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The Increased Exposure to Coronavirus (COVID-19) for Prisoners Justifies Early Release: And the Wider Implications of This for Sentencing—Reducing Most Prison Terms Due to the Harsh Incidental Consequences of Prison

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The Increased Exposure to Coronavirus (COVID-19) for Prisoners Justifies Early Release: And the Wider Implications of This for Sentencing—Reducing Most Prison Terms Due to the Harsh Incidental Consequences of Prison

Mirko Bagaric,* Peter Isham** & Jennifer Svilar***

Abstract

The risk of coronavirus (COVID-19) spreading in prisons is especially acute. This has resulted in an unprecedented number of prisoners being released across the world—including many prisoners in the United States. From the health, social, and political perspectives, this is a sound approach. This is especially the situation in relation to older prisoners and those who have not been imprisoned for serious sexual and violent offenses. Despite the large number of prisoners that are being released, the United States will still have the largest prison population on earth—and by a large margin. However, the coronavirus pandemic and the response to it has considerably wider implications for the broader criminal justice system. In particular, it brings into focus a large number of other unintended adverse consequences experienced by prisoners. These include being deprived of the right to procreate; materially increasing the risk that they will be assaulted or raped in prison; and suffering a considerable reduction in their lifetime earnings. The familial relationships of most prisoners are also normally materially

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impaired. The adverse, incidental harms associated with prison and the impact that this should have on sentencing law is an under-researched area of law. This Article fills that gap in the literature: we argue that sentences for most offenders should be reduced to accommodate the incidental hardships experienced by prisoners. The result would be a large reduction in the United States prison and jail population, without an increase in the crime rate.

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I. INTRODUCTION

The coronavirus (COVID-19) pandemic has had a devastating impact on all aspects of American society.¹ The United States has been more severely impacted by the coronavirus than any other country on Earth.² The health and economic devastations the virus has caused in the United States is almost incomprehensible. Every area of American society has been profoundly affected by the virus. This Article focuses on the immense impact that the rapid spread of the virus has had on the criminal justice system, and in particular, prisons and the sentencing system.

Most importantly, we explore the wider implications that the pandemic has for the criminal justice system and argue that it should be used as the catalyst to significantly reduce United States prison numbers to a point where the United States would no longer have the unenviable status of being the world's largest incarcerator by a massive margin. There is scope to greatly drive down prison numbers without compromising community safety.

The impact that the pandemic has had on the criminal justice system is striking. The coronavirus spreads most rapidly in circumstances where people congregate closely together.³ This is the reason that large numbers of cruise ships have reported such high numbers of coronavirus sufferers.⁴ Prisons, by their nature, are densely populated, with inmates undertaking all living activities in confined spaces and having virtually no capacity to reduce their

1. See *infra* Part II.

2. See *infra* notes 44–51 and accompanying text (noting that as of September 6, 2020, the United States accounted for over one-fifth of the world's coronavirus cases and deaths).

3. See, e.g., *Your Health: How to Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html#:~:text=The%20virus%20is%20thought%20to,are%20not%20showing%20symptoms> (last updated July 31, 2020) (noting that the virus spreads from person to person “[b]etween people who are in close contact with one another (within about 6 feet)”).

4. See *Your Health: CDC's Role in Helping Cruise Ship Travelers During the COVID-19 Pandemic*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/travelers/cruise-ship/what-cdc-isdoing.html> (last updated July 23, 2020) (“The current scientific evidence suggests that cruise ships pose a greater risk of COVID-19 transmission than other settings because of the high population density onboard ships.”); see also Smriti Mallapaty, *What the Cruise-Ship Outbreaks Reveal About COVID-19*, NATURE (Mar. 26, 2020), <https://www.nature.com/articles/d41586-020-00885-w> (examining the *Diamond Princess*'s outbreak and what it revealed about COVID-19 spreads in confined spaces).

contact with other people.⁵ Thus, prisons are fertile locations for the spread of coronavirus. Hence, it was not surprising that within several weeks of the first coronavirus cases being reported in the United States, the disease had made its way into the prison system.⁶

The infiltration of coronavirus into the prison system has resulted in immediate action by many states.⁷ Within several months of the commencement of the pandemic, many states had already released large numbers of inmates prior to the expiration of their sentences in order to minimize the spread of the virus in prisons, and in recognition of the limited health services available to prisoners.⁸ The full extent of the prisoner release is yet to be determined, although it is clear that, by any measure, the COVID-19 crisis is having a huge impact on prison numbers.⁹ By late May 2020, it was estimated that 5% of the global prisoner population had been released in response to the pandemic.¹⁰ According to Harm Reduction International, prison decongestion schemes in response to COVID-19 were in place in 109 countries.¹¹ Such schemes—about one-fourth of which exclude people

5. See Dan Morse & Justin Jouvenal, *Inmates Sharing Sinks, Showers and Cells Say Social Distancing Isn't Possible in Maryland Prisons*, WASH. POST (Apr. 10, 2020, 8:15 PM), https://www.washingtonpost.com/local/public-safety/inmates-sharing-sinks-showers-and-cells-say-social-distancing-isnt-possible-in-maryland-prisons/2020/04/10/5b1d5cf8-7913-11ea-9bee-c5bf9d2e3288_story.html (noting that prisoners cannot socially distance because they live in crowded quarters, sharing sleeping and hygiene areas).

6. See Katie Park, Tom Meagher, & Weihua Li, *Tracking the Spread of the Coronavirus in Prisons*, MARSHALL PROJECT (Apr. 24, 2020), <https://www.themarshallproject.org/2020/04/24/tracking-the-spread-of-coronavirus-in-prisons#:~:text=The%20first%20cases%20of%20COVID,from%20their%20friends%20and%20neighbors> (reporting that the first cases of coronavirus in prison occurred on March 20, 2020).

7. See *Responses to the COVID-19 Pandemic*, PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/virus/virusresponse.html> (last updated Sept., 11, 2020) (tracking the different state and local government responses to the threat of coronavirus in prisons).

8. See *id.*

9. See *id.*

10. See *Covid-19 Prisoner Releases Too Few, Too Slow*, HUM. RTS. WATCH (May 27, 2020, 1:00 AM), <https://www.hrw.org/news/2020/05/27/covid-19-prisoner-releases-too-few-too-slow> (reporting that by late May, approximately 5% of prisoners had been released globally in response to COVID-19).

11. Douglas A. Berman, *Notable Review of Worldwide Decarceration Efforts in Response to COVID-19*, SENT'G L. AND POL'Y (July 9, 2020, 6:29 PM), https://sentencing.typepad.com/sentencing_law_and_policy/2020/07/notable-review-of-worldwide-decarceration-efforts-in-response-to-covid-19.html (citing COVID-19, *Prisons and Drug Policy: Global Scan—March-June 2020*, HARM REDUCTION INT'L, <https://www.hri.global/covid-19-prison-diversion-measures> (last updated June 17, 2020)). No measures were reported in China and Russia, which have the second- and fourth-

incarcerated for drug offenses despite United Nations recommendations—include: early releases (through sentence commutation), pardons, diversion to home arrest, and release on bail or parole.¹² Release measures are temporary in a few countries, meaning prisoners are expected to return once the emergency is resolved.¹³

In this Article, we argue that a mass release of prisoners in order to reduce the likelihood of being infected with the virus is a desirable policy response.¹⁴ Fundamentally, offenders “are sent to prison as punishment, not for punishment”¹⁵ The main deprivation they should experience is the loss of liberty, and they should not be subjected to other forms of harm, such as a grossly elevated risk of contracting a serious illness. These principles justify the mass prisoner release in response to the pandemic.¹⁶

However, these very same principles also logically and morally command a reassessment of our current approach to the use of prison as a criminal sanction. Increased exposure to the coronavirus is one of many incidental hardships to which prisoners are subjected. It has been empirically established that inmates face a much higher risk of sexual and physical assault than the rest of the community.¹⁷ Their ability to have children is also negated

highest prison populations in the world, respectively. *Id.*

12. *Id.*

13. *Id.* Such countries include Iran, Costa Rica, Belgium, and Colombia. *Id.*

14. *See infra* Part III.

15. Rachel Bloom, *Prison as Punishment, Not for Punishment*, ACLU: BLOG (Mar. 26, 2010, 3:43 PM), <https://www.aclu.org/blog/national-security/prison-punishment-not-punishment>; *see International Standards*, JUST. & PRISONS, http://justiceandprisons.org/?page_id=5023 (last visited Sept. 26, 2020) (“These [United Nations international treaties] make it clear that while prisoners lose their rights to freedom of movement they keep their rights as human beings when they are in detention. They must not be treated in an inhuman or degrading way.”).

16. *See infra* Part VI; *see also* William Cooper, *Imprisonment During a Pandemic? That’s Cruel and Unusual Punishment*, S. FLA. SUN SENTINEL (Apr. 19, 2020), <https://www.sunsentinel.com/opinion/commentary/fl-op-com-cooper-covid-19-cruel-unusualpunishment-20200419-gfvnfnfvtnqf3gclohq7f5ii5e-story.html>.

17. Jo Yurcaba, *Rape Behind Bars: Stopping the Cycle of Violence*, NATION SWELL (Sept. 28, 2018), <https://nationswell.com/rape-in-prison/>. In 2007, a Bureau of Justice Statistics (BJS) report revealed that four years after passage of the Prison Rape Elimination Act (PREA), more than 70,000 prisoners were raped in American jails the previous year. *Id.* In 2012, the Justice Department issued standards for reporting sexual assault under PREA. Alysia Santo, *Prison Rape Allegations Are on the Rise*, MARSHALL PROJECT (July 25, 2018, 8:00 AM), <https://www.themarshallproject.org/2018/07/25/prison-rape-allegations-are-on-the-rise>. Since these standards were released, assaults are being reported more, with the number increasing from 8,768 in 2011 to 24,661 in 2015. *Id.* After a prisoner survey in 2012, the BJS “estimated that more than 200,000 inmates are sexually abused in

or restricted.¹⁸ Spending time in prison also consigns people to much lower life expectancies and reduced lifetime earnings.¹⁹ In addition, the family harmony of prisoners is greatly compromised compared to people living in the mainstream community.²⁰ Thus, prisoners are exposed to a number of considerable incidental deprivations.²¹ The cumulative total of these deprivations is so considerable that it arguably constitutes a greater hardship than the loss of liberty manifest in a prison term.²²

The criminal justice response to the coronavirus focuses attention on the impact that unintended deprivations should have on the nature of prison as a criminal sanction. Prison is, in reality, a far greater hardship than is conventionally accepted. This has significant consequences for the manner in which we use this sanction. Proportionality is the main principle that informs the nature and severity of punishment. In short, this is the view that the punishment should fit the crime.²³ More extensively, proportionality is the principle that the hardship of the penalty should match the seriousness of the crime.

It has emerged that the hardship of prison as a result of the coronavirus is more burdensome than was previously understood, and hence, consistent with the proportionality principle, many prisoners have been released early.²⁴ Other incidental deprivations also add to the extra burden of prison. Thus, prison should be used less frequently as a criminal sanction. It should be reserved only for the most serious of offenses (namely, sexual and violent offenses), and when it is used, prison terms should generally be shorter than is currently the situation. This would result in a considerable reduction in the United States's prison numbers. The empirical evidence suggests that it will not have any increase in the crime rate.²⁵

In the next part of this Article, we set out the nature and extent of the coronavirus pandemic and the response to the crisis by criminal justice

American detention facilities annually." *Id.*

18. *See infra* Part IV.B.

19. *See infra* Part IV.D.

20. *See infra* Part IV.B.

21. *See infra* Part IV.A.

22. *See infra* Part IV.

23. *See infra* Part IV.

24. *See infra* Part II.B.

25. *See infra* Section III.C.

officials. In Part III, we discuss the incarceration crisis that currently exists in the United States. We note that America is the world's largest incarcerator by a considerable margin. Incarceration numbers grew four-fold in the four decades leading to 2007. While there has been a slight reduction in prison numbers over the past decade, prison rates in the United States are still ten times higher than many other developed countries. This is followed by a discussion of the other extraordinarily harsh burdens of prison in Part IV. In Part V, we argue that these other hardships are so profound that they should result in fundamental recalibration of the extent to which prison is used as a criminal sanction. Our reform recommendations are summarized in the conclusion.

II. THE CORONAVIRUS PANDEMIC AND THE CRIMINAL JUSTICE RESPONSE

A. Overview of the Pandemic

“Coronaviruses are a large family of viruses” commonly found in humans and a variety of animal species, “including camels, cattle, cats, and bats.”²⁶ Rarely, animal coronaviruses can infect people and then spread between them.²⁷

In December 2019, a pneumonia outbreak was reported in Wuhan, Hubei Province, China.²⁸ On December 31, 2019, the outbreak was traced to a novel strain of coronavirus,²⁹ and in February 2020, the International Committee on Taxonomy of Viruses (ICTV) named the virus “severe acute respiratory syndrome coronavirus 2,” or “SARS-CoV-2.”³⁰ “Viruses are named based on

26. *Situation Summary*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://stacks.cdc.gov/view/cdc/87026> (last updated Apr. 19, 2020) [hereinafter *Situation Summary*].

27. *Id.*

28. The Editorial Board, *Is the World Ready for the Coronavirus?*, N.Y. TIMES: OPINION (Jan. 29, 2020), <https://www.nytimes.com/2020/01/29/opinion/coronavirus-outbreak.html>.

29. *Archived: WHO Timeline—COVID-19*, WORLD HEALTH ORG. (Apr. 27, 2020), <https://www.who.int/news-room/detail/27-04-2020-who-timeline---covid-19>.

30. *Naming the Coronavirus Disease (COVID-19) and the Virus that Causes It*, WORLD HEALTH ORG., [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it) (last visited Sept. 27, 2020); *see also* INT'L COMM. ON TAXONOMY OF VIRUSES, <https://talk.ictvonline.org/> (last visited Sept. 27, 2020) (explaining the naming of the novel coronavirus).

their genetic structure to facilitate the development of diagnostic tests, vaccines, and medicines,” while the diseases that viruses cause “are named to enable discussion on disease prevention, spread, transmissibility, severity and treatment.”³¹ On February 11, 2020, the World Health Organization (WHO)—the international group responsible for human disease preparedness and response—announced “COVID-19” as the name of this new disease.³²

“Early on, many patients at the epicenter of the outbreak in Wuhan . . . had some link to a large seafood and live animal market, suggesting animal-to-person spread. Later, a growing number of patients reportedly did not have exposure to animal markets, indicating person-to-person spread.”³³ Subsequently, health officials reported person-to-person spread outside of Hubei Province and in other countries, including the United States.³⁴

COVID-19³⁵ is thought to spread mainly from person to person, between people in close contact with one another (within about six feet), and through respiratory droplets produced when an infected person coughs or sneezes.³⁶ Those droplets can land in the mouths or noses of people who are nearby and can possibly be inhaled into the lungs.³⁷ People are thought to be the most contagious when they are most symptomatic (the sickest), and it is widely believed that people can be contagious before they even show symptoms.³⁸ A person can also potentially contract coronavirus “by touching a surface or object that has the virus on it and then touching their own mouth, nose, or eyes,” but this is not thought to be the main way the virus spreads.³⁹

The ease with which a virus spreads from person to person can vary, both in terms of the contagiousness of the virus and whether the spread is

31. *Naming the Coronavirus Disease (COVID-19) and the Virus that Causes it*, *supra* note 30.

32. *Id.*

33. *Situation Summary*, *supra* note 26.

34. *Id.*

35. Hereinafter referred to as “coronavirus” or “COVID-19.”

36. *How COVID-19 Spreads*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Ftransmission.html (last updated Oct. 5, 2020) [hereinafter *How COVID-19 Spreads*].

37. *Id.*

38. *Id.*

39. *Id.* Coronavirus is thought to persist on surfaces for a few hours up to several days. *See Q&A on Coronaviruses (COVID-19)*, WORLD HEALTH ORG. (Apr. 17, 2020), <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>.

“sustained,” meaning spreading continually without stopping.⁴⁰ Coronavirus appears to be spreading both easily and sustainably in the United States, largely because of community spread, meaning “some people have been infected and it is not known how or where they became exposed.”⁴¹ In January 2020, WHO declared the coronavirus outbreak a “public health emergency of international concern,” defined as “‘an extraordinary event’ [constituting a] ‘public health risk to other States through the international spread of [the] disease,’”⁴² and on March 11, 2020, WHO declared the coronavirus outbreak a “pandemic,” defined as the “worldwide spread” of a new disease.⁴³

Different parts of America are experiencing different levels of coronavirus activity. As of April 19, 2020, the United States overall was in the “acceleration” phase of the pandemic.⁴⁴ “The peak of illnesses occurs at the end of the acceleration phase, which is followed by a deceleration phase, during which there is a decrease in illnesses.”⁴⁵ By March 18, all fifty states had reported cases of coronavirus to the Centers for Disease Control (CDC).⁴⁶ Cases included travelers who were abroad and returned to the United States, close contacts of known cases, and community-spread cases where the source of the infection was unknown.⁴⁷ And as of April 13, all U.S. states had reported some community spread of coronavirus.⁴⁸

The remarkable change in the number of infections and deaths in the first five months of the pandemic demonstrates the incredible speed at which COVID-19 spreads. As of September 6, 2020, there have been nearly 881,000 deaths and nearly 27 million confirmed coronavirus cases across the world.⁴⁹

40. *How COVID-19 Spreads*, *supra* note 36.

41. *Situation Summary*, *supra* note 26.

42. Michael Nedelman, *World Health Organization Declares Coronavirus a Public Health Emergency of International Concern*, CNN (Jan. 30, 2020, 3:42 PM), <https://www.cnn.com/2020/01/30/health/coronavirus-who-public-health-emergency-international-concern-declaration/index.html>.

43. *Situation Summary*, *supra* note 26.

44. *Id.*

45. *Id.*

46. *See Coronavirus Disease 2019 (COVID-19): Cases in the U.S.*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://stacks.cdc.gov/view/cdc/85955> (last updated Mar. 18, 2020).

47. *How COVID-19 Spreads*, *supra* note 36.

48. *Situation Summary*, *supra* note 26.

49. *See* Roz Edward, *Georgia—Coronavirus Claims 6,000 Lives over Labor Day Weekend*, ATLANTA DAILY WORLD (Sept. 6, 2020), <https://atlantadailyworld.com/2020/09/06/georgia-coronavirus-claims-6000-lives-over-labor-day-weekend/>; *see generally* COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU), JOHN

As of that date in the United States, there have been more than 188,000 confirmed deaths and more than 6 million confirmed cases,⁵⁰ with a rate of about 1900 cases per 100,000 people.⁵¹

“The complete clinical picture with regard to COVID-19 is not fully known. Reported illnesses have ranged from very mild (including some [people] with no reported symptoms) to severe, including illness resulting in death.”⁵² An analysis by the WHO, released in March 2020, indicated that current data suggests that “80% of infections are mild or asymptomatic,” 15% of infections are severe and require oxygen, and “5% are critical infections, requiring ventilation.”⁵³ Common symptoms, which are believed to manifest between two and fourteen days after exposure, include fever, cough, and shortness of breath,⁵⁴ while some people have also reported fatigue, aches, runny nose, sore throat, and the loss of smell or taste.⁵⁵

A CDC report looked at the severity of the diseases among coronavirus patients in the United States and concluded that older individuals and those with pre-existing health conditions comprise higher-risk groups.⁵⁶ The report found that 80% of coronavirus-related deaths were among adults aged sixty-five and older, with the highest percentage occurring in people eighty-five years and older, and that people with serious underlying medical conditions, such as heart conditions, chronic lung disease, and diabetes, were at a higher

HOPKINS U. & MED.: CORONAVIRUS RES. CTR., <https://coronavirus.jhu.edu/map.html> (last updated Sept. 20, 2020, 8:23 PM) (tracking coronavirus cases); *Coronavirus Worldwide Graphs*, WORLDOMETER, <https://www.worldometers.info/coronavirus/worldwide-graphs/#total-cases> (last updated Sept. 20, 2020) (compiling global coronavirus cases and deaths). As of September 6, 2020, Worldometer noted more than 27.2 million cases and 896,737 deaths from COVID-19. *Id.*

50. *United States COVID-19 Cases and Deaths by State*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last updated Oct. 22, 2020, 12:31 PM).

51. *Id.*

52. See *COVID-19 Community Resources*, CITY OF EL CERRITO <http://el-cerrito.org/1513/COVID-19-Community-Resources> (last visited Oct. 7, 2020).

53. *Coronavirus Disease 2019 (COVID-19) Situation Report—46*, WORLD HEALTH ORG. (Mar. 6, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200306-sitrep-46-covid-19.pdf?sfvrsn=96b04adf_2.

54. *Symptoms of Coronavirus*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last updated Mar. 13, 2020).

55. *Coronavirus Disease 2019 (COVID-19)*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963> (last visited Apr. 21, 2020).

56. See *infra* note 57 and accompanying text.

risk of developing serious COVID-19 illness.⁵⁷

African-Americans are also being disproportionately infected and killed by coronavirus.⁵⁸ For instance, an April 7, 2020 *New York Times* article noted that in Chicago, African-Americans accounted for more than half of those who tested positive for the virus and constituted 72% of virus-related deaths, despite making up a little less than a third of the city's population.⁵⁹ Similar disproportionate figures for African-Americans have been reported in Louisiana, North Carolina, and South Carolina, leading even President Trump to ask in a daily briefing, "Why is it that the African-American community is so much, numerous times more than everybody else?"⁶⁰ For many public health officials, the reasons behind these disparities are explainable.⁶¹ For example, longstanding inequalities affecting Black Americans make them less likely to have a job with the luxury of working from home, "more likely to have existing health conditions and face racial bias that prevents them from getting proper treatment," and more likely to live in segregated neighborhoods with less access to stable housing and healthy food.⁶²

The impact that coronavirus has had on everyday life and society is absolutely extraordinary.⁶³ The changes have been unprecedented to the point of surrealism.⁶⁴ Restaurants, bars, and retail stores closed as major metropolitan cities and entire states issued multi-week lockdown or stay-at-home orders.⁶⁵ Hospital resources and personnel have been overworked and

57. *Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19)—United States, February 12–March 16, 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 27, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm?s_cid=mm6912e2_w; see also *People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last updated Oct. 16, 2020).

58. See *infra* notes 59–62 and accompanying text.

59. John Eligon et al., *Black Americans Face Alarming Rates of Coronavirus Infection in Some States*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/coronavirus-race.html>.

60. *Id.*

61. *Id.*

62. *Id.*

63. See, e.g., Alexander W. Bartik et al., *The Impact of COVID-19 on Small Business Outcomes and Expectations*, PROC. NAT'L ACAD. SCI. U.S.A (June 23, 2020), <https://www.pnas.org/content/pnas/117/30/17656.full.pdf> (analyzing COVID-19's impact on over 5,800 small businesses).

64. *Id.* (noting that COVID-19 "has caused a major economic shock").

65. See Jacob Gershman, *A Guide to State Coronavirus Reopenings and Lockdowns*, WALL ST. J., <https://www.wsj.com/articles/a-state-by-state-guide-to-coronavirus-lockdowns-11584749351>, (last updated May 20, 2020, 1:47 PM); Holly Secon & Aylin Woodward, *About 95% of Americans Have*

overwhelmed.⁶⁶ Other first responders battle record numbers of infection rates, leading to massive amounts of employees calling out sick.⁶⁷ Seemingly every company, from major global corporations to mom-and-pop shops, has moved its entire workforce to virtual, work-from-home setups.⁶⁸ In February 2020, the U.S. stock market had some of its worst daily and weekly losses in history.⁶⁹ Almost every school, college, and university across the country has moved classes to virtual learning or cancelled them altogether.⁷⁰ Record

Been Ordered to Stay at Home, BUS. INSIDER (Apr. 7, 2020), <https://www.msn.com/en-us/news/us/more-than-80-25-of-all-americans-have-been-ordered-to-stay-at-home-this-map-shows-which-cities-and-states-are-under-lockdown/ar-BB11LkzY#:~:text=About%2095%25%20of%20Americans%20have%20been%20ordered%20to,measures%20to%20prevent%20the%20spread%20of%20the%20coronavirus> (“As of [April 7, 2020], 42 US states, Guam, Washington, DC, and Puerto Rico had issued stay-at-home orders, asking residents to shelter in place and go out only for essential services, like buying food and medicine.”)

66. See *Hospitals Overwhelmed as Coronavirus Cases Skyrocket*, CBS News Broadcast (Apr. 2, 2020), <https://www.cbsnews.com/video/hospitals-overwhelmed-as-coronavirus-cases-skyrocket/>; see also Michael Rothfeld et al., *13 Deaths in a Day: An ‘Apocalyptic’ Coronavirus Surge at an N.Y.C. Hospital*, N.Y. TIMES (Mar. 25, 2020), <https://www.nytimes.com/2020/03/25/nyregion/nyc-coronavirus-hospitals.html>.

67. See, e.g., Craig McCarthy & Julia Marsh, *Huge Percentage of NYPD Cops Out Sick as Coronavirus Spreads*, N.Y. POST (Apr. 6, 2020, 7:54 PM), <https://nypost.com/2020/04/06/nearly-20-percent-of-nypd-cops-are-out-sick-during-coronavirus-outbreak/>; Scott Simon, *‘I Hear the Agony’: Increasing Coronavirus Cases Take Toll on NYC’s First Responders*, NPR (Apr. 18, 2020, 8:00 AM), <https://www.npr.org/2020/04/18/837855152/i-hear-the-agony-increasing-coronavirus-cases-take-toll-on-nyc-s-first-responder> (reporting that Vincent Variale, President of the Uniformed Emergency Medical Services (EMS) Officers Union, stated that “close to 14% of FDNY’s workforce is out sick, including those diagnosed with COVID-19”).

68. Alex Hern, *COVID-19 Could Cause Permanent Shift Towards Home Working*, GUARDIAN: TECHNOLOGY (Mar. 13, 2020, 1:11 PM), <https://www.theguardian.com/technology/2020/mar/13/covid-19-could-cause-permanent-shift-towards-home-working>; see also Derek Thompson, *The Coronavirus Is Creating a Huge, Stressful Experiment in Working from Home*, ATLANTIC: IDEAS (Mar. 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/coronavirus-creating-huge-stressful-experiment-working-home/607945/> (“In one picture, [working from home] is a desolate and lonely experience that often saps creativity and collapses the narrow distance between labor and downtime. In the next picture, it is a boon to social life, family life, egalitarianism, neurodiversity, and the planet itself. The messiness of the remote-work picture is a sign of the idea’s infancy.”).

69. Mark DeCambre, MarketWatch, & Joy Wiltermuth, *Dow, S&P 500 Fall for 7th Straight Day; Stocks Suffer Biggest Weekly Fall Since 2008*, MARKETWATCH (Feb. 28, 2020, 4:57 PM), <https://www.marketwatch.com/story/us-stock-futures-point-to-further-sharp-declines-as-asia-follows-wall-street-plunge-2020-02-28>.

70. See Emily Bary, *‘This Is Online Education’s Moment’ as Colleges Close During Coronavirus Pandemic*, MARKETWATCH (Mar. 18, 2020, 5:43 PM), <https://www.marketwatch.com/story/this-is-online-educations-moment-as-colleges-close-during-coronavirus-pandemic-2020-03-17>; Dana Goldstein, *Coronavirus Is Shutting Schools. Is America Ready for Virtual Learning?*, N.Y. TIMES

numbers of Americans filed for unemployment at the end of March 2020 as companies laid off or furloughed workers.⁷¹ Manufacturing disruptions and panic buying have disrupted the global food chain and affected essential drug supplies.⁷² Court systems have issued unprecedented freezes on pending criminal and civil cases and filing deadlines.⁷³ The federal government has announced immediate stimulus checks for Americans who fell below certain income thresholds and massive corporate bailouts of numerous Fortune 500 companies, including all of the largest national airlines and other hard-hit industries.⁷⁴ Major American sporting events and entire seasons, concerts,

(Mar. 13, 2020), <https://www.nytimes.com/2020/03/13/us/virtual-learning-challenges.html>. Months later, schools are still torn on how to proceed in the face of the pandemic. See Tawnell D. Hobbs, *Schools are Reopening, Then Quickly Closing Due to Coronavirus Outbreaks*, WALL ST. J. (Aug. 17, 2020, 5:48 PM), <https://www.wsj.com/articles/schools-are-reopening-then-quickly-closing-due-to-coronavirus-outbreaks-11597700886>. Many districts offer families “a choice between in-person learning and [virtual] learning,” with many schools that opened for in-person learning being forced to close again after students and teachers tested positive for COVID-19. See *id.*; see also Anya Kamenetz, *Biden Calls School Reopening a ‘National Emergency,’* NPR (Sept. 4, 2020, 7:01 AM), <https://www.npr.org/2020/09/04/909337949/biden-calls-school-reopening-a-national-emergency> (noting that “college towns are driving coronavirus outbreaks nationwide[.]” with more than 50,000 reported cases on campuses as of September 4, 2020).

71. See Heather Long, *Over 10 Million Americans Applied for Unemployment Benefits in March as Economy Collapsed*, WASH. POST: ECON. (Apr. 2, 2020, 9:56 AM), <https://www.washingtonpost.com/business/2020/04/02/jobless-march-coronavirus/> (reporting that a record more than 6.6 million Americans filed for unemployment benefits in the last week of March 2020).

72. See *Explainer: How the Coronavirus Crisis Is Affecting Food Supply*, REUTERS (Apr. 2, 2020, 10:52 PM), <https://www.reuters.com/article/us-health-coronavirus-food-explainer/explainer-how-the-coronavirus-crisis-is-affecting-food-supply-idUSKBN21L0D2>; Knvul Sheikh, *Essential Drug Supplies for Virus Patients Are Running Low*, N.Y. TIMES (Apr. 2, 2020), <https://www.nytimes.com/2020/04/02/health/coronavirus-drug-shortages.html> (“Medicines to alleviate breathing difficulty, relieve pain and sedate coronavirus patients are in very high demand, depleting stock around the country.”).

73. See David J. Clark, *Coronavirus Freezes Most Litigation Filings in New York State Courts, So Look Elsewhere for TROs and Preliminary Injunctions*, 10 NAT’L L. REV. 278 (Mar. 25, 2020), <https://www.natlawreview.com/article/coronavirus-freezes-most-litigation-filings-new-york-state-courts-so-look-elsewhere>; Jacob Gershman & Byron Tau, *Coronavirus Disrupts U.S. Court System*, WALL ST. J. (Mar. 17, 2020, 7:40 AM), <https://www.wsj.com/articles/coronavirus-disrupts-u-s-court-system-11584445222>.

74. See Catie Edmondson, *5 Key Things in the \$2 Trillion Coronavirus Stimulus Package*, N.Y. TIMES (Mar. 25, 2020), <https://www.nytimes.com/2020/03/25/us/politics/whats-in-coronavirus-stimulus-bill.html> (“The largest economic stimulus measure in modern history would authorize direct payments to taxpayers and loans to small businesses, and create a \$500 billion corporate bailout fund.”); see also Alan Rappeport & Niraj Chokshi, *Crippled Airline Industry to Get \$25 Billion Bailout, Part of It as Loans*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/business/coronavirus-airlines-bailout-treasury-department.html#:~:text=Crippled%20Airline>

plays, movie releases, and other live entertainment events have been postponed or cancelled altogether.⁷⁵ People and families have sat quarantined at home. Life as Americans knew it has changed fast, and drastically.

Arie Kuglanski, a psychology professor at the University of Maryland, noted that “[n]o event in recent history has affected us as profoundly or pervasively,” and that coronavirus not only serves as a stark reminder of human fragility, but it also “undermines [our] economic security, throws daily routines topsy-turvy, wreaks havoc on plans, and isolates us from friends and neighbors.”⁷⁶ Professor Kuglanski identifies three major ways the coronavirus pandemic has changed society, and in particular our psyches.⁷⁷ First, it has changed our sense of security: We wonder who will be affected and infected, for how long and how quickly, whether tests will be available, whether we will die, how long this will last, and what will happen to our jobs and our income.⁷⁸ Second, coronavirus has changed our needs: Ample research suggests that when our feelings of control and personal agency are compromised, our dependence on others rises, increasing our need for social relations with loved ones, family, and friends as we yearn for personal connection amidst the realization “that we need others, that we cannot hack it alone.”⁷⁹ Third, as the pandemic brings people closer together, it has changed our values: “Communal values of cooperation, consideration, [and compassion] are prioritized” while individualistic ones such as “prestige, popularity, and power” have been devalued.⁸⁰ And while we might approve of stronger communal bonds and humanitarianism, coronavirus has also led

%20Industry%20to%20Get%20%2425%20Billion%20Bailout%2C,200%20applications%20from%20U.S.%20airlines%20seeking%20payroll%20support.

75. See Lisa Respers France, *Coronavirus Has Halted These Concerts, Festivals, and Movie Premieres*, CNN: ENTMT (Mar. 18, 2020, 1:43 PM), <https://www.cnn.com/2020/03/10/entertainment/concerts-festivals-canceled-coronavirus/index.html>; Victor Mather, *How the Coronavirus Has Disrupted Sports Events*, N.Y. TIMES (Mar. 2, 2020), <https://www.nytimes.com/2020/03/02/sports/coronavirus-sports.html>; *All the Live Events, Movie Releases, and Productions Affected by the Coronavirus*, VULTURE (last updated Oct. 3, 2020), <https://www.vulture.com/2020/04/events-cancelled-coronavirus.html>.

76. Arie Kruglanski, *3 Ways the Coronavirus Pandemic Is Changing Who We Are*, CONVERSATION (Mar. 20, 2020, 8:09 AM), <https://theconversation.com/3-ways-the-coronavirus-pandemic-is-changing-who-we-are-133876>.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

to “close-mindedness, black-and-white thinking,” and even racism.⁸¹ The crisis has brought out both the best and worst in people.

B. Criminal Justice Response to the Pandemic—Mass Release of Prisoners

As the coronavirus pandemic ravages countries throughout the world, prisoner advocates are warning of the potential for a disastrous outbreak among inmates.⁸² The U.S. inmate population is aging, and although “[t]he elderly are most vulnerable, . . . jails and prisons . . . are breeding grounds for contagious diseases” given their crowded, restrictive nature.⁸³

In March 2020, consultant and former executive director of the Colorado Department of Corrections Rick Raemisch described prisons as “bacteria factories,” noting that the public would not appreciate the gravity of coronavirus in the criminal justice system and that the “devastation” would be “unbelievable.”⁸⁴ During the week of March 25, New York inmates tested positive at Rikers Island, the Texas Department of Criminal Justice reported its first two confirmed cases of coronavirus, and numerous large county and municipal jurisdictions began freeing hundreds of inmates deemed low-risk, including seniors and prisoners in poor health.⁸⁵ And on March 26, U.S. Attorney General William Barr issued a memo imploring “federal prisons to transfer older and medically vulnerable prisoners to home confinement,” but the memo was directed only at those with non-violent offense backgrounds “who were deemed low-risk.”⁸⁶

As of April 8, 2020, “[a]t least 1,324 confirmed coronavirus cases [were] tied to prisons and jails across the United States . . . including at least [thirty-

81. *Id.*; see also Holly Yan et al., *What’s Spreading Faster than Coronavirus in the U.S.? Racist Assaults and Ignorant Attacks Against Asians*, CNN (last updated Feb. 21, 2020, 6:02 PM), <https://www.cnn.com/2020/02/20/us/coronavirus-racist-attacks-against-asian-americans/index.html>.

82. See *supra* note 5 and accompanying text.

83. David Montgomery, *‘Prisons Are Bacteria Factories’; Elderly Most at Risk*, PEW CHARITABLE TRS. (Mar. 25, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/03/25/prisons-are-bacteria-factories-elderly-most-at-risk>.

84. *Id.*

85. J.J. Prescott et al., *It’s Time to Start Releasing Some Prisoners with Violent Records*, SLATE, (Apr. 13, 2020, 10:50 AM), <https://slate.com/news-and-politics/2020/04/combating-covid-release-prisoners-violent-cook.html> [hereinafter *It’s Time*].

86. *Id.*

two] deaths.”⁸⁷ Accurate numbers are likely much higher, since “some state and local agencies have not released information, and others, including the federal Bureau of Prisons [(BOP)] . . . are not testing everyone who falls ill.”⁸⁸ According to data compiled by *The New York Times*, as of April 8, Cook County jail in Chicago, one of the nation’s biggest, was deemed the largest known source of coronavirus infections in the nation.⁸⁹ Cook County jail reported more confirmed cases than infected Navy ship U.S.S. *Theodore Roosevelt*, a nursing home in Washington State infamous for a coronavirus outbreak, and a heavy coronavirus cluster in New Rochelle, New York.⁹⁰ The spread of coronavirus in prisons is accelerating across the country.⁹¹

As of April 13, 2020, the BOP reported that 388 federal inmates and 201 BOP staff had confirmed cases of coronavirus from all over the country, nineteen inmates and twelve staff had recovered, and thirteen inmates had died from coronavirus.⁹² Forty BOP facilities and nine Regional Reentry Centers (halfway houses) had been affected.⁹³ And by April 14, 2020, multiple reports from multiple prisons and jails throughout America announced that prisoners and staff had died from coronavirus, including at least four of the nation’s five most populous states: California, Texas, New York, and Pennsylvania.⁹⁴

87. Timothy Williams & Danielle Ivory, *Chicago’s Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars*, N.Y. TIMES (Apr. 8, 2020), <https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html>.

88. *Id.*

89. *Id.*

90. *Id.*; see Jack Healy & Serge F. Kovalski, *The Coronavirus’s Rampage Through a Suburban Nursing Home*, N.Y. TIMES (Mar. 21, 2020), <https://www.nytimes.com/2020/03/21/us/coronavirus-nursing-home-kirkland-life-care.html>.

91. See Ned Parker et al., *Spread of Coronavirus Accelerates in U.S. Jails and Prisons*, REUTERS (Mar. 28, 2020, 10:40 AM), <https://www.reuters.com/article/us-health-coronavirus-usa-inmates-insigh/spread-of-coronavirus-accelerates-in-us-jails-and-prisons-idUSKBN21F0TM>; Holly Yan, *Prisons and Jails Across the U.S. Are Turning into ‘Petri Dishes’ for Coronavirus. Deputies Are Falling Ill, Too*, CNN (Apr. 10, 2020, 9:49 AM), <https://www.cnn.com/2020/04/09/us/coronavirus-jails-prisons/index.html>.

92. Douglas A. Berman, *Latest BOP Numbers with Still More COVID Cases, and More Prisoner Deaths, at Still More Federal Facilities*, SENT’G L. AND POL’Y (Apr. 13, 2020, 5:28 PM), https://sentencing.typepad.com/sentencing_law_and_policy/2020/04/latest-bop-numbers-with-still-more-covid-cases-and-more-prisoner-deaths-at-still-more-federal-facili.html.

93. *Id.*

94. Douglas A. Berman, *Noticing Ever-Growing Number of States with an Ever-Growing Number of Prisoner and Prison Staff Deaths Due to COVID-19*, SENT’G L. & POL’Y (Apr. 14, 2020, 1:16 PM), https://sentencing.typepad.com/sentencing_law_and_policy/2020/04/noticing-ever-growing-number-of-states-with-an-ever-growing-number-of-prisoner-and-prison-staff-deat.html; see also 2019 U.S.

These numbers increased dramatically within a few short months. As of September 6, 2020, the University of California, Los Angeles (UCLA) Covid-19 Behind Bars Data Project had evaluated prisons and jails in all fifty states, as well as the BOP, and released a report indicating that there were 122,717 confirmed cases for residents of jails and prisons; 27,478 confirmed staff cases; 937 confirmed deaths for residents; and 73 confirmed staff deaths.⁹⁵ An interesting note about the number of inmate deaths from COVID-19 is that “it amounts to more prisoner deaths than has been produced by carrying out formal death sentences in the United States for the entire period from 2001 to 2020.”⁹⁶

Despite the virus’s spread prompting criminal justice system authorities to release thousands of inmates across the country—a large number “of whom were awaiting trial or serving time for nonviolent crimes”—an alarming rate of infection remains “among a population in which social distancing is virtually impossible and access to soap and water is not guaranteed.”⁹⁷ The rapid, unprecedented transmission of coronavirus has left United States prisons from coast to coast in a state of increased alarm, tension, and distrust. Some facilities have isolated inmates with fevers in solitary confinement, while others have locked inmates inside their cells for more than twenty-two hours a day in an effort to impede movement and potential transmission.⁹⁸ Yet others are sending infected prisoners to hurriedly-built microprisons.⁹⁹

As coronavirus continues its destructive spread across America’s massive system of prisons and jails, officials and scholars have focused on whether

Population Estimates Continue to Show the Nation’s Growth Is Slowing, U.S. CENSUS BUREAU (Dec. 30, 2019), <https://www.census.gov/newsroom/press-releases/2019/popest-nation.html>.

95. UCLA LAW COVID-19 BEHIND BARS DATA PROJECT, https://docs.google.com/spreadsheets/d/1X6uJkXXS-O6eePLxw2e4JeRtM41uPZ2eRcOA_HkPVtk/edit#gid=845601985 (last visited Sept. 28, 2020).

96. Douglas A. Berman, *The New Death Penalty: COVID Has Now Killed More US Prisoners in Months Than the US Death Penalty Has in the Last Two Decades*, SENT’G L. & POL’Y (Aug. 23, 2020, 11:23 AM), https://sentencing.typepad.com/sentencing_law_and_policy/2020/08/the-new-death-penalty-covid-has-now-killed-more-us-prisoners-in-months-than-the-us-death-penalty-has.html.

While Berman notes that such a comparison is problematic, he notes the concern that the number of deaths could have been much lower “if more aggressive depopulation efforts were taken” to get vulnerable offenders “out of the super-spreader environment that prisons represent.” *Id.*

97. Williams & Ivory, *supra* note 87.

98. *Id.*

99. *Id.*

prisoners should be released early, and if so, why.¹⁰⁰

A University of Michigan Law School study focused on the impact of coronavirus on prisoners with violent criminal histories.¹⁰¹ That segment of the prison population is especially concerning with respect to coronavirus for two reasons.¹⁰² First, efforts to date to move people out of prisons and jails have primarily targeted “the lowest-hanging fruit: those detained for inability to pay bail, technical parole violations, minor misdemeanors, [etc].”¹⁰³ Nearly all of these efforts have excluded people convicted of violent crimes.¹⁰⁴ Second, as the researchers noted, people convicted of violent crimes comprise the “majority of the total state prison population.”¹⁰⁵ Moreover, “because sentences for violent crimes are longer, [such individuals] make up an even larger percentage of the older detainees [who are] most vulnerable to [coronavirus]”—two-thirds of prisoners are over age fifty-five.¹⁰⁶ And, naturally, many people believe that individuals with violent convictions are dangerous.¹⁰⁷

Thus, given that a large population of currently incarcerated prisoners are more at risk because of their age, more likely to be serving longer sentences due to having violent crime convictions, and more likely to be viewed negatively because of those convictions, a critical question emerges: just “how dangerous is it to release prisoners with violent records?”¹⁰⁸ According to the Michigan Law study—which involved an empirical analysis of “post-release crime data on hundreds of thousands of . . . prisoners” with violent convictions—the answer is “that it is much less dangerous than you probably think.”¹⁰⁹ The study found that about one in ten released prisoners “was sent

100. See generally Joe D. Whitley et. al., *A Prisoner’s Dilemma: COVID-19 and Motions for Compassionate Release*, BAKER DONELSON (May 28, 2020), <https://www.bakerdonelson.com/webfiles/Bios/Prisoners%20dilemmaWestlaw.pdf> (discussing the legal hurdles to compassionate release).

101. J.J. Prescott et al., *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643, 1643–44 (2020) [hereinafter *Understanding*] (arguing that this demographic has largely been ignored by existing policies aimed at reducing mass incarceration).

102. *Id.* at 1697.

103. *It’s Time*, *supra* note 85.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Understanding*, *supra* note 101, at 1647–48; *It’s Time*, *supra* note 85 (italics omitted).

109. *It’s Time*, *supra* note 85; see also *Understanding*, *supra* note 101, at 1645–47.

back to prison for any new [type of] crime within the next three years[,]” and only one in twenty was sent back to prison for a violent crime within three years.¹¹⁰ Re-offense rates have also been consistently demonstrated “to be lower for people released after serving sentences for violent crimes” rather than for nonviolent crimes.¹¹¹ Furthermore, a “look at older prisoners” who are “most seriously threatened” by coronavirus shows that their crime rates are even lower.¹¹² Of “more than 7,000 prisoners over age [fifty-five] who had served at least five years in state prisons for a violent offense[,]” less than 1% of them were sent back to prison for a new crime within three years of release, and less than 0.5% of them were reincarcerated for a new violent crime.¹¹³ Those releases, however, “were normal releases from prison into society.”¹¹⁴ The notion of “release” during a global pandemic becomes more complex.

In the face of the pandemic, releases “could mean temporary transfers to home confinement for the duration of the emergency[,]” or the implementation of protective measures such as electronic monitoring.¹¹⁵ Such actions could further reduce crime, which has already dropped significantly since the implementation of lockdown measures.¹¹⁶ Nonetheless, at many prisons, there are likely some individuals whose dangerousness makes safely releasing them, even to home confinement and monitoring, unfeasible, but current data suggests both that the number of such cases is likely to be relatively small, and that policymakers could implement reforms for earlier release without substantially jeopardizing public safety.¹¹⁷ A positive outcome of such reforms is that fewer people would be incarcerated, potentially making it easier for those who remain to more safely practice

110. *It's Time*, *supra* note 85.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*; *see, e.g.*, Tal Axelrod, *Crime Rates Drop Across the Nation amid Coronavirus*, HILL (Apr. 3, 2020, 2:57 PM), <https://thehill.com/homenews/state-watch/491055-crime-rates-drop-across-the-nation-amid-coronavirus> (“The New York Police Department [reported] that crime across all five of the city’s boroughs and within the transit system and public housing fell by nearly 20 percent from March 12–31. In the second half of last month, murder decreased by 25 percent, robberies fell by 10 percent and grand larcenies dropped by 37 percent.”).

117. *It's Time*, *supra* note 85.

social distancing and more readily access basic hygienic products such as soap.¹¹⁸

In addition, while crime rates of hypothetically released (past) violent offenders are unlikely to be zero, the price of inaction given the extreme vulnerability of prisons and jails to the spread of infectious diseases has never been higher.¹¹⁹ Coronavirus indisputably poses a major risk to the over two million inmates in the United States in addition to hundreds of thousands of staff.¹²⁰ Moreover, coronavirus from inside arguably threatens countless people on the outside too.¹²¹ Prison and jail staff enter and leave daily.¹²² Some will unknowingly bring coronavirus in with them, and as the virus spreads through the country's prisons and jails, many of them will carry it out.¹²³ In one sense, "[p]risons and jails are like concerts, conferences, and cruise ships: places where crowds in confined spaces can spread the virus to many, many people fast."¹²⁴ But those places have been shut down; prisons and jails have not. Thus, coronavirus outbreaks behind bars could potentially

118. *Id.*

119. See, e.g., Amanda Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html>; Margo Schlanger & Sonja Starr, *Four Things Every Prison System Must Do Today*, SLATE (Mar. 27, 2020, 12:00 PM), <https://slate.com/news-and-politics/2020/03/four-steps-prevent-coronavirus-prison-system-catastrophe.html>; Peter Wagner & Emily Widra, *Five Ways the Criminal Justice System Could Slow the Pandemic*, PRISON POL'Y INITIATIVE (Mar. 27, 2020), <https://www.prisonpolicy.org/blog/2020/03/27/>; see also *Understanding*, *supra* note 101, at 1647 ("As many have recognized, prisons and jails are extremely vulnerable to the spread of infectious disease, due to the impossibility of effective social distancing, the large numbers of people coming in and out daily (especially staff), and even challenges associated with basic hygiene in such facilities.").

120. *It's Time*, *supra* note 85; see also Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE, slideshow 1 (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2019.html> ("The U.S. locks up more people per capita than any other nation, at the staggering rate of 698 per 100,000 residents. . . . 2.3 million people are confined nationwide."); *Staff Ethnicity/Race*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_staff_ethnicity_race.jsp (last updated Sept. 26, 2020) (noting over 37,000 staff work in United States federal prisons); Zhen Zeng, *Jail Inmates in 2018*, U.S. DEP'T OF JUSTICE, at 9 (2020), <https://www.bjs.gov/content/pub/pdf/ji18.pdf> (finding approximately 221,600 staff employed in local jails in 2018).

121. *It's Time*, *supra* note 85.

122. *Id.*

123. *Id.*; German Lopez, *A Coronavirus Outbreak in Jails or Prisons Could Turn into a Nightmare*, VOX (Mar. 17, 2020, 8:30 AM), <https://www.vox.com/policy-and-politics/2020/3/17/21181515/coronavirus-covid-19-jails-prisons-mass-incarceration> ("Visitors and correctional staff could spread the disease when they go back home, and inmates could spread it when they're released.").

124. *It's Time*, *supra* note 85.

devastate the world beyond, threatening America's ability to manage the pandemic and regain a semblance of normal life.¹²⁵ This reality, coupled with the strikingly low re-offense rates for released prisoners with violent convictions, especially older prisoners, supports policy and reforms aimed at releasing more of such individuals in these unparalleled times.¹²⁶

Other analyses have applied a more rigorous legal approach to the issue of releasing prisoners during the coronavirus pandemic. Since this pandemic is so novel, and because individual penal laws and codes vary widely among states, these analyses have focused on federal law.¹²⁷ There are only two ways to reduce a federal prison sentence: either the government moves to decrease the sentence based on a defendant providing "substantial assistance"¹²⁸ in the investigation of others, or the defendant qualifies for "compassionate release."¹²⁹ For decades, compassionate release was rarely granted, in large part because only the BOP was authorized to determine whether courts could consider if a defendant had satisfied the necessary criteria.¹³⁰ However, "[t]wo factors [recently] changed that: . . . [t]he First Step Act of 2018 amended the [relevant] statute to allow prisoners to directly petition courts for compassionate release," and the coronavirus pandemic significantly increased the number of instances that support using the compassionate release statute.¹³¹

Under 18 U.S.C. § 3852(c), a court may not modify a sentence of

125. *Id.*

126. *Understanding, supra* note 101, at 1647–48, 1697.

127. *See, e.g.*, NATHAN JAMES & MICHAEL A. FOSTER, CONG. RESEARCH SERV., R46297, FEDERAL PRISONERS AND COVID-19: BACKGROUND AND AUTHORITIES TO GRANT RELEASE (2020) (discussing the legal implications of granting prisoners early release).

128. FED. R. CRIM. P. 35(b)(1).

129. 18 U.S.C. § 3582I (2018). This statute is commonly known as the "compassionate release" statute, though it does not contain that specific language. Nina J. Ginsberg, *From the President: Compassionate Release: The Nuts and Bolts*, MEDIUM (Mar. 5, 2020), <https://medium.com/@NACDL/from-the-president-compassionate-release-the-nuts-and-bolts-e3406408f644> (noting that the statute has "become known as the 'compassionate release' program").

130. William W. Berry, III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 867–68 (2009) (noting that in the 1990s, 0.01% of inmates annually were granted compassionate release).

131. William Athanas, JD Thomas, & Charles Prueter, *Tips for Prisoner Release During Pandemic*, LAW360 (Apr. 12, 2020, 8:02 PM), <https://www.law360.com/access-to-justice/articles/1262468/tips-for-prisoner-release-requests-during-pandemic>; *see* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. First Step is an acronym for the Formerly Incarcerated Re-enter Society Transformed Safely Transitioning Every Person. *Id.*

imprisonment once imposed except under limited circumstances, such as “where the court finds that ‘extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.’”¹³² But before a court can make that determination, “the motion must be made by [either] the director of the [BOP], or by the defendant” himself after he “has fully exhausted all administrative rights to appeal the BOP’s failure” to make such a motion, or if thirty days have passed since a defendant has administratively appealed to the warden of his facility and received no response, whichever occurs first.¹³³ And rather than define what constitutes “extraordinary and compelling reasons,” Congress directed the United States Sentencing Commission (Sentencing Commission) to determine what criteria to apply and to cite “specific examples of extraordinary and compelling reasons.”¹³⁴ In turn, the Sentencing Commission “establish[ed] three potential categories: the defendant’s medical condition; . . . age; . . . and family circumstances.”¹³⁵

With respect to coronavirus, a defendant’s medical condition has been and will continue to be the factor “most frequently invoked to satisfy the ‘extraordinary and compelling reasons’” threshold.¹³⁶ Under the Sentencing Commission’s guidelines, “compassionate release is warranted where ‘the defendant is . . . suffering from a serious physical or medical condition . . . that substantially diminishes the ability to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.’”¹³⁷ A court evaluating compassionate release requests must make that finding, and it “must also find that the defendant is not a danger to the safety of any other person or to the community.”¹³⁸ “Finally, the court must

132. Athanas, Thomas, & Prueter, *supra* note 131 (quoting § 3582(c)(1)(A)(i)) (“The statute also grants the court authority to reduce an imposed sentence where the defendant is at least 70 years old, has served at least 30 years in prison, and is not deemed a danger to the community.”).

133. *Id.*

134. *Id.*

135. *Id.*; U.S. SENTENCING GUIDELINES MANUAL § 1B1.13, App. Note 1 (U.S. Sentencing Comm’n 2018).

136. Athanas, Thomas, & Prueter, *supra* note 131.

137. *Id.* (internal brackets omitted) (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.13, App. Note 1(A)(ii) (U.S. Sentencing Comm’n 2018)).

138. *Id.* at n.6 (citing *United States v. Butler*, 2020 WL 1689778, at *2–3 (S.D.N.Y. Apr. 7, 2020) (“At least one court has followed the Guideline’s mandate in denying a motion for compassionate release where the defendant had shown ‘extraordinary and compelling reasons’ but was unable to

apply the factors [outlined] in [18 U.S.C. §] 3553(a), which guide sentencing generally.”¹³⁹

Once it became clear in mid-March 2020 that coronavirus would “spread exponentially across the United States, concern grew about [the] risk [the virus would pose to] correctional facilities.”¹⁴⁰ The United States District Court for the Eastern District of Pennsylvania said in a compassionate release case that “prisons are tinderboxes for infectious disease.”¹⁴¹ As discussed above, prisons and jails increase the risk of contracting infectious diseases such as coronavirus.¹⁴² Much of that risk comes from the combination “of inmates with chronic, often untreated, illnesses” in environments “with minimal levels of sanitation, [reduced] access to personal hygiene [products], and limited access to medical care.”¹⁴³ Moreover, proper social distancing is practically impossible, enabling coronavirus “to spread rapidly” once it penetrates the walls of a prison or jail.¹⁴⁴

One study by three law firm partners analyzed seventy judicial orders issued in response to compassionate release motions filed in March and April 2020, and immediately noticed that only one of them was filed by an inmate with an actual confirmed case of coronavirus.¹⁴⁵ By contrast, the overwhelming majority of motions sought relief based on the “risk of harm that would result *were* they to become infected.”¹⁴⁶ A review of these judicial

demonstrate that he was not a danger to the community.”).

139. Athanas, Thomas, & Prueter, *supra* note 131.

140. *Id.*

141. *Id.* (quoting *United States v. Rodriguez*, 451 F. Supp. 3d 392, 394 (E.D. Penn. 2020)).

142. Williams & Ivory, *supra* note 87 (“It started small. On March 23, two inmates in the sprawling Cook County jail, one of the nation’s largest, were placed in isolation cells after testing positive for the coronavirus. In a little over two weeks, the virus exploded behind bars infecting more than 350 people.”)

143. Athanas, Thomas, & Prueter, *supra* note 131; *see also* Keri Blakinger & Beth Schwartzapfel, *When Purell Is Contraband, How Do You Contain Coronavirus?*, MARSHALL PROJECT (Mar. 6, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/03/06/when-purell-is-contraband-how-do-you-contain-coronavirus> (“‘Jails and prisons are often dirty and have really very little in the way of infection control,’ said Homer Venters, former chief medical officer at New York City’s notorious Rikers Island jail complex.”).

144. Athanas, Thomas, & Prueter, *supra* note 131, at n.9 (quoting *United States v. Davis*, 449 F. Supp. 3d 532, 537 (D. Md. Mar. 30, 2020) (“[T]he inability to practice social distancing in jails makes ‘transmission of COVID-19 more likely.’”)).

145. *Id.* (citing *United States v. Matera*, No. 02-CR-743-6 (JMF), slip op. at *1 (S.D.N.Y. Apr. 8, 2020)).

146. *Id.*

orders, as of April 10, 2020, revealed at least five key principles guiding court decisions.¹⁴⁷ These principles are important because they developed the framework for the manner in which future cases would be decided.¹⁴⁸

First:

Exhaustion of administrative remedies [emerged as] the key factor[:]
In all but three of the [forty-three] cases where courts denied relief, failure to exhaust administrative remedies was the primary reason given. In the [twenty-four] cases where relief was granted, the defendant was [either] found to have exhausted administrative remedies, or the court [found] that an exception to the exhaustion requirement existed.¹⁴⁹

Second, government consent proved to be an important but not critical factor.¹⁵⁰ Compassionate release was granted in every case where the government consented, but it was also granted in at least thirteen cases where the government objected to the motion.¹⁵¹ Third, the “[t]ypes of health conditions matter[ed]. As one [might] expect, motions filed by inmates with significant respiratory issues were granted most frequently.”¹⁵² But “courts also granted compassionate release for [inmates] suffering from diabetes, hypertension, Crohn’s disease, and other . . . chronic conditions [leaving inmates] immunocompromised.”¹⁵³ However, not all inmates suffering from

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* This number could be higher, as it was unclear in some cases whether the government opposed relief. *Id.*

152. *Id.* at n.11; *see, e.g.*, *United States v. Hernandez*, 451 F. Supp. 3d 301, 302 (S.D.N.Y. 2020) (noting that the BOP should find a sentence reduction “clearly merited” considering the heightened risk of an inmate who suffers from asthma of contracting the coronavirus); *United States v. Gonzalez*, 451 F.Supp.3d 1194, 1197–98 (E.D. Wash. 2020) (finding the same for COPD and emphysema).

153. Athanas, Thomas, & Prueter, *supra* note 131, at nn. 12, 14, 18 (citing *United States v. Jasper*, No. 18 Cr. 390-18, slip op. at *1 (S.D.N.Y. Apr. 4, 2020) (Crohn’s disease); *United States v. Zukerman*, 451 F. Supp. 3d 329, 330 (S.D.N.Y. 2020) (diabetes, hypertension, obesity); *United States v. Colvin*, 451 F. Supp. 3d 237, 238 (D. Conn. 2020) (hypertension, diabetes); *United States v. Muniz*, No. 4:09-CR-0199-1, 2020 WL 1540325, at *2 (S.D. Tex. Mar. 30, 2020) (end stage renal disease, hypertension, diabetes); *United States v. Campagna*, No. 16 Cr. 78-01 (LGS), 2020 WL 1489829, at *1 (S.D.N.Y. Mar. 27, 2020) (“[C]ompromised immune system with very low white blood cell counts.”).

chronic medical conditions were granted relief.¹⁵⁴ Fourth, the “[l]ength of sentence remaining was not a determinative factor.”¹⁵⁵ “While many of the defendants successful in gaining release had a relatively short amount of time left before completing their sentences,” courts have not made that a prerequisite, and, in fact, ten inmates whose motions were granted had a year or more left to serve.¹⁵⁶ Fifth, the presence of the virus in a given facility was at times dispositive.¹⁵⁷ In granting relief, several courts “cited this factor as evidence of ‘extraordinary and compelling reasons,’ including one which distinguished cases denying relief on the grounds . . . [that] those defendants were not housed in facilities ‘where COVID-19 was spreading.’”¹⁵⁸ Finally, when the compassionate release motions were filed had seemingly no correlation with their likelihood of success.¹⁵⁹ Of the seventy judicial orders studied—fifty-seven of them issued after April 1, 2020, as the pandemic continued to spread—“approximately one-third of motions filed for compassionate release were granted.”¹⁶⁰

The patterns in the rulings issued thus far indicate that an individual’s chance of securing compassionate release based on a coronavirus-related legal argument are significantly raised when he meets one or more of three criteria.¹⁶¹ First, the defendant must overcome the “exhaustion requirement” of administrative remedies.¹⁶² This might be the most daunting of the obstacles inmates face, given the thirty-day waiting period for a decision by the BOP while the threat of coronavirus harm in prisons looms over and

154. See, e.g., Athanas, Thomas, & Prueter, *supra* note 131, at n.13 (citing *United States v. Ramos*, No. 14 Cr. 484 (LGS), slip op. at *2 (S.D.N.Y. Apr. 7, 2020) (finding that a defendant suffering from asthma was adequately treated by BOP); *United States v. Gileno*, 448 F. Supp. 3d 183, 187 (D. Conn. Mar. 19, 2020) (finding that a defendant suffering from high blood pressure, high cholesterol, and asthma did not meet requirement of demonstrating extraordinary and compelling reasons for relief)).

155. Athanas, Thomas, & Prueter, *supra* note 131.

156. See generally *id.* at n.14 (citing *Zukerman*, 451 F. Supp., at 334 (twenty-seven months remaining); *United States v. Resnick*, 451 F. Supp. 3d 262 (S.D.N.Y. 2020) (thirty-three months remaining); *Rodriguez*, 451 F. Supp. 3d, at 405 (thirty-six months remaining); *Muniz*, 2020 WL 1540325, at *1 (thirty-eight months remaining)).

157. *Id.*

158. *Id.* (quoting *Zukerman*, 451 F. Supp., at 336 n.3).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

continues to grow.¹⁶³ Nonetheless, defendants with legitimate requests should submit them to the BOP as soon as possible.¹⁶⁴ It not only starts the thirty-day clock, but it looks good in court and can speed up the clock, too: “[i]n at least two cases, courts have deferred ruling and directed the BOP to make . . . administrative [decisions] promptly”.¹⁶⁵ Other judicial decisions have waived the exhaustion requirement or deemed it satisfied when failure to do so would put an inmate’s health at risk,¹⁶⁶ while still others have said that if the government consented to release, then exhausting BOP remedies is unnecessary.¹⁶⁷

The second of the criteria is a relevant medical condition.¹⁶⁸ The most important factor here is that the “defendant is . . . suffering from a serious physical or medical condition . . . that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.”¹⁶⁹ In short, courts examine whether a given “defendant has a medical condition [that], when combined with coronavirus” in the current conditions of his incarceration facility, puts his survival at risk.¹⁷⁰ Ultimately, a defendant must be able to show that he suffers from a condition that puts him at serious risk of harm or death if he contracts coronavirus.¹⁷¹ Such a showing will increase “the possibility that a court will find [an] ‘extraordinary and compelling reason[]’ to grant [a] motion” for early release.¹⁷²

163. *Id.*

164. *Id.*

165. *See, e.g., id.* at n.17 (citing *United States v. Jemal*, No. 15-570, 2020 WL 1701706, at *3 (E.D. Pa. Apr. 8, 2020) (providing the BOP four days to rule on defendant’s request for compassionate release, which had already been pending for ten days); *United States v. Gross*, 452 F. Supp. 3d 26, 27 (S.D.N.Y. 2020) (ordering the government to submit BOP determination within three days)).

166. *See, e.g., Athanas, Thomas, & Prueter, supra* note 131, at n.18 (citing *United States v. McCarthy*, 453 F. Supp. 3d 520, 525 (D. Conn. 2020); *United States v. Colvin*, 451 F. Supp. 3d 237, 240 (D. Conn. 2020)).

167. *Id.* at n.19 (citing *United States v. Villaneuva*, No. 18 Cr. 472-3 (KPF), 2020 U.S. Dist. LEXIS 61908, at *9 (S.D.N.Y. Apr. 8, 2020); *United States v. Marin*, No. 15-cr-252 (PKC) (E.D.N.Y. Mar. 30, 2020)).

168. *Id.*

169. U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 cmt. 1(A)(ii) (U.S. Sentencing Comm’n 2018).

170. Athanas, Thomas, & Prueter, *supra* note 131.

171. *Id.*

172. *Id.*

Third, securing the government's consent drastically improves an inmate's likelihood of securing his release.¹⁷³ No reported cases as of mid-April 2020 showed denial of release where the government agreed it was appropriate.¹⁷⁴ Naturally, then, real gains can be made when a defendant self-advocates, for example, by making the government aware of the combination of his medical situation and the conditions of the particular prison or jail housing him.¹⁷⁵ Defense attorneys can add value by brokering these conversations and by highlighting for the government their client's specific circumstances and instances where relief was granted for similarly situated defendants.¹⁷⁶ Indeed, one author of this Article has participated in a number of these conversations already.¹⁷⁷

As time passes, our understanding of coronavirus will evolve, and the picture of its impact in prisons and jails will become clearer.¹⁷⁸ But for inmates, the race against the clock is now.¹⁷⁹ Medical reasons, legal reasons, and human-decency reasons all support releasing prisoners who are non-violent, older, and suffering from one or more chronic health conditions, and such releases are taking place. The focus shifts to the inmates who remain, and it is likely that this pandemic will result in one of the largest prisoner

173. *Id.*

174. *Id.* For a recent analysis of some trends in early release COVID applications, see Zoe Tillman, "I Had Hit the Lottery": Inmates Desperate to Get Out of Prisons Hit Hard by the Coronavirus Are Racing to Court, BUZZFEED NEWS (Aug. 6, 2020, 3:08 AM), <https://www.buzzfeednews.com/article/zoetillman/coronavirus-prison-release-rules-inconsistency>.

175. Athanas, Thomas, & Prueter, *supra* note 131.

176. *Id.*

177. See Peter Isham, LINKEDIN, https://www.linkedin.com/public-profile/in/peter-isham-05181666?challengeId=AQEv3SMz33wmSwAAAXTdR2ZoOgUD_JW-YM124806_117BY52_TjJPjscrwypKyuTSuxbc9UqU_AIQKzxCsZJ78F0JY7BsWj8_w&submissionId=9bb3a8ab-7275-3916-a658-03c2763a6b40 (last visited Sept. 29, 2020). Co-author Peter Isham is a criminal prosecutor as an Assistant District Attorney for New York City. *Id.* As of April 2020, he has participated in numerous compassionate release hearings at the state level, including instances where the government has consented to release due to some combination of the factors discussed in this Article, for example, a defendant's medical condition, conditions of his prison or jail, nature of the current charges and sentence, and his criminal history.

178. See *A State-by-State Look at Coronavirus in Prisons*, MARSHALL PROJECT (last updated Oct. 2, 2020 4:55 PM), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

179. See *id.* ("By Sept[ember] 29, at least 138,105 people in prison had tested positive for the illness, a [four] percent increase from the week before. New cases among prisoners reached an all-time high in early August after slowing down in June.")

releases in U.S. history.¹⁸⁰

As of September 1, 2020, there were already some signs of a greater preparedness for officials to facilitate large numbers of early releases for COVID-19-based reasons. The UCLA Covid-19 Behind Bars Data Project collected data from several states and the BOP, which showed a reduction of nearly 4% in the prison population, with California and Illinois reporting 3,418 and 4,000 releases, respectively.¹⁸¹ Insofar as jails are concerned, the project also noted a reduction of 31%, with a total of 68,176 releases.¹⁸²

While at this stage the number of COVID-19 releases has not resulted in massive numbers of prisoner releases, there has been an enormous reduction in the number of admissions to jails during the pandemic.¹⁸³ The scale of the reduction is staggering.¹⁸⁴ Research from the Vera Institute indicates that “nationally there may have been approximately 200,000 fewer people in jail at the beginning of June [2020] than in mid-March [2020]”.¹⁸⁵ This is a reduction in the jail population size by about 25%.¹⁸⁶ The exact reasons for this are multi-faceted.¹⁸⁷ The Vera Institute study suggests:

Jail bookings dropped as people who would otherwise have been arrested stayed home, and police and sheriffs made fewer arrests Simultaneously, many judges and prosecutors used their broad discretion to facilitate the release of people they deemed safe, while

180. See Peter Wagner, *Large Scale Releases and Public Safety*, PRISON POL’Y INITIATIVE (Apr. 9, 2020), <https://www.prisonpolicy.org/blog/2020/04/09/large-scale-releases/> (analyzing whether “governments [can] safely release hundreds of thousands of people from prison” and offering fourteen historical successful examples—from countries including the United States, Czech Republic, Finland, Israel, Italy, and Russia). The examples show that large-scale releases have been common throughout the United States and in other nations for a variety of legal, political, and health reasons, and not only did the places where the releases occurred not become hotspots for crime, but “in many cases, the inverse happened—and the academic literature about these experiences prove it.” *Id.*

181. *UCLA Law Covid-19 Behind Bars Data Project*, *supra* note 95.

182. *Id.* For a full list of prison and jail release court orders, see *UCLA Law Covid-19 Behind Bars Data Project—Court Orders*, UCLA L., <https://law.ucla.edu/academics/centers/criminal-justice-program/ucla-covid-19-behind-bars-data-project/ucla-covid-19> (last visited Sept. 30, 2020).

183. JASMINE HEISS ET AL., *THE SCALE OF THE COVID-19-RELATED JAIL POPULATION DECLINE*, VERA. INST. OF JUSTICE 1 (2020), <https://www.vera.org/publications/covid19-jail-population-decline> (summarizing an analysis of U.S. jails that showed a reduction of the jail population).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

public defenders filed thousands of motions to secure the release of their clients. . . . But as the United States faces continued outbreaks of COVID-19, it is crucial to recognize that decarceration has still been inadequate, from both a public safety and a public health perspective.¹⁸⁸

A key aspect of our argument is that there is a pressing need to release large numbers of other prisoners.¹⁸⁹ In abstract, the concept of early release is radical but obviously made more realistic in light of the coronavirus pandemic. It is also made more realistic by the fact that the early release of prisoners, even recently, has not been simply in response to extreme events such as the coronavirus crisis.¹⁹⁰ In December 2019, the federal government enacted the First Step Act, which significantly reduced the federal incarceration rate.¹⁹¹ Pursuant to the Act, various offenses, including drug crimes, now attract more lenient sanctions; offenders' criminal histories play a greater role in the determination of their sentences; and prisoners can be released early.¹⁹² The latter can occur where the BOP agrees to move "low risk" offenders to home detention once they have served the bulk of their sentences,¹⁹³ or where prisoners qualify for an "Elderly Home Detention" program on the basis that they are sixty years of age, have completed two-thirds of their sentences, and have not been convicted of certain serious offenses.¹⁹⁴

The legislation requires the Attorney General to create a "Risk and Needs Assessment System," which evaluates prisoners' risk of reoffending and the

188. *Id.* (footnotes omitted).

189. *See infra* Part V.

190. *See, e.g.*, First Step Act of 2018, Pub. L. No. 115-391, § 602, 132 Stat. 5194, 5238 (2018).

191. *See President Donald J. Trump Secures Landmark Legislation to Make Our Federal Justice System Fairer and Our Communities Safer*, WHITE HOUSE (Dec. 21, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-secures-landmark-legislation-to-make-our-federal-justice-system-fairer-and-our-communities-safer/>.

192. Gina Martinez, *The Bipartisan Criminal-Justice Bill Will Affect Thousands of Prisoners. Here's How Their Lives Will Change*, TIME (Dec. 20, 2018, 4:21 PM), <http://time.com/5483066/congress-passes-bipartisan-criminal-justice-reform-effort/>.

193. Brandon Sample, *The First Step Act Bill Summary Explained: A Comprehensive Analysis*, SENTENCING.NET (Dec. 19, 2018), <https://sentencing.net/legislation/the-first-step-act-2018-summary> (Title VI, Section 602).

194. *Id.* (Title VI, Section 603(b)).

programs that will assist them most to lower that risk.¹⁹⁵ The Attorney General is also required to ensure that prisoners can participate in these programs so they can maximize their opportunity to be released early, though offenders who have been convicted of many types of generally violent crimes are not eligible for early release.¹⁹⁶

Pursuant to this legislation, the Department of Justice (DOJ) has recently developed the Prisoner Assessment Tool Targeting Estimated Risk and Needs (PATTERN) program, which is based on an algorithm and incorporates the following key features.¹⁹⁷ First, the DOJ aims to introduce a “dynamic individualized assessment,” which evaluates offenders’ risks and needs by reference to factors that are susceptible to change, including their conduct while incarcerated, rather than immutable matters such as the nature of their offenses.¹⁹⁸ Second, the DOJ proposes “periodic re-validation and update” of the tool so that it remains effective.¹⁹⁹ Third, the DOJ aims to make the tool racially and ethnically neutral, so that particular social groups are not prejudiced as a consequence of its application.²⁰⁰ Fourth, the DOJ proposes assessment of offenders’ criminogenic needs, so that measures can be developed to lessen their risks of reoffending.²⁰¹ The tool involves undertaking a risk and needs assessment of all prisoners; improving the needs assessment system; bringing the earned time credit system into operation; making the workflow automatic; and bringing into effect policies that incite prisoners to participate in programs that can reduce their risk of reoffending and thus maximize their chances of early release.²⁰²

The DOJ has already implemented the First Step Act.²⁰³ By early 2020, more than 3,100 prisoners who did not commit sexual or violent offenses were released pursuant to the Act.²⁰⁴ Additionally, 2,471 orders have been issued

195. *Id.* (Title I, Section 101).

196. *Id.* (Title I, Section 102(e)).

197. U.S. DEP’T OF JUSTICE, OFFICE OF THE ATTORNEY GEN., THE FIRST STEP ACT OF 2018: RISK AND NEEDS ASSESSMENT SYSTEM 43 (2019), https://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/the-first-step-act-of-2018-risk-and-needs-assessment-system_1.pdf.

198. *Id.* at 26.

199. *Id.* at 27–28.

200. *Id.* at 28.

201. *Id.* at 28–29.

202. *See id.* at 71–72.

203. *Id.*

204. *See* Press Release, U.S. Dep’t of Justice, Dep’t of Justice Announces Enhancements to the Risk

for sentence reduction, 124 requests for compassionate release have been approved, and 2,000 inmates are on home confinement.²⁰⁵ Moreover, 379 inmates have been approved to enroll in a pilot program that aims to transition “eligible elderly and terminally ill offenders” to home confinement.²⁰⁶

Accordingly, the coronavirus pandemic is radically shaping criminal justice and prison policy, particularly by leading to steps that will lower prison numbers.²⁰⁷ In this Article, we argue that this approach should be broadened in light of other manifest hardships that are caused by incarceration and have not been properly calibrated into the principles that should govern the sentencing of offenders. Prior to making this argument, we provide a brief overview of the current state of United States sentencing law and penal practices.

III. THE CURRENT MASS INCARCERATION CRISIS

A. *Prisoners by Numbers*

The United States is experiencing a mass incarceration crisis.²⁰⁸ In the United States, incarcerated offenders are held in two forms of detention: prisons and jails. Prisons are long-term confinement institutions run by states or the federal government that hold offenders with sentences that are typically longer than one year in duration, and include public and private prisons, boot camps, and treatment centers.²⁰⁹ Jails are temporary detention facilities operated by “a sheriff, police chief, or city or county administrator,” and

Assessment Sys. and Updates on First Step Act Implementation (Jan. 15, 2020), <https://www.justice.gov/opa/pr/departement-justice-announces-enhancements-risk-assessment-system-and-updates-first-step-act> (on file with author).

205. *See id.*

206. *Id.*

207. *See* Martinez, *supra* note 192 (finding that “some 53,000 of the 181,000 inmates currently imprisoned in the federal system [will] be affected over the next 10 years”).

208. *See generally* Udi Ofer & Nicole Zayas Fortier, *Unveiling a State-by-State Plan to End Our Mass Incarceration Crisis*, ACLU (Oct. 18, 2019), <https://www.aclu.org/news/smart-justice/unveiling-a-state-by-state-plan-to-end-our-mass-incarceration-crisis/> (noting that mass incarceration “is not one crisis,” but “is a series of state-based catastrophes”).

209. DANIELLE KAEBLE & MARY COWHIG, U.S. DEP’T OF JUSTICE, NCJ 251211, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016, at 5 (2018), <https://www.bjs.gov/content/pub/pdf/cpus16.pdf> (distinguishing jails from prisons).

generally hold offenders who are sentenced to a term of one year or less.²¹⁰

Currently, approximately 1.52 million Americans are incarcerated in state and federal prisons and local jails hold an additional 631,000 prisoners, which, when combined with other detention categories, equates to a total of nearly 2.3 million incarcerated people.²¹¹ Total incarceration numbers peaked at 2,310,300 in 2008.²¹² Leading up to 2008, “imprisonment numbers increased nearly four-fold in four decades.”²¹³ The incarceration rate in the United States has dropped in recent years and, in 2018, was at its lowest level since 1996.²¹⁴ Between 2006 and 2018, the rate fell by 17% from 666 prisoners per 100,000 residents who were incarcerated in federal and state prisons in 2008 to 555 sentenced prisoners per 100,000 residents in 2018.²¹⁵ Between 2017 and 2018, the total prison population diminished by 1.6%.²¹⁶ Notwithstanding the overall trend towards decarceration, this change has occurred slowly.²¹⁷ “At the current pace of decarceration, it is estimated that it will take up to forty years to return to the rate of imprisonment in 1971.”²¹⁸ Moreover, the United

210. *Id.*

211. See Sawyer & Wagner, *supra* note 120. Other categories included in the 2.3 million are youth (44,000); territorial prisons (11,000); immigration detention (42,000); involuntary commitment (22,000); Indian country (2,500); and military (1,300). *Id.*

212. Kaeble & Cowhig, *supra* note 209, at 2 (displaying a table with the total U.S. incarceration numbers from 2000–2016).

213. Mirko Bagaric, Dan Hunter & Jennifer Svilar, *Prison Abolition: From Naïve Idealism to Technological Pragmatism*, 111 J. CRIM. L. & CRIMINOLOGY (forthcoming 2021) (manuscript at 4) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3665468); NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 33 (Jeremy Travis et al, eds., 2014) [hereinafter THE GROWTH OF INCARCERATION].

214. Bureau of Justice Statistics, U.S. DEP’T OF JUSTICE, U.S. IMPRISONMENT RATE AT ITS LOWEST SINCE 1996 1 (2018), https://www.bjs.gov/content/pub/press/p18_pr.pdf; see also John Gramlich, *Black Imprisonment Rate in the U.S. Has Fallen by a Third Since 2006*, PEW RES. CTR. (May 6, 2020), <https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006/> (reporting that the incarceration rate has dropped nationwide, particularly for Black Americans).

215. Gramlich, *supra* note 214.

216. BUREAU OF JUSTICE STATISTICS, *supra* note 214, at 1.

217. See Cameron Kimble & Ames Grawert, *Between 2007 and 2017, 34 States Reduced Crime and Incarceration in Tandem*, Brennan Ctr. for Justice (Aug. 6, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/between-2007-and-2017-34-states-reduced-crime-and-incarceration-tandem> (noting that despite criminal justice reform efforts aimed at reducing incarceration, the number of sentenced individuals decreased by only 6% over the past decade).

218. See Bagaric et al., *supra* note 213, at 5; accord Kimble & Grawert, *supra* note 217 (noting that continuing at this pace of decarceration would take forty years to return to the level in 1971, which

States still “imprisons more people than any other nation, and at a rate that is, remarkably, ten times higher than that of some other developed nations.”²¹⁹

“Mass incarceration is a relatively new phenomenon in the United States.”²²⁰ The rise in prison numbers stemmed from increased penalties—beginning when former President Richard Nixon declared a “War on Drugs” in the late 1960s—that sought to curb increasing crime rates in the 1970s and 1980s.²²¹ Notably, the increased sanctions often came “in the form of (harsh) mandatory minimum terms.”²²² As Mark Fondarcaro observes, “mass incarceration in America has been fueled by an increased likelihood that an

was the last time crime rates were as low as they are today).

219. Bagaric et al., *supra* note 213, at 5 (footnote omitted); see Nick Wing, *Here Are All of the Nations That Incarcerate More of Their Population Than the U.S.*, HUFFINGTON POST (Dec. 6, 2017), http://www.huffingtonpost.com/2013/08/13/incarceration-rate-per-capita_n_3745291.html; see generally Roy Walmsley, *World Prison Population List*, INST. FOR CRIM. POL’Y RES. 4–6, 9, 11–12 (2018), https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf

(providing statistics for prison populations by nation). Denmark, Sweden, Finland, Japan, and Iceland (and a number of unexpected developing countries such as South Sudan, Tanzania, Syria, and Yemen) each have an imprisonment rate less than ten times that of the United States. See *id.* at 4, 5, 9, 11, 12.

220. Bagaric et al., *supra* note 213, at 5. “However, it is widely accepted that incarceration levels are unsustainable.” *Id.* at 5 n.28; see, e.g., SASHA ABRAMSKY, *AMERICAN FURIES: CRIME, PUNISHMENT AND VENGEANCE IN THE AGE OF MASS IMPRISONMENT* 65 (2007); ANTHONY THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES: RE-ENTRY, RACE, AND POLITICS* 13 (2009); Lynn Adelman, *What the Sentencing Commission Ought to Be Doing: Reducing Mass Incarceration*, 18 MICH. J. RACE & L. 295, 295–96 (2013); Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL’Y REV. 307, 307 (2009); Bernard E. Harcourt, *Keynote: The Crisis and Criminal Justice*, 28 GA. ST. U. L. REV. 965, 983 (2012). The problem is so acute that even a “Reverse Mass Incarceration Act” has been proposed. Lauren-Brooke Eisen & Inimai Chettiar, *The Reverse Mass Incarceration Act*, BRENNAN CTR. FOR JUST. 1 (2015), https://www.brennancenter.org/sites/default/files/2019-08/Report_The_Reverse_Mass_Incarceration_Act%20.pdf; see also Douglas A. Berman, *Reforming the Nation’s Criminal Justice System: The Impact of 2015 and Prospects for 2016*, *Sent’g L. & Pol’y* (Dec. 23, 2015), https://sentencing.typepad.com/sentencing_law_and_policy/2015/12/reforming-the-nations-criminal-justice-system-the-impact-of-2015-and-prospects-for-2016.html (indicating the state of criminal justice reform in 2015, specifically how politicians noted it was a priority but had not yet taken action). Vivien Stern, Secretary General of Penal Reform International, states: “Among mainstream politicians and commentators in Western Europe, it is a truism that the criminal justice system of the United States is an inexplicable deformity.” Vivien Stern, *The International Impact of U.S. Policies*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 279, 280 (Marc Mauer & Meda Chesney-Lind eds., 2002).

221. Bagaric et al., *supra* note 213, at 10; THE GROWTH OF INCARCERATION, *supra* note 213, at 9, 68, 119–20.

222. Bagaric et al., *supra* note 213, at 5; THE GROWTH OF INCARCERATION, *supra* note 213, at 44 (explaining that mandatory minimum sentences were introduced for drug-related offenses and violent crimes as an effort to diminish crime levels).

individual will: A) be sent to prison, and B) be assigned to stay for a longer period of time, as prisons have risen as the predominant means of social control.”²²³ William Berry explains how the introduction of mandatory guidelines for courts led to this situation:

Prior to 1984, federal judges possessed discretion that was virtually “unfettered” in determining sentences, guided only by broad sentence ranges provided by federal criminal statutes. The Sentencing Reform Act of 1984 . . . moved the sentencing regime almost completely to the other extreme, implementing a system of mandatory guidelines that severely limited the discretion of the sentencing judge.²²⁴

“Such guidelines, which remain in force to different extents in all United States jurisdictions,²²⁵ prescribed fixed or presumptive penalties,²²⁶ with individual penalties calculated according to offenders’ criminal history scores and the seriousness of their crimes.”²²⁷

B. The Financial Cost of Mass Incarceration

The main reason for the reduction in incarceration rate is the prohibitive cost of imprisoning more than two million Americans.²²⁸ Mass incarceration

223. Mark R. Fondacaro et al., *The Rebirth of Rehabilitation in Juvenile and Criminal Justice: New Wine in New Bottles*, 41 OHIO N.U.L. REV. 697, 707 (2015).

224. William W. Berry, III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 After Booker and Its Progeny*, 40 CONN. L. REV. 631, 633 (2008) (footnote omitted).

225. See Mirko Bagaric & Daniel McCord, *Decarcerating America: The Opportunistic Overlap Between Theory and (Mainly State) Sentencing Practice as a Pathway to Meaningful Reform*, 67 BUFF. L. REV. 227, 235 (2019) (citing CONNIE DE LA VEGA ET AL., UNIV. OF S.F. SCH. OF L. CTR. FOR L. & GLOB. JUSTICE, CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 46–47 (May 2012), <https://www.usfca.edu/sites/default/files/law/cruel-and-unusual.pdf>). “They are also one of the key distinguishing aspects of the United States sentencing system compared to that of Australia (and most other sentencing systems in the world).” See *id.* at 235, n.23 (“noting that 137 of 168 surveyed countries had some form of minimum penalties but none were as wide-ranging or severe as in the United States”).

226. *Id.* at 235. For the purposes of clarity, these both come under the terminology of fixed or standard penalties in this Article. *Id.* at 235, n.24.

227. *Id.* at 235; see THE GROWTH OF INCARCERATION, *supra* note 213, at 134 (describing the efficacy of sentence enhancements in studies on deterrence).

228. See Mirko Bagaric, Dan Hunter, & Gabrielle Wolf, *Technological Incarceration and the End of the Prison Crisis*, 108 J. CRIM. L. & CRIMINOLOGY 73, 73 (2018); see, e.g., Aimee Picchi, *The High Price of Incarceration in America*, CBS MoneyWatch (May 8, 2014, 5:53 AM),

produces several major problems. The most obvious of these is the high and “unmaintainable cost to the public purse:” \$81 billion annually.²²⁹ This figure rises to \$182 billion when accounting for “policing and court costs, and the cost paid by families who financially support incarcerated loved ones.”²³⁰ The figures reveal even more when broken down further.²³¹ Government officials have noted that:

Broken down by person, the cost to taxpayers for each person in state prisons (calculated by dividing the total state spending on prisons by the average daily prison population) was already an average [of] \$33,274, and far higher in some states, with a high of \$69,355 in New York. And this only accounts for the cost of operating prisons, jails, parole, and probation—leaving out other costs including policing, court costs and economic losses incurred by families of incarcerated people.²³²

“Comparative spending on prisons and education in many . . . states is particularly alarming:” over the past twenty years, growth in expenditure on incarceration has outpaced that of spending on higher education by a ratio of 6:1.²³³

<https://www.cbsnews.com/news/the-high-price-of-americas-incarceration-80-billion/> (describing the increase in spending on U.S. prisons and jails).

229. Bagaric, Hunter, & Wolf, *supra* note 228, at 82.

230. *Mass Incarceration Costs \$182 Billion Every Year, Without Adding Much to Public Safety*, EQUAL JUST. INITIATIVE (Feb. 6, 2017), <https://eji.org/news/mass-incarceration-costs-182-billion-annually/> (finding that the \$81 billion figure does not account for “policing and court costs, and costs paid by families to support incarcerated loved ones”).

231. *Prison Spending in 2015*, Vera INST. OF JUST., <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending> (last visited Sept. 26, 2020) (explaining the categories of spending on incarceration).

232. Miriam Aroni Krinsky & Marc Levin, *U.S. Taxpayers Already Pay a High Price to Support America’s Giant Prison Population. Now COVID-19 Is Costing Them Even More*, MARKETWATCH: OPINION (Aug. 20, 2020, 4:30 PM), <https://www.marketwatch.com/story/us-taxpayers-already-pay-a-high-price-to-support-americas-giant-prison-population-now-covid-19-is-costing-them-even-more-2020-08-19>.

233. Bagaric, Hunter, & Wolf, *supra* note 228, at 83 (citing Adam Gopnik, *The Caging of America*, NEW YORKER (Jan. 30, 2012), <http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america>).

C. *Mass Incarceration Does Not Mean Lower Crime*

While the financial and human cost²³⁴ of imprisonment is extremely high, the demonstrable benefits of incarcerating over two million Americans are small.²³⁵ The increasing consensus among researchers is that mass incarceration has not meaningfully improved community safety.²³⁶ A 2016 Brennan Center report notes that “[r]igorous social science research based on decades of data shows that increased incarceration played an extremely limited role in the crime decline.”²³⁷ FBI data from late 2019 confirmed these trends, noting consistency with longer term patterns, and the Marshall Project summed up the data as follows:

[T]he U.S. remains on a decades-long downward trend, falling by 3.9 percent in 2018. Overall, the violent crime rate has plunged by more than 50 percent since the highwater mark of the early 1990s. The drops came across categories of violent offenses, including murder, non-negligent manslaughter and robbery, and property crimes like burglary, larceny and vehicle thefts, while aggravated assault numbers remained about flat. The rate for rape bucked this trend however, up slightly for 2018, and in each of the last six years.²³⁸

Imprisonment undoubtedly prevents individuals from reoffending during their incarceration, but this does not justify the current level of incarceration

234. See Bagaric et al., *supra* note 213, at 6 (explaining that in addition to financial costs, mass incarceration imposes a cost on the quality of life of those imprisoned by depriving them of rights and opportunities, as well as creating hardships for families of imprisoned persons).

235. See, e.g., *Mass Incarceration Costs \$182 Billion Every Year, Without Adding Much to Public Safety*, *supra* note 229 (showing the high cost of incarceration); see *infra* Section IV (discussing the human cost of imprisonment).

236. See *Mass Incarceration Costs \$182 Billion Every Year, Without Adding Much to Public Safety*, *supra* note 230.

237. Dr. James Austin et al., *How Many Americans Are Unnecessarily Incarcerated?*, BRENNAN CTR. FOR JUSTICE 1, 5 (2016); see also Mirko Bagaric, *The Punishment Should Fit the Crime—Not the Prior Convictions of the Person that Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing*, 51 SAN DIEGO L. REV. 343, 405–07 (2014) [hereinafter Bagaric, *The Punishment Should Fit the Crime*] (summarizing studies on the issue).

238. Jamiles Lartey & Weihua Li, *New FBI Data: Violent Crime Still Falling*, MARSHALL PROJECT (Sept. 30, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/09/30/new-fbi-data-violent-crime-still-falling>.

nationwide.²³⁹ It is clear “that mass incarceration does not meaningfully reduce the crime rate.”²⁴⁰ The most likely reason is because the current criminal justice regime does not target the right people, exacerbating the harm to communities while simultaneously failing to protect them.²⁴¹

Part of the reason for this is because the empirical data indicates that prison increases the rate of recidivism.²⁴² A 2016 Sentencing Commission report²⁴³ tracked 25,431 federal prisoners following their release from prison in 2005,²⁴⁴ finding that “over the succeeding eight-year period, almost half (49.3%) were re-arrested.”²⁴⁵

The numbers from state prisons mostly tell the same story.²⁴⁶ According to a study conducted of offenders released from state prisons in 2005, 83% were “arrested at least once during the nine years following their release.”²⁴⁷ Nearly half (44%) were “arrested at least once during the first year after release.”²⁴⁸

Thus, while imprisonment prevents offenders from committing offenses during their term of imprisonment, this benefit is “only temporary given that

239. See Sawyer & Wagner, *supra* note 120 (stating that there are currently over 1.5 million Americans incarcerated).

240. Mirko Bagaric, Gabrielle Wolf & William Rininger, *Mitigating America’s Mass Incarceration Crisis Without Compromising Community Protection: Expanding the Role of Rehabilitation in Sentencing*, 22 Lewis & Clark L. Rev. 1, 12 (2018); see Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, VERA INST. OF JUST. 1, 1 (July 2017), https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf (noting that there is a weak relationship between mass incarceration and lower crime rates).

241. See, e.g., Api Podder, *Research Confirms That Entrenched Racism Manifests in Disparate Treatment of Black Americans in Criminal Justice System*, MySocialGoodNews (May 4, 2018), <https://mysocialgoodnews.com/research-confirms-that-entrenched-racism-manifests-in-disparate-treatment-of-black-americans-in-criminal-justice-system/> (summarizing research findings “demonstrating how America’s history of racism and oppression continues to manifest in the criminal justice system and perpetuates the disparate treatment of black people.”).

242. See *Recidivism Among Federal Offenders: A Comprehensive Overview*, U.S. SENTENCING COMM’N 1, 5 (2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.

243. *Id.* (explaining the study of prisoners’ recidivism rate).

244. *Id.* at 3.

245. *Id.*

246. See Mariel Alper et al., *2018 Update on Prisoner Recidivism: A 9-Year Follow-Up Period (2005–2014)*, U.S. DEP’T OF JUSTICE 1, 1 (May 2018), <https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf>.

247. *Id.*

248. *Id.*

95% of prisoners are ultimately released from prison,”²⁴⁹ and the protection offered to the community by prison walls is eroded by the high rates of reoffending by released prisoners.²⁵⁰

Thus, the financial burden that mass incarceration imposes on the community does not have an offsetting benefit to the community, certainly not in terms of providing the community with durable and meaningful enhancements in community safety.²⁵¹ This Article now argues that there is a compelling additional reason for reducing incarceration numbers: the suffering imposed by prison has been greatly underestimated and, hence, most prisoners suffer more than is “commensurate with the seriousness of their crimes.”²⁵²

249. Bagaric et al., *supra* note 213, at 8, n.56 (citing NATHAN JAMES, CONG. RESEARCH SERV., RL34287, OFFENDER REENTRY: CORRECTIONAL STATISTICS, REINTEGRATION INTO THE COMMUNITY, AND RECIDIVISM 1, (2015), <https://fas.org/sgp/crs/misc/RL34287.pdf>). Nearly three-quarters of released prisoners reoffend and are arrested within five years of release; 60% of them are reconvicted. *Id.* “There are three reasons that prisoners do not get released[.]” the most common being that they are sentenced to life imprisonment. *Id.* There are approximately 160,000 inmates serving life sentences, and of these, almost 50,000 have no possibility of parole. *Id.* at 8–9 (citing Ashley Nellis, *Life Goes On: The Historic Rise in Life Sentences in America*, SENT’G PROJECT 1, 1 (2013), <https://www.sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf>). Approximately 4,500 inmates died in prison or jail in 2013 due to natural causes, illness or disease, suicide, or violence. *Id.* (citing Margaret E. Noonan et al., U.S. DEP’T OF JUSTICE, NCJ 248756, MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000–2013—STATISTICAL TABLES 1 (2015), <https://www.bjs.gov/content/pub/pdf/mljsp0013st.pdf>). For the report on number of deaths in federal prisons (444), see Margaret E. Noonan, U.S. DEP’T OF JUSTICE, NCJ 250150, *Mortality in State Prisons, 2001–2014—Statistical Tables 1* (2016), <https://www.bjs.gov/content/pub/pdf/msp0114st.pdf> [hereinafter NCJ 250150]. A small number are also executed. See Robert Dunham, *The Death Penalty in 2016: Year End Report*, DEATH PENALTY INFO. CTR., 1, 1 (2016), <http://deathpenaltyinfo.org/documents/2016YrEnd.pdf>. In fact, 2016 had the smallest number of executions (20) since 1991. *Id.* at 1, 5.

250. See Bagaric et al., *supra* note 213, at 9, n.57 (citing NATHAN JAMES, CONG. RESEARCH SERV., RL34287, OFFENDER REENTRY: CORRECTIONAL STATISTICS, REINTEGRATION INTO THE COMMUNITY, AND RECIDIVISM 1 (2015), <https://fas.org/sgp/crs/misc/RL34287.pdf>). Sixty percent of released prisoners who reoffend and are arrested within five years of release are reconvicted. JAMES, *supra* note 127, at 1 (citing MATTHEW R. DUROSE, ALEXIA D. COOPER, & HOWARD N. SNYDER, U.S. DEP’T OF JUSTICE, NCJ244205, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, 1 (2014)).

251. See *Mass Incarceration Costs \$182 Billion Every Year, Without Adding Much to Public Safety*, *supra* note 230 (comparing the high cost of incarceration in the United States with the minimal public safety benefits).

252. Bagaric, Hunter, & Wolf, *supra* note 228, at 98.

IV. THE CONSIDERABLE INCIDENTAL BURDENS EXPERIENCED BY PRISONERS

A. Overview: The Immense Incidental Pains of Prison

The main reason for the current drop in prison numbers is the heavy fiscal burden of imprisoning over 700 persons in every 100,000 U.S. residents.²⁵³ However, no principled options for systematically reducing prison numbers are currently in the process of being implemented, and they are not likely to occur if they are simply motivated by a desire to reduce prison numbers.²⁵⁴ “Pragmatically motivated reform is likely to produce expedient solutions,” but will “exacerbate the United States’ sentencing crisis.”²⁵⁵ A “durable and reasoned solution” is necessary. This Article proposes such a solution in light of the impetus for reducing prison numbers stemming from the coronavirus pandemic.

We suggest an approach that involves two key pillars. The first involves the principle of proportionality, which in crude terms is the principle that the punishment should fit the crime.²⁵⁶ The second is greater recognition of the fact that the burden of prison is far more significant than conventional orthodoxy suggests.²⁵⁷ Prison is “the most serious sanction imposed on serious offenders, apart from the death penalty.”²⁵⁸ Hence, given the greater

253. See Mirko Bagaric, Sandeep Gopalan, & Marissa Florio, *A Principled Strategy for Addressing the Incarceration Crisis: Redefining Excessive Imprisonment as a Human Rights Abuse*, 38 CARDOZO L. REV. 1663, 1666, n.11 (2017) (citing MELISSA S. KEARNEY ET AL., TEN ECONOMIC FACTS ABOUT CRIME AND INCARCERATION IN THE UNITED STATES, THE HAMILTON PROJECT 1–2 (May 2014), https://www.brookings.edu/wp-content/uploads/2016/06/v8_THP_10CrimeFacts.pdf). More recently, it has been calculated that the cost of incarceration (including the incidental costs of incarceration) is in fact much higher and could be more than one trillion dollars annually, which equates to 6% of the gross domestic product. *Id.* (citing Michael McLaughlin et al., *The Economic Burden of Incarceration in the U.S.* 2 (Inst. for Advancing Just. Res. & Innovation, Working Paper No. AJI072016, 2016)), https://www.prisonpolicy.org/scans/iajre/the_economic_burden_of_incarceration_in_the_us.pdf.

254. *Id.* at 1666.

255. *Id.*; Bagaric, Hunter, & Wolf, *supra* note 228, at 77.

256. THE GROWTH OF INCARCERATION, *supra* note 213, at 20 (explaining the concept of proportional punishment).

257. See Bagaric, Hunter & Wolf, *supra* note 228, at 84 (noting that incarceration inflicts suffering that is “disproportionate to the gravity of the crimes”).

258. See Bagaric, Gopalan, & Florio, *supra* note 253, at 1666; Nellis, *supra* note 249, at 1 (describing the most severe penalties available in the incarceration system). In absolute terms, the

burden stemming from prison, it follows that it should be used more sparingly and generally for shorter periods.²⁵⁹ As noted earlier, it is this reasoning that underpins the current mass release of prisoners on account of the coronavirus. But, the additional hardships stemming from prison go far beyond an elevated risk of being infected with coronavirus. These additional burdens have been established for many years but have been largely ignored by lawmakers.²⁶⁰ Now is the right time to press the doctrinal case for greater recognition of these burdens. Before analyzing the principle of proportionality in greater detail, we set out the net burden of imprisonment by focusing on the incidental hardships stemming from prison.

The elevated risk of contracting COVID-19 is only one of many additional hardships prisoners experience. In fact, prisoners experience a large number of other serious infringements. The most obvious is the denial of liberty. This is of course a serious human rights infringement but one which is intentional and an intrinsic aspect of incarceration.

B. Restrictions on Procreation and Family

By contrast, however, many of the incidental rights deprivations stemming from “incarceration are not intended as part of a prison term.”²⁶¹ “From a human rights perspective, these additional deprivations are considerable,²⁶² verging on [oppressive].”²⁶³ A key interest that is curtailed by imprisonment is the right to procreation.²⁶⁴ The Supreme Court has ruled procreation to be an unquestionable fundamental right.²⁶⁵ However, what constitutes “procreation” is ambiguous:

death penalty is rarely invoked. Dunham, *supra* note 249, at 1.

259. See Bagaric, Gopalan, & Florio, *supra* note 253, at 1723.

260. Bagaric, Gopalan, & Florio, *supra* note 253.

261. *Id.* at 1694.

262. For an overview of some of the pains of imprisonment, see GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* (1st Princeton Classic ed. 2007).

263. Bagaric, Gopalan, & Florio, *supra* note 253, at 1694.

264. *Id.* at 1698 (describing the recognized right to procreate).

265. *Id.* at 1695 (citing Johnson C. Montgomery, *The Population Explosion and United States Law*, 22 HASTINGS L.J. 629, 629 (1971); see also *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1297 (1980)) (discussing the fundamental right to procreation for those who are incarcerated).

There is a common thread in the ways U.S. constitutional law, international law sources, and Lockean natural law treat the procreative right. Despite suggestions in all of those sources of a broad right, when analyzed more closely these authorities merely provide for a right to continue the species, a right to perpetuate the race and have offspring, and the right to simply found a family, respectively. They recognize a special right, necessary for the continuation of society, and qualified by societal interests and the interests of prospective children.²⁶⁶

In the landmark case *Skinner v. Oklahoma ex rel. Williamson*,²⁶⁷ the Court invalidated a law allowing prisons to sterilize inmates who were convicted of at least three felonies involving “moral turpitude” because it violated the Fourteenth Amendment’s Equal Protection Clause.²⁶⁸ In its opinion, the Court noted that procreation is “a sensitive and important area of human rights” and that “Oklahoma deprives certain individuals” of those rights.²⁶⁹ The Court added:

Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.²⁷⁰

However, the right to procreate has its limitations.²⁷¹ Several cases have

266. Bagaric, Gopalan, & Florio, *supra* note 253, at 1695 (citing Carter J. Dillard, *Rethinking the Procreative Right*, 10 YALE HUM. RTS. & DEV. L.J. 1, 10–11 (2007)).

267. 316 U.S. 535 (1942); *see also* Elaine E. Sutherland, *Procreative Freedom and Convicted Criminals in the United States and the United Kingdom: Is Child Welfare Becoming the New Eugenics?*, 82 OR. L. REV. 1033, 1037–39 (2003)).

268. *Skinner*, 316 U.S. at 541–43.

269. *Id.* at 536.

270. *Id.* at 541; *see also* Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (holding that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process and Equal Protection clauses); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 647–48 (1974) (finding that overly restrictive maternity leave regulations in public schools violate the Due Process Clause)).

271. *Id.* at 1697. This aligns with *Obergefell v. Hodges*. *Id.* at 1697, n.167 (citing *Obergefell*, 576

upheld laws authorizing the forced sterilization of mentally ill and disabled people.²⁷² After *Skinner*, courts recognized that imprisonment and probation could restrict the “procreation rights of prisoners and offenders.”²⁷³

The Ninth Circuit in *Gerber v. Hickman (Gerber II)* also acknowledged that jails and prisons can limit procreation rights, like conjugal visits.²⁷⁴ The Eighth Circuit in *Goodwin v. Turner* found that the right to procreate did not necessarily permit an imprisoned husband to send a sample of his sperm to his wife.²⁷⁵

Courts seem to disfavor “claims asserting constitutional rights to conjugal visits.”²⁷⁶ The “unanimity of federal court rulings. . . reflect[s] the opinion that the penological interests asserted by the states are more compelling than the constitutional right to procreative liberty claimed by prisoners.”²⁷⁷

Thus, some courts have limited the right to procreate, “but this does not detract from the existence of the right or its importance.”²⁷⁸ As Judge Bradley notes, the Court recognizes procreation as a fundamental right.²⁷⁹ That the Court can limit procreation rights “does not undermine the importance of the

U.S. at 646). The majority stated that identifying and protecting fundamental rights “is an enduring part of the judicial duty [when interpreting] the Constitution. That responsibility, however, ‘has not been reduced to any formula.’ Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.” *Id.* (citing *Obergefell*, 576 U.S. at 663–64 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting))).

272. See *Skinner*, 316 U.S. at 539; *Buck v. Bell*, 274 U.S. 200, 207 (1927); see also Dillard, *supra* note 266, at 26.

273. *Gerber v. Hickman*, 291 F.3d 617, 624 (9th Cir. 2002) (holding the denial of an inmate’s request to artificially inseminate his wife was not a deprivation of the right to procreation).

274. *Id.* at 620–23 (“We hold that the right to procreate while in prison is fundamentally inconsistent with incarceration.”).

275. 908 F.2d 1395, 1400 (8th Cir. 1990).

276. See, e.g., *Block v. Rutherford*, 468 U.S. 576 (1984) (allowing the discretion of prison authorities to restrict conjugal visits for security reasons); *Gerber*, 291 F.3d 617 (stating that while prisoners maintain the right to marry, they do not retain the right to physical intimacy); *Doe v. Coughlin*, 518 N.E.2d 536 (N.Y. 1987) (explaining that prisoners are not entitled to conjugal visits; rather they are only entitled to the possibility of such visits); *Research Finds That Conjugal Visits Correlate with Fewer Sexual Assaults*, PRISON LEGAL NEWS, May 2014, <https://www.prisonlegalnews.org/media/issues/05pln14.corrected.pdf> (“On February 1, 2014, Mississippi joined the 45 states that prohibit conjugal visits, halting the century-old practice due to what officials called budget issues and concerns about babies being born as a possible result of the visits.”).

277. Adam M. Breault, Note, “*Onan’s Transgression*”: *The Continuing Legal Battle over Prisoners’ Procreation Rights*, 66 ALB. L. REV. 289, 309 (2002).

278. Bagaric, Gopalan, & Florio, *supra* note 253, at 1698.

279. See *Skinner*, 316 U.S. at 541.

interest or imply that loss of the right is not a considerable hardship.”²⁸⁰

Although neither the right to foster family relationships nor the right to have intimate contact is as grounded in law as is the right to procreation, similar considerations apply.²⁸¹ The law does not expressly protect the right to a family, but the Court refers to such a right in dicta.²⁸² Concurring in *Griswold v. Connecticut*, Justice Goldberg stated:

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.

Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so.²⁸³

Visitation rights affect inmates’ abilities to maintain, foster, and promote family relationships, make telephone calls, and, to a lesser extent, send and receive mail.²⁸⁴ Courts have ruled as legitimate correctional objectives the needs to maintain order and security, and “such needs can influence visitation and similar rights.”²⁸⁵

280. Bagaric, Gopalan, & Florio, *supra* note 253, at 1699; see Dillard, *supra* note 266, at 48 (commenting that the removal of the right to procreate is a considerable hardship).

281. See Bagaric, Gopalan, & Florio, *supra* note 253, at 1699 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a marriage’s right to privacy is a liberty that is protected by the Constitution)); *Skinner*, 316 U.S. at 541 (“Marriage and procreation are fundamental to the very existence and survival of the race.”).

282. See *Griswold*, 381 U.S. at 495 (Goldberg, J., concurring).

283. *Id.* at 495–96 (Goldberg, J., concurring).

284. See Columbia Human Rights Law Review, *A Jailhouse Lawyer’s Manual, Your Right to Communicate with the Outside World* 577, 578–79 (11th ed. 2017), <http://jlm.law.columbia.edu/files/2017/05/31.-Ch.-19.pdf>.

285. Bagaric, Gopalan, & Florio, *supra* note 253, at 1670 (citing *Overton v. Bazzetta*, 539 U.S. 126 (2003); *Pell v. Procunier*, 417 U.S. 817 (1974)). “For a discussion of the legitimate restrictions that can be placed on the incoming and outgoing prisoners’ mail,” see *A JAILHOUSE LAWYER’S MANUAL*, *supra* note 284, at 578–79. Bagaric, Gopalan, & Florio, *supra* note 253, at 1700, n.183. For a

Prisons do not have uniform protocols for visitation rights. At least one state has allowed Correctional Services to deny prisoners' requests to attend family reunion events.²⁸⁶ The state of New York ruled that an inmate's participation in a family reunion program was a privilege, rather than a right, and that "the decision about whether an inmate may participate is 'heavily discretionary' and will be upheld if it has a rational basis."²⁸⁷

C. *Increased Risk of Physical and Sexual Abuse*

In addition to the deprivation of rights, prisoners experience "considerable diminution in personal safety." Unlike the deprivation of rights, the threat of prisoners' safety is an indirect consequence.²⁸⁸ Although prison officials should prevent prisoners from deliberately harming one another, "the reality is that prisoners are subjected to a far higher level of physical and sexual abuse than non-prisoners."²⁸⁹

Studies show that injuries in jails are commonplace: one survey shows that about one third of state prisoners experienced injuries resulting from

discussion of visitation rights, see A JAILHOUSE LAWYER'S MANUAL, *supra* note 284, at 526–30. Prisons often severely limit inmates' abilities to make telephone calls. A JAILHOUSE LAWYER'S MANUAL, *supra* note 284, at 530–31.

286. See *Philips v. Comm'r of Corr. Servs.*, 885 N.Y.S.2d 138, 138 (App. Div. 2009).

287. *Id.* (quoting *Doe v. Coughlin*, 518 N.E.2d 536, 541 (N.Y. 1987)); see also *Giano v. Goord*, 9 F. Supp. 2d 235 (W.D.N.Y. 1998), *aff'd in part and vacated in part*, 250 F.3d 146 (2d Cir. 2001), *vacated on other grounds*, 380 F.3d 670 (2d Cir. 2004), *abrogated on other grounds* by *Ross v. Blake*, 136 S. Ct. 1850 (2016).

288. See *Farmer v. Brennan*, 511 U.S. 825, 833–34 (1994); *Vaughan v. Ricketts*, 859 F.2d 736, 741 (9th Cir. 1988), *abrogation recognized* by *United States v. Fowlkes*, 804 F.3d 954 (9th Cir. 2013).

289. Bagaric, Gopalan, & Florio, *supra* note 253, at 1702.

September 2013 marked the 10-year anniversary of the passage of the Prison Rape Elimination Act (PREA), which resulted in the development of national standards to detect, prevent, and punish prison rape. Implementation remains a challenge: approximately 4 percent of state and federal prison inmates and 3 percent of jail inmates report having experienced one or more incidents of sexual abuse in 2011–2012, and many incidents continue to go unreported. Transgender prisoners continue to experience high levels of violence in detention.

Many prisoners and jail inmates—including youth under age 18—are held in solitary confinement, often for weeks or months on end. In July, an estimated 30,000 inmates in California's prison system engaged in a hunger strike to protest conditions, including the use of solitary confinement. Prolonged solitary confinement is considered ill-treatment under international law and can amount to torture.

World Report 2014: United States, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2014/country-chapters/united-states> (last visited Sept. 27, 2020).

accidents and intentional acts of violence.²⁹⁰ Almost one in twenty prisoners reports being either raped or sexually abused behind bars.²⁹¹

D. *Reduced Life and Income Earning Expectancy*

Other subtler, yet important, burdens of imprisonment exist. “Imprisonment reduces life expectancy, earnings, and family harmony.”²⁹² A recent study of the link between incarceration in the United States and mortality over a forty-year period found that there is “a moderate association between incarceration and mortality, with relative risks ranging between 1.7 to 2.7. These mortality excesses translate into losses of life expectancy at age 45 of about 4–5 years or 13 percent of current US life expectancy at age 45.”²⁹³

The suffering prisoners experience “also extends to diminishing their career and earnings prospects.”²⁹⁴ Most studies find that in addition to struggling to find secure employment, ex-prisoners “also have a considerably lower rate of lifetime earnings.”²⁹⁵ According to recent modeling by Theodore

290. See Hung-En Sung, *Prevalence and Risk Factors of Violence-Related and Accident-Related Injuries Among State Prisoners*, 16 J. CORRECTIONAL HEALTH CARE 178, 178 (2010); SYKES, *supra* note 262).

291. *US: Federal Statistics Show Widespread Prison Rape*, HUM. RTS. WATCH (Dec. 15, 2007, 7:00 PM), <https://www.hrw.org/news/2007/12/15/us-federal-statistics-show-widespread-prison-rape>. In 2012, the Justice Department issued standards for reporting sexual assault under PREA. Alysia Santo, *Prison Rape Allegations Are on the Rise*, MARSHALL PROJECT (July 25, 2018, 8:00 AM), <https://www.themarshallproject.org/2018/07/25/prison-rape-allegations-are-on-the-rise>. Since the DOJ released these standards, prisoners have reported more assaults, with the number increasing from 8,768 in 2011 to 24,661 in 2015. *Id.* After a prisoner survey in 2012, the BJS “estimated that more than 200,000 inmates are sexually abused in American detention facilities annually.” *Id.*

292. Bagaric, Gopalan, & Florio, *supra* note 253, at 1703.

293. Sebastian Daza, Alberto Palloni, & Jerrett Jones, *The Consequences of Incarceration for Mortality in the United States*, 57 *Demography* 577–598 (2020); Bagaric, Gopalan, & Florio, *supra* note 253, at 1703 (citing Anne C. Spaulding et al., *Prisoner Survival Inside and Outside of the Institution: Implications for Health-Care Planning*, 173 *AM. J. EPIDEMIOLOGY* 479, 479 (2011) (discussing mortality rates in light of those who are incarcerated); THE GROWTH OF INCARCERATION, *supra* note 213, at 220 (explaining racial disparities in prisoner mortality rates). *But see* Samuel Norris et al., *The Effect of Incarceration on Mortality*, SSRN (Sept. 22, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3644719 (“Mortality risk halves during the period of incarceration, with large declines in murders, overdoses, and medical causes of death.”).

294. Bagaric, Gopalan, & Florio, *supra* note 253, at 1703.

295. *Id.*; THE GROWTH OF INCARCERATION, *supra* note 213, at 247. One study estimated the earnings reduction to be as high as forty percent. Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 139 *DÆDALUS* 8, 8, 13–19 (Summer 2010).

S. Corwin III and Daniel K. N. Johnson, “incarceration reduces average lifetime income growth by one-third even for a relatively short earning period, with that depth depending on length of sentence, employment history, and education level in some surprising ways.”²⁹⁶

Imprisonment also disrupts and negatively affects prisoners’ families.²⁹⁷ Imprisoned, married men are “three times more likely to divorce than those who had been convicted of an offense, but not incarcerated,²⁹⁸ and the families of prisoners have higher rates of homelessness than the general population.”²⁹⁹ Moreover, studies report that “fathers’ incarceration is stressful for children, increasing both depression and anxiety as well as antisocial behavior.”³⁰⁰ Children of incarcerated parents face more emotional difficulties, engage in school less, experience more problems in school between the ages of six and seventeen, and suffer from other issues that stem from the lack of parental monitoring.³⁰¹ Further, incarcerating a parent greatly increases the likelihood that his or her children will also face incarceration and experience physical and mental health problems later in their lives.³⁰²

Overall, the human rights incursions stemming from imprisonment include: a limitation on the right to procreate and maintain family relationships; an increased risk of violation of one’s physical and sexual autonomy; a reduction in life expectancy; and a reduction in life-time earnings.³⁰³ “Cumulatively, [these restrictions] are perhaps even more

296. Theodore S. Corwin III & Daniel K. N. Johnson, *Plus a Life Sentence? Incarceration’s Effects on Expected Lifetime Wage Growth* (Colo. Coll., Working Paper No. 2019-03, 2019); see also Stephanos Bibas, *The Truth About Mass Incarceration*, NAT’L REV. (Sept. 16, 2015, 8:00 AM), <http://www.nationalreview.com/article/424059/mass-incarceration-prison-reform> (finding prisons destroy earning potential for those who have been incarcerated).

297. See Bagaric, Gopalan, & Florio, *supra* note 253, at 1704.

298. *Id.* (citing THE GROWTH OF INCARCERATION, *supra* note 213, at 265).

299. *Id.* (citing THE GROWTH OF INCARCERATION, *supra* note 213, at 267).

300. *Id.* (citing THE GROWTH OF INCARCERATION, *supra* note 213, at 270).

301. Emily Nagisa Keehn & J. Wesley Boyd, *How Mass Incarceration Harms U.S. Health*, in *5 Charts*, CONVERSATION (Jan. 31, 2018, 6:42 AM), <https://theconversation.com/how-mass-incarceration-harms-u-s-health-in-5-charts-90674>.

302. See E. Mosely, *Incarcerated—Children of Parents in Prison Impacted*, TEX. DEP’T OF CRIMINAL JUSTICE: GOKIDS (July 6–12, 2008), http://www.tdcj.state.tx.us/gokids/gokids_articles_children_impacted.html; Keehn & Boyd, *supra* note 301. Children of incarcerated parents are five times more likely than other children to commit crimes and, incredibly, 70% of them become incarcerated at some point. See *id.*

303. See Bagaric, Gopalan, & Florio, *supra* note 253, at 1704.

oppressive than the mere denial of liberty that directly follows from imprisonment. If the above deprivations were imposed outside of the prison setting, they [could possibly violate] the constitutional prohibition against cruel and unusual punishment.”³⁰⁴

V. PROPORTIONALITY REQUIRES A LESS FREQUENT USE OF PRISON

The appropriate manner in which to accommodate prisoners’ rights deprivations is to incorporate such deprivations into the sentencing calculus set out by the proportionality principle.³⁰⁵ The proportionality principle requires that the hardship of the sanction match the seriousness of the harm.³⁰⁶ “Proportionality is . . . a requirement of the sentencing regimes of ten states in the United States,”³⁰⁷ and “it is also a core principle that informs (though it does not direct) the Federal Sentencing Guidelines.”³⁰⁸

“This proportionality principle, however, has not been effective at containing the growth in prison numbers. A key reason for this is that the content of the principle is obscure[.]”³⁰⁹ “The most obscure and unsatisfactory aspect of proportionality is that there is no stable and clear manner in which

304. *Id.* at 1704–05 (citing DE LA VEGA ET AL., *supra* note 225, at 33). “[I]n *Brown v. Plata*, 563 U.S. 493 (2011), the Supreme Court stated that over-crowded prison conditions in California, which resulted in inadequate medical services, constituted cruel and unusual punishment.” *Id.* at 1705 n.211. In both *Ewing v. California* and *Lockyer v. Andrade*, the Court also held that “apart from capital cases, disproportionate sentences (unless grossly disproportionate) are unlikely to constitute cruel and unusual punishment.” *Id.* However, in *Graham v. Florida*, the Court held that “life without parole for crimes other than homicide is unconstitutional in relation to juvenile offenders.” *Id.* Furthermore, consecutive prison sentences do not violate the Eighth Amendment. DE LA VEGA ET AL., *supra* note 225, at 36–41; Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101 (1995).

305. Mirko Bagaric, *Injecting Content into the Mirage That Is Proportionality in Sentencing*, 25 N.Z. U.L. REV. 411, 417 (2013) [hereinafter *Injecting*].

306. Bagaric, Gopalan, & Florio, *supra* note 253, at 1713; *Injecting*, *supra* note 305, at 415.

307. Mirko Bagaric & Sandeep Gopalan, *Saving the United States from Lurching to Another Sentencing Crisis: Taking Proportionality Seriously and Implementing Fair Fixed Penalties*, 60 ST. LOUIS U.L.J. 169, 190 (2016) [hereinafter *Saving*] (citing Gregory S. Schneider, Note, *Sentencing Proportionality in the States*, 54 ARIZ. L. REV. 241, 250 (2012) (focusing on the operation of the principle in Illinois, Oregon, Washington, and West Virginia)).

308. *See id.* (citing THE GROWTH OF INCARCERATION, *supra* note 213, at 23).

309. Bagaric, Gopalan, & Florio, *supra* note 253, at 1713.

the punishment can be matched to the crime.”³¹⁰ According to Jesper Ryberg, one of the key criticisms of proportionality is that it “presupposes something which is not there, namely, some objective measure of appropriateness between crime and punishment.”³¹¹ Further, to give content to proportionality, it is necessary to rank crimes and punishments and anchor the scales.³¹²

When broken down, proportionality has two limbs: the severity of the crime and the severity of the sanction.³¹³ Proportionality also has a quantitative component—“the two limbs must be matched. In order for the principle to be satisfied, the seriousness of the crime must be equal to the harshness of the penalty.”³¹⁴ There is no settled mechanism to achieve these calibrations.³¹⁵

The criminal justice system needs a doctrinally sound approach that explains the criteria defining offense severity.³¹⁶ There is one criterion that measures “offense severity and the hardship of a sanction: individual well-being.”³¹⁷ The type and degree of punishment offenders face should set back their well-being to the same degree in which the victim’s well-being was set back.³¹⁸ There is admittedly a degree of approximation involved in such an assessment, but the level of accuracy in making such determinations is increasing.³¹⁹

Data suggests that victims of violent and sexual crimes “have their well-being more significantly set back than [do victims of] other types of crime.”³²⁰

310. Mirko Bagaric & Theo Alexander, *Rehabilitating Totality in Sentencing: From Obscurity to Principle*, 36(1) U. NEW SOUTH WALES L.J. 139 (2013). As noted in Section III of this Article, the courts have not attempted to define exhaustively the factors that are relevant to proportionality.

311. JESPER RYBERG, *THE ETHICS OF PROPORTIONATE PUNISHMENT* 184 (2004).

312. *Id.* at 185.

313. *See* Bagaric, Gopalan, & Florio, *supra* note 253, at 1714.

314. *Id.*

315. ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* 143 (2005).

316. Bagaric, Gopalan, & Florio, *supra* note 253, at 1715.

317. *See id.* (arguing that authorities should modify the proportionality principle in accordance with how crime and sanctions set back the well-being of both victims and offenders).

318. *See* Bagaric, Hunter, & Wolf, *supra* note 228, at 96.

319. *Saving*, *supra* note 307, at 216 (arguing that though scholarship on proportionality is still young, early observations exist that can guide judges and legislators).

320. Bagaric, Gopalan, & Florio, *supra* note 253, at 1716 (citing Rochelle F. Hanson et al., *The Impact of Crime Victimization on Quality of Life*, 23 J. TRAUMA STRESS 189, 192–93 (2010)).

One study showed that victims of violent crime, particularly sexual crime, struggle in intimate relationships,³²¹ and have “higher divorce rates,³²² diminished parenting skills (although this finding was not universal),³²³ lower levels of success in the employment setting,³²⁴ and much higher levels of unemployment.”³²⁵ “Victims of property crime likewise suffer reduced levels of well-being but at generally less pronounced rates than victims of sexual and violent crime.”³²⁶

“While there has been some consideration given to measuring crime severity, there has been less attention given to the other side of the proportionality equation: measuring punishment severity.”³²⁷ Ryberg attributes this to “the underlying belief that the ‘answer is pretty straightforward,’ as imprisonment is clearly the harshest disposition.”³²⁸ Ryberg notes that this answer seems to rest on the “negative impact on the well-being of the punished.”³²⁹ “To this end, it is clear that imprisonment is the harshest commonly applied sanction [because] it has a severe impact on the well-being of offenders,” and “[t]he extent of the pain caused by imprisonment has been considerably understated.”³³⁰

“The final problem regarding proportionality is how to match the severity of the punishment with the seriousness of the offense.”³³¹

321. *See id.* at 1716, n.256 and accompanying text (citing Hanson et al., *supra* note 320, at 190–91).

322. *See id.* at 1717, n.257 and accompanying text (citing Hanson et al., *supra* note 320, at 191).

323. *See id.* at 1717, n.258 and accompanying text (citing Hanson et al., *supra* note 320, at 190).

324. *See id.* at 1717, n.259 and accompanying text (citing Hanson et al., *supra* note 320, at 191); MIKE DIXON ET AL., INST. FOR PUB. POLICY RESEARCH, THE UNEQUAL IMPACT OF CRIME 26 (2006), http://www.ippr.org/files/images/media/files/publication/2011/05/crimeshare_1500.pdf?noredirect=1 (documenting how victimization impacts employment).

325. *See* Bagaric, Gopalan, & Florio, *supra* note 253, at 1717, n.260 and accompanying text (citing Hanson et al., *supra* note 320, at 191); DIXON ET AL., *supra* note 324, at 27 (finding a correlation between violent victimization and loss of earnings).

326. Bagaric, Gopalan, & Florio, *supra* note 253, at 1717, n.261 and accompanying text (citing Adriaan J.M. Denkers & Frans Willem Winkel, *Crime Victims' Well-Being and Fear in a Prospective and Longitudinal Study*, 5 INT'L REV. VICTIMOLOGY 141, 155–56 (1998)).

327. Bagaric, Gopalan, & Florio, *supra* note 253, at 1717.

328. Mirko Bagaric & Sandeep Gopalan, *Sound Principles, Undesirable Outcomes: Justice Scalia's Paradoxical Eighth Amendment Jurisprudence*, 50 AKRON L.R. 302, 327 (2017) (citing RYBERG, *supra* note 311, at 102).

329. *Id.* (citing RYBERG, *supra* note 311, at 102–03).

330. Bagaric, Gopalan, & Florio, *supra* note 253, at 1717.

331. *Id.*

The above approach assesses both the hardship of punishment and the severity of crime as they relate to well-being. This enables at least a crude match to be made, which stem[s] from a number of premises. First, the crimes [that] have the most serious adverse consequences for victims are assault and sexual offenses. Second, [in light of the above discussion,] the adverse effects of imprisonment [are] greatly undervalued.³³²

In light of this, authorities should apply the broad general principle that

imprisonment should be imposed only for sexual and violent offenses, and most prison terms should be reduced compared to those currently imposed. Of course, this says nothing about the appropriate length of imprisonment for certain categories of sexual and violent offenses. However, the default position should be that most prison terms for these offen[s]es should be less than is currently the norm given that current sentencing practices greatly underestimate the harshness of imprisonment.³³³

This would constitute a massive reduction to current prison numbers. The most recent data show that approximately 40% of all inmates are in custody for offenses not involving violence or sex.³³⁴ In addition, prisons should, in some instances, abolish excessive penalties for all crimes. To this end, it has been suggested that all life sentences should be abolished.³³⁵ A key reason for this recommendation is that research indicates that life sentences do not deter crime or enhance public safety to any greater extent than twenty-year prison

332. *Id.* at 1717–18.

333. *Id.* at 1718; *Saving*, *supra* note 307, at 216 (suggesting that most offenses should be dealt with in a manner that does not involve a term of imprisonment and that imprisonment should be mainly reserved for serious sexual and violent offenses).

334. Sawyer & Wagner, *supra* note 120 (explaining the number of prisoners in United States prisons and jails for non-violent or sexual offenses).

335. See Daniel S. Nagin, *Guest Post: Reduce Prison Populations by Reducing Life Sentences*, WASH. POST (Mar. 21, 2019, 5:30 AM), <https://www.washingtonpost.com/crime-law/2019/03/21/guest-post-reduce-prison-populations-by-reducing-life-sentences/>; see also Eileen Rivers, *The Graying of America's Prisons: "When is Enough Enough?"*, USA TODAY (Sep. 8, 2019), <https://www.usatoday.com/in-depth/opinion/lifers/2019/09/03/lifers-aging-inmates-federal-prisons-drug-charges/1861873001/>.

sentences.³³⁶ Currently, about 200,000 people are serving life sentences in state and federal prisons, which has led to an increase in the average age of prisoners.³³⁷ As offenses are predominantly committed by young men, the high number of life sentences has not meaningfully lowered the crime rate.³³⁸ For this reason, German Lopez has suggested that all prison sentences should be capped at twenty-year terms on the basis that this would reduce prison populations without compromising public safety.³³⁹ Given that people's criminal tendencies tend to wane as they age, life sentences do not reduce offenders' likelihood of reoffending any more than twenty-year prison terms.³⁴⁰ Of course, some limited exceptions to this rule are necessary for offenders such as serial killers, but Lopez suggests that courts could manage such cases by extending sentences indefinitely by up to five years if courts still believe the individual poses a risk to public safety after the first twenty-year prison term.³⁴¹

The upshot of our reform would reduce the United States prison population by approximately 50%.³⁴² Of course, there is a need to impose alternative sanctions for offenders who are not sentenced to prison or are released early.³⁴³ The exact details of an appropriate alternative sanction are beyond the scope of this Article, but a detailed alternative form of punishment has already been proposed.³⁴⁴ As an alternative, the "monitoring sanction" harmonizes disparate existing technologies to track the real-time movements and locations of offenders using sensor equipment.³⁴⁵ According to the proposal,

336. Nagin, *supra* note 335.

337. *See id.*

338. *See id.* The percentage of prisoners above the age of fifty has increased from 5% to 20% since 1993. Nagin, *supra* note 335. Moreover, the percentage of prisoners above forty years old has doubled from 17.9% to 40% over that same time period. *Id.*

339. German Lopez, *The Case for Capping All Prison Sentences at 20 Years*, VOX (Feb. 12, 2019, 7:30 AM), <https://www.vox.com/future-perfect/2019/2/12/18184070/maximum-prison-sentence-cap-mass-incarceration>.

340. *Id.*

341. *Id.*

342. *Id.*

343. *See generally* Mirko Bagaric, Dan Hunter & Colin Loberg, *Introducing Disruptive Technology to Criminal Sanctions: Punishment by Computer Monitoring to Enhance Sentencing Fairness and Efficiency*, 84 BROOK. L. REV. 1227 (2019) (providing alternatives to long-term incarceration).

344. *Id.*

345. *Id.* at 1231 (describing the "monitoring sanction" concept).

[i]f the movement involves suspicious activity, a camera would automatically be activated, enabling a corrections officer to gain a more accurate assessment of the relevant event. Suspicious activities include fast movements which could involve the application of force to another person or picking up an implement which could be used as a weapon.³⁴⁶

This sanction would be far less expensive than probation or parole and would more effectively deter offenders from committing further crime, while at the same time providing evidential data if they do offend.³⁴⁷ It would also impose a penalty commensurate with the seriousness of their offense type.³⁴⁸ Even if lawmakers lack the initiative to release prisoners early in accordance with this recommendation, from a jurisprudential and normative perspective, the reforms suggested in this Article should be applied prospectively. This would still result in a large—albeit more gradual—decline in incarceration levels.

VI. CONCLUSION

The coronavirus pandemic has resulted in a mass release of prisoners because the nature of prison conditions poses a significant risk of infection among inmates.³⁴⁹ Moreover, the level of medical care in prisons is compromised, further exacerbating the risk of infection.³⁵⁰ Viewed more broadly, the rationale underpinning this approach is that prisoners should not be subjected to undue incidental harsh burdens as a result of their incarceration.³⁵¹ From the logical and normative perspective, this principle applies not only to the risk of contracting coronavirus, but also to other deprivations prisoners experience.³⁵²

“From a hardship perspective, some of these other deprivations” habitually suffered by prisoners are also considerable and perhaps

even more burdensome than the deprivation of liberty. Prisoners

346. *Id.* at 1269.

347. *Id.* at 1230.

348. *Id.* at 1267.

349. *See supra* Part I.

350. *See supra* Section II.A.

351. *See supra* Section II.B.

352. *See supra* Section II.B.

cannot procreate. They cannot engage in meaningful family relationships. . . . They are far more likely to be beaten or raped than other members of the community and[,] hence[,] their right to sexual and physical security is diminished. Further, their ability to secure employment after release is diminished, as are their lifetime earnings.³⁵³

The inability to engage in intimate relationships for years, decades, and in some cases a lifetime would be a penalty which, if imposed directly, would almost certainly be met with loud calls as being an intolerable violation of human sexual autonomy. The fact that a rights infringement occurs in the prison setting does not excuse it; rather, it makes it worse because it cumulates the pain stemming from the deprivation of liberty. . . .[354] When these discrete deprivations are added together, [often] their combined effects may . . . disproportionately burden[] [some prisoners when] compared [to] the seriousness of [their] offenses,³⁵⁵

compelling a move to reduce the resort to imprisonment and lessen the length of most prison terms.³⁵⁶

Prison should only be utilized for serious sexual and violent offenders, and in relation to these offenders, penalties shorter than those currently assigned generally should be imposed.³⁵⁷ This would result in a reduction of prison numbers by more than 50% and would not result in any diminution in community safety.³⁵⁸

353. See Bagaric, Gopalan, & Florio, *supra* note 253, at 1667.

354. See *id.*

355. *Id.* at 1668.

356. See *supra* Section IV.D.

357. See *supra* Part V.

358. See *supra* Part V.