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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. The United States has been more severely impacted by the coronavirus than any other country on Earth. 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. This is the reason that large numbers of cruise ships have reported such high numbers of coronavirus sufferers. 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%20transmitted%20from%20person%20to%20person%20through%20contact%20with%20an%20infected%20person%20who%20is%20not%20showing%20symptoms%20(last%20updated%20July%2031%2C%202020)%20(noting%20that%20the%20virus%20spreads%20from%20person%20to%20person%20%5Bb%5D%20between%20people%20who%20are%20in%20close%20contact%20with%20one%20another%20(within%20about%206%20feet))
contact with other people. 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.

The infiltration of coronavirus into the prison system has resulted in immediate action by many states. 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. 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.

By late May 2020, it was estimated that 5% of the global prisoner population had been released in response to COVID-19. According to Harm Reduction International, prison decongestion schemes in response to COVID-19 were in place in 109 countries. Such schemes—about one-fourth of which exclude people


8. See id.

9. See id.


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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. Release measures are temporary in a few countries, meaning prisoners are expected to return once the emergency is resolved.

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. Fundamentally, offenders “are sent to prison as punishment, not for punishment . . . .” 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.

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. 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.
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
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or restricted. Spending time in prison also consigns people to much lower life expectancies and reduced lifetime earnings. In addition, the family harmony of prisoners is greatly compromised compared to people living in the mainstream community. Thus, prisoners are exposed to a number of considerable incidental deprivations. 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.

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. 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. 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.

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...
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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.” Rarely, animal coronaviruses can infect people and then spread between them.

In December 2019, a pneumonia outbreak was reported in Wuhan, Hubei Province, China. On December 31, 2019, the outbreak was traced to a novel strain of coronavirus, 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.” “Viruses are named based on

27. Id.
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.”

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.

“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.”

Subsequently, health officials reported person-to-person spread outside of Hubei Province and in other countries, including the United States.

COVID-19 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. Those droplets can land in the mouths or noses of people who are nearby and can possibly be inhaled into the lungs. 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.

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.

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. Id.  supra note 26.
34. Id.
35. Hereinafter referred to as “coronavirus” or “COVID-19.”
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.\textsuperscript{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.”\textsuperscript{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,”\textsuperscript{42} and on March 11, 2020, WHO declared the coronavirus outbreak a “pandemic,” defined as the “worldwide spread” of a new disease.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{45} By March 18, all fifty states had reported cases of coronavirus to the Centers for Disease Control (CDC).\textsuperscript{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.\textsuperscript{47} And as of April 13, all U.S. states had reported some community spread of coronavirus.\textsuperscript{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.\textsuperscript{49}

\textsuperscript{40.} How COVID-19 Spreads, supra note 36.
\textsuperscript{41.} Situation Summary, supra note 26.
\textsuperscript{43.} Situation Summary, supra note 26.
\textsuperscript{44.} Id.
\textsuperscript{45.} Id.
\textsuperscript{47.} How COVID-19 Spreads, supra note 36.
\textsuperscript{48.} Situation Summary, supra note 26.
\textsuperscript{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,\textsuperscript{50} with a rate of about 1900 cases per 100,000 people.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{53} Common symptoms, which are believed to manifest between two and fourteen days after exposure, include fever, cough, and shortness of breath,\textsuperscript{54} while some people have also reported fatigue, aches, runny nose, sore throat, and the loss of smell or taste.\textsuperscript{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.\textsuperscript{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 risk.\textsuperscript{57}
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risk of developing serious COVID-19 illness.\textsuperscript{57}

African-Americans are also being disproportionately infected and killed by coronavirus.\textsuperscript{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.\textsuperscript{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?”\textsuperscript{60} For many public health officials, the reasons behind these disparities are explainable.\textsuperscript{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.\textsuperscript{62}

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

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\begin{itemize}
\item \textsuperscript{58} See infra notes 59–62 and accompanying text.
\item \textsuperscript{60} Id.
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Id.
\item \textsuperscript{64} Id. (noting that COVID-19 “has caused a major economic shock”).
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overwhelmed. Other first responders battle record numbers of infection rates, leading to massive amounts of employees calling out sick. Seemingly every company, from major global corporations to mom-and-pop shops, has moved its entire workforce to virtual, work-from-home setups. In February 2020, the U.S. stock market had some of its worst daily and weekly losses in history. Almost every school, college, and university across the country has moved classes to virtual learning or cancelled them altogether.


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,


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

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77. Id.
78. Id.
79. Id.
80. Id.
to “close-mindedness, black-and-white thinking,” and even racism. 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. 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.

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.” 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. 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.”

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-
two] deaths.” 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.” 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. 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. The spread of coronavirus in prisons is accelerating across the country.

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. Forty BOP facilities and nine Regional Reentry Centers (halfway houses) had been affected. 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.

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88. Id.
89. Id.
93. Id.
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. 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.”

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.” 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. Yet others are sending infected prisoners to hurriedly-built microprisons.

As coronavirus continues its destructive spread across America’s massive system of prisons and jails, officials and scholars have focused on whether
prisoners should be released early, and if so, why.\textsuperscript{100}

A University of Michigan Law School study focused on the impact of coronavirus on prisoners with violent criminal histories.\textsuperscript{101} That segment of the prison population is especially concerning with respect to coronavirus for two reasons.\textsuperscript{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].”\textsuperscript{103} Nearly all of these efforts have excluded people convicted of violent crimes.\textsuperscript{104} Second, as the researchers noted, people convicted of violent crimes comprise the “majority of the total state prison population.”\textsuperscript{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.\textsuperscript{106} And, naturally, many people believe that individuals with violent convictions are dangerous.\textsuperscript{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?”\textsuperscript{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.”\textsuperscript{109} The study found that about one in ten released prisoners “was sent


\textsuperscript{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).

\textsuperscript{102} Id. at 1697.

\textsuperscript{103} It’s Time, supra note 85.

\textsuperscript{104} Id.

\textsuperscript{105} Id.

\textsuperscript{106} Id.

\textsuperscript{107} Id.

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

\textsuperscript{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. 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. Furthermore, a “look at older prisoners” who are “most seriously threatened” by coronavirus shows that their crime rates are even lower. 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. Those releases, however, “were normal releases from prison into society.” 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. Such actions could further reduce crime, which has already dropped significantly since the implementation of lockdown measures. 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. 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.
117. *It’s Time*, supra note 85.
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social distancing and more readily access basic hygienic products such as soap.\footnote{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.\footnote{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.\footnote{120} Moreover, coronavirus from inside arguably threatens countless people on the outside too.\footnote{121} Prison and jail staff enter and leave daily.\footnote{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.\footnote{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.”\footnote{124} But those places have been shut down; prisons and jails have not.

\footnote{118. Id.}
\footnote{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.”).}
\footnote{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/jii18.pdf (finding approximately 221,600 staff employed in local jails in 2018).}
\footnote{121. It’s Time, supra note 85.}
\footnote{122. Id.}
\footnote{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.”).}
\footnote{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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”\textsuperscript{128} in the investigation of others, or the defendant qualifies for “compassionate release.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{131}

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

\begin{footnotesize}
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\item \textsuperscript{125} Id.
\item \textsuperscript{126} Understanding, supra note 101, at 1647–48, 1697.
\item \textsuperscript{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).
\item \textsuperscript{128} FED. R. CRIM. P. 35(b)(1).
\item \textsuperscript{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”).
\item \textsuperscript{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).
\item \textsuperscript{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.
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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

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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.


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

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.” The United States District Court for the Eastern District of Pennsylvania said in a compassionate release case that “prisons are tinderboxes for infectious disease.” As discussed above, prisons and jails increase the risk of contracting infectious diseases such as coronavirus. 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.” Moreover, proper social distancing is practically impossible, enabling coronavirus “to spread rapidly” once it penetrates the walls of a prison or jail.

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. By contrast, the overwhelming majority of motions sought relief based on the “risk of harm that would result were they to become infected.”

demonstrate that he was not a danger to the community.”).
orders, as of April 10, 2020, revealed at least five key principles guiding court decisions.\footnote{147} These principles are important because they developed the framework for the manner in which future cases would be decided.\footnote{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.\footnote{149}

Second, government consent proved to be an important but not critical factor.\footnote{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.\footnote{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.”\footnote{152} But “courts also granted compassionate release for [inmates] suffering from diabetes, hypertension, Crohn’s disease, and other . . . chronic conditions [leaving inmates] immunocompromised.”\footnote{153} However, not all inmates suffering from

\begin{footnotes}
\footnote{147} Id.
\footnote{148} Id.
\footnote{149} Id.
\footnote{150} Id.
\footnote{151} Id. This number could be higher, as it was unclear in some cases whether the government opposed relief. Id.
\footnote{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).
\end{footnotes}
chronic medical conditions were granted relief. Fourth, the “[l]ength of sentence remaining was not a determinative factor.” 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. Fifth, the presence of the virus in a given facility was at times dispositive. 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.’” Finally, when the compassionate release motions were filed had seemingly no correlation with their likelihood of success. 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.”

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. First, the defendant must overcome the “exhaustion requirement” of administrative remedies. 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 505 (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.
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continues to grow. nonethelssh, defendants with legitimate requests should submit them to the BOP as soon as possible. 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”. 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, while still others have said that if the government consented to release, then exhausting BOP remedies is unnecessary.

The second of the criteria is a relevant medical condition. 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.” 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. 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. Such a showing will increase “the possibility that a court will find [an] ‘extraordinary and compelling reason[]’ to grant [a] motion” for early release.

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.
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.\textsuperscript{173} No reported cases as of mid-April 2020 showed denial of release where the government agreed it was appropriate.\textsuperscript{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.\textsuperscript{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.\textsuperscript{176} Indeed, one author of this Article has participated in a number of these conversations already.\textsuperscript{177}

As time passes, our understanding of coronavirus will evolve, and the picture of its impact in prisons and jails will become clearer.\textsuperscript{178} But for inmates, the race against the clock is now.\textsuperscript{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

\textsuperscript{173} Id.  
\textsuperscript{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.  
\textsuperscript{175} Athanas, Thomas, & Prueter, supra note 131.  
\textsuperscript{176} Id.  
\textsuperscript{177} See Peter Isham, LINKEDIN, https://www.linkedin.com/public-profile/in/peter-isham-05181666?challengeId=AQEv3SMz33wmSwAAAXTdR2ZoOgUD_JW-YMI2480_11785Y2_TjJPscrvwpKyuTSxubc9UqU_AIQKxzCsZJ78F0UY7t3s7Wj8_w&submissionId=9bb3a8ab-7275-3916-a658-03c2763ab40 (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.  
\textsuperscript{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.”).
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releases in U.S. history.\textsuperscript{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.\textsuperscript{181} Insofar as jails are concerned, the project also noted a reduction of 31%, with a total of 68,176 releases.\textsuperscript{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.\textsuperscript{183} The scale of the reduction is staggering.\textsuperscript{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]].\textsuperscript{185} This is a reduction in the jail population size by about 25%.\textsuperscript{186} The exact reasons for this are multi-faceted.\textsuperscript{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

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\item 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.
\item UCLA Law Covid-19 Behind Bars Data Project, supra note 95.
\item Id.
\item Id.
\item Id.
\item Id.
\end{enumerate}
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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.
194. Id. (Title VI, Section 603(b)).
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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

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195. Id. (Title I, Section 101).
196. Id. (Title I, Section 102(e)).
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
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for sentence reduction, 124 requests for compassionate release have been approved, and 2,000 inmates are on home confinement. 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.

Accordingly, the coronavirus pandemic is radically shaping criminal justice and prison policy, particularly by leading to steps that will lower prison numbers. 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. 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. Jails are temporary detention facilities operated by “a sheriff, police chief, or city or county administrator,” and


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

“Mass incarceration is a relatively new phenomenon in the United States.” 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. Notably, the increased sanctions often came “in the form of (harsh) mandatory minimum terms.” As Mark Fondarcaro observes, “mass incarceration in America has been fueled by an increased likelihood that an
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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.”

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.

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

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. Mass incarceration

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

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”).
C. Mass Incarceration Does Not Mean Lower Crime

While the financial and human cost\textsuperscript{234} of imprisonment is extremely high, the demonstrable benefits of incarcerating over two million Americans are small.\textsuperscript{235} The increasing consensus among researchers is that mass incarceration has not meaningfully improved community safety.\textsuperscript{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.”\textsuperscript{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 high water 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.\textsuperscript{238}

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

\begin{footnotesize}
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\item \textsuperscript{234} See Bagaric et al., \textit{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).
\item \textsuperscript{235} See, e.g., \textit{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).
\item \textsuperscript{236} See \textit{Mass Incarceration Costs $182 Billion Every Year, Without Adding Much to Public Safety, supra} note 230.
\item \textsuperscript{237} Dr. James Austin et al., \textit{How Many Americans Are Unnecessarily Incarcerated?}, \textit{Brennan Ctr. for Justice} 1, 5 (2016); see also Mirko Bagaric, \textit{The Punishment Should Fit the Crime—Not the Prior Convictions of the Person that Committed the Crime: An Argument for Less Impact Being Accrued to Previous Convictions in Sentencing}, \textit{51 San Diego L. Rev.} 343, 405–07 (2014) [hereinafter Bagaric, \textit{The Punishment Should Fit the Crime}] (summarizing studies on the issue).
\end{itemize}
\end{footnotesize}
nationwide.\textsuperscript{239} It is clear “that mass incarceration does not meaningfully reduce the crime rate.”\textsuperscript{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.\textsuperscript{241}

Part of the reason for this is because the empirical data indicates that prison increases the rate of recidivism.\textsuperscript{242} A 2016 Sentencing Commission report\textsuperscript{243} tracked 25,431 federal prisoners following their release from prison in 2005,\textsuperscript{244} finding that “over the succeeding eight-year period, almost half (49.3\%) were re-arrested.”\textsuperscript{245}

The numbers from state prisons mostly tell the same story.\textsuperscript{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.”\textsuperscript{247} Nearly half (44\%) were “arrested at least once during the first year after release.”\textsuperscript{248}

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

\begin{itemize}
\item \textsuperscript{239} See Sawyer & Wagner, supra note 120 (stating that there are currently over 1.5 million Americans incarcerated).
\item \textsuperscript{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.”).
\item \textsuperscript{243} Id. (explaining the study of prisoners’ recidivism rate).
\item \textsuperscript{244} Id. at 3.
\item \textsuperscript{245} Id.
\item \textsuperscript{247} Id.
\item \textsuperscript{248} Id.
\end{itemize}
95% of prisoners are ultimately released from prison,\textsuperscript{249} and the protection offered to the community by prison walls is eroded by the high rates of reoffending by released prisoners.\textsuperscript{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.\textsuperscript{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."\textsuperscript{252}


\textsuperscript{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).

\textsuperscript{252} Bagaric, Hunter, & Wolf, supra note 228, at 98.
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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. 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. “Pragmatically motivated reform is likely to produce expedient solutions,” but will “exacerbate the United States’ sentencing crisis.” 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. The second is greater recognition of the fact that the burden of prison is far more significant than conventional orthodoxy suggests. Prison is “the most serious sanction imposed on serious offenders, apart from the death penalty.”

We refer you to the sources below for more detailed information.


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. 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. 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.” “From a human rights perspective, these additional deprivations are considerable, verging on [oppressive].” A key interest that is curtailed by imprisonment is the right to procreate. The Supreme Court has ruled procreation to be an unquestionable fundamental right. 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.
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).
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

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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)).
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. After Skinner, courts recognized that imprisonment and probation could restrict the “procreation rights of prisoners and offenders.”

The Ninth Circuit in Gerber v. Hickman (Gerber II) also acknowledged that jails and prisons can limit procreation rights, like conjugal visits. 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.

Courts seem to disfavor “claims asserting constitutional rights to conjugal visits. 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.

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

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. The law does not expressly protect the right to a family, but the Court refers to such a right in dicta. 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.

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

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).


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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. 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.”

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. 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.”

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.

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.

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

D. Reduced Life and Income Earning Expectancy

Other subtler, yet important, burdens of imprisonment exist. “Imprisonment reduces life expectancy, earnings, and family harmony.” 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.

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


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


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.”

Imprisonment also disrupts and negatively affects prisoners’ families. Moreover, studies report that “fathers’ incarceration is stressful for children, increasing both depression and anxiety as well as antisocial behavior.” 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. 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.

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. “Cumulatively, [these restrictions] are perhaps even more
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The 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.”

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. The proportionality principle requires that the hardship of the sanction match the seriousness of the harm.

“Proportionality is . . . a requirement of the sentencing regimes of ten states in the United States,” and “it is also a core principle that informs (though it does not direct) the Federal Sentencing Guidelines.”

“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[].” “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.P.A.L.REV. 101 (1995).


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


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.” 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.” Further, to give content to proportionality, it is necessary to rank crimes and punishments and anchor the scales.

When broken down, proportionality has two limbs: the severity of the crime and the severity of the sanction. 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.” There is no settled mechanism to achieve these calibrations.

The criminal justice system needs a doctrinally sound approach that explains the criteria defining offense severity. There is one criterion that measures “offense severity and the hardship of a sanction: individual well-being.” 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. There is admittedly a degree of approximation involved in such an assessment, but the level of accuracy in making such determinations is increasing.

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.”

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.


312. Id. at 185.

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

314. Id.


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, and have “higher divorce rates, diminished parenting skills (although this finding was not universal), lower levels of success in the employment setting, and much higher levels of unemployment.” “Victims of property crime likewise suffer reduced levels of well-being but at generally less pronounced rates than victims of sexual and violent crime.”

“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.” Ryberg attributes this to “the underlying belief that the ‘answer is pretty straightforward,’ as imprisonment is clearly the harshest disposition.” Ryberg notes that this answer seems to rest on the “negative impact on the well-being of the punished.” “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.”

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

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

322. See id. at 1716, n.257 and accompanying text (citing Hanson et al., supra note 320, at 191).

323. See id. at 1716, n.258 and accompanying text (citing Hanson et al., supra note 320, at 190).


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).


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


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


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 stems 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.\footnote{Id. at 1717–18.}

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 offenses should be less than is currently the norm given that current sentencing practices greatly underestimate the harshness of imprisonment.\footnote{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).}

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.\footnote{Sawyer & Wagner, supra note 120 (explaining the number of prisoners in United States prisons and jails for non-violent or sexual offenses).} 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.\footnote{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/} 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
sentences.\textsuperscript{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.\textsuperscript{337} As offenses are predominantly committed by young men, the high number of life sentences has not meaningfully lowered the crime rate.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{341}

The upshot of our reform would reduce the United States prison population by approximately 50%.\textsuperscript{342} Of course, there is a need to impose alternative sanctions for offenders who are not sentenced to prison or are released early.\textsuperscript{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.\textsuperscript{344} As an alternative, the “monitoring sanction” harmonizes disparate existing technologies to track the real-time movements and locations of offenders using sensor equipment.\textsuperscript{345} According to the proposal,

\textsuperscript{336} Nagin, supra note 335.
\textsuperscript{337} See id.
\textsuperscript{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.
\textsuperscript{340} Id.
\textsuperscript{341} Id.
\textsuperscript{342} Id.
\textsuperscript{344} Id.
\textsuperscript{345} Id. at 1231 (describing the “monitoring sanction” concept).
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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. Moreover, the level of medical care in prisons is compromised, further exacerbating the risk of infection. 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. From the logical and normative perspective, this principle applies not only to the risk of contracting coronavirus, but also to other deprivations prisoners experience.

“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.\[^{358}\]