contract of laws. It is important to note that many people incarcerated are not because of a criminal act but because of the criminalization of their social status as poor and/or of color. Through criminal justice efforts such as the War on Drugs, broken windows policing, and stop and frisk, already marginalized groups of people were targeted. Laws and policies such as these led to the mass incarceration that was disproportionately made up of poor people of color. These populations were essentially made into foreigners when placed in prison, removed, and hidden from society. As result, they were overlooked during the COVID-19 pandemic and placed at a greater risk of contracting the novel virus.
CHAPTER SIX

HOME CONFINEMENT POLICY AND PRISON RELEASE

Prisons only amplify the spread of infectious diseases because of overcrowding within already unsanitary living conditions. As result, in the first year of the pandemic COVID-19 took the lives of inmates at higher rates than the general population.

Immediate action to reduce the number of people behind bars would have only had a positive impact on slowing the spread of COVID-19, which could become standard practice in criminal justice policy to reduce harm caused by mass incarceration. Through the implementation of home confinement policies whether at the federal level under the CARES Act (discussed in greater detail later in this chapter) or compassion release, or at the state level it becomes apparent that policies do no good if they are not enforced in an efficient, timely manner (see Figure 6.1 for a timeline relevant to home confinement policy). Furthermore, they must continue to be enforced to see the greatest impact.

From the start of the outbreak, incarcerated people were uniquely vulnerable to the spread of the COVID-19 virus as result of their close quarters, confined living conditions and higher rates of preexisting health problems. Historically, prisons are epicenters for virus and disease transmission as result of poor sanitation, poor ventilation, and overcrowding. Further, the history of social determinants of poor public health has led to the incarceration of populations who are disproportionately composed of people of color, people with higher rates of preexisting health conditions, and people with stigmatized behavioral health disorders (Henry, 2020; Nowotny, Bailey, Omori, and Brinkley-Rubinstein 2020).
Figure 6.1 shows a timeline relevant to home confinement policy as it reflects my thematic analysis and process tracing.
Many people incarcerated in the United States have chronic health conditions, “such as high blood pressure, asthma, cancer, tuberculosis, hepatitis C, and HIV, making them particularly vulnerable to communicable diseases” (Nowotny et. al 2020). Further, a harsh history of sentencing policies has led to a prison population that is aging, with 11% of the population 55 years old or older, placing over 165,000 people at great risk for dying of COVID-19.

Additionally, COVID-19 outbreaks in prison settings can be detrimental to the health of people incarcerated and beyond. Such outbreaks may overwhelm prison healthcare services and resources, placing additional burdens on aid from facilities in the community. Furthermore, with an estimated 30 million people being released annually from prison globally, “prisons are a vector for community transmission that will disproportionately impact marginalized communities” (Kinner, et al. 2020). Few US prisons have health systems that are equipped to accommodate the surge in “sick calls” placed by inmates to medical staff during an outbreak. Although the US Constitution guarantees a right to health care for people incarcerated, “available medical care varies greatly with regard to both access and quality” (Hawks, Woolhandler, and McCormick 2020, 1041).

By definition, prison health is public health although prisons are often excluded or treated separately from public health efforts. The COVID-19 crisis in facilities across the country—and the response that followed—exacerbates the disconnect between life behind bars and lives in the community and the porous borders between prisons and marginalized communities. The obvious solution to reducing these circumstances is
reducing the amount of people overcrowding federal and state operated facilities across the country and safely returning people to communities before increasing risks of transmission. Decarceration attempts are aimed at reducing the number of people incarcerated in jails and prisons. Decarceration policies allow inmates to transition back into their communities and to access community resources, freeing up resources within the prison, therefore making it a vital part of the overall public health system in the United States.

The American Public Health Association (AJPH) identified 10 public health priorities for responding to COVID-19 in prisons, many of which were also implemented in communities across the nation. These steps include improving prison ventilation systems, ensuring appropriate mask use, limiting inmate transfers between facilities, strengthening partnerships between public health departments and prison leadership, introducing or maintaining effective occupational health programs, ensuring access to advance care planning processes, strengthening partnerships between prison leadership and incarcerated people, providing emergency mental health support for prison residents and staff, committing to public accountability, and accelerating population reduction coupled with community reentry support (Barnet, Kwan, and Williams 2021). Despite guidelines laid out by public health officials and the CDC, lack of coordination and variation in prison system responses have led to poor outcomes that often place inmates in positions of greater vulnerability of contraction. The differing implementation of decarceration strategies is an example of how the lack of federally coordinated response
efforts based on differing prison policy initiatives that vary from prison type and jurisdiction can be harmful to peoples incarcerated.

Coordinated federal response efforts can be impacted by orders coming from the top down. For example, on January 18, 2021 Former President Trump signed into order EO13979 Ensuring Democratic Accountability in Agency Rulemaking. Simply, this executive order regulates who can make federal rules and regulations. The order was intended to ensure that the officials responsible for making and executing law and policy are held accountable to the American people to successfully govern federal agencies. More so, the order meant that regulations would have to conform to the new president’s agenda, not to the career, as executive agency rulemaking should now only be initiated by the president, or a Presidential appointee (Lofchie 2021; Slattery 2021).

President Biden revoked the order on February 24, 2021. Revoking this order removes the clause that it must be democratically appointed officials who are setting the rules, making it difficult to know who to hold accountable for executive branch agency actions. While this executive order did raise the problem that allowing only presidential elected officials to be involved in rulemaking further promotes one political agenda, and by removing the order, Biden could have allowed for more voices to be involved in rulemaking, I include this executive order in this dissertation for two main reasons. First, removing this executive order removed a level of accountability that came from assigning specific people the responsibility to make quick, lasting decision to combat the spread of COVID-19, therefore knowing who to hold responsible when protection for the American people was not met. Which leads to my second reason, the revocation of this order is
important because this order precludes application to the Federal Bureau of Prisons (BOP), excluding rulemaking under the Trump administration and removing any administrative changes during the Biden administration.

The exemption from executive orders highlights how inmates are specifically excluded from the response and protection of the state. According to Agamben, inclusion through exclusion matters as we are rendering the lives of inmates bare. Inmates across the nation are not exempt from the detrimental impacts of the COVID-19 pandemic, rather they are being held in position in which they cannot protect themselves from its rapid spread. By remaining locked-up and unable to protect themselves, they rely on the state to offer refuge. Excluding this specific population from protection under executive orders such as 13979, excludes responsibility by the state to offer resources to criminalized populations, allocating resources—such as personal protection equipment and testing kits—only to law abiding citizens. Policy is often a response to states of emergency to reduce the amount of damage caused to the public. In the moment of COVID-19, policies excluding the prison population only justifies the exemption of care by the state and the ability of the sovereign state to exclude certain rules in the name of protecting the public good.

**Home Confinement Overview**

Home confinement as a means of incarceration “has been around for decades, allowing some inmates, even those who were from high security prisons, to serve a percentage of their prison term on strict conditions while living at home” (Pavlo, 2021). The pandemic, along with the rising numbers of death and illness at federal correctional
institutions, led to new legislation that was put into place to curb the spread of the infection. This included the Coronavirus Aid, Relief, and Economic Security Act, better known as the CARES Act. The 116th Congress passed the CARES Act in March 2020. This was the third and largest major legislative initiative to address COVID-19, following the Coronavirus Preparedness and Response Supplemental Appropriations Act and the Families First Coronavirus Response Act (Moss, et. al 2020). The CARES Act addresses a variety of provisions focused on the government’s response to the COVID-19 outbreak that relate to the health and wellbeing of people such as paid sick leave, insurance coverage of COVID-19 testing, support for broader use of telehealth services, and reauthorization to programs typically seen in rural areas such as the Temporary Assistance for Needy Families (TANF) program. It also allocated funds to assistance programs such as the supplemental nutrition assistance program (SNAP) and the Federal Emergency Management Agency (FEMA) to further assist families impacted. Further, funding was made possible for increased spending by the Federal Bureau of Prisons to account for staff personal protective equipment and supplies relate to coronavirus, clean work and living environments, and inmate medical care and supplies related to the virus. In fact, the CARES Act brought several changes to the daily operations of state and federal prisons.

Home confinement authority within the BOP is addressed specifically under the CARES Act based on “the density of the inmate population, the high traffic, the high volume of inmates, the high rate of turnover of inmates and personnel, and the number of high security areas” within the BOP facilities (Coronavirus Aid, Relief, and Economic

95
Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. Section 12003 (b)). This act grants the Attorney General the authorization to declare the time in which state of emergency conditions will affect the function of the Bureau, thus allowing the director of the BOP to lengthen the amount of time an inmate may be placed on home confinement. Then, in April 2020 Attorney General William Barr issued a memorandum under the CARES Act to declare a state of emergency within the BOP, prioritizing and enforcing home confinement where appropriate (Pavlo 2021; Barr 2020). This declaration had the potential to make the CARES Act one of the most influential policy initiatives in protecting prison populations from COVID-19 infections.

Eligibility for home confinement considers the age and vulnerability of the inmate to COVID-19 in accordance with the CDC, the security level of the facility in which the inmate is housed, the inmate's conduct in prison, the inmate’s score under the Prisoner Assessment Tool Targeting Estimated Risk and Needs (PATTERN), and the inmate’s crime of conviction and their potential danger to the community. Additionally, home confinement should be granted only when the Bureau of Prisons (BOP) has determined that the transfer is not likely to increase the inmate’s risk of contracting COVID-19.

On April 3, 2020 the Attorney General issued a second memorandum to the BOP requesting the Bureau give priority in the implementation of new standards under the CARES Act to the most vulnerable inmates at the most affected facilities. At the time of the memorandum, these facilities included FCI Oakdale, FCI Danbury, and FCI Elkton, where COVID-19 was materially affecting operations (Pavlo 2021; Barr 2020) .
FCI Oakdale, in Louisiana, became an early hotspot for infection as it failed to promptly screen inmates and staff and issue face covering requirements. This delay led to a quick rise in infection rates. Further, Oakdale failed to comply with BOP and CDC isolation and quarantine guidance and did not advise staff who supervised these inmates that they would be interacting with COVID-19 positive inmates (U.S. Department of Justice Office of the Inspector General 2020). Nearly 100 asymptomatic inmates who tested positive for COVID-19 were still using public showers, telephones, and other common areas within the facility (Hymes 2020). The delay in policy and implementation resulted in rapid spread, staff shortages, inmate hospitalization and five inmate deaths in the first month of the pandemic (Neff and Blakinger 2020).

In Connecticut, more than half the women incarcerated in FCI Danbury tested positive for COVID-19. According to allegations, prison officials “returned more than a dozen inmates with COVID-19 back into dorms and other inmates after they tested positive” and did not isolate them for more than 24 hours (Dunavin 2022). Many experienced symptoms without being tested or removed from crowded spaces. In 2020 a class action lawsuit was filed seeking to require federal officials to provide emergency measures to protect men and women incarcerated in FCI Danbury (Yale Law School 2020). According to the suit, the people housed in FCI Danbury are among the most vulnerable to COVID-19 because they live in close quarters “with units containing more than 100 people lined up in rows of bunk beds, and with communal bathrooms and dining areas” (Yale Law School 2020). At one of Danbury’s women’s facilities, 34 of 50
inmates were infected. In December 2021, one in 10 inmates tested positive at FCI Danbury facilities (Rabin 2021).

By April 2020, 37 inmates were hospitalized and another 71 were isolated at the Elkton prison with COVID-19 symptoms. Having such a high number of inmates in the hospital required a high number of staff to guard them, leaving staff within the prison short. Therefore, the Ohio National guard was deployed to FCI Elkton to help with staffing (Polansky and Trexler 2020). With only one day of formal training before interacting with prisoners, the guard members “could be prone to mistakes that could put them or the prisoners in danger” (Lartey 2020). Increased use of force on inmates caused further harm at the hands of the state.

At the end of 2021, despite the problems outlined above and with increased numbers of infections, hospitalizations, and deaths in prisons across the nation, only about 5 percent of people serving federal sentences had been granted home confinement (Rabin 2021). At FCI Elkton, where nearly all 2300 inmates were infected, only six inmates, as of July 2021, had been transferred to home confinement; nine inmates had died (Pavlo 2021). Home confinement has been an option for inmates who are too medically fragile for incarceration, even prior to the COVID-19 pandemic. The broadened scope of eligibility for home confinement as defined under the CARES Act could have become a tool that, if used properly and as intended, could have slowed the spread of infection, and saved lives. Failure to release more people at quicker rates under the home confinement clauses points to the lives of those incarcerated as the bare life, as homo sacer. The political existence of those incarcerated in prisons across the United
States has been removed by those who have power to define who is included and who is excluded as worthy human beings. In this case, whose lives take precedence in protection and safety and who can be left to die (Agamben 1995).

**Former President Donald Trump**

People incarcerated in federal prisons who sought early release during the pandemic could do so in two main ways: through home confinement or through compassionate release (more below). Both options allow low-risk offenders to finish their sentence at home or other alternatives to incarceration, such as in Residential Reentry Management Centers (RRCs) better known as halfway houses (Santos 2020). But, on January 15, 2021, during the final days of the Trump Administration, then-Deputy Assistant Attorney General Jennifer Mascott with the Office of Legal Counsel (OLC) issued a memorandum opinion which stated that inmates who had been released on home confinement under the CARES Act would be required to return to prison within 30 days after the COVID-19 emergency declaration had ended. Furthermore, this memorandum pointed out that 18 US Code section 3621 instructed BOP to maintain custody of a person sentenced to a term with BOP until “the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624” (Mascott 2021). It was the responsibility of the BOP to designate the location of the inmate’s term of imprisonment. If inmates did not qualify for home confinement, they were to be returned to a facility within 30 days of the expiration of the CARES Act, when the national state of emergency under the National Emergencies Act with respect to the Coronavirus Disease 2019 (COVID-19) had ended.
A memorandum has specific implications, setting it apart from other legal terms. A memorandum opinion allows for affirmation or modification to actions of a court decision; however, it does not offer precedential value. It is not published and is not cited or relied on for future, unrelated cases. (Tennessee State Courts 2022). This memorandum is only applicable for this moment, during the COVID-19 pandemic.

The memorandum opinion released by the OLC highlighted the uncertainties surrounding the implementation and expiration of the CARES Act. Provisions to the CARES Act left room for ambiguity and uncertainties of when and how home confinement should be implemented. By leaving the deadline open—for offenders who would otherwise not qualify for home confinement without the CARES Act—to fall within 30 days of the CARES Act expiration left many offenders in limbo. Inmates and their families were unsure if and when they would be required to return to prison, adding increased stress and uncertainties during a already harmful pandemic. Policy makers and BOP administration were also left in moments of uncertainty as order and policy implementation remained unclear as it brought continual changes.

Five days after the memorandum opinion, President Joe Biden took office. As of January 20, 2021 the pandemic was still spreading across the nation and the state of emergency was still in place. The newly appointed Biden administration was faced with the option to reverse the Trump OLC opinion to allow the people released on home confinement to remain on home confinement, to grant clemency to some or all prisoners released on home confinement, or to follow the OLC opinion to reincarcerate those on home confinement at the close of the state of emergency.
President Joe Biden

During the first several months in office, the Biden Administration did not present any definite decisions about the government’s potential plan for people placed on home confinement under the CARES Act. It was unclear if the Biden Administration would allow people to remain on home confinement or be forced to return to prison. According to American Civil Liberties Union (ACLU), this left thousands of people in limbo, wondering whether, and when, they would be forced back to prison following the COVID-19 pandemic. ACLU’s staff attorney Emma Andersson stated, “(t)he BOP told incarcerated people, their families, the American public, and Congress that if people followed the rules on home confinement, they would be allowed to rebuild their lives outside of prison” ACLU 2021). The shift in presidential administration and lack of committed plans by the Biden Administration raised questions of uncertainty, until September 2021.

On September 13, 2021 the Biden administration began the clemency process for some inmates released on home confinement under the CARES Act (Hoffman and Carrega 2021; Simmerson and Zuckerman 2021; Stein, 2021). This process began with nonviolent drug offenders on home confinement with four years or fewer remaining on their sentence. To be eligible to remain on home confinement, former inmates had to submit commutation applications, or an application requesting a reduced or lessened sentence. Additionally, some eligible people on home confinement could request a sentence commutation through compassionate release. This statute allows the court to reduce the term of imprisonment and/or impose a term of probation or supervised release.
if the court finds that, (1) “extraordinary and compelling reasons warrant such a reduction; or the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned…and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission” (Legal Information Institute 2021 ). The Compassionate Release/Reduction in Sentence allows an inmate with a minimum term sentence to be immediately eligible for parole by reducing the sentence to time served. The Comprehensive Crime Control Act of 1984 allows the Director of the BOP to reduce the term of a sentence for “particularly extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of the sentencing” (Federal Bureau of Prisons 2019). Unlike parole, compassionate release is based on extraordinary circumstances such as a medical concern like a terminal illness or if the inmate is elderly not on the inmate’s behavior.

In a revised opinion on December 21, 2021, then-Assistant Attorney General Christopher Schroeder with the OLC stated that the OLC departed from the view of their January 2021 opinion concerning 12003(b)(2) of the CARES Act. The OLC now concluded that section 12003(b)(2) and the Bureau’s preexisting authorities “are better read to give the Bureau discretion to permit prisoners in extended home confinement to remain there” (Schroeder 2021). In other words, the OLC’s new interpretation under the Biden Administration is that the CARES Act does not require inmates on home
confinement to return to prison when the state of emergency ends. However, as the pandemic worsened, fewer people were being released.

**Federal Bureau of Prisons**

As tens of thousands of federal prisoners applied for clemency and compassionate release in 2020, the system became backlogged, nearly 80% of motions were denied in 2020, and many motions were ignored (Simmerson and Spaeder 2021; Blakinger and Neff 2021; Neff and Blackinger 2020). With a change in BOP director came fewer approvals for compassionate release. In 2019 BOP approved 55 requests, while in 2020 only 36, despite the growing number of applicants: from 1,735 in 2019 to nearly 31,000 after the virus hit in March 2020 (Blakinger and Neff 2021). Michael Carvajal was appointed as Director of BOP by the Trump administration’s attorney general in February 2020. During his short time as director, he faced scrutiny over the handling of the coronavirus pandemic (Pietsch and Zapotosky 2022). With Carvajal acting as director over the agency for the majority of the pandemic, “about one in three Bureau of Prisons inmates has tested positive for the virus…a rate nearly double that of the general U.S. population” (Pietsch and Zapotosky 2022). Senator Richard Durbin requested Attorney General Merrick Garland to fire Carvajal following an investigation by the Associated Press that provided examples of misconduct within the Bureau that reached beyond the pandemic to include abuse, corruption, sexual abuse, murder, and allegations of cash bribes for smuggling contraband (Pietsch and Zapotosky 2022; Balsamo and Sisak 2021). Durbin recognized that with a new administration came new opportunity to reform the criminal justice system and stated that “it’s clear that there is much going wrong in our
federal prisons, and we urgently need to fix it” (Pietsch and Zapotosky 2022). With the BOP’s slow response, with less than 3% of medically vulnerable federal prisoners being sent home as of June 2020, and failure to follow its own pandemic response plan, the BOP drew scrutiny from Congress. Lawmakers questioned how the outbreak spread uncontrollably through BOP facilities despite the $100 million allotted for pandemic response funding. The American Federation of Government Employees Council of Prison Locals, which represents federal prison workers, claimed that Carvajal and the BOP leadership made the virus spread worse rather than containing it, and as of June 2020, prisoners filed at least 11 class-action lawsuits against Carvajal and wardens seeking improved conditions and to compel releases (Hamilton and Blakinger 2020). This led federal court officials to order releases. Federal Judge James Gwin ordered the BOP to release or transfer 837 medically vulnerable inmates from Federal Correctional Institute Elkton, which had the highest number of staff cases among the affected 61 federal prisons and reentry centers and the fourth highest number of inmates testing positive in federal prison by April 2020 (Bobby-Gilbert 2020). Still, the BOP declared that only five people met the criteria for release (Hamilton and Blakinger 2020). Only after an Appeals Court Judge denied the request to stall the release of the inmates at Elkton were the inmates transferred or released (WKYC 2020; NBC News 2020). Similar stories were told across the nation.

On the day of his inauguration, President Biden signed Executive Order 13992: Revocation of Certain Executive Orders Concerning Federal Regulations. This executive order revoked six previous orders issued by former President Donald Trump.
Specifically, this executive order revoked previous executive order 13892, Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, which instructed agencies in the executive branch to act transparently and fairly with respect to conduct and standards. Signed October 9, 2019, the order is intended to make agencies publish rules, policies, and interpretations of law to promote accountability and ensure fairness to avoid “the inherently arbitrary nature of unpublished ad hoc determinations” (Morton v. Ruiz, 415 U.S. 199, 232, 1974; Trump 2019). Simply, this executive order required federal agencies to provide the public with notice of regulations. No person can be held accountable to civil administration, or general operations, enforcement action without prior notice of the enforcing agency in the executive branch. This executive order should promote cooperation between agencies of different jurisdictions, federal, state, or local, promote information sharing, and establish predictable outcomes.

Repealing executive orders such as order 13892, changed regulatory policies that hindered the federal government’s ability to confront and respond to the COVID-19 pandemic. Changing such policies should create opportunities to use law and policy to deliver better outcomes to COVID-19 response, by removing any policies that enables agencies to utilize regulatory instruments detrimental to tackling the pandemic. This is accomplished by removing policies that threaten the ability for the government to respond appropriately. Overall, order 13892 provides the Biden Administration more power and flexibility with enforcing other executive orders. This power trickles down to executive branch agencies such as the Bureau of Prison. While change in executive
orders has prompted the BOP to be transparent, I question whether that transparency and predicted fairness is translated into practice.

Throughout the pandemic, BOP has shown some transparency by publicly posting updated operational levels, modified operations, and statements by the director. In a statement before the Committee on the Judiciary United States Senate on the oversight of the BOP, Director Michael Carvajal publicly discussed the Bureau’s COVID-19 pandemic response, mission and operations. However, BOP stopped putting cases and deaths on reports making it impossible to determine whether case numbers were improving under policy change, or continuing to spread throughout the system.

State Level

Home confinement orders under the CARES Act only apply to federal inmates and federal facilities, leaving the response in other facilities up to that state or local jurisdiction. As of May 2020, researchers found that many local level jails were responding more aggressively to the COVID-19 crisis by drastically cutting populations, while state-controlled prisons hardly made any attempts at reducing numbers of people in their facilities (Wildra and Wagner 2020; Wildra 2022). On average, jails have reduced populations by more than 30% since the onset of the pandemic in March 2020, while state prison systems have reduced its population by only around 5% (Widra and Wagner 2020). Jails house only one-third of the incarcerated population in the United States, meaning the majority are held by state and federal systems (Wildra and Wagner 2020; Sawyer and Wagner 2022). Like jails, state level prisons are overcrowded, leaving it
nearly impossible for inmates to practice social distancing and safely protect themselves from contracting the virus.

Just as local jails can adjust policy, such as issuing early releases or reducing the number of intakes, state prisons have the jurisdiction to do the same. Making changes such as stopping new inmate intakes from county jails or releasing people who are medically vulnerable, elderly, or nearing the end of their sentences could greatly reduce the spread of the coronavirus in prison and protect the lives of not only the inmates, but the community as well. However, when put into practice, the actual population changes were small. Even transferring people in prison to home confinement did not amount to significant changes in reducing population (Widra and Wagner 2020).

As the original COVID-19 strain emerged into the Delta variant which was determined to be more contagious and more deadly, public officials continued to recommend prison populations be decreased as the primary method for reducing infection spread (Barnert, Kwan, and Williams 2021; Widra 2021). Still, numbers of inmates released were low and in states where prison populations did drop there were still too many prisoners to accommodate social distancing or room for isolation and quarantine. For example, during the first year and a half of the pandemic, California reduced the state prison population, by nearly 19%, but as of June 2021, the prisons still held more people than they were designed for at 107% of their maximum capacity (Widra, 2021). Additionally, while many states may have seen a slight drop in their prison populations towards the beginning of the pandemic, many began to grow in 2021. Changes in the number of average monthly releases from prison were short-lived as there were fewer
prison releases than there were over the same amount of time in 2019 and 2020. By October 21, 2021, many state prisons returned to pre-pandemic levels despite the ongoing dangers of COVID-19, such as the onset of the Delta variant. While COVID-19 cases and death rates peaked in late 2020 and early 2021 and the United States saw numbers begin to decline, the cumulative toll of cases and death remained several times higher among the state and federal prison population than the overall national population at 200 deaths per 100,000 inmates as compared to 81 deaths per 100,000 residents of the general US population. (Marquez et al. 2021).

To justify the lack of speedy releases from prisons, criminal justice officials imply that doing so would jeopardize public safety. In other words, saving the lives of people behind bars is not worth risking the lives of those who are not. However, research has shown that historical decarceration attempts in the United States have not only been common, such as in California (1968-1972), Florida (1963-1965), Illinois (1980-1983), Massachusetts (1969), and New York and New Jersey (late 1990s to present), but have shown that doing so does not jeopardize public safety (Wagner 2020). Regardless, states took great precautions in electing to release people on a case-by-case basis which was a slow, tedious, and ineffective method. The attempt was not effective enough to reduce the amount of harm caused to the inmates daily.

Fortunately, some states recognized this ineffective approach and made more appropriate attempts at reducing people within their prisons. For example, New Jersey Governor Murphy followed public health officials’ guidance and signed legislation (S2519) requiring “public health emergency credit” be awarded to inmates and parolees
with less than a year left on their sentences, allowing them to be released early. Murphy also signed to E.O. 124 which released more than 1200 people on parole prior to the end of their sentences. More than 2,000 people were released from New Jersey state prisons in just a few weeks (Widra 2021; New Jersey 2020). Similarly, North Carolina Governor Roy Cooper made plans in February 2021 to release people using discretionary sentence credits, home confinement, and post-release supervision. In a six-month period, 3500 inmates were released early from the state’s custody (Anderson 2021). It should be noted, however, that these changes only came in response to a deal struck by the National Association for the Advancement of Colored People, who stated they would sue over prison conditions during the pandemic on grounds that the conditions violated inmates’ rights under North Carolina state constitution (https://www.acluofnorthcarolina.org/en/cases/nc-naacp-v-cooper-rights-incarcerated-people). Overall, New Jersey, Connecticut and Illinois reduced their prison populations the most at roughly 26% (Herring and Sharma 2021). Prison Policy Initiative provides a more extensive list of state-level policy changes (2022).

Conclusions

In March 2020, the lives of many Americans paused as restaurants, bars, gyms, schools, and offices closed as COVID-19 began to spread through the country. In attempt to slow the spread and protect from the uncertainty of what was to come with the global pandemic, people were told to stay home, a luxury for some. This was not the case for the Bureau of Prisons, who continued business as usual. Social distancing was not an option for those incarcerated but releasing them did not seem like an option either as it was the
Bureau’s business to secure inmates away from society. As the pandemic worsened, officials actually granted fewer releases and daily operations continued as normal (Blakinger and Neff 2021). Over the course of 21 months, only 35,277 inmates were placed on home confinement by BOP (Schroeder, 2021).

Since there is a large percentage of those inmates who pose no threat to society, more inmates could have been released and those who were could have been moved to home confinement much sooner. BOP operates institutions under four security levels, minimum, low, medium, and high, with the majority housed at minimum security. Minimum security inmates may work outside of the compound, may be part of a work-release program, may go to doctors’ appointments in the community with minimum supervision (Pavlo 2021). These people are already partially integrated into the community and could have been placed on home confinement right away.

This dissertation raises the question of whether polices and their impacts constitute state violence. To what extent does lack of quick response and policy follow-through constitute state violence? At the federal and state level, hesitation to enforce policy change and resources available took the lives of thousands of inmates across the United States. Former President Trump, President Biden, the Federal Bureau of Prisons (BOP), and each state Department of Corrections had the scientific evidence and recommendations on COVID-19 that suggested the need to implement early releases and home confinement. Prominent health organizations such as the American Medical Association and the National Academy of Sciences, Engineering, and Medicine (NASEM) have supported and advocated for decarceration (National Academies of
Sciences, Engineering, and Medicine 2020; Barsky, Kung, and Jimenez 2021). Such organizations even suggested medical-legal partnerships (MLPs) as a solution to support health transitions from prison to the community (Barsky, Kung, and Jimenez 2021). These partnerships can foster care by connecting incarnated people with health professionals and community health workers who can advocate on their behalf (Barsky, Kung, and Jimenez 2021). Yet, policies were not implemented nor executed in a timely manner. Guidance for correctional and detention facilities on COVID-19 was given by the CDC, but such recommendations could not be followed because of the shear amount of overcrowding caused by mass incarceration. These recommendations included social distancing, isolation of people suspected of having COVID-10, offering personal protection equipment, and encouraging correctional staff to stay home if sick (CDC 2021). At the end of 2018, “the prison custody population in 25 states and the federal Bureau of Prisons has a total number of prisoners in custody that met or exceeded their minimum number of beds” (EJI 2021). Having more people held in areas they are not designed to hold leads to overcrowding and increased risk of infection. There is not enough space within these facilities to practice social distancing, isolation, or quarantine nor are there enough resources to provide masks and proper sanitation. In prisons where there is space for isolating upon infection, inmates are placed in solitary confinement which has been deemed by human rights organizations as cruel and inhumane. Essentially, they are being punished for becoming sick. I argue that the unwillingness to protect this population is a strong example of institutional and systematic state violence through neglect and depraved indifference.
CHAPTER SEVEN

VACCINE ROLLOUT AND TESTING

When the COVID-19 pandemic began, the federal government implemented policy to control the spread of the virus, though in practice they fell short. Within days of declaring a state of emergency, Trump signed the Coronavirus Aid, Relief, and Economic Security Act (CARES), which specifically addressed the protection of the prison population (116th Congress 2020). However, early in the US vaccination rollout plans, incarcerated people were not prioritized for vaccine distribution (see Figure 7.1 for a timeline relevant to vaccine rollout and testing policies). In his first days, President Biden issued Executive Order on Improving and Expanding Access to Care and Treatments for COVID-19, which included people in care facilities that would receive COVID-19 testing and treatment, but it did not include those incarcerated though they also have an increased risk of contracting and dying from COVID-19. However, prisons—unlike other group quarters—are not widely considered as care facilities such as nursing homes, assisted living, residential treatment facilities, intermediate care for people with disabilities, hospice, or hospitals. Prison operations focus on security as opposed to adequate health care. The security measures taken to detain and monitor people behind bars rarely includes regular screening and protection from disease, infection, or illness. Thus, prior to the development of the vaccine, prisons implemented excessive solitary confinement and suspended most prison programs, visitation, and movement to aid social distancing (Lennon 2021).
Figure 7.1 shows a timeline relevant to vaccine rollout and testing policies as it reflects my thematic analysis and process tracing.
Further, though movement was limited, inmates spent much time in close contact with other inmates and were not always provided masks and other personal protective measures (Lennon 2021).

That does not mean that prisons were entirely ignored. In the early stages of the coronavirus pandemic, public health officials warned wardens “that prisons needed to take precautionary measures against the virus” and that without basic steps “including social distancing, better sanitation, and less crowding, correctional institutions had the potential to become incubators for the virus” (Burkhalter 2021). Regardless, many states chose to take a different approach to responding to the virus. They enacted measures designed to keep the virus out of prison. Despite the old adage that an ounce of prevention is worth a pound of cure, the reality was that the prevention strategy left prisons ill prepared for the eventual outbreaks that occurred, probably because the virus was brought to the prison by prison workers—a condition that appeared by to ill-considered by decision-makers. By focusing on stopping family visitation and some inmate services, prison staff were not prepared to handle outbreaks once the virus got inside the facilities.

This chapter investigates the COVID-19 response policies that directed the distribution of and eligibility for COVID-19 testing and vaccination. More specifically, I layout response differences between the Trump and Biden administrations and state jurisdictions. By exploring the ways in which government officials responded to vaccine and testing distributions, and how this distribution was prioritized among groups of
people, I can illustrate forms of state violence through the hesitation, or even lack, of protection.

**Testing and Contact Tracing**

The Trump administration began preparing for preventative services such as vaccines and testing for COVID-19 with the implementation of the CARES Act, which stated that testing and vaccines would be implemented quickly and covered under the Medicare program (116th Congress 2020). Mass testing on the prison population began in late-April 2020, with only a handful of states, which allowed staff to identify cases sooner and possibly intervene in the spread of the virus through the facility (Aspinwall and Neff 2020). By December 2020, one in every five state and federal prisoners had tested positive for COVID-19; in some states, more than half of the prison population had been infected (Schwartzapfel, Park and Demillo 2020).

The testing and vaccine rollouts came at a moment of transition in the United States as they became available during final months of the Trump administration. On September 29, 2021 the Department of Health and Human Services announced a plan to send 100 million rapid COVID-19 tests to states by the end of year 2021 and vaccine rollouts began in December 2021 (AJMC 2021). A month later, January 20, 2021, President Biden was inaugurated, shifting responsibility to a new political party. The next day, President Biden signed the Executive Order on Ensuring Data-Driven Response to COVID-19. President Biden made it policy to respond to COVID-19 through effective approaches that would be guided by “the best available science and data, including by building back a better public health infrastructure” (Biden 2021). According to the order,
a large part of building a better public health infrastructure is urging the heads of executive departments and agencies to “facilitate the gathering, sharing, and publication of COVID-19 related data” (Biden 2021). This policy pushes for a joint effort across the nation to facilitate informed community decision-making to better understand and respond to the pandemic. Taking this community, holistic approach puts the people first, and alludes what a transitional justice framework can lend to a global pandemic.

Also on January 21, 2021, President Biden issued Executive Order on Establishing the COVID-19 Pandemic Testing Board, which set out to identify barriers faced by some populations to accessing testing and increase testing for these populations. The policy specifically addresses at-risk settings which includes correctional facilities and detention facilities and called attention to the urgent need for testing within these facilities. Adequately testing for COVID-19 in prisons and jails—for both the symptomatic and not—is critical in attempts to identify and slow the spread of the virus through facilities. Additionally, contact tracing can slow the spread by identifying and intercepting contact with additional persons so transmission can be stopped. Contract tracing is a process that identifies, assesses, and manages people who have been exposed to the COVID-19 virus (World Health Organization 2021). This interruption in transmission is crucial in overcrowded facilities such as prisons, especially if we consider the constant movement of people between facilities or areas within facilities. Testing inmates before they leave the area in which they have been held will aid in keeping the virus contained in one area as opposed to risking the spread through the remainder of the facility.
Routine testing and contact tracing in prisons is also important in helping people who are at a higher risk of developing severe symptoms from the virus know they have been exposed sooner so they can receive medical care more quickly. Many people incarcerated have underlying health concerns, making them more susceptible to worsened symptoms (Prison Policy Initiative 2022). However, the distribution of COVID-19 tests was slow and limited for the public in the early stages, and the availability for incarcerated people was delayed (Stagoff-Belfort, Rahman, and Chapman 2021). Through the first several months of the pandemic, there were no national guidelines that ensured screening and contact tracing for people incarcerated or people working within prisons (Williams, Ahalt, Cloud, Augustine, Rorvig, Sears 2020).

**Vaccine Rollout**

As researchers worked to develop a COVID-19 vaccine, policy makers prepared to develop a plan for distribution and implementation. On September 16, 2021 the Trump Administration released Operation Warp Speed (OWS), a distribution plan with the Department of Health and Human Services and Department of Defense that aims to provide COVID-19 vaccines to all Americans (AJMC 2021; HSS 2020). This plan tentatively assumed beginning to rollout vaccines by January 2021. OWS, however, did not include a decision on who would receive the vaccine first, or in what order the limited number of vaccines would be delivered. In October 2020 the Center for Disease Control and Prevention (CDC) began to make recommendations on how federal, state, and local governments should prepare for vaccine distribution in their jurisdictions. These recommendations were based on the research conducted by the Advisory Committee on
Immunization Practices (ACIP), and included a multi-phase rollout system that would administer in waves based on priority and needs as the US supply of COVID-19 vaccines were limited (Dooling et al. 2021). The final decision on vaccine distribution, however, was made by each state. In October 2020, only four states—Delaware, Nebraska, Maryland and New Mexico—specifically listed incarcerated people as part of their Phase 1 priority vaccination recipients (Misra 2021). More states raised priority for incarcerated people as incarcerated people and advocates began to speak out. However, some states—such as Colorado and Vermont—once prioritized inmates to receive vaccinations early in the rollout stage but removed all priority designation “following backlash from conservative commentators” (Misra 2021). This reversal went against what science and data showed about the spread of the virus through carceral institutions.

On December 1, 2020 ACIP recommended that the first phase would be broken up into multiple stages of vaccine distribution, starting with prioritizing health care personnel and residents of long-term care facilities as Phase 1A, people over the age of 75 and frontline essential workers outside of healthcare as Phase 1B, and people aged 65-74 years, people ages 16-64 with high-risk medical conditions, and essential workers who were not already vaccinated as Phase 1C (Dooling 2021). On December 8, three days before the first emergency use vaccine was given, Trump issued Executive Order on Ensuring Access to U.S. Government COVID-19 Vaccines, ensuring Americans “have priority access to free, safe, and effective COVID-19 vaccines” (Trump 2020). This policy further stated that the executive branch shall “ensure that Americans have priority access to United States Government COVID-19 Vaccines and shall ensure that the most
vulnerable United States populations have first access to such vaccines” (Trump 2020). This allowed the government to define who is vulnerable in the United States based on who takes priority in the receiving the limited number of vaccinations distributed. For example, while the federal prison system was recommended as one of the first government agencies to receive the COVID-19 vaccine, this referred only to staff and not to inmates despite the evidence that inmates were getting sick from COVID-19 at higher rates than staff (more on this below; Balsamo and Sisak 2020).

The first vaccines for preventing COVID-19 were authorized on December 11, 2020 by the Food and Drug Administration (FDA) under the emergency use authorization that allowed the Pfizer-BioNTech COVID-19 Vaccine to be distributed. The Pfizer/BioNTech vaccine offers up to 95% protection against the virus (BBC 2020). Just a few days after the Pfizer/BioNTech vaccine received emergency-use authorization (EUA) from the US Food and Drug Administration (FDA), vaccinations began to roll out in phases, beginning with front-line healthcare workers. On December 14, 2020, the first vaccines outside of clinical trial were administered to healthcare workers across the United States (Guarino, Cha, Wood and Witte 2020). Later, two additional COVID-19 vaccines became available for distribution in the United States, starting with Moderna on December 18, 2020, followed by Johnson & Johnson (AJMC 2021). Aside from the exclusion of incarcerated people by some state officials, the state and federal government followed the recommendations of the CDC and ACIP in distributing the COVID-19 vaccine (Herring and Widra 2021; Turner and Bryant 2020).
People who were at higher risks of exposure, such as elderly people, people with preexisting health problems conditions such as cardiovascular disease, diabetes, or a respiratory disease that make the infection a greater threat to them, or people who reside or work in crowded spaces should have been top priority (World Health Organization 2022). With the standards presented by the World Health Organization, CDC, and ACIP that are being used by the federal government, incarcerated people should have been high on every state’s priority list (Quandt 2020; Turner and Bryant 2020). Throughout the pandemic, some states have seen mortality rates among incarcerated peoples seven times as high as in the general population (Misra 2021). Yet, depending on the jurisdiction’s vaccine prioritization plan, incarcerated people could be some of the last to receive the COVID-19 vaccine.

According to Prison Policy Initiative research, only ten states put people incarcerated in state prisons in Phase 1 of their vaccine distribution plan, and eight states—Alaska, Arkansas, Colorado, Florida, Michigan, South Caroline, South Dakota and Texas—did not include incarcerated people in any vaccine rollout phase (Prison Policy Initiative 2022). By July 2021, 15 states had vaccinated less than 60% of their incarcerated people.

The BOP was one of the few federal agencies to receive vaccines for direct distribution, allowing people incarcerated in federal detention centers to receive their vaccines directly through prison staff. However, the BOP’s vaccination policy was to vaccinate all prison staff before the inmates, which would take months (Misra 2021). But, many correctional staff were refusing to get vaccinated when the vaccine was offered
(Stagoff-Belfort, Rahman and Chapman, 2021). According to UCLA Law’s COVID Behind Bars Data Project, in August 2021—6 months after vaccines were being distributed—as a new variant, the Delta variant, surged and the number of infections among prison workers rose, many correctional staff were refusing to get vaccinated (Tyagi and Manson 2021).

**Correctional Staff Responses and State Violence**

Failing to respond adequately to dangers of the global pandemic proved fatal for nearly 3,000 people incarcerated in US prison, a population that is held at the hands of the state without the freedom to leave and take care of themselves (Wildra, 2021). As seen in the home confinement policy implementation, prisons did not move quickly enough to test inmates or employees or provide contract tracing. According to a *New York Times* report, prisons only sporadically traced the contacts of infected prisoners and employees, inhibiting their ability to prevent the virus from entering or spreading through facilities (Burkhalter et al. 2021)

Moreover, throughout much of the pandemic, many correctional officers refused to be vaccinated for the coronavirus, which may have undermined efforts to control the pandemic, both inside and outside of prisons (Lewis and Sisak 2021). When asked, only 40 of 475 correctional officers at a Florida prison said they would receive the vaccine when offered; more than half of the officer’s responded, “Hell no” (Lewis and Sisak 2021). In Rhode Island, 30% of prison staff refused vaccination (Lewis and Sisak 2021). In California, Connecticut, Iowa, Massachusetts, Oregon, and West Virginia, at least 40 percent of prison staff have elected not to receive a vaccine (Stagoff-Belfort, Rahman,
Correctional officers refused the vaccine for a variety of reasons: they feared the effects of the immunization, believed in conspiracy theories about the vaccine, or had distrust of the prison administration and their handling of the virus (Lewis and Sisak 2021).

As correctional officers in state and federal prisons, their job is to monitor and protect the people incarcerated within the facility. By refusing to get vaccinated, officers downplayed the severity of the pandemic and the large numbers of outbreaks within prisons (Tyagi and Manson 2021). Indeed, officers made the problem worse when they could have played a large role in protecting and even saving inmates’ lives. This indifference is a good example of Agamben’s theory of *homo sacer* in which those of the bare life, in this case inmates incarcerated in US prisons, live a life that correctional staff-servants of the state—would let die. The incarcerated population was not seen as a population worth protecting.

Prison staff refusals to get vaccinated also threatened the control of the community outside of the prison. As mentioned throughout this dissertation, prisons are hot spots for viruses and diseases like COVID-19. The overcrowded, unsanitary conditions coupled with the fact that inmates are not free to leave allowed the virus to spread like wildfire through facilities. When prison staff come and go between work at the prison and home in the surrounding communities, they have the potential to carry the virus both to the prison and back out into the community. Arguably, mass incarceration make community spread worse by requiring the hiring of more staff to support large
prison populations. The more staff interacting with prisoners, the more risk of spread to the community, especially if staff are not getting vaccinated.

By June 2021, 114,237 prison staff reported a positive COVID test and there were 209 reported deaths related to COVID-19 among prison staff (The Marshall Project 2021). These numbers, however, may be underreported because only 13 states released information on COVID-19 among prison staff, and for many of those states the count only included employees who voluntarily reported a diagnosis (ibid 2021). Public health and criminal justice experts say that the high level of cases, and deaths, among people incarcerated could have been prevented if correctional institutions would take even the most basic life-saving measures to protect them (Burkhalter et.al 2021).

On January 21, 2021 President Biden implemented an order that stood as an important move in recognizing how social problems and inequalities in the United States exacerbated the spread of COVID-19 among vulnerable populations. The Executive Order on Ensuring Equitable Pandemic Response and Recovery called out underserved, high-risk populations specifically and relied on a data-driven, expert engagement approach to understanding the needs of those populations during a state of emergency. This order was issued to address the disproportionate impact COVID-19 had on communities of color and other underserved populations. The order recognizes the severe and pervasive health and social inequalities in the US that were exacerbated during the pandemic. The policy is written in a manner that specifically addresses the systemic and structural racism that is prevalent in many facets of society in the United States. It recognizes that “it is impossible to change the course of the pandemic without tackling it
in the hardest-hit communities” (Biden 2021). But first, the hardest-hit communities had to be identified. Biden’s policy demands a data-driven, expert engagement approach that recognizes the lack of complete data, or data that is often obscured, which excludes communities that are disproportionately affected by public health emergencies such as a pandemic to include communities of color, sexual and gender minority groups, those living with disabilities, and those living at the margins of our economy. Addressing the devastating toll the pandemic had on communities of color and underserved populations was the necessary step needed to begin to slow the spread of Covid-19 as these populations are at a higher risk of exposure and hold less resources to get treated or for self-care once infected (Jane Adams College of Social Work 2020). This policy directs a governmental approach to address health equity.

An important element to this policy was the joint effort approach of the COVID-19 Health Equity Task Force. Members of this task force include federal governmental officials from the Department of Health and Human Services and nonfederal members from the community with expertise or lived experience relevant to the marginalized groups who were suffering at disproportionate rates during the pandemic. The order specifically identified different types of external engagement that may be utilized in seeking alternative viewpoints which includes “those with lived experience with homelessness, incarceration, discrimination, and other relevant issues” (Biden 2021). This brought a voice to those communities and allowed a platform for victims of deep-rooted systemic violence to be heard and to find some refuge through acknowledgement and, hopefully, reconciliation. The task force was implemented to provide
recommendations to the President for mitigating the health inequities that were exacerbated by the pandemic. This provided the opportunity for marginalized communities to implement input to the needs that contribute to the health, safety, and infrastructure of those communities.

The implementation of new task forces to recognize marginalized communities and the inequalities they have faced in the United States supports my argument that the COVID-19 pandemic could be a catalyst for a project on transitional justice. The pandemic created a particular situation that forced the country to see the severity and dangers of the harm caused by a long history of social inequalities in the United States. The pandemic acted as a catalyst to force recognition and promote social change as the only way to save the lives of hundreds of thousands of marginalized people often overlooked in our country. Transitional justice offers a lens to view the historical levels of systematic and institutional violence against marginalized populations in the United States and reminds the nation of the vulnerability of these populations, especially those who are now incarcerated as a result of this history.

On September 9, 2021 Biden signed the Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees, that could have aided in protecting inmates in federal prisons. This executive order follows the January 2021 order prioritizing the reliance on the best available data and science-based public health measures to slow the spread of COVID-19 and to prevent infection by new variants. Much of the data from the CDC and Department of Health and Human Services suggests the best way to slow the spread of the COVID-19 virus is to be vaccinated. Additionally,
research from the FDA determined that the vaccines available for the public are safe and effective. Therefore, President Biden determined that “to promote the health and safety of the Federal workforce and the efficiency of the civil service,” COVID-19 vaccinations should be required for all federal employees (Biden 2021). This policy specifically addresses the populations with whom the Federal workforce interacts with, in this case, people incarcerated in federally operated prisons. This order recognizes the role that the federal government must play in serving and protecting the people, especially during a state of emergency. During states of emergency, such as a global pandemic, there are a lot of uncertainties that lead to fear and unrest. The government, which holds a leadership role for the country, should take all measures to protect those who cannot protect themselves.

Also on September 9, 2021, President Biden implemented Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors. This order focuses on the safety of federal employees and the safeguards that will decrease the spread of COVID-19. It also specifics that the intention is to promote the economy and efficiency of the workforce (Biden 2021). Safeguarding employees and decreasing the spread of COVID-19 will “decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government” (Biden 2021). Questioning the incentives behind laws and policy is important to understanding the narrative of systematic and institutional state violence. While people incarcerated in prisons in the United States may have inadvertently benefited from orders from President Biden that included mask mandates, vaccine
distributions and further safety protocols, the measures were not put into place to protect them. To receive a small amount of protection as second-hand, that trickled down from the population that was meant to be protected, does not erase the harmful position inmates were placed, and kept, in throughout the pandemic. As I will discuss at more length in the conclusion, the question remains whether justice is served when inmates benefit from a policy that trickles down from the real people who are meant to be protected.
CHAPTER EIGHT

REDUCING COST OF COMMUNICATION AND MEDICAL COPAYMENTS

A topic often overlooked in the conversation of incarceration is the hidden costs of being in prison. While it may be apparent that people in prison have sacrificed their freedoms and liberties to pay for their alleged crime, there is an actual financial cost to being incarcerated. Contrary to commonly held misconceptions, being held in a prison is not free (Wu and Brady 2020). Inmates are given three meals a day and limited basic personal hygiene items such as soap and toothpaste (Lockwood and Lewis 2019). All other items must be purchased from the prison commissary. People incarcerated can buy food, clothes, hygiene items, or other necessities when the basic needs covered by authorities run out. In most prisons, incarcerated people spend the most amount of money on food and hygiene products (Raher 2018).

In the United States, we take the poorest people in society and incarcerate them under lengthy prison terms, and then charge them to be incarcerated without providing them the option to make enough money to cover that cost. During the COVID-19 pandemic many inmates continued to work and—regardless of the hazards of contracting the COVID-19 virus while working alongside other inmates—were paid little to nothing. By law, incarcerated people do not have to be paid and some states do not pay most inmates for the work they perform in prison (Benns 2015). In most states, however, inmates in prison earn between 12-14 cents per hour (Federal Bureau of Prisons 2022). The money earned from work does not go straight to the pockets of inmates, but rather a portion is garnished for their financial obligations such as court-ordered fines, restitution,
child support or other fees (Wu and Brady 2020). This left little for inmates to spend on commissary.

But commissary is not the only form of financial exploitation of incarcerated people. For decades, inmates have been faced with hefty fees to communicate with people outside of the prison and to access medical services (Reutter 2020; Pitcher 2020. With little funds left to afford necessities, the financial burden often falls on the family. Therefore, these payments came to light during COVID-19 because the need to pay these fees were exacerbated, as this chapter highlights. As COVID-19 began to spread through the United States, prisons across the country began to suspend visitation, increasing inmate’s use of phone calls to stay in contact with people on the outside (Wu and Brady 2020). Further, as COVID-19 started making its way through prisons across the country and more inmates became sick, the long-standing medical copayments to be seen by a medical professional had to be addressed (Pitcher 2020). While medical copayment rates are set by each state, most fell within the range of $2-$8 per visit (Pitcher 2020). Like communication costs, COVID-19 exacerbated the amount of doctor visits needed, therefore bringing to light the cost of medical treatment for inmates (see Figure 8.1 for a timeline relevant to communication costs and medical copayment policies).

The high cost of communication and medical care in prison is not a new problem but is a problem that grew in both severity and attention during COVID-19.
Figure 8.1 shows a timeline relevant to communication costs and medical copayment policies as it reflects my thematic analysis and process tracing.
COVID-19 synced communication costs and medical copayment together as increased usage of these services—and the cost associated with them—came from the same source. Both became essential during the pandemic, and both typically fell on family members to carry the financial burden. In both instances, the use of these services were exacerbated during the pandemic, making communication costs and medical copayment important to this dissertation. In this chapter, I discuss the financial exploitation of communication costs and medical copayments in federal and state prisons that were illuminated during the COVID-19 pandemic. I begin by discussing communication costs in federal and state prisons to include a history of the fees and the policies used in attempt to regulate the fees. I then discuss medical copayments in prison, also to include a history of the fees and the policies around their application. I then tie the two together in one discussion of the ways in which the COVID-19 exacerbated and shed light on the high costs of being incarcerated.

**Communication Costs**

Prior to the 1970s, people incarcerated in state and federal prisons could make only one collect call every three months. This remained policy until the Bureau of Prisons expanded telephone access that would allow community contact while also allowing prison staff to monitor calls for security concerns (Jackson 2005). Until 1984, AT&T remained in control of the telecommunication market in prisons, setting the rates for collect calling. The 1984 Consent Decree brought changes to the telecommunications market across the United States, including the prison market, leaving the prison phone sector up for grabs (Jackson 2005). For years following, competition rose among
differing third-party companies. States could choose which companies they would contract with to offer local and long-distance communication options for inmates.

Prisons contract with companies to buy phone equipment and set call rates, lending to fees for calls to and from the facility, making prison telecommunication a $1.4 billion industry (Ness 2021). Securus Technologies and Global Tel Link are the two main companies that dominate the prison telecommunications industry. These two companies have a large say in the cost of phone calls made by incarcerated people. Securus serves more than 3,400 facilities and Global Tel Link serves over 2,400 (Pipia 2019). States can enter contracts with the telecommunication companies and set their own prices, allowing states to earn a commission off the revenue made from inmate calling services (Pipia 2019). For example, the state of Washington contracted with Global Tech Link and pocketed 56 percent of the intrastate revenue, which equaled $3.8 million in 2017 (Pipia 2019).

The average cost for a 15-minute call from prison costs $5.74, while some prisons charge as much as a dollar or more per minute (Heuvel 2021). This does not include the hidden user fees that increase the overall cost. In an interview with a woman in federal prison, PEW highlighted that one or two calls per week from a federal prison would cost a family around $200 each month (Ness 2021). A 2015 study found that nearly 2 in 3 families, or 65%, with an incarcerated member were unable to meet their family’s basic needs, 48% struggled with food insecurity, and 48% had trouble with basic housing needs (deVuono-powell, Schweidler, Walters, and Zohrabi 2015). In another case, a mother of an incarcerated person spent $120 in two weeks to speak to her son (Pipia 2019). While
paying fees, supporting loved ones financially while incarcerated by putting money on commissary and paying the communication costs, many families also lost the income of the family member who is now incarcerated.

Because one-third of the prison population is Black, the high costs of communication further widen the racial wealth gap in the United States (Chann and Lin 2021). One study found that 1 in 3 families went into debt to cover phone and visitations costs to maintain contact with their family member while incarcerated. (deVuono-Power et. al 2015).

In 1934, The Communications Act of 1934 was introduced as a way to organize federal regulations of telephone, telegraph, and radio communications (Bureau of Justice Assistance 2022). The Act created the Federal Communications Commission (FCC) to stand as the primary overseer and regulator of the telecommunications industry. The FCC, which oversees the prison communications industry, has made efforts to limit high costs of phone use. However, these efforts only address interstate and international phone calls (Federal Communications Commission 2022). Prior to the Trump administration, the FCC attempted to set new capped rates on interstate calls in 2013, and new capped laws for intrastate calls in 2014 (Pipia 2019). Under the Trump administration and FCC Chairman Ajit Pai, the FCC removed the authority to set price caps on intrastate calls, which are most phone calls being made from inmates (Pipia 2019).

At the time of this dissertation, interstate calls are still capped at 21 cents per minute for prepaid calls and 25 cents for collect calls (Chan and Lin 2021; Federal Communications Commission 2022). However, these caps only applied to calls being
regulated at the federal level. Eighty percent of all calls are in-state calls, which are not regulated by the FCC or by these capped guidelines (Chan and Lin 2021). Further, providers can charge additional fees for automated payments, to speak to a live agent, or for paper bills and statements (Pipia 2019). However, US Senator Tammy Duckworth and other senators introduced a bill which called for “just and reasonable charges” which brought into question both intra and interstate fees (Pipia 2019). This bill, The Martha Wright-Reed Just and Reasonable Communications Act of 2021, amended the Communications Act of 1934 to extend authority to the FCC to address inmate calling rates in all correctional and detention facilities (117th Congress 2021). At the time of this writing, the bill is still in committee.

To prevent the spread of COVID-19 through prisons, some state policymakers did not see social distancing as an option, so focus was placed on preventing the virus from entering the prison rather than preparing to handle outbreaks once inside. (Pavlo 2021). Unfortunately, for many inmates this came at the high cost of seeing or even speaking to their loved ones. Many state and federal prison halted family visitations (Barr 2020). This left phone calls as the only way many inmates could remain in touch with their families, suggesting that the problem of high cost for telecommunications was exacerbated during COVID-19 (Heuvel 2021). It wasn’t until visitation was suspended that some people realized how much it cost for people in prison to remain in contact with those on the outside (Ness 2021).
Medical Copayments

Communication fees were not the only financial burden for people incarcerated in the US prison system that was brought to light during the COVID-19 pandemic. The pandemic illuminated several injustices within the criminal justice system, particularly centered around medical treatment for inmates while incarcerated. Many people find it increasingly difficult to seek adequate medical care while incarcerated, either because high copayments are used to deter inmates from seeking care unless really needed, or because resources within the facility are limited and subpar. Medical copayments, like communication costs, is not a new problem faced by inmates across the nation but is a problem that is exacerbated by the onset of a pandemic (Pitcher 2020).

Prior to the 1970s, medical care was not readily available to inmates and the quality of healthcare they did receive was “appallingly negligent and even brutal at worst” (McDonald 1999, 427). Prisons were often left to operate on their own, isolated from the resources of the surrounding communities. They operated as their own self-contained world, a world where healthcare wasn’t delivered regularly, and when provided it was by people with little to no medical training (McDonald 1999). As federal courts began to investigate the conditions of prison life, prisoner’s legal rights to medical care were established and extended (Boston and Manville 1996). In the 1970s, federal courts began to implement court decisions that bridged the gap between prisons and the organized medical profession, making it so inmates were no longer provided second-class medical care (McDonald 1999). This brought the development of health care standards to correctional institutions across the United States. The American Public Health

The development of these new health care standards came at a time when incarceration rates were dramatically rising across the nation. These standards were developed during the same time as the implementation of policy initiatives of the war on drugs. Beginning in 1971, the use of imprisonment became the instrument of choice to combat illegal drug use. In 1973, there were 204,200 inmates in state and federal prisons, and by the end of 1997 there were over 1,244,600 (McDonald 1999). The war on drugs brought a disproportionately large number of peoples from marginalized, poor communities of color that were already at a higher risk of health concerns.

Additionally, the establishment of the Comprehensive Crime Control Act in 1984 and the Anti-Drug Abuse Act of 1986 imposed mandatory minimum sentences and eliminated federal parole options for drug-related charges resulted in growing numbers of older prisoners serving longer sentences. Like elderly people in society in general, these inmates often required a disproportionately large share of healthcare resources (McDonald 1999). As the number of peoples incarcerated in state and federal prisons continued to rise, demands and pressure on the health care systems within prisons rose with it. Incarcerated peoples are the only population in the United States who have a “constitutionally protected right to health care, and the courts show no sign of extinguishing the right to health care, even if they are often hostile to prisoners’
assertions of those rights” (McDonald 1999: 430). The right to health care is upheld in prison, but it can be expensive to inmates and their families.

The rise in the need for adequate health care services came at a cost. According to the U.S. Department of Labor (1996; 1998), the cost of medical services throughout the United States began to rise at rapid speed through the 1980s. Following this inflation, prison administrators developed care practices used by health care insurers and providers in the larger society to control spending. This included medical copayments and more explicit limits on services provided (McDonald 1995; 1999; LIS, Inc. 1997). As mass incarceration continued to rise, a corresponding surge in the cost to house and care for the rising population forced larger state budgets to support the criminal justice system. User fees, such as co-pays are intended solely for revenue and shift the costs of incarceration from the government to the convicted (Wiggens 259).

In most state and federal prisons, incarcerated people pay medical co-pays for visits, medications, dental treatment, or other health care services. Medical copayments in prison can be between $2-5. People incarcerated typically earn 14 to 63 cents per hour. Therefore, although this copayment that may seem low, it is astronomically high when compared to what people pay outside of prison (Sawyer 2017). In West Virginia, one visit to a doctor would cost a month’s pay for an incarcerated person, which, when compared to someone earning state minimum wage, is equivalent to $1,093 outside of prison. In Michigan, a single visit would be equivalent to $300 outside of prison, and in 14 other states charges for medical co-pay were equivalent to charging minimum wage workers more than $200 per visit (Sawyer 2017, 2). Sawyer (2017) continues to point out
that some states, such as Texas, take a more extreme approach that implements a flat $100 yearly health service fee. Imposing steep medical copayments is endangering the physical and mental health of incarcerated people, “all in the name of cost cutting and prisoner control” (Wiggens 2021, 258).

While many inmates in state and federal prisons work, they receive minimal payment, leaving funds for medical care, whether an annual service fee or a copayment for visits for medications, to fall on the pockets of family or friends of incarcerated people on the outside. In one account, an inmate worked two jobs within the prison for forty cents per hour, which was double the starting rate for prison workers. This inmate would have to work twelve and a half hours to afford one medical copayment (Wiggens 2021). People outside of the jail can upload funds to a commissary account, which is an account that holds an inmate’s funds which are used to pay for “toiletries, extra clothing, food, stationary, stamps, over-the-counter medication, and any other essentials or incidentals an inmate might need” (Wiggins 2021, 256). It is important to note that people incarcerated often come from low-class backgrounds, making it difficult for families to support their incarcerated loved one financially.

Being charged per medical visit with limited financial resources disincentivized inmates from requesting unnecessary care abusing sick calls, thus reducing the demand for services. In a 2012 survey, 70% of the men incarcerated in a maximum-security prison on the east coast avoided medical services at least once during a three-month period due to the high copayment (Wyant and Harner 2018). These copayments are not only harmful to the health and well-being of the inmate, but the health of the entire
incarcerated population, staff, and the public (Sawyer 2017). This is especially important to a discussion on the spread of virus and disease such as COVID-19.

The access to and high cost of adequate medical treatment within US prisons has been debated since at least the 1970s and grew in importance through the war on drugs era. The social and political changes brought by the war on drugs also prompted changes in communication costs for incarcerated people. There have been many changes in the telecommunication industry in US prisons since the mid-1980s (Jackson 2005). Following the economic crises, social unrest, and urban disturbances of the 1960s and 1970s the implementation of the federal law and policy changes during the war on drugs brought a rapid increase in the national rate of incarceration. With a rise in the price to construct new prisons and the price to keep inmates incarcerated came for the increase in fees from the inmates and their families. With the quick spread of COVID-19 in early 2020, policy makers and administrators were forced to make decisions to make policy changes centered around the medical resources for incarcerated people.

COVID-19

As cases of COVID-19 infected people continued to rise across the US, with a disproportionately high number within prisons and jails, facilities were forced to change the way they operate (Jenkins, 2020). With limited space to allow social distancing to each inmate and limited healthcare resources, especially when the country’s medical resources are already strained, officials stopped in-person visitation to prevent new COVID-19 cases from entering the facility. This change highlighted the ways in which fees led to more harmful, more dangerous conditions for inmates. Many inmates had to
choose between hygiene products, healthcare, or communication as each came at a high price.

Early in the pandemic—March 2020—the Prison Policy Initiative started collecting data and reporting conditions within prisons and jails in the United States and compiling it in their project, COVID-19 Behind Bars (Prison Policy Initiative 2022). Prison Policy Initiative is a non-profit that strives to produce research to expose harms of mass criminalization. In March 2020, they recommended five ways the criminal justice system could slow the spread of the pandemic. Two of the recommendations directly addressed the high costs of communication and medical care. First, the criminal justice system must make correctional healthcare humane as to protect health and human dignity by not only providing basic healthcare needs while incarcerated, but to eliminate medical copays “that deter people from seeking healthcare in prison” (Wagner and Widra, 2020). Secondly, the criminal justice system must make this time (during the pandemic) less stressful than necessary for families by providing unlimited, free phone calls, video calls, and emails to allow families to maintain contact throughout the pandemic (Wagner and Widra 2020). Face-to-Face visitation was suspended in facilities across the country, limiting inmate’s contact with family and friends. Phone, video calls, and emails became the only means for contact, which became unaffordable for many (Wagner and Widra 2020; Chan and Lin 2021).

Being able to keep in touch with family to assure themselves that they are safe from the pandemic will reduce the already high levels of stress and anxiety for inmates (Wagner and Widra 2020). The coronavirus pandemic “has increased the desire for
communication to ensure the well-being” of a family member who is imprisoned, especially after visitation was stopped (Reutter 2020). On April 14, 2020 the Bureau of Prisons announced that inmates in federal facilities would be allowed to make video and phone calls free of charge (Barr 2020). Further, the monthly call limit for federal inmates increased to 500 minutes. This includes 122 prisons. This change came under the provisions of the CARES Act, which is set to expire 30 days after the president ends the national state of emergency for COVID-19. In June 2021, over a year into the pandemic, Connecticut became the first state to make calls from prisons free (Ness 2021). Still, only a few prisons have made an effort to supplement the loss of visitation by waiving or reducing communication fees and by March 2022, most agencies—including the BOP—returned to the prior high costs of communication (Prison Policy Initiative 2022).

In addition to changes in communication costs, some states implemented hygiene policies that would offer soap to inmates for free and waived medical copays for inmates who reported cold and flu symptoms (Jenkins 2020). Prior to the pandemic, officials justified high costs for medical treatment by suggesting that they wanted to “discourage prisoners from abusing the medical system or stretching staff too thin” (Pitcher 2020). However, with the onset of COVID-19 and the rapid spread through prisons, officials were forced to decide if that was a risk to take and to eliminate or reduce copayments. To reduce the spread of COVID-19, some states waived all copays while other suspended fees “only for those exhibiting coronavirus symptoms” (Pitcher 2020). This is problematic because as the pandemic unfolded and health officials learned more about
the virus, known symptoms often changed and some infected persons experienced no symptoms at all. Therefore, many inmates could have been infected, spreading the virus through the prison, without being diagnosed. While the Centers for Disease Control and Prevention estimated that nearly 40 percent of COVID-19 cases do not present symptoms, in “correctional facilities, where social distancing and sanitation measures are not always enforced,” that percentage can be much higher.

According to research by Prison Policy Initiative, twenty-eight states modified their policies during the beginning months of the pandemic. However, the BOP did not modify copay policies until March 2021, a year into the pandemic. Eventually, all but the state of Nevada made temporary changes to their medical policies (Herring 2022), but of the states that do charge medical copays as normal practice, only 10 completely suspended fees during the pandemic. It wasn’t long, though, before prisons began to go back to normal operation and the waived fees and policy initiatives to reduce medical costs expired. The suspended copayments set by the BOP only covered COVID-19 related care, and it was in place for only three months before the BOP expired the waiver (Herring 2022). Essentially, state and federal prisons were doing the bare minimum to protect incarcerated people during the COVID-19 pandemic.

The excessive, almost impossible, fees to maintain communication with loved ones or to see a medical professional for a health concern show how the lives of incarcerated people are often taken advantage of. High costs for life lends to a description of the bare life, or the life of the homo sacer, that is deprived of rights and deprived of protection. Those who have power, in this case prison administration, define who is
included and who is excluded as worthy human beings. The US capitalist society has monopolized on the lives of such second-class citizens. The structural and institutional violence against incarcerated people in the form of astronomical fees to cover necessities that people on the outside often take for granted, is not a new problem.

**Transitional Justice**

For decades the state has utilized the American criminal justice system as a tool to systematically remove large portions of marginalized groups from society by placing them behind bars and stripping them of political rights and existence. While it has been known that living conditions within prisons have historically been unsanitary and dangerous, COVID-19 brought to light the second-class treatment of inmates through limited resources for medical treatment and, for some, the inability to maintain contact with people outside of the prison. Furthermore, the pandemic showed how families of incarcerated peoples were also being punished by allowing them to foot the bill for contact and medical care. Rather than provide necessary care to inmates that they had incarcerated, the state continued the cycles of harm on marginalized communities by increasing financial burdens for those already facing poverty.

Excessive fees for communication and medical co-pays have been a hurdle for poor, marginalized populations incarcerated and their families for decades. Medical copayments were called into question during infectious disease outbreaks before, specifically between 2001-2003 with the spread of the bacterial infection, MRSA (Pitcher 2020). In the case of COVID-19, it took a global pandemic to create a platform for change. It took a global pandemic to offer alternative ways to view justice within the
American criminal justice system. The virus paved the way for transitional justice by offering a form of truth seeking that stood outside of traditional truth commissions often implemented during or following state violence. Lobbyists and officials involved in the shift to free or reduced fines for communication and medical care “credit the pandemic and widespread racial injustice protests in 2020” that brought light to how inequitable things really are (Ness 2021). It became clear that the burden of providing security for mental and physical health is often placed on the pockets of families of incarcerated peoples.

While response by federal and state prison administration was reactive, not proactive, it was still a response. However, the lack of preparedness and urgency to respond to the rapid speeds of transmission was a systematic form of violence by the state that jeopardized, and in some cases took, the lives of inmates across the nation. Neither former president Donald Trump nor President Joe Biden addressed the concern of communication fees or medical copayments during the COVID-19 pandemic. Neither made direct orders to protect those incarcerated during the pandemic.

In his first week of office, President Biden scaled back the use of private prisons with Executive Order on Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities. In this order, signed into place January 26, 2021, Biden points out that mass incarceration imposes significant costs on communities, and to decrease incarceration levels we must first reduce profit-based incentives (Biden 2021). To ensure that incarceration prioritizes rehabilitation and redemption, goals that many privately operated, for-profit correctional facilities are not
prioritizing. Biden states that “we should ensure that time in prison prepares individuals for the next chapter of their lives.” (Biden 2020 p. 2). According to the ACLU, “this is an important first step in decreasing dependence upon the private prison system,” but there is a loophole (Vukovich 2021). The language in this order limits the populations it covers, such as those without legal documentation. This allows private prisons to still hold certain federal and US Immigration and Customs Enforcement (ICE) inmates. Therefore, the cost is still harming marginalized communities.

Taking a transitional justice approach to evaluating the predatory pricing of communication and healthcare in prison that became apparent during the COVID-19 pandemic allows for an investigation of the social structures and institutions rooted in racism and inequality that has led to mass incarceration and the treatment of the 2.2 million people incarcerated in the United States. Transitional justice offers tools to critique impunity, to suggest restoration, and to offer redress. Reducing communication fees or medical copayments—either permanently or temporarily—offered some restoration to inmates and families during a time that was isolating, scary, and even deadly for everyone globally. These changes offered a possibility for social and political changes within the United States that could change the narrative of the treatment of inmates within state and federal prisons. Furthermore, these changes could offer ways to bridge the lives of people incarcerated and the outside community to make it easier for incarcerated people to transition back into society and reduce recidivism rates. Fair, just, and humane treatment of people incarcerated in US prisons and compensation for past wrongdoings takes more than simply changing laws or regulations. A transitional justice
approach could create a platform to open an investigation that aids in highlighting the systematic and structural harms and state violence that drives the mistreatment of inmates.

By reducing the amount of money inmates and family spend on communication fees and medical copayments, the small amount of income prison workers makes and the money that the families on the outside save could be used to transition the inmate upon release. Often, inmates are released from prison with only the clothes they entered the facility with. While some states provide newly released peoples with a small amount of money, it is insufficient. For example, California gives released inmates $200, the same as it was in 1973 (O’Bannon 2021). With inflation, that would equal around $1,200 which still would not go far for a person who has nothing. The additional resources saved from communication fees and medical copays could aid in finding housing, new clothes, job training, transportation, etc. By addressing and acknowledging the continuous cycles of harm perpetrated by the criminal justice system, the goal of transitional justice, the state could begin to imagine pathways to compensation and better treatment.
CHAPTER NINE
DISCUSSION AND CONCLUSION

The United States has been impacted by the COVID-19 pandemic in ways that reflect past and ongoing social injustices and inequalities related to public health. While the virus was labeled “the great equalizer” that impacted all people, that commonality masked the “underlying social and economic inequalities that make some populations more vulnerable to the disease than others” (Jane Addams College of Social Work 2020). COVID-19 magnified the preexisting lack of equity for vulnerable populations in terms of access to healthcare and structural policies to ensure health and wellness (Barsky, Kung, and Jimenez). I argue that the COVID-19 crisis has not only exposed the sheer number of human rights violations perpetrated by the US government against minorities and marginalized groups but has also exacerbated state crimes of structural violence and negligence.

It is within this violence and negligence that I raised the three main research questions explored throughout this dissertation. First, I investigated the COVID-19 policies implemented during the last year of former president Trump’s administration that related to incarcerated people and questioned the extent to which these policies and their impact constituted forms of state violence. I found that while policies were implemented during the Trump administration, such as the CARES Act authorizing the Federal Bureau of Prisons (BOP) to release more people on home confinement and to increase the time people can spend on home confinement, the hesitation to respond to the spread of the virus promptly was harmful, even deadly, to many vulnerable people incarcerated in
prisons across the country (Prison Policy Initiative 2022; Wildra 2022). This hesitation to enforce policy change took the lives of thousands of inmates across the United States, even though there was scientific evidence and recommendations on COVID-19 that suggested the need to implement such changes (Barnert, Kwan, and Williams 2021; CDC 2020; CDC 2021).

Secondly, I investigated the COVID-19 policies implemented under President Biden’s administration related to incarcerated people, measured the impact of these policies, and questioned the extent to which these policies and their impact constituted forms of state violence. Unlike former President Trump, President Biden took office a year after the pandemic had begun. This placed his administration in a different position than the Trump administration in that home confinement policy had already begun being implemented, vaccines were already being distributed, and fees within prisons such as medical copayments and telecommunication costs were already being investigated. However, the pandemic was still spreading across the nation and the state of emergency was still in place when President Biden took office. Therefore, the new administration had immediate decisions to make regarding the public health of the nation. The Biden administration had the opportunity to change or remove policy to aid marginalized groups of people, in this case those incarcerated.

I found that, like the Trump administration, the Biden administration demonstrated hesitancy in responding to the rapid spread of COVID through US prisons. During the first several months in office, the Biden administration did not make any definite decisions about the plan for people placed on home confinement under Trump’s
CARES Act. It was unclear if people would be able to stay at home, or if returning to prison would be mandatory. This demonstrated another level of state violence as it left thousands of people in limbo, uncertain of whether they would be forced back to prison and, if so, when. This uncertainty lasted nearly eight months. Eight months is a long time to not know whether or not you will be sent back to prison.

The lack of direct care and protection for incarcerated people was also apparent during the vaccine rollout plan implemented by the Biden administration. As President Biden planned to vaccinate as many Americans as possible, people incarcerated in prisons were not specifically addressed nor did they take precedent for vaccination despite being contained in an area that was high-risk or contracting the virus. This form of violence by the state occurred on two levels. First, when President Biden implemented the Executive Order on Improving and Expanding Access to Care and Treatment for COVID-19, the order specifies facilities such as nursing homes, assisted living, intermediate care for people with disabilities, and residential treatment facilities, but not prisons (Biden 2021). This pushes the narrative that prisons are not considered a care facility, despite being a total institution, therefore prisons do not take high priority for care or vaccine distribution. Secondly, the vaccine rollout plan was delegated to the state level; it was up to each state to decide in which phases people would be eligible to receive the COVID-19 vaccine. Only ten states placed incarcerated people in the first phase of vaccine distribution while eight states did not include incarcerated people in the plan for vaccine distribution at all (Prison Policy Initiative 2022).
Lastly, I questioned the impact of presidential administration on COVID-19 policies. Overall, I did find that during times of emergency, such as the COVID-19 pandemic, presidential administrations do have a significant impact. Much of this dissertation explores the uncoordinated response by the federal and state governments, lending to unequal and disproportionate outcomes across the United States. Coordinated federal response efforts can be impacted by orders coming from the top down. For example, former president Trump implemented the Executive Order on Ensuring Democratic Accountability in Agency Rulemaking, which regulated who can make federal rules and regulations (Trump 2020). The order meant that regulations would have to conform to Trump’s agenda, which is problematic as it protects the administration in pushing a single agenda, regardless of the views or needs of career employees. The attitudes and beliefs that people placed in political power hold can impact the narrative that is being pushed through the country, driving political and legal decision making. Therefore, who is in power matters. For example, at the end of 2020 during the vaccine rollout campaigns, Colorado Governor Jared Polis stated to reporters that “there’s no way it’s going to go to prisoners…before it goes to the people who haven’t committed any crime” (Schwartzapfel, Park, and Demillo 2020). Statements such as this support my argument that these public attitudes towards incarcerated people could have driven the response to COVID-19.

In comparing the transition from the Trump administration to the Biden administration, the policies reflected continuity. One of the main takeaways from this dissertation was the notion that policy and decision makers acted as if the problems
brought by the COVID-19 pandemic were new. However, looking at the history of federal and state prisons this was far from true. This was not the first time that deadly virus or disease spread through facilities, and this was not the first time the government fell short in their response efforts to protect the lives of those incarcerated. For this, it did not come to a surprise that no change occurred across presidential administrations. This alludes to the notion of American Exceptionalism and the idea that we, as a country, seem to be especially attached to Agamben’s theory of homo sacer. There is an indifference to life and death that foundationally structures the American society, especially as life and death relates to marginalized populations. The fact that we are the only developed nation without a national health care access plan suggests that we support Agamben’s theory that some people don’t deserve to live, or that it is justifiable to let some people die. This notion is extended to inmates.

In her discussion on torture during war on terror, Rowen discusses problems with taking a transitional justice approach. She states “whereas actors in other countries were able to use the ambiguity of the concept of a truth commission, particularly with regard to judicial accountability, to their advantage, that same ambiguity was a liability in the United States, as individuals who were unfamiliar with truth commissions were worried that promoting one was promoting amnesty, or that calling for a truth commission would make an implicit comparison between the United States and places where truth commissions had been created for much more extreme violence” (Rowen 2017:125). She argues that for many US. advocates, the idea was not only a foreign idea, but something that was developed for people and places where ‘real justice’ i.e., criminal justice, is not
possible. This idea taps into the American Exceptionalism ideology, while ignoring the flaws in the US. criminal justice and judicial system. The arguments for why transitional justice may not work in the United States are shallow because the underlying problem is that the United States is not willing to try. The United States is not willing to admit to flaws, not willing to critique institutions, and not willing to take chances that will make our government look as vulnerable as other countries. The United States would rather maintain the status quo through American Exceptionalism.

As previously mentioned in this dissertation, the United States has restrained from ratifying human rights related treaties presented by the International Criminal Court (ICC)—one of the strongest international forces that could hold the power to investigate and prosecute state violence—that are designed to hold states accountable for providing basic civil, political, economic, and social and cultural rights to all people. Because the United States has not signed and ratified the treaty, the violence perpetrated by the government is not addressed, allowing the government to create its own legitimacy of violence. To take this a step further, Congress passed the American Servicemembers’ Protection Act of 2001 that legally prohibits US cooperation with the ICC, ensuring that the United States does not fall within the jurisdiction of the ICC and cannot be investigated and/or held accountable for violence it commits. The resistance to signing onto human rights treaties and the like suggests the possibility that nothing is likely to change in US politics and governance of marginalized populations, particularly incarcerated populations.
These questions of administration led to the larger question of whether COVID-19 could offer a platform for social change. To answer this, I also had to raise the question of whether the structure of the American government impacts response and outcomes during a state of emergency such as a global pandemic. Understanding first how the United States is governed, especially during the COVID-19 response efforts, led to a more defined narrative of how law and policy function in the country, and, thus, how law and policy are used as tools of state violence. By separating the US prison system into multiple jurisdictions that are operated by different levels of government, the federal government was able to take a more hands-off approach to responding to the COVID-19 pandemic’s impact on prisoners. Further, this separation of powers decentralized public health, leading to the idea that there was not a need for a national plan in response to outbreaks within prisons. This understanding laid the foundation on which questions of alternative forms of justice could be raised to find possibilities in centralizing the health of people incarcerated in US prisons within the US public health narrative.

I conclude by suggesting that the COVID-19 pandemic can be the catalyst to have a transitional justice project related to mass incarceration. COVID-19 exemplified the many ways in which the social structures and institutions rooted in racism and inequality has led to mass incarceration and the mistreatment of the 2.2 million people incarcerated in the United States. Transitional justice offers tools to critique impunity, suggest restoration, and offer redress to the communities impacted the most by harsh policies that increased policing practices and long prison terms. To draw together presidential power,
homo sacer, and the need for transitional justice, I conclude this dissertation by reflecting on the role of the carceral state.

The carceral state’s connection to neoliberalism reiterates ways in which the production of surplus life is braided within the organization of the carceral space. The precarious life aids in determining who we define as a criminal, as punishable, and whose life is of more value. Through this dissertation, I investigated the lives of incarcerated peoples through the theoretical lens of the homo sacer and the state of exception. Identifying this population as homo sacer and as the exception through a global pandemic offers a new theoretical understanding of the severity of harm enacted on incarcerated people—and the communities in which they come from—by the state. A discussion of the carceral state in junction to this dissertation offers another link to the bridge that connects life inside the prison and life outside. This same bridge carried the detrimental impacts of COVID-19 on marginalized populations—both inside and outside the prison walls—across the United States.

The Carceral State and Carceral Citizenship

Legal discourse is often used as a tool to further promote distributional inequalities while hiding behind the façade of upholding justice (Delgado and Stefancic 2016; 2017). Popular perceptions of justice in the United States have historically been rooted in the misconceptions of the criminal justice system and the false reliance on the rule of law. These misconceptions lie in the understanding of the role of the criminal justice system and whether punitive responses to crime is indeed serving justice. Such
perceptions are reinforcing acts of state harm perpetrated against marginalized groups, in the name of serving justice or laying down the law.

Marginalized populations in the United States are often viewed as undesirable, as disposable. The power of the prison industrial complex is rooted deeply in our country’s economic history and attempts at developing a wealthy, industrialized society.

In the 19th century, development was understood philosophically as improving mankind. However, this is an elite interpretation. Elites formulated government policy to manage the social transformations attending the rise of capitalism and industrial technologies, so development was identified with both industrialization and the regulation of its distributive social impacts. (McMichael, 2017:2)

Not only does development introduce new class and racial hierarchies but offers a platform for the state to define productive and unproductive, or disposable or non-disposable groups of people in society. The word “development” was used as the generic term for the many different practices designed to increase well-being and “allowed the conditions under which the desired process could unfold to be postulated” (Rist 2014: 25). Rist (2014) metaphorically describes development as similar to the growth of a plant. In order to grow, a plant must avoid frost, be able to count on the sun and be free from any undesirable vegetation nearby, but the fact remains that the plant will develop spontaneously in accordance with well-established rules—warmth, sun, and space. It is in established rules—or laws-- that we see change. It is in established laws that we keep marginalized populations marginalized, to allow for a society to grow without interference. And just like the unwanted weeds in a garden, for growth—so the state believes—we must remove the undesirables. The carceral polices the growth and
development of our society. Therefore, the carceral “both manages life and makes that life disposable” (Story 2019:7).

The carceral produces and manages social disposability in late-capitalist America. It allows us to make connections between people and their struggles, the restructuring of urban spaces to increase surveillance, and the shifts in policing throughout history that have targeted specific populations such as broken-windows and quality-of-life policing. Once these populations are involved in the American criminal justice system, they become trapped in a cycle of constant crisis. This crisis manifests in everyday existence, whether incarcerated or not, leading to the slow death of marginalized groups. Wang’s 2018 carceral capitalism arguments shows how this cycle continues by questioning whether prisons will survive government fiscal crises that are unfolding around the country (38). As there is an increase in private prisons, there is also a decrease in prison populations in some states. However, there remains higher rates of private surveillance such as probation, drug courts, reentry programs, tracking devices, etc. It may be possible to imagine a future where the prison as a physical structure is superseded by total surveillance without physical confinement, but there may always be forms of surveillance and policing keeping marginalized populations confined.

Whether ever incarcerated in the physical confines of prison or jail, or even involved in the criminal justice system, the carceral is a part of each of our lives daily. Policing and surveillance occur in all facets including education, healthcare, the foster care system, the workforce, etc. The carceral helps differentiate what makes divisions in populations, in capitalism which homogenizes and introduces difference. When
discussing the prison industrial complex, Gilmore and Gilmore (2007) state that what is important is “the transformation of relationships between and among the elements that make up the [Prison Industrial Complex] PIC, producing and projecting into the unforeseeable future a set of dependencies—in the form of domestic militarism—that rely on harming individuals and communities in the name of safety” (151). As long as the system can control the narrative of safety for the continuance of surveillance and policing, the carceral can continue to operate. In an interview with Ruth Gilmore on the Laura Flanders Show, Gilmore explains that prisons are more prevalent in societies where inequality is deep and where capital holds a big stick. For this, prisons—whether physical or metaphorical—will remain a driving force of the day-to-day lives of marginalized Americans and the carceral state will maintain its meaning.

While the carceral state targets marginalized groups of people, the same carceral logics are running social welfare and social services. To get social benefits in the United States, you must get involved with the carceral state, with the institutions the carceral controls. Again, we see how law regulates daily life. Loyd (2011) suggests that “confinement, in turn, effectively becomes the mark of criminality, regardless of criminal conviction” (12). Conviction, therefore, is not necessary to grant carceral citizenship—a citizenship status experienced by populations targeted by the prison industrial complex based on race, gender, and class. The construction of a population deemed necessary for mass surveillance is enough.

Individual sovereignty is forfeited and replaced with new forms of governance once defined as a carceral citizen. Carceral citizenship “is produced by crime control
practices born in the era of mass incarceration and its community analog, mass supervision and presumes that one has committed a crime (Miller and Alexander 2016: 296). The carceral citizen, thus, has distinctive rights and claims which can be made against the state that are differentiated from other vulnerable populations because of the unique position the state has placed them in. The carceral citizen gains access to services such as mental health treatment or treatment for co-occurring disorders and/or healthcare, that the average citizen of the state would not qualify for. Carceral citizenship allows for the “constitutionally justified forms of exclusion based solely on the presumption of legal guilt at some point in their lifetimes” (Miller and Alexander 2016: 297). This presumption justifies the power and control of targeted populations through carceral spaces and surveillance under the veneer of grating social welfare policies. Sovereignty must be forfeited, and state recognition must be granted for carceral citizenship to be achieved. It is within the benefits of the carceral citizenship that social problems such as poverty, hunger, and healthcare.

In Simone Browne’s *Dark Matters*, the long history of racial formation is illustrated to include methods of policing Black life under slavery—such as branding, runaway slave notices, and lantern laws. Browne (2015) is able to articulate how contemporary surveillance technologies and practices are informed, and how such practices lead to often detrimental outcomes for the Black community. Browne adds to the understandings of surveillance the concept of racializing surveillance, “a technology of social control where surveillance practices, policies, and performances concern the production of norms pertaining to race and exercise a power to define what is in or out of
Enactments of surveillance reify boundaries, borders, and bodies along racial lines, and the outcome is often discriminatory treatment of those who are negatively racialized by such surveillance. For the Black community portrayed through this book, this is mass incarceration and police violence. However, I argue that the racial formation among the history of Black lives reaches beyond incarceration and violence at the hands of the police to extend to various forms of state violence including the negligence to protect and to intentionally be placed in life threatening conditions during a global pandemic. The carceral state continues to take punitive and harmful approaches to policies and practices that keep particular groups marginalized and often in danger of sacrificing their own well-being.

Historically, a branding process of dehumanizing and classifying people into particular groups to produce identities and tie people into a system of exploitation was often used in the United States (Browne 2015). Story (2019: 27) suggests:

Perhaps the most important, this remapping of carcerality serves to connect spaces and in connecting spaces, to connect people and their struggles…The degradations of low-wage work and unemployment, of unaffordable rent and housing foreclosure, and of illness and vulnerability to violence are certainly unevenly distributed along lines of race, class, and gender, among other axes. They are at the same time all expressions of a capitalist economic system that functions through exploitation, creates perverse levels of inequality, and then legitimates that inequality through various tools of social division.

This system of exploitation that produces particular identities further emphasizes my argument to implement Foucault’s theoretical notions of power, and the power that sovereignty holds in dictating who is able to live and who can be left to die. This power reaches from within the confinements of the prison walls, to the confinement of
marginalized communities. Placing incarcerated people during the COVID-19 outbreak at the center of Story’s argument allows us to map carceral power across the exploitive history of these marginalized groups to see the continuing impacts carcerality has on the social, political, and economic conditions.

**Presidential Power, Homo Sacer and the need for Transitional Justice**

I tied the COVID-19 pandemic into the carceral studies literature to connect the spaces in which marginalized populations are held, and often isolated in. The 2.2 million people behind bars in the United States may be physically hidden from plain site by concrete walls and barbed wire, but the marginalized communities outside of those walls are hidden just the same. Although the physical barricades of concrete and steel may be removed, there is this unseen barrier keeping poor communities of color imprisoned in their own spaces. Both spaces have increased surveillance. Both spaces suffer the hardships of limited resources and limited protection from the state, particularly during the time of a state of emergency. Relying on the theoretical underpinnings of this dissertation, this form of existence is best explained by the ways in which the state defines the population. Connecting Agamben’s theory of the homo sacer and the paradigm of the bare life to mass incarceration in the United States allows for a clearer understanding of how criminalized populations are defined, in a way in which they are removed from the political life and excluded from political rights and freedoms.

The treatment of people trapped in the parallel spaces of surveillance—the people who are criminalized and treated as the homo sacer—that encounter state violence is part of a narrative that has haunted the United States for decades. For this, I specifically draw
on the race narrative portrayed by scholars such as Browne (2015) and Story (2019) to illustrate a way in which scholars, activists, lobbyists, or policy makers can use similar narratives to map carceral power across an exploitive history to understand the connection between presidential power, homo sacer, and the need for transitional justice. This narrative was made clear—and even exacerbated—through the COVID-19 pandemic, creating a moment to implement new forms of justice that may address the violent past to create institutional change for a better future.

The COVID-19 outbreaks in US prisons occurred on the coattail of decades of mass incarceration that disproportionately impacted communities of color. This systematic injustice stemmed from genocide, slavery, and structural and institutional racism that has dogged the United States for centuries. The differing levels of response among federal and state prisons allows for a unique opportunity to explore the possibility of decarceration and the long-term impact it may have on both mass incarceration and public health in the United States. This dissertation speaks to the urgency to implement transitional justice. I have argued that democratic states, especially the United States, often go through moments of political transition that can call for forms of transitional justice. COVID-19 and the political response that followed, was one of these moments. This moment offered the opportunity for social change, but instead was used to cause more violence.

The political and administrative response to the pandemic allowed for a moment to see presidential power at work in the United States. Because the crisis of COVID-19 happened amid a presidential campaign and change in presidential administration, it
created the platform to do a project that links presidential power to transitional justice. Allowing us to see differing attempts at managing the same pandemic offered a lens through which we could view the prioritization of different populations within the United States. COVID-19 could be the catalyst to have a transitional justice project related to mass incarceration as the pandemic—and the responses that followed—shed light on the slow violence that has occurred through mass incarceration. Through this dissertation, I have shown how this slow violence has occurred through the overuse of punitive responses to breaking criminal code by incarcerating too many people, issuing sentences that are too long, and then charging those people for contact and healthcare while serving those sentences. These are problems that have been ongoing but were brought to a head during COVID-19. The United States reached a moment where a problem became a tragedy. And, like a long-time dictatorship that ends in a bloody coup or revolution before embarking on transitional justice, the injustices of mass incarceration became atrocities which created the ideal time to implement transitional justice.

**Limitations and Directions for Future Research**

COVID-19 cases and deaths were often underreported or not reported at all (Pavlo 2020; Turcotte, Sherman, Griesbach and Klein 2021). In some instances, cases were being reported for a short time, but policy changed to put a stop to reporting. For example, the BOP removed cases and deaths from its reports, prohibiting accurate accounts of cases in all federal prisons, which had more people infected than any other system (The Marshall Project 2021). Further, many systems failed to provide adequate testing to people incarcerated, again limiting the accuracy of number of known cases. It is
nearly impossible to get an accurate count of the number of cases. There is no uniform national reporting system for COVID-19 in correctional systems, leading to this research relying on other resources such as news reports and other data sets provided by The Marshall Project and Prison Policy Initiative. Efforts to test inmates and staff were sporadic, so infection rates within prisons are questionable. Many state prison systems began testing regularly based on symptoms and prior positive results, but not in the first several months of the pandemic and efforts didn’t continue. Therefore, cases were most likely undercounted, suggesting the true magnitude of this problem is unknown. With limited data, there is limited evidence to push for change.

In 2020, at the onset of the COVID-19 pandemic, the American criminal justice system housed nearly 2.3 million people in state and federal prisons, juvenile correctional facilities, local jails, immigration detention facilities, and Indian Country jails (Sawyer and Wagner 2020). Specifically, there are 1,833 state prisons and 110 federal prisons, which were the focus of this dissertation. This project focused only on the state and federal prisons to investigate the effects of presidential administration on federal policy initiatives. State operated prisons had to be included in this research to demonstrate the impact of the federalism approach to governance in which there was a separation of powers during the COVID-19 pandemic. This separation of powers demonstrated how the federal government can choose to take a hands-off approach to responding to states of emergency, while also maintaining the power to implement federal policies as seen fit. Juvenile correctional facilities, local jails, immigration detention facilities, and Indian Country jails are operated under different jurisdictions that were outside of the scope of
This dissertation only scratches the surface of ways the federal government can allocate resources and responsibility, in this case during a pandemic, to relieve economic pressures on state prisons by using local jails as repositories for people in all stages of the criminal justice system: convicted felons, federal inmates, parole violators, pretrial detention, mental health holds, work release, convicted misdemeanants, etc. The central role of the jail in the 19th-century American criminal justice system was to manage petty offenders or to hold the accused until trial (Tillotson and Colanese 2017). The shift towards heavier use of long-term confinement led to higher numbers of people incarcerated in local institutions, for longer terms. With the push for prison abolition and decarceration state prison populations have declined, but jail populations have increased as legal roles to house people for longer terms has been expanded to the local level. Federal policies that support decarceration only pertain to federal facilities, which house less than 10 percent of the 2 million people incarcerated (Kushner, 2019). To expand federal policies to reach the facilities at the local level, there must be pressure for change from the bottom-up as federal policy only moves when people make it move. Therefore, there is a great need to move the focus of this type of research to the local.

Transcarceration is key to understanding the carceral state now, so that the shift in mass incarceration is now happening in US country jails. Transcarceration refers to the interaction between various forms of control (Johnson 1996). This interaction lies at the junction of formal social controls such as prisons, community corrections, welfare
programs, and mental health treatment options. While America continues to use imprisonment as a primary attempt at social control and a catch-all solution to social problems, state and federal penal policy has shifted the burden of incarceration to local jails (Tillotson and Colanese 2017). Nearly 10 million people enter jails across the United States each year, creating a new focus for mass incarceration in which possibility for change must happen at the local level. Consequently, most of the possibilities for transitional justice and transformative justice are happening at the local level.

Many models of transitional justice focus on historical reparations to address social and economic as well as political and legal justice. This dissertation, through the lens of transitional and transformative justice, urges for options to not necessarily dismantle an entire system, but to make necessary changes to acknowledge and address the systematic and institutional violence within those systems. Part of the recognition to these oppressive systems is the need to repair histories of harm that drive these systems. The remedies brought by reparations encompass a wide array of demands which are justified by the long history of damage caused by European settler colonialism, particularly to Black and Indigenous people (Cullors 2019). The damage to these populations are continuously reinforced by the carceral state. To offer reparations at the local level, focus should be placed on restoring a balance from within the community and placing pressure on state accountability. Moreso, reparations could offer the education needed to practice restorative practices to offer alternatives to punitive responses to criminalization. People are being arrested for being homeless. People are being detained for being poor. People are being held in confinement as a form of mental health
treatment. Incarceration has become the means to address problems by removing them from society and containing them in carceral spaces in the name of justice and security. The United States is trapped in this punitive and oppressive response to the criminalization that stems from social problems in the community, so by providing the education and language to offer a new response change could occur. Transitional justice remedies at the local level can bring forward the need to have adequate physical and mental health services, education, job training, drug and alcohol rehabilitation and other social services as opposed to harsher policing tactics or the overuse of imprisonment.

Transitional justice remedies at the local level can be used to address the overuse of imprisonment, but also the treatment of those already imprisoned. This dissertation demonstrates the harmful ways in which inmates housed in state and federally operated prisons are treated once incarcerated. For example, I showed how some states did incorporate inmates in the first phases in their state polices for vaccine rollouts, while some states did not include inmates in the planning for vaccination at all. Understanding the rationale behind this is worth exploring as it is an important question that remains unexplored. I speculate that the argument or justification lies in the narrative pushed by the governor of that state. The language used to disparage the lives of those incarcerated drove decision making which led to the justification to allow thousands of people to become ill or even die. Transitional justice at the local level can help change the narrative, to push against the indifference to life and death that foundationally structures the American society and make life—and living—more valuable.
In May 2015 the Chicago City Council adopted legislation that sought to repair damage caused by police torture in Chicago (Losier 2019). This reparations legislation came in part from the interventions and contributions from grassroots organizations that prompted changes at the local, state, and federal level. While these legislative changes brought financial compensation to some torture survivors, it also offered nonfinancial compensation such as counseling, job training, and higher education at no cost (Losier 2019). Furthermore, the bill added teaching of torture cases in the standard curriculum of Chicago public high schools. The extreme use of torture to coerce confessions from over a hundred suspects was kept as an open secret for decades. The new legislation brought the violence to light, recognized its existence, and made efforts to make change to the future of policing and acknowledge the harm caused to the city as a whole. These are the levels of change, the shifts in the narrative that transitional justice can bring at the local level. The pressures placed on the local level of government provides leverage to apply pressure on the US government, local, state, and federal.

Similar efforts for reparations are becoming more apparent at the local level to capture the impacts of violence across life and losses for the Black community caused by policing and mass incarceration across the United States (Coates 2014; King and Page 2017; Murphy 2020; Murphy and Zvobgo 2020). This opens the possibility for future research to investigate similar forms of violence at the local level to look at how a top-down approach from federal and state laws and policies trickle down to have detrimental effects on local jails, and the importance of taking a bottom-up approach to provide leverage for impactful change.
This project is the first step within a larger research trajectory to understanding the ways in which laws and policies shape the health and safety of people incarcerated in the United States. Through these initial, exploratory findings, this project evolved to show the importance of the separation of powers in US law and governance and the harmful impacts it can have on the lives of incarcerated people. I will continue to explore the ways in which transitional justice mechanisms can be used to change the direction of the criminal justice system by addressing alternative responses to the social problems that are rooted in centuries of state violence and control.

**Conclusions**

In broad terms, transitional justice is an attempt to address the mechanism of harm, particularly state harm. This official address usually occurs in formal truth commissions. In the US, a formal truth commission may not have taken place to address the harmful impact of policy on people incarcerated in state and federal prisons during COVID-19, but the pandemic did highlight the injustices and violence that was not only occurring during this particular moment but had been occurring for decades. For example, the rapid spread of virus and disease through prisons and spaces of confinement was not a new phenomenon. For centuries, people incarcerated have been at higher risk of contracting the virus or disease of that time. COVID-19 lent another opportunity to address the sanitation of living conditions within prisons and the need for a response plan to be implemented at the onset of a viral spread. Additionally, high fines and fees in the criminal justice system is an ongoing concern for incarcerated peoples and their families. COVID-19 brought a lot of public attention to the high costs of telecommunications in
prisons, an industry that has been making billions of dollars from marginalized populations for decades. While the high cost to keep in contact with loved ones while in prison is not a new problem, this moment illuminated this history and offered ways to reduce or even curb the fees.

Transitional justice can help in transforming the American criminal justice system by first acknowledging the damage inflicted and shedding light on the institutional structures rooted in inequality. Historically in the United States, laws have been written in a manner that utilizes the criminal justice system as a tool to ostracize or criminalize entire groups of people. Using a transitional justice framework, it becomes clearer that justice is not only a matter of law, but of recognition, acceptance, and reconciliation. Applying the tools of transitional justice can offer ways to focus on addressing harmful, punitive practices in the US and creating a path for change in laws and policies that strip away the liberties of so many people across the country.

While transitional justice is the focus of this dissertation and can lay the platform to bring the mistreatment of law and the punitive practices wrapped up in mass incarceration to the forefront, I include transformative justice practices in my overall approach to achieving justice in the United States. Conventional methods of transitional justice often fall short in discussing long-term solutions to transforming social and political institutions. Transformative justice policies, however, are used to respond to violence in ways that do not create more violence, aiding in the identification of ways structural and systematic institutions create further criminality and address avenues for institutional change.
BIBLIOGRAPHY


Aljazeera. 2020. “UN urges Iran to free political prisoners amid coronavirus spread”.


https://ajph.aphapublications.org/doi/10.2105/AJPH.2021.306221


https://www.whitehouse.gov/briefing-room/presidential-


Blankenship, Kim, Ana Maria del Rio Gonzalez, Danya Keene, Allison Groves, and Alana Rosenberg. 2018. “Mass Incarceration, Race Inequality, and Health:


176


https://www.bop.gov/about/history/.

https://www.bop.gov/about/facilities/federal_prisons.jsp.

https://www.bop.gov/inmates/custody_and_care/work_programs.jsp.


(https://finesandfeesjusticecenter.org/articles/criminal-justice-debt-barrier-reentry/).


https://greensborotrc.org/about_the_commission.php.


https://journals.sagepub.com/doi/10.1177/1090198120927318


Kinner, Stuart, Jesse Young, Kathryn Snow, Louise Southalan, Daniel Lopez-Acuna, Carina Ferreira-Borges et al. 2020. “Prisons and custodial settings are part of a comprehensive response to COVID-19”.
https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30058-X/fulltext


https://www.law.cornell.edu/uscode/text/18/3582.


194


Schroeder, Christopher. 2021. “Discretion to Continue the Home-Confinement 
Placements of Federal Prisoners After the COVID-19 Emergency.”
https://int.nyt.com/data/documenttools/2021-12-21-home-confinement-olc-opinion/40233db2f35811ae/full.pdf

Schwartzapfel, Beth, Katie Park and Andrew Demillo. 2020. “1 in 5 Prisoners in the U.S.

Shaw, Rosalind et al. 2010. Localizing Transitional Justice: Interventions and Priorities 

Commission request, leaves its future in doubt”. Iowa City Press-Citizen.

Administration Will Allow Prisoners on Home Confinement Under the CARES 
ACT to State Home After the COVID-19 Pandemic.” JDSUPRA.
https://www.jdsupra.com/legalnews/home-for-the-holidays-the-biden-9080055/


Theidon, Kimberly. 2012. _Intimate Enemies: Violence and Reconciliation in Peru._


VITA

Rachel A. Ponder was born on a military base in Jacksonville, Florida. After moving around every few years of her life, she settled in Knoxville and now calls it home where she shares life with her wife, Sabrina. Rachel received a Master of Criminal Justice from Boston University and began a short career in law enforcement before beginning her PhD at the University of Tennessee. She has received a Disasters, Displacement, and Human Rights graduate certificate. She has taught several undergraduate courses including Social Problems & Social Justice, Introduction to Sociology, Criminal Justice, Criminology, Investigative Forensics, and Criminal Law & Procedure. Her research interests include transitional justice, political/state violence and harm, justice studies, and law and policy. These themes can be seen through her dissertation “Justice Involvement during COVID-19 and the Possibility of Transitional Justice”, which focuses on COVID-19 as a catalyst to offer a transitional justice attempt to address mass incarceration, human rights, and harmful policies related to the American criminal justice system.