The Revelatory Nature of COVID-19 Compassionate Release in an Age of Mass Incarceration, Crime Victim Rights, and Mental Health Reform

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"Thucydides, describing the anarchy that followed the plague at Athens, suggests how men, unrestrained from human laws and made cynical by disaster about divine ones, lapse into lawlessness. Retribution needs to be secure to be effective as a prudential argument; very often it is not."
- MARY MARGARET MACKENZIE, PLATO ON PUNISHMENT 113 (1981).

ABSTRACT

The crime victim rights movement and mass incarceration grew side-by-side in the United States, and in many ways they deal with similar questions about the purposes, benefits, and effectiveness of the criminal justice system. Among the dominant criminal justice theories, retribution continues to receive stalwart support as an assurance of justice, but also as a possible form of penance and individual and societal healing. This is in some tension, however, with the prevalence of atypical neurology among prisoners and the associated push for treatment rather than punishment for those deemed less accountable for the harm they cause.. The COVID-19 worldwide pandemic in 2020 tested the value attributed to retribution,

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rehabilitation, and other criminal justice goals in sentencing and incarceration. Specifically, the First Step Act of 2018 enhanced discretionary compassionate release from prison due to illness and disability, requiring a post-sentencing balance of interests between perceived risks to the prisoner while in prison and risks to the public if release were granted. Early COVID-19 compassionate release decisions reveal that courts continue to base early release decisions primarily on an assessment of public safety risk from crime, not community impact, crime victim impact, or even prisoner health. In so doing, judges and prosecutors usurp and marginalize the role of the community and those most affected by crime. Greater consideration of community and crime victims' perspectives would better serve justice, and its goals of retribution and rehabilitation.

I. INTRODUCTION

Mass incarceration in the United States is finally being identified by policymakers as harmful to society and the result of ineffective efforts to combat crime and protect the public, particularly the "War on Drugs."[1] Why high levels of incarceration is problematic is a complex question, but many prisoners have a serious diagnosable mental health disorder, including neuroatypical conditions such as substance abuse addiction, intellectual disabilities, or mental illness.[2] Inequities are compounded by the fact that in both state and federal jurisdictions, offenders who are caught in the net of the criminal justice system are disproportionately young, African American or Hispanic men who are relatively poor with less formal education.[3] What is more, low income men of color caught within the trap of mass incarceration

[1] *See, e.g.*, First Step Act of 2018, P.L. 115-391, 132 Stat. 5194 (2018) (aiming, through bipartisan legislation, to reduce mass incarceration of nonviolent offenders); *see generally* Andrea Craig Armstrong, *The Missing Link: Jail and Prison Conditions in Criminal Justice Reform*, 80 LA. L. REV. 1, 4 (2019); Susan Stuart, *War as Metaphor and the Rule of Law in Crisis: The Lessons We Should Have Learned from the War on Drugs*, 36 S. ILL. U. L.J. 1 (2011).

[2] *See* E. FULLER TORREY ET AL., U.S. DEP'T JUSTICE, NCJ NO. 230531, MORE MENTALLY ILL PERSONS ARE IN JAIL AND PRISONS THAN HOSPITALS: A SURVEY OF THE STATES (2010), *available at* https://www.ojp.gov/library/abstracts/more-mentally-ill-persons-are-jails-and-prisons-hospitals-survey-states.

[3] *See generally* Brett Dignam, *Learning to Counter Mass Incarceration*, 48 CONN. L. REV. 1217, 1220 (2016) (addressing the need for more educational services to the prison population, disproportionately comprised of "young black men who dropped out of high school").

comprise a population group less likely to have access to quality medical and mental health services from a young age.[4]

Also, with the increase in urbanization and illegal drug use in the United States, by the 1960s, a burgeoning middle-class victims' rights movement[5] arose in response to the sharp increase in rates of property and violent crime. Police purportedly were unable to address the spike adequately and crime victims were reluctant to cooperate with no possibility of victim compensation or voice at sentencing.[6] However, those most fearful of crime in the United States were those who lived in low-income communities, who had less access to transportation and personal security measures, felt little trust toward law enforcement, and feared retaliation by offenders.[7] This community of crime victims witnessed mass incarceration differently than the policymakers.

In the 1990s, during the height of the Clinton tough-on-crime era, criminologist Michael Tonry stated that communities afflicted with inner city drug-related crime did not want mass incarceration and police crack downs; they wanted "more drug treatment, more early childhood programs, and more

[4] *See generally* MELISSA THOMPSON, RACE, GENDER, AND MENTAL ILLNESS IN THE CRIMINAL JUSTICE SYSTEM 111 (2005) (finding that African-Americans are least likely to be psychologically evaluated in the criminal justice system); M. Gregg Bloche, *Race and Discretion in American Medicine*, 1 YALE J. HEALTH POL'Y, L. & ETHICS 95, 108 (2001) ("Working poor and unemployed patients, especially the uninsured, tend to find their way to a bottom tier of public clinics staffed by rotating house officers and salaried attendings with little institutional cache."). Studies have also shown that offenders have a three to six times higher rate of having a sexually transmitted infection than the non-offender population, with higher rates among women than men, and higher rates among Black offenders than White offenders. Sarah E. Wiehe et al., *Epidemiology of Sexually Transmitted Infections Among Offenders Following Arrest or Incarceration*, 105 AM. J. PUB. HEALTH, Dec. 2015, at e26, e28 (studying approximately 250,000 Marion County, Indiana offenders between 2003–2008).

[5] The term "victim" will be used throughout for consistency with related victim rights legislation, but the author acknowledges the importance and greater accuracy of the alternative term "survivor", as well as the dignity demanded by the person first movement.

[6] LESLIE W. KENNEDY & VINCENT F. SACCO, CRIME VICTIMS IN CONTEXT 51 (1998).

[7] *See* JEFFREY REIMAN, THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS, AND CRIMINAL JUSTICE 170 (8th ed. 2007); KENNEDY & SACCO, *supra* note 6, at 116–17.

crime prevention initiatives."[8] Indeed, mandatory sentencing and mass incarceration undermined the ability of offenders to provide victims of crime with restitution, which again disproportionately impacted low-income communities, where victims most needed restitution.[9] Mandatory sentencing also reduced the potential influence and relevance of crime victim impact statements at sentencing.[10]

Mandatory sentencing guidelines, such as the Sentencing Reform Act of 1984 and the Anti-Drug Abuse Acts of 1986 and 1988, ensured an increase in arrests in minority communities with a focus on particular controlled substances, such as crack cocaine, rather than promoting the treatment of addiction.[11] By 1994, every state had mandatory sentencing laws.[12] The continuing legacy of the War on Drugs has criminalized certain conduct that disproportionately impacts low-income communities of color, while declining to criminalize other significantly harmful activity, such as white collar crime, industrial disasters, or political corruption - crimes that would address a different, more affluent, demographic of offender.[13] Due to recidivism, reincarceration, and long prison sentences, many of these young offenders find themselves eventually aging in prison, resulting in a growing proportion of much older inmates with serious medical and mental health needs.[14] As stated before Congress:

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[8] KENNEDY & SACCO, *supra* note 6, at 129; *see also* Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219 (2000).

[9] *See* REIMAN, *supra* note 7, at 170; ROBERT ELIAS, VICTIMS STILL: THE POLITICAL MANIPULATION OF CRIME VICTIMS 40–41 (1993).

[10] ELIAS, *supra* note 9, at 94.

[11] CONTROLLING THE DANGEROUS CLASSES: A HISTORY OF CRIMINAL JUSTICE IN AMERICA 50–54 (Randall G. Shelden ed., 2d ed. 2008).

[12] HEATHER AHN-REDDING, THE "MILLION DOLLAR INMATE": THE FINANCIAL AND SOCIAL BURDEN OF NONVIOLENT OFFENDERS (2007).

[13] *See generally* REIMAN, *supra* note 7, at 30; KENNEDY & SACCO, *supra* note 6, at 58–59.

[14] *See generally* Lindsey E. Wylie et al., *Extraordinary and Compelling: The Use of Compassionate Release Laws in the United States*, 24 PSYCHOL., PUB. POL'Y & L. 216, 216–217 (2018) (finding that inmates age 50 and older are the fastest growing population segment in the United States prison system). A number of state and federal appeals relate to age-related mental disorders among prisoners, particularly Alzheimer's disease. *See, e.g.*, Wilson v. Adams, 901 F.3d 816 (7th Cir. 2018) (affirming a motion for summary judgment on a constitutional deliberate indifference and medical malpractice state claim); Dahl v. Miles, 2017 WL 3600397 (D. Minn. Aug. 20, 2017) (denying on procedural grounds a habeas corpus claim for

> Our Nation's Federal prison population is rapidly aging. Of the 1.5 million adults currently in State and Federal prisons, there has been a 300 percent spike in the elderly population since 1999. By 2050, it is estimated that one-third of the prison population of the United States will be over age 50.[15]

Many thoughtful and perceptive grassroots advocates and concerned scholars have addressed the factors impacting mass incarceration mentioned above, but few have considered the role of crime victims in the conversation. This is particularly unfortunate, for many offenders have also been victims of crime. For example, one petitioner for compassionate release from prison during the pandemic had convictions for firearms offenses and domestic violence; had spent half of his life in prison after a childhood in which he had been hospitalized due to physical abuse by the grandfather who raised him; and received diagnoses for PTSD, depression, and impulse control disorder.[16] Victims and offenders in such cases come from the same communities and face similar societal barriers and prejudices.[17]

As will be discussed below, the crime victim rights movement has been subject to efforts at manipulation and stereotyping by both offender advocates and state agents.[18] Victims of crime are not bent on revenge regardless of the cost, nor are they without compassion for the serious and negative impacts of excessive incarceration and the societal neglect of

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conditions of confinement, including denial of medications to forestall the progression of Alzheimer's disease); Stackhouse v. State, 2015 WL 4381703, at *5 (Tenn. Ct. Crim. App. July 17, 2015) (affirming the denial of postconviction relief to a 77-year-old sexual offender with Alzheimer's disease, in addition to having Parkinson's disease, diabetes, and high blood pressure); State v. Kirby, 173 Wis. 2d 307 (1992) (noting the "inability of the prison system to provide adequate supervision for an elderly person with his chronic frailties of mind").

[15] *Good Conduct Time Credits for Certain Elderly Nonviolent Offenders*, H.R. Rep. No.116-192, at H9191116th Cong. (2019) (statement of Rep. Ted Deutch addressing the Second Chance Act of 2007).

[16] U.S. v. Cannon, 2021 WL 231100, at *3 (D. Conn. Jan. 22, 2021).

[17] *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T JUSTICE, NCJ No. 255578, NATIONAL CRIME VICTIMIZATION SURVEY: VIOLENT VICTIMIZATION BY RACE OR ETHNICITY, 2005-2019, (2020), https://www.bjs.gov/content/pub/pdf/vvre0519.pdf (finding, in 2005, 32.7 violent victimizations per 1,000 black persons age 12 or older and 27.7 violent victimizations per white persons, falling to 18.7 for black persons and 21.0 for white persons in 2019); KENNEDY & SACCO, *supra* note 6, at 14 (identifying research showing that the most likely victim of violent crime in the United States is a young, black male who knows his offender).

[18] *See generally* ELIAS, *supra* note 9.

medical and mental health needs of inmates. Tough-on-crime government voices have selectively lifted up only certain crime victims in the public eye, profiling middle-class white victims who are far from typical for those most victimized by crime while repeatedly portraying poor communities of color as hardened criminals who choose to be so, even if they are subject to victimization.[19] Examples of the government's choice to adopt primarily public health approaches to the opioid crisis and fetal alcohol syndrome, which impact middle-class communities, contrast vividly with the criminalization of pregnant women who use crack cocaine or heroin in predominantly low-income communities of color.[20] All crime victim voices are valuable, but more crime victims and more representative crime victims need to weigh in for criminal justice reform to effectively incorporate a crime victim rights perspective. This is more important than ever as the American middle class shrinks and the divide between rich and poor grows ever greater.[21]

History matters here. While each addressed different concerns, the crime victim rights movement and the rise of mass incarceration largely began during the same post-1960s period.[22] Yet, as fierce public policy debates about the causes and effectiveness of mass incarceration continue, the quiet and modest progress of the crime victim rights movement has continued to proceed relatively independently. However, it could be joining more actively with immigrant rights, consumer protection, racial justice, defendants' rights, and other civil rights organizations to alleviate the causes

[19] *See* KENNEDY & SACCO, *supra* note 6, at 15 (suggesting that portraying victims of crime who are poor and of color as receiving their just deserts alleviates middle class guilt for failing to take responsibility for social inequity); ELIAS, *supra* note 9, at 40–41(stating that the 1982 Presidential Task Force on Victims of Crime selectively protected an unrepresentative group of crime victims, "not lower-class minorities").

[20] *See, e.g.*, Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758, 803 (2020) ("Although the crack baby phenomenon proved not to be real after continued medical and public health research, the panic led to widespread criminal and administrative sanctions against pregnant women, especially poor Black and brown women, and the effects of this stigmatizing public policy are still being felt today.").

[21] *See* PETER TEMIN, THE VANISHING MIDDLE CLASS: PREJUDICE AND POWER IN A DUAL ECONOMY (2017) (asserting that wage stagnation, racial segregation, and mass incarceration are components of a deliberate policy to maintain a cheap labor force and ensure high profits for the wealthy few); SHELDEN, *supra* note 11, at 320 (finding that as of 2005 one-third of African-American men had been in jail, prison, probation or parole).

[22] *See infra* Part II.

of social inequity that lead to much crime. Although crime victim rights are of relatively recent origin, and a remarkable achievement for all victims of crime, they take a narrow view of the crime victim's experience. That is, the crime victim rights movement has hesitated to focus on reform of the justice system as a whole, the needs of the defendant, and the diversity of members of the community. The history of criminal sentencing theory, in turn, has patently ignored the role of crime victims, most of whom are far more likely to understand the context within which the crime occurred than a judge or other government agent far removed from the realities of the defendant's community and life experience. If their experiences were given more weight, crime victims could have offered a perspective that would have helped the criminal justice system avoid the unfortunate path of mass incarceration and its terrible costs to so many both in and out of prison.

This dearth of victim-impact perspective is seen most poignantly now, at a time when neuroatypical offenders and other inmates with medical conditions have faced the terrifying risk of death in prison due to the COVID-19 pandemic. The rapid and necessary spate of compassionate release claims filed on behalf of inmates with conditions that place them at greater risk of the contagion have vividly reflected the priorities and inequities of the criminal justice system. With little time for reflection given the rapid spread of the contagion, court and prison authorities have repeatedly emphasized community protection from recidivism and notions of retribution first, devaluing yet again the perspectives of those offenders and victims already marginalized in the justice system. As a poignant example, it was reported that North Carolina state officials designed a strict policy during the pandemic of refusing compassionate release to any prisoner convicted of a violent crime, even if she was pregnant and her sentence was nearly complete.[23]

This article will address, in Part II, the intersection of the history of mass incarceration in the United States and the development of crime victim rights, highlighting the impact of mental health research on both. Part III evaluates traditional sentencing theories against the benefits and risks of mental health goals and the interests of crime victims and defendants. Finally, Part IV specifically examines how public health crises, such as the COVID-

[23] *See* Hannah Critchfield, *Pregnant NC Prisoner Hopes of Release Fading*, N.C. HEALTH NEWS (June 17, 2020), https://www.northcarolinahealthnews.org/2020/06/17/pregnant-nc-prisoners-hopes-of-release-fading/.

19 pandemic, reveal the priorities of the criminal justice system and its disregard of marginalized community voices in favor of state control.

II. THE PARALLEL HISTORY OF MASS INCARCERATION AND CRIME VICTIM RIGHTS

Several patterns mark the parallel history of mass incarceration and the crime victim rights movement. Aside from occurring during the same era, following the Civil Rights era of the 1960s and 1970s, both responded to the tough-on-crime political climate of the subsequent 1980s and 1990s, and both were strongly supported by President Reagan, President Bush, and President Clinton.[24] However, they did not speak to the same types of crimes.

A. Legal Recognition of the Mental Health Needs of Crime Victims and Offenders

While mass incarceration emerged from public fears related to the rise in property crimes and homicides connected to increased availability of illegal drugs, the movement for victims' rights arose from both medical recognition of child abuse and the women's movement, which recognized that women victims of interpersonal and family violence were wholly marginalized in the criminal courts.[25] Nonprofit crisis centers arose largely serving women and child victims of crime, with a tenuous recognition of the importance of race and class on the incidence of violence, aiming instead for an alliance with government.[26]

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[24] *See* Eliav Lieblich & Adam Shinar, *The Case Against Police Militarization*, 23 MICH. J. RACE & L. 105, 115 (2017–2018).

[25] *See* Kristin N. Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive v. Rehabilitative Systems of Justice*, 97 CAL. L. REV. 1107, 1110 (2009) (reviewing the historical development of crime victims' rights); Karen-Lee Miller, *Purposing and Re-Purposing Harms: The Victim Impact Statement and Sexual Assault*, 23 QUALITATIVE HEALTH RES. 1445, 1449 (2013) (finding in a study of victims of sexual assault that their victim impact statements emphasized the opportunity to be recognized by the court, where their experiences of "marginality and stigma" by the legal system had exacerbated their feelings of emotional distress from the crime).

[26] *See* ELIAS, *supra* note 9, at 47–48 ("[T]he victims movement we know has not fundamentally challenged U.S. society on its crime-control strategies, social policies, or otherwise."); Office of Victims of Crime, *Introduction and Executive Summary*, OVC ARCHIVE, https://www.ncjrs.gov/ovc_archives/repcong/intro.htm (last accessed Mar. 6, 2021) (stating that the Victims of Crime Act (VOCA) of 1984 provided extensive funding for "pioneering partnerships" that included children's advocacy centers, victim services centers, and interdisciplinary violence against

Mandatory reporting of child abuse and mandatory arrest and prosecution of domestic violence marked a serious systemic reach into the lives of families that was needed to curb the retributory nature of interpersonal violence, but the policies also enhanced the state control of offenders through incarceration.[27] As a movement, sympathy was difficult to find among advocates for battered women or victims of sexual violence with respect to the offender's related substance abuse, putting forth the highly prominent theme that violence is a choice to exert power and control, not a result of a mental health disorder.[28] Victims of violence sought accountability and respect from the justice system, which political figures put to their own use. Child victims of abuse and neglect were too young to fully exercise their victim rights in the justice system in a meaningful way, which led advocates and the State to speak for them.[29]

Remarkably, at this time the most common victim of violent crime was a young man who looked much like the most common convicted offender – a low-income, young man of color facing economic challenges and hardship since birth. There were no crime victim advocacy centers for these young men.[30] Instead, their advocates in the criminal justice system

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women programs in order to "reduce the number of victim interviews, provide settings especially designed for victims, and increase collaboration between criminal justice and victim service agencies").

[27] *See* KENNEDY & SACCO, *supra* note 6, at 105 (describing interpersonal violence as seen as retribution in the home).

[28] *E.g.*, ECHO A. RIVERA ET AL., NAT'L CTR. ON DOMESTIC VIOLENCE, TRAUMA & MENTAL HEALTH, AN APPLIED RESEARCH PAPER ON THE RELATIONSHIP BETWEEN INTIMATE PARTNER VIOLENCE AND SUBSTANCE ABUSE 1 (2015) ("IPV [interpersonal violence] is best understood as an ongoing pattern of power and control in romantic relationships that is enforced by the use of abusive tactics, such as intimidation, threats, physical or sexual violence, isolation, economic abuse, stalking, psychological abuse, and coercion related to mental health and substance use." (internal citation omitted)).

[29] *See* Lisa Kelly & Alicia LeVezu, *Until the Client Speaks: Reviving the Legal-Interest Model for Preverbal Children*, 50 FAM. L.Q. 383 (2016); *Marlene A. Young Interview Transcript*, ORAL HISTORY OF THE CRIME VICTIM ASSISTANCE FIELD VIDEO AND AUDIO ARCHIVE, UNIV. OF AKRON (Feb. 24, 2003), http://vroh.uakron.edu/transcripts/Young.php (founding Executive Director of the National Organization for Victim Assistance).

[30] *See* Eric Stiles et al., *Serving Male-Identified Survivors of Intimate Partner Violence*, NAT'L RESOURCE CTR. ON DOMESTIC VIOLENCE 8 (July 2017), https://vawnet.org/sites/default/files/assets/files/2017-07/NRCDV_TAG-ServingMaleSurvivors-July2017.pdf (noting that the prevalence of women-focused

rose up from the ranks of criminal defense, stating that their clients were victims of the system. Discussion of childhood victimization did, however, become important in sentencing hearings.[31] Those who regularly worked with child victims of crime could not help but recognize the pattern of victim as offender, and offender as victim in communities with little social and economic support.[32] While politicians raged about the hardened criminal or professional criminal class, they targeted the poorest and least politically powerful rather than the professional affluent classes who, in the 1980s and beyond, were rigging the economy and creating an ever widening class division.[33]

Crime victims were pitted politically against criminal offenders, which made little sense, particularly when constitutional rights generally focus on curbing the arbitrary and inequitable use of state power.[34] The primary concern for both victim and offender was always the workings of the criminal justice system itself and those who pulled its levers. In the meantime, gains were made in the medical and mental health communities, particularly since the 1990s.[35] For example, pharmacological treatments for serious mental illnesses such as bipolar disorder were developed, new best

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names of crisis centers "limits males' ability to see themselves as victims and find their way to service providers").

[31] *See, e.g.*, Craft v. State, NO. SC19-953, 2020 WL 6788794 (Fla. Nov. 19, 2020) (holding that the trial court properly weighed defendant's history of childhood trauma as a mitigating factor at sentencing); Eaton v. State, 192 P.3d 36 (Wyo. 2008) (holding that a murder defendant was not provided with ineffective assistance of counsel at the penalty stage when counsel failed to investigate and present certain mitigating abusive events in the defendant's childhood).

[32] *See generally* David Finkelhor et al., Office of Juvenile Justice & Delinquency Prev., *How the Justice System Responds to Juvenile Victims: A Comprehensive Model*, JUV. JUST. BULL. (Dec. 2005), https://www.ojp.gov/pdffiles1/ojjdp/210951.pdf.

[33] *See* Lucian E. Dervan & Ellen S. Podgor, *"White-Collar Crime": Still Hazy After All These Years*, 50 GA. L. REV. 709 (2016); Eli Wald, *Serfdom Without Overlords: Lawyers and the Fight Against Class Inequality*, 54 U. LOUISVILLE L. REV. 269 (2016); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L REV. 1795 (1998).

[34] *See* KENNEDY & SACCO, *supra* note 6, at 57.

[35] *See generally DSM History*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/psychiatrists/practice/dsm/history-of-the-dsm (outlining the history of the evolving classification of mental disorders in the Diagnostic and Statistical Manual of Mental Disorders (DSM) and the International Classification of Diseases).

practices and identification for posttraumatic stress disorder and chronic depression were implemented, and gains were made in understanding the nature of cognitive disabilities that are relevant to the justice system.[36]

This modest renaissance in mental health research led offender advocates in the new millennium to rightly argue that incarceration was more inhumane and unjust for some with such mental health challenges. The victim advocacy movement remained relatively silent, focusing instead on the mental health gains in treatment for victims with these same conditions. It demanded restitution from offenders for the costs of such treatment but said little about the meaning of justice for similarly neuroatypical offenders. Rehabilitation as a sentencing goal gained new life with new treatments,[37] but also created the serious new risks of adding to the state's power public health surveillance and medically anesthetizing a population of low-income communities of color already disproportionately impacted by state control.

In the last half-century, the medical and mental needs of both convicted offenders and victims of crime have received substantially more attention than in decades past.[38] In 1972 in *Jackson v. Indiana*, the United States Supreme Court held that substantive due process rights, specifically the liberty interests of detained persons with intellectual disabilities, may override the police power interest in community safety and allow for pretrial release.[39] In 1994 in *Farmer v. Brennan*, the Court put forth that, pursuant to the Eighth Amendment Cruel and Unusual Punishment Clause, "[t]he Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones" when reviewing whether a state facility had been deliberately indifferent to the petitioner's health needs.[40] In *Atkins v. Virginia*

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[36] Walter Alexander, *Pharmacotherapy for Post-traumatic Stress Disorder in Combat Veterans*, 37 PHARMACY & THERAPEUTICS J. 32 (2012) (discussing the co-morbidity and treatment of bipolar, schizophrenia, and posttraumatic stress disorder).

[37] Richard Williams, Nat'l Conference of State Legislatures, *Addressing Mental Health in the Justice System*, 23 LEGISBRIEF (Aug. 2015), https://www.ncsl.org/research/civil-and-criminal-justice/addressing-mental-health-in-the-justice-system.aspx.

[38] *See Executive Summary: Final Report of the APA Task Force on the Victims of Crime and Violence*, 40 AM. PSYCHOLOGIST 107, 108 (1985) ("It is clear from research evidence that loss of personal property and/or bodily injury, commonly thought of as the most unsettling aspect of victimization, may in fact be of less importance than the psychological damage suffered by the victim.").

[39] 406 U.S. 715, 731 (1972).

[40] Farmer v. Brennan, 511 U.S. 825, 832 (1994).

in 2002, the Court questioned the utility of imprisonment and capital punishment of offenders with cognitive disabilities who do not meet the criteria for involuntary commitment but cannot easily be rehabilitated or deterred from future offending by imprisonment alone.[41] In 2005 in *Roper v. Simmons*, the Court acknowledged both international human rights protection of minors and research on the adolescent brain as less developed than previously understood when it abolished the death penalty for juvenile offenders.[42] Indeed, the unduly harsh conditions of prison that more vulnerable offenders experience has led to an array of constitutional challenges, most recently with respect to the restriction on the insanity defense in state jurisdictions,[43] as well as the mental health impact of solitary confinement and the risk of assault in prison.[44] Thus the criminal justice system, since the 1960s, responded to the development of mental health research with calls for the dignity and constitutional protection of both crime victim and offender.

B. The Crime Victim Rights Movement Appeals to Justice

Criminal justice was originally less of a structured system under British common law, where the prosecutor was usually the victim and, if poor, had little ability to compensate witnesses or ensure effective court processes.[45] This also shaped the early history of the American criminal justice system.[46] Initially, American jails were temporary holding facilities where many punishments involved capital punishment, whipping, branding

[41] Atkins v. Virginia, 536 U.S. 304, 317 (2002) ("This consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty.").

[42] Roper v. Simmons, 543 U.S. 551 (2005).

[43] *See* Kahler v. Kansas, 140 S. Ct. 1021 (2020).

[44] *See generally* Jennifer A. Brobst, *The Metal Eye: Ethical Regulation of the Use of Technology to Observe Humans in Confinement*, 55 CAL. W.L. REV. 1 (2018).

[45] GEORGE RUDÉ, CRIMINAL AND VICTIM: CRIME AND SOCIETY IN EARLY NINETEENTH-CENTURY ENGLAND 89–90 (1985).

[46] *See* KENNEDY & SACCO, *supra* note 6, at 50 (discussing the lack of public police or prosecutors in colonial America); Paul G. Cassell & Margaret Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Marsy's Law for Florida*, 110 J. CRIM. L. & CRIMINOLOGY 99, 102–03 (2020) (citing William F. McDonald, *Toward a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649 (1976)).

and other mutilation, or being sent to serve the victim as laborer.[47] In Britain, given the strict class structure and the "savagery of the law" of property crimes, victims were known to openly "hesitate to play a part," recognizing that the death penalty was an unjust punishment for stealing.[48] By the mid-nineteenth century in England, the death penalty had been abolished for such crimes, but metropolitan police departments emerged to keep the peace against labor and political riots in a Dickensian rising industrialized society.[49] In the United States, post-Civil War prisons in the late nineteenth century housed debtors, vagrants, and served as the "depository" for the mentally ill.[50]

Historian George Rudé found in early British records that the new police officers, primarily from the class of laborers, craftsmen, and ex-soldiers, would engage in acts of entrapment, aggression against vagrants, and interfere with victims who recommended "mercy."[51] Jurors also resisted through nullification of the harsh criminal laws against property offenders, which they felt were "devised by a landlord-dominated Parliament."[52] Seen in retrospect, Rudé argues that the British common law in the early Industrial Age reflected "an increasingly central and omnicompetent State" comprised of the poor, a new working class, middle-class Radicals, and "the replacement of one class system of justice by another; an aristocratic system geared to the land by one created in the image of a commercial and manufacturing middle class."[53] Despite the new middle class strata serving as a bridge in the legal system between the working class and upper class, Rudé acknowledges that "[t]here was still the presumption that a poor man, particularly one without movable possessions or a home of his own, was a potentially dangerous malefactor who could be detained with impunity."[54]

However, in the early 1900s, the more heavily populated regions of the United States aimed for reformatory prisons, focusing on rehabilitation and implementing parole boards that used new scientific psychological testing to determine levels of dangerousness.[55] Analogizing prison reform to

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[47] HERBERT A. JOHNSON, HISTORY OF CRIMINAL JUSTICE 149 (1988).
[48] RUDÉ, *supra* note 45, at 89.
[49] *Id.* at 90, 98.
[50] JOHNSON, *supra* note 47, at 150.
[51] RUDÉ, *supra* note 45, at 98–99.
[52] *Id.* at 109.
[53] *Id.* at 116.
[54] *Id.* at 119–20.
[55] JOHNSON, *supra* note 47, at 229.

hospital treatment led to indeterminate sentencing at the turn of the nineteenth century and the classification of prisoners by perceived dangerousness, such as recidivists and sex offenders.[56] Thus, the new criminal justice systems in Britain and the United States reflected the class divisions and fears of a changing society, as well as the hopes of new science. By the 1970s, the United States Supreme Court began to frame these concerns more frequently as social injustice, as seen in the concurring opinion of Justice Douglas in *Furman v. Georgia*, addressing the imposition of the death penalty:

> Former Attorney General Ramsey Clark has said, 'It is the poor, the sick, the ignorant, the powerless and the hated who are executed.' One searches our chronicles in vain for the execution of any member of the affluent strata of this society. The Leopolds and Loebs are given prison terms, not sentenced to death.[57]

Inequity persists for both crime victim and offender. According to historians, "at no time has the majority of the U.S. adult population or households managed to gain title to any more than about 10% of the nation's wealth."[58] In 2001, the bottom half of American households reportedly owned only 2.8% of the nation's wealth and 0.5% of stock investments.[59]

When the first federal crime victims' rights legislation was presented with the support of President Reagan's Task Force on Victims of Crime in 1982,[60] crime victims came forward to testify to their mistreatment by the justice system and their relative disadvantage. Select witnesses decried paying for the "staggering expenses" of the funerals of their murdered children, while the convicted defendants were incarcerated, "getting all the help they need" in the form of food, housing, clothing, education, and medical and psychological care.[61] At this time, the United States Supreme

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[56] SHELDEN, *supra* note 11, at 169–70.

[57] Furman v. Georgia, 408 U.S. 238, 251–52 (1972) (internal footnote and citation omitted).

[58] REIMAN, *supra* note 7, at 189 (citing Carol Shammas, 98 AM. HIST. REV. 189 (1993)).

[59] *Id.*

[60] ROBERT C. DAVIS ET AL., SECURING RIGHTS FOR VICTIMS: A PROCESS EVALUATION OF THE NATIONAL CRIME VICTIM LAW INSTITUTE'S VICTIMS' RIGHTS CLINICS 9 (2009).

[61] *Judge Lois Haight Interview Transcript*, AN ORAL HISTORY OF THE CRIME VICTIM ASSISTANCE FIELD VIDEO AND AUDIO ARCHIVE, UNIV. OF AKRON (Feb. 24,

Court in *Rhodes v. Chapman*, held that prison overcrowding did not violate the Eighth Amendment Cruel and Unusual Punishment Clause if there was no actual injury from deprivation of essential food, medical care, sanitation, or increased violence.[62] Moreover, the Court held that lack of rehabilitation is not inherently violative:

> Although job and educational opportunities diminished marginally as a result of double celling, limited work hours and delay before receiving education do not inflict pain, much less unnecessary and wanton pain; deprivations of this kind simply are not punishments. We would have to wrench the Eighth Amendment from its language and history to hold that delay of these desirable aids to rehabilitation violates the Constitution.[63]

Prosecutors and victim advocates shared how the justice officials generally blamed victims for the inability to hold offenders "accountable" when victims were reluctant to report crime or cooperate with the system.[64] Victims were seen as "just one more piece of evidence," and if they failed to appear, they could be jailed for contempt.[65] Judges failed to protect victim privacy, routinely sharing their contact information with offenders in discovery, and failed to ensure that victims received the return of their property kept in evidence.[66] In the early 1980s, victims in the vast majority of states were not permitted to provide a victim impact statement at trial or at parole hearings, and they were not informed when offenders obtained early release.[67]

By the early 1990s, every state provided a victim compensation fund for victims of violent crime and the right to be "informed, present, and heard."[68] By 2005, the voters of 32 states had amended their constitutions to

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2003), http://vroh.uakron.edu/transcripts/Haight.php (a former prosecutor in Oakland, California).

[62] Rhodes v. Chapman, 452 U.S. 337, 348 (1981).

[63] *Id.*

[64] *Judge Lois Haight Interview Transcript*, *supra* note 61.

[65] *Marlene A. Young Interview Transcript*, AN ORAL HISTORY OF THE CRIME VICTIM ASSISTANCE FIELD VIDEO AND AUDIO ARCHIVE, UNIV. OF AKRON (Feb. 24, 2003), http://vroh.uakron.edu/transcripts/Young.php.

[66] *Judge Lois Haight Interview Transcript*, *supra* note 61.

[67] *Id.*

[68] DAVIS ET AL., *supra* note 60, at 11.

include crime victim rights, and all 50 states had protective legislation.[69] In 2018, gains had slowed to where 35 states had constitutional provisions, with six more states considering adoption of specific constitutional crime victim rights.[70] In this twenty year period, crime victim rights sought a tenuous partnership with the State. However, when federal grant funding for crime victim rights was first provided, crime victim advocates from nonprofit crisis centers, who were doing most of the work, did not receive the same level of funds as prosecutors and other state officials who "gobbled it up" with more professional grant applications, creating, for example, internal victim witness assistant programs.[71] When prosecutors were tasked with ensuring that victims were given the opportunity to exercise their rights, they often lacked training,[72] and law schools still rarely include crime victim rights education in the curricula despite their constitutional status. State actors appear to have been indifferent to the importance of the crime victim voice as a key to justice, perhaps fearing that the victim would "distort the delicate balance of [justice]" in a system "not designed for the remedy of private interests."[73] Some argued that lifting up the status of crime victims would interfere with the role of the prosecutor to ensure not only justice for the victim, but for the public as well.[74] However, with respect to promoting the goals of the justice system, Judge Haight, one of the first prosecutors to work with new victim rights legislation in California, stated the problem succinctly:

> If we treat victims poorly, if we don't treat them well, they will not cooperate with the criminal justice system and they will not report crime or if they do report it, they won't testify

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[69] Sarah Brown Hammond, Nat'l Conference of State Legislatures, *Enforcing and Evaluating Victims' Rights Laws*, 13 LEGISBRIEF 1 (March 2005), https://www.ncsl.org/Portals/1/documents/pubs/lbriefs/05LBMar_VictimsRights.pdf.

[70] Anne Teigen, *Rights for Crime Victims on the Ballot in Six States*, NAT'L CONFERENCE OF STATE LEGISLATURES: THE NCSL BLOG (Oct. 12, 2018), https://www.ncsl.org/blog/2018/10/12/rights-for-crime-victims-on-the-ballot-in-six-states.aspx.

[71] *Judge Lois Haight Interview Transcript*, *supra* note 61.

[72] *Id.*

[73] Alan N. Young, *Two Scales of Justice: A Reply*, 35 CRIM. L.Q. 355, 358 (1993).

[74] *See* Lawrence Schlam, *Enforcing Victim's Rights in Illinois: The Rationale for Victim "Standing" in Criminal Prosecutions*, 49 VAL. U. L. REV. 597, 602-03 (2015) (quoting concerns by the judiciary of "a dangerous return to the private blood feud mentality").

> and then the criminal is free to prey on more and more victims. There is no accountability.[75]

To accompany an array of federal crime victim rights legislation in the 1980s and 1990s,[76] crime victim rights clinics were developed to empower a cadre of attorneys to represent crime victims in court and ensure that their rights were enforced.[77] For example, crime victim attorneys could seek orders of protection for privacy and safety, move to amend a plea to include restitution, or file a writ with the court to allow the victim to be present in the courtroom.[78] Victims needed legal standing to enforce these rights, which was not often provided, and remedies for violations of crime victim rights were also absent.[79] Standing elevated the status of crime victim rights in the few states that permitted crime victims to be personally represented in criminal court,[80] with renewed efforts to amend constitutions to grant such standing.[81] During the pandemic, for example, the Supreme

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[75] *Judge Lois Haight Interview Transcript*, *supra* note 61.

[76] *See* DAVIS ET AL., *supra* note 60, at 9–10 (discussing the legislative chronology, including the Victim and Witness Protection Act of 1982, Pub. L. 97-291 (authorizing victim restitution and victim impact statements); Victims of Crime Act (VOCA) of 1984, Pub. L. 98-473 (providing victim compensation funding at the state and local level); Victims' Rights and Restitution Act of 1990, 42 U.S.C. § 10607 et seq., Pub. L. 101-647 (authorizing victim notification of criminal processes in federal court, the right to attendance, notice of defendant's release, right to inform the prosecution on pleas and sentencing, and protection from aggressive acts by the defendant); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322 (providing for a right for the victim to speak at sentencing, mandating restitution in sex offense cases, and increasing funding for local victim services); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132; Victim Rights Clarification Act of 1997, Pub. L. 105-6; and Crime Victim Rights Act of 2004, Pub. L. 108-405 (incorporated as part of the Justice for All Act of 2004)).

[77] *See generally* DAVIS ET al. supra note 60. (a monograph for the RAND Corporation). *But see* Paul G. Cassell & Margaret Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Marsy's Law for Florida*, 110 J. CRIM. L. & CRIMINOLOGY 99, 136–137 (2020) (explaining that many crime victims must assert their rights without the aid of counsel).

[78] DAVIS ET AL., *supra* note 60, at xiv.

[79] *Id.* at 12-13, Hammond, *supra* note 69.

[80] DAVIS ET AL., *supra* note 60, at 10, 13 (identifying states with express provisions granting legal standing to assert crime victim rights to include Ariz. Rev. Stat. § 13-4437, Fla. Stat. § 960.001; Ind. Code § 35-40-2-1, and Tex. Const. Art. I, § 30).

[81] *See generally* Paul G. Cassell & Margaret Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Marsy's Law for Florida*, 110 J. CRIM. L. & CRIMINOLOGY 99 (2020).

Court of Arizona held in *E.H. v. Slayton*, that the Arizona Constitution gave a crime victim the right to have an attorney at bar, as well as the statutory right to "full" restitution, with no cap imposed at the plea hearing without victim consent.[82] Moreover, the Court held that "[a]t all times, . . . a trial court's discretion to address seating arrangements [during the pandemic] must honor a victim's constitutional right to be present and heard at criminal proceedings and to be treated with fairness, dignity, and respect."[83]

However, victims' rights could not generally impinge on the defendant's constitutional rights, such as interference with an agreed upon plea.[84] Victim impact statements often have been limited to testimony regarding the impact of the crime alone, whether a victim seeks vengeance or mercy and a compassionate sentence.[85] In *State v. Glassell*, the Arizona Court of Appeals held that the trial court did not err in a capital case when it failed to permit a victim witness to testify at the penalty phase in favor of a life sentence, for the Eighth Amendment bars a victim from making a sentencing recommendation.[86] Despite the defendant's argument that the Eighth Amendment should only prevent victims from advocating for a death sentence, not from advocating for leniency, the court held that the only relevance of a victim impact statement is "evidence of the impact of the crime."[87]

As to offering substantive evidence, many evidentiary and witness accommodations have been recognized since the 1980s, taking into account trauma caused to victims from the criminal act and the trial process itself.[88] And yet, a focus on the victim's mental health, a source of advocacy for restitution for the cost of counseling, became a basis for defense strategies to diminish the credibility of crime victims.[89] As an example, in a child physical

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[82] E.H. v. Slayton, 468 P.3d 1209 (2020).

[83] *Id.* at 1217.

[84] *E.g.*, State v. Means, 926 A.2d 328 (N.J. 2007).

[85] *See* DAVIS ET AL., *supra* note 60, at 61.

[86] State v. Glassel, 116 P.3d 1193, 1215 (2005), *cert. denied*, 547 U.S. 1024 (2006).

[87] *Id.*

[88] *E.g.*, Walker v. State, 461 S.W.3d 599 (Tex. Ct. App. 2015) (holding that when a child victim of sexual abuse testifies by closed circuit television to reduce trauma it does not violate the defendant's right to confrontation).

[89] *See, e.g.*, In re Michael H., 602 S.E.2d 729 (S.C. 2004) (upholding, as a matter of first impression, a trial court's order at the defendant's request for an independent psychological evaluation of a child sexual abuse victim witness). *But see* State v. Horn, 446 S.E.2d 52 (N.C. 1994) (concluding that "the possible benefits to an

abuse prosecution involving burns to a child with autism spectrum disorder, the defendant unsuccessfully attempted to establish a compelling need to order an independent psychological examination of the child to challenge the child's competency to testify.[90] The factors included consideration of the probative value of the evidence, but also "the resulting physical and/or emotional effects of the examination of the victim."[91]

While one might argue that "[i]deal victims are those who it is believed would find it difficult or even impossible to protect themselves from criminal offenders,"[92] such preferred status is not offered to the many persons in the United States suffering from addiction or mental illness who have been both crime victim and offender. Also, most victims and offenders of violent crime know each other as members of the same household or community.[93] Stigma against certain crime victims reflects the existing prejudices in society, likely influencing which victims have been more "heard" by prosecuting attorneys and the courts. The perspectives of victims who themselves have a criminal record or were engaged in criminal conduct at the time of the offense may not be as valued by a court obliged to sentence the defendant for similar conduct.[94] Victims of crime who are perceived as morally suspect, such as those who have contracted a sexually transmitted disease, or exhibit aberrant behavior not identified as a mental illness, or who live a life on the margins of society, may not be granted equal respect by the criminal justice system.[95] In a review of litigation involving either HIV-positive defendants or victims, one researcher has suggested that "circumstances involving HIV-positive lives or homosexuality challenge

innocent defendant, flowing from such a court ordered examination of the witness, are outweighed by the resulting invasion of the witness' right to privacy and the danger to the public interest from discouraging victims of crime to report such offenses.").

[90] State v. Johnson, No. 2017-000873, 2019 WL 7369266 (S.C. Ct. App. Dec. 31, 2019).

[91] *Id.* at *2.

[92] KENNEDY & SACCO, *supra* note 6, at 12.

[93] *Id.* at 14.

[94] *See generally* Joshua Kleinfeld, *A Theory of Criminal Victimization*, 65 STAN. L. REV. 1087 (2013) (examining the moral and theoretical justifications for differential legal treatment of different types of victims, such as children or persons with disabilities).

[95] Ben Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements*, 10 PSYCHOL., PUB. POL'Y & L. 492 (2004) (finding that juries in capital cases are more emotionally swayed by certain kinds of victim impact statements).

decision-makers' sense of familiarity and comfort" with race, gender identity, and sexual orientation.[96] Demonstrating a punitive approach to social stigma, more than thirty states have enacted criminal felony offenses for intentional transmission of an infectious disease, including HIV/AIDS.[97]

State actors and politicians manipulate what has been termed by Professor Melissa Cole as a "hierarchy of disability," where the statutory framework identifying the need for legal protection excludes some conditions more than others.[98] Wrapped up in the definitions of disability are notions of self-control and agency. In other words, if one can alleviate a disability one should do so, such as taking medication for mental illness or wearing corrective lenses or accepting a cochlear implant. Thus, the individual "chooses", with society's approval, to no longer be disabled.[99] In the criminal justice system, this is apparent where some victims, such as children and older adults, are granted higher status through enhanced sentences and specific offenses to protect them as special victims,[100] compared to those victims who are vulnerable based on class, race, or lack of access to health care who receive no such protection. The latter are, in essence, to be blamed for their victimization, despite the fact that victims with mental illness experience significantly higher rates of crime victimization than those without disabilities.[101] Due to their relative lack of access to law enforcement and reduced ability to detect and protect themselves from offending behavior, victims facing an intersection of race,

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[96] Carrie Griffin Basas, *The Sentence of HIV*, 101 KY. L.J. 543, 591–92, 599–600 (2012-2013).

[97] Mark E. Wojcik & David W. Austin, *Criminal Justice and COVID-19*, 35 CRIM. JUST. 44, 45 (2020).

[98] *See* Melissa Cole, *The Mitigation Expectation and the Sutton Court's Closeting of Disabilities*, 43 HOW. L.J. 499, 528 (2000).

[99] *Id*. at 527–28.

[100] *E.g.*, MO. REV. STAT. § 565.002 (2020) (providing sentencing enhancements for assaults against certain special victims, such as law enforcement officers, persons with a disability, elderly persons, employees of mass transit systems, and corrections officers in the performance of their duties).

[101] Office for Victims of Crime, *First Response to Victims of Crime Who Have a Disability*, U.S. DEP'T. OF JUSTICE 1 (Oct. 2002) (addressing additional legal protections and required accommodations for victims of crime with disabilities under the Americans with Disabilities Act of 1990 and section 504 of the Rehabilitation Act of 1973).

class, and mental illness are at higher risk of becoming both a victim of crime and targeted as an offender by the state.[102]

Victims' rights are not duties and victims' optional exercise of their rights is inherently diverse. What crime victims want from the justice system may vary from regaining control, being heard, obtaining compassion, seeking vindication, and ensuring rehabilitation of offenders, but it also allows for forgiveness as an element of healing for the victim.[103] Anecdotal reports in legal news have stated that "[s]ome crime victims and their families expressed anger upon learning that inmates were released from prison because of COVID-19."[104] On the other hand, this may merely reflect the bias of reporters to reinforce the stereotype that victims of crime only seek punishment at all costs. Anecdotal reports of crime victims advocating for compassionate release, or declining to oppose it, would not make news, and yet crime victims have done so throughout the pandemic.[105] For certain types of offenses, however, such as family violence, the risk of release to the victim and the public may be quite serious. According to the National Bulletin on Domestic Violence Prevention, the United Nations estimated that six months of lockdown worldwide could lead to 31 million additional domestic violence cases.[106] Arguably, giving crime victims the power to accept or decline the right to provide a victim impact statement or to seek restitution is beneficial in itself for one disempowered by the criminal act and historically disrespected by the justice system.

C. The Typical Prisoner is Neuroatypical

Just as many victims of crime experience trauma, most criminal offenders experience significant trauma both before and during incarceration, and after release.[107] It is well established that more persons with mental illness are incarcerated than are in mental health facilities in the United States.[108] Some would argue that addressing the mental health needs of those

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[102] *Id*.

[103] ELIAS, *supra* note 9, at 95.

[104] Wojcik, *supra* note 98, at 48.

[105] *See infra* Part IV.

[106] *DV in the News: DV and COVID-19*, 26 NAT'L BULL. ON DOMESTIC VIOLENCE PREV. (June 2020) (including data from Johns Hopkins University).

[107] *See* Curtis Davis & Samantha Francois, *Behind Closed Doors: Considering a Triphasic Traumatic Incarceration Experience*, 26 TRAUMATOLOGY 193 (2020).

[108] *See* E. Fuller Torrey et al., U.S. DEPT. JUSTICE TREATMENT ADVOC. CTR., NCJ No. 230531, MORE MENTALLY ILL PERSONS ARE IN JAIL AND PRISONS THAN

in prison "is nearly impossible" due to the paucity of resources, staff, and funding.[109] Supermax prisons with extreme isolation became misused for housing the overflow of mentally ill and ungovernable prisoners, which led to extreme psychological damage, including "states of psychosis, depression, anxiety, and confusion."[110] In a 2002 prison study, inmates over age 65 accounted for over 30% of prison medical costs, including treatment for age-related mental health disorders.[111]

Congress also recently recognized the inordinate number of prisoners with mental illness, who in previous generations may have been directed to treatment facilities rather than incarceration:

> [T]he high incidence of offenders with mental illness in jail is simply the lack of mental health treatment, particularly for non-violent offenders. Once incarcerated, people with mental illness have difficulty obtaining adequate treatment. They are at high risk of suicide, and they may be preyed upon by other inmates.[112]

In its best light, the severity of mass incarceration in large part reflects a crime control policy premised on the philosophy of deterrence, and yet researchers have not supported a deterrent effect on crime for the individual or society due the criminogenic effect of incarceration.[113] What came out of

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HOSPITALS: A SURVEY OF THE STATES, TREATMENT ADVOC. CTR. (May 2010), https://www.ojp.gov/library/abstracts/more-mentally-ill-persons-are-jails-and-prisons-hospitals-survey-states; *see also* Dominic A. Sisti et al., *Improving Long-term Psychiatric Care: Bring Back the Asylum*, 313 JAMA NETWORK 243, 243 (2015) (stating that in-patient psychiatric beds have declined by 95% in the last half century).

[109] AHN-REDDING, *supra* note 12, at 62.

[110] *Id.* at 60; *see also* Kirsten Weir, *Alone, in 'the Hole'*, *Psychologists Probe the Mental Health Effects of Solitary Confinement*, 43 AM. PSYCHOL. ASS'N 54 (May 2012), https://www.apa.org/monitor/2012/05/solitary (identifying risks of solitary confinement in supermax prisons to include "anxiety, panic, insomnia, paranoia, aggression and depression).

[111] AHN-REDDING, *supra* note 12, at 104.

[112] *Criminal Justice Responses to Offenders with Mental Illness: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security on the Judiciary*, 110th Cong., 1 (2007) (statement of Robert Scott, Chair, House of Rep. Committee of the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security).

[113] CASSIA SPOHN, HOW DO JUDGES DECIDE? THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT 291–93 (SAGE, 2d ed., 2009) (finding that incarceration doubles the rate of recidivism of drug offenders compared to probation).

the War on Drugs was not only mass incarceration, but increasing opportunities for invasive surveillance and militarized approaches against what the state portrayed as deviant communities.[114] As reported violent crime declined over the decades[115] and the focus on violent crime victims took the lead in the crime victim rights movement, "victimless" drug offenses became the object of policies enabling mass incarceration.

Victims who wanted leniency in sentencing a criminal case were not necessarily those who sought services from the crime victim rights movement. Victim witness assistants, working for the state prosecutors' offices, naturally promoted the objectives of the state, but could not easily manage dual loyalties should a victim openly disagree with a prosecutor, while still seeking support from the prosecutor's office. The nonprofit crisis center victim advocates, more independent from the state, although often reliant on grant funding from the state,[116] often worked with the most egregious cases of violence, thus likely influencing their fears that offenders presented a continual risk and deserved severe sanctions. Statewide victim advocacy nonprofits that provide training to crisis advocates, prosecutorial staff, police officers, and even judges, have consistently lobbied for greater criminal sanctions against offenders.

While these factors all facilitate the crime victim rights movement's support of state control, it does not necessarily reflect the perspective of most crime victims, who directly experience the impact of the criminal justice system, mass incarceration and the tearing of social fabrics where both victim and offender lived. Most crime victims who are victims of less violent crimes are not sincerely asked to exercise their rights in the justice system. Also,

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[114] Eliav Lieblich & Adam Shinar, *The Case Against Police Militarization*, 23 MICH. J. RACE & L. 105, 134 (2017-2018) (connecting racial profiling to militarized approaches to civil unrest); REIMAN, *supra* note 7, at 48 (identifying the state's interest in normalizing perpetual surveillance with a panopticon effect); Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1422 (1993) (presenting numerous reports of racist and "groundless searches" of minorities during drug investigations, resulting in vastly disproportionate numbers of arrests of black and Hispanic men for drug offenses); ELIAS, *supra* note 9, at 67.

[115] *See* John Gramlich, *What the Data Says (and Doesn't Say) About Crime in the United States*, PEW RES. CTR. (Nov. 20, 2020), https://www.pewresearch.org/fact-tank/2020/11/20/facts-about-crime-in-the-u-s/ (explaining that while most Americans believe crime is on the rise, in fact, the violent crime rate fell by 49% between 1993 and 2019).

[116] *See supra* note 26.

many crime victims who are actively involved in the sentencing process are not asked to consider justice, but are only asked to explain the impact on their own life, ultimately to be measured by the system itself.[117] If the typical prisoner is neuroatypical, and both victims and offenders face similar societal barriers, together they could present a vision of reform for the criminal justice system that respects the needs of the communities most harmed. Whether such an approach would comport with the goals and interests of the criminal justice system warrants examination.

III. THE BENEFITS OF RETRIBUTION, DETERRENCE, AND RESPECT FOR AUTONOMY

The criminal justice system, when dehumanizing offenders and crime victims, amplifies the interests of the state over the individual. Even efforts at rehabilitation as a more humane cure for crime than punishment can disguise an interest in enhancing state control in society. Importantly, mental health researchers evaluating the criminal justice system have highlighted the risk that applying psychological labels to offenders is paternalistic and could diminish the legal autonomy of the offender.[118] Given court-ordered indeterminate treatment, such as involuntary commitment of sex offenders, "the use of psychiatry in the legal system seems to provide support for increased social control of felony defendants," which shifts the focus from punishment to the "management of aggregates of dangerous groups."[119] Existing biases are infused in new justice approaches when discretion is exercised by the same state actors. Research has found that aggressive women prisoners, for example, are more likely to be provided with a mental health placement, while aggressive men are more likely to be placed in solitary confinement.[120]

What is absent in traditional theoretical approaches to sentencing is direct consideration of the role of the crime victim in the criminal justice system.[121] The case law addressing victim impact statements reveals diversity of viewpoint among victims of crime as to the appropriateness of

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[117] *See supra* notes 75–78.
[118] THOMPSON, *supra* note 4, at 178.
[119] *Id.* at 184.
[120] *Id.* at 27.
[121] KENNEDY & SACCO, *supra* note 6, at 93 ("The history of theoretical attempts to explain crime can largely be read as a history of the neglect of the role and significance of crime victims.").

punishment.[122] Given the recency of crime victim rights in the United States, and lack of standing to assert them, it is not surprising if victim involvement is sporadic. The few research studies directly addressing what victims usually seek from sentencing hearings are limited.[123]

Enhancing the crime victim's role at sentencing has potential to improve the effectiveness and fairness of the system. And yet, the risks are cyclical if public policy fails. In one view, "[c]rime must be adequately punished by the state; if the prison is not sufficiently punitive, a system of private revenge will arise to supplement it."[124] This assumes that victims and society require punishment. A rehabilitative alternative could be oppressive, anesthetizing offenders and rendering them incapacitated against their will. The latter would offend American notions of autonomy, and, without economic and racial justice reform, would yet again disproportionately disadvantage the low-income, purportedly "deviant" classes. Prison should never have been the primary treatment facility for Americans. Offender programs, alternate sentencing, and other efforts at individual reform will have little impact, anyway, until the United States better addresses income inequality and equal opportunity.[125] If policymakers cannot see this, perhaps a stronger, combined voice of offender and victim will right the imbalance and reestablish proportionality, dignity and respect for the individuals in the justice system.

A. Theoretical Approaches to Sentencing

In matters of criminal justice reform, sentencing policy must be informed by its goals. Historically, and at present, these could very generally be summarized to include the goals of *rehabilitation*, including education, medication, involuntary commitment, restorative justice, and therapeutic jurisprudence; *specific and general deterrence*, including tailored specialty courts, incarceration, electronic monitoring and other forms of community

[122] *See infra* Part IV.

[123] *E.g.*, Uli Orth, *Punishment Goals of Crime Victims*, 27 L. & HUMAN BEHAV. 173 (2003) (studying victims of sexual assault and non-sexual assault and finding that victims prioritized the goals of deterrence of the offender, victim security, and societal security, followed by general deterrence, retribution, and rehabilitation least of all).

[124] HERBERT A. JOHNSON, HISTORY OF CRIMINAL JUSTICE 293 (1988).

[125] *See* SHELDEN, *supra* note 11, at 323.

supervision; and *retribution*.[126] Disparate forms of sentencing such as orders of restitution, hard labor, and prisons requiring solitary confinement could all be argued to serve the three goals listed in some way.

The call for retribution strikes a chord in most people, as it is meted out in quotidian human interactions where one might feel another deserves to be punished, regardless of the outcome. As a matter of state condemnation, retribution performs an expressive role, avoiding the appearance that the State is complicit in the misconduct.[127] However, according to Protagoras, one should seek a more rational approach to punish in order to deter future harm, and thus avoid the animal instincts of vengeance.[128] Plato's theory of punishment would reform the "curable criminals," seek to obtain forgiveness from victims, and incapacitate the "incurables" in order to deter others.[129] Personal responsibility is favored over pity for the offender or victim, where Plato finds utility to be derived only from punishment upon the "satisfaction of the grievance of the victim" who will benefit "simply by witnessing the wretchedness of the man who originally made him suffer."[130] Philosophy scholar Mary Margaret Mackenzie identifies correlates between Greek and modern cultural attachments to the impulse toward retributivism.[131] Such an impulse reinforces concepts of culpability, freedom, and self-determination to reassure humans that they are not merely creatures of circumstance.[132] Offering an offender an opportunity to redress harms and pay for his or her wrongdoing is more respectful of human autonomy than assuming the offender is incapable of choosing whether or not to commit a crime. However, proportionality in sentencing remains a foundational concept for retribution, proportional in the sense that the punishment fits the crime and that individual offenders are treated fairly with respect to each other.

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[126] *See generally Beware of Punishment: On the Utility and Futility of Criminal Law*, *in* 14 SCANDINAVIAN STUDIES IN CRIMINOLOGY (Annika Snare ed., 1995); EDMOND CAHN , CONFRONTING INJUSTICE, THE EDMOND CAHN READER (Lenore L. Cahn ed., 1966); Dena M. Gromet & John M. Darley, *Punishment and Beyond: Achieving Justice Through the Satisfaction of Multiple Goals*, 43 L. & SOC'Y REV. 1 (2009); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659 (1992).

[127] MARY MARGARET MACKENZIE, PLATO ON PUNISHMENT 25 (1981).

[128] PAMELA HUBY, PLATO AND MODERN MORALITY 72 (1972) (noting that Protagoras is a pre-Socratic philosopher who died in 411 B.C.E.).

[129] MACKENZIE, *supra* note 127, at 227–28.

[130] *Id.* at 229.

[131] *Id.* at 237.

[132] *Id.* at 238.

Jeremy Bentham, the English philosopher, jurist, and social reformer regarded as the founder of modern utilitarianism, put forth the principle that the greatest happiness of the greatest number is the measure of right and wrong.[133] Here the utilitarian would welcome the offender's suffering if it deterred future misconduct, but not as a form of retributivist justice or just deserts.[134] As a paternalistic approach, it would impute consent to punishment and forced rehabilitation on the part of the offender as a member of society and disregard any "encroachment upon the autonomy of the individual."[135] Influencing early American sentencing theory, utilitarianism asserted that proportionality in punishment would be required to avoid greater harm and to promote general deterrence, but individual victim impacts and restitution would not further the wider utilitarian goal.[136] Today, victim advocates would suggest that victim impact statements supply critical information to the judiciary in determining the extent of the harm caused and thus benefit the determination of a proportional sentence.[137]

In the modern era, the Supreme Court has held that the Eighth Amendment Cruel and Unusual Punishment Clause is measured, not by "historical conceptions," but by the "evolving standards of a mature society," which "[do] not mandate adoption of any one penological theory."[138] And yet, "[r]etribution is a legitimate means to punish," in order to "express [societal] condemnation of the crime and to seek restoration of the moral imbalance caused by the offense." [139] However, the Court has reasoned that "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."[140] Bentham and other philosophers, for various reasons, would consider punishment of infants or the insane to lack utilitarian value, proportionality, and any possibility of specific deterrence or retributive value.[141]

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[133] *See id.* at 35.

[134] *Id.* at 39.

[135] MACKENZIE *supra* note 127, at 57.

[136] *Id.* at 37–38.

[137] *See generally* Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611 (2009).

[138] Graham v. Florida, 560 U.S. 48, 58, 71 (2010).

[139] *Id.* at 71.

[140] *Id.*

[141] *See, e.g.*, Jeremy Bentham, *Inefficacious Punishment*, *in* PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 186, 186 (Gertrude Ezorsky ed., 1972); Thomas Hobbes, *Of Punishments and Rewards in* PHILOSOPHICAL PERSPECTIVES ON

To determine a just and proportionate sentence, predominating factors also evolve over time and vary by jurisdiction, undermining what Immanuel Kant would have espoused as essential consistency to elevate retribution over "mere private judgment."[142] Crime victims and advocates would easily note that individual jurists cannot escape their own private judgments and cultural familiarity.[143] In *People v. Rhoades*, the Illinois Court of Appeals stated that it need not compare its standards with that of other states.[144] The Illinois Constitution article I, section 11 requires considering the seriousness of the offense and restoring useful citizenship to the defendant, but the court held in *Rhoades* that it would primarily protect vulnerable members of society, specifically children, from sexual abuse in imposing a life sentence.[145] The goals of protective restraint and specific deterrence seem to predominate over goals of rehabilitation or retribution in this determination.

Nevertheless, retribution alone has value for crime victims of violence and their families, who themselves may never fully recover from the impact of the criminal act. There is also a purpose to collective suffering evident in the creation of the modern crime victims' rights movement, as well as other humanitarian and civil justice reform efforts. They hearken back to the publicly performed Greek tragedies, provoking fear and pity for manifest unfairness, emotions bringing comfort when felt together by many.[146] However true this remains today, many victims and offenders do pursue the end of suffering for themselves and others, but find revelation and self-awareness through suffering as well. Modern sentencing alternatives, such as restorative justice embrace this concept.

PUNISHMENT 3, 3-4 (Gertrude Ezorsky ed., 1972) (asserting that the right to punish inheres from an ability to consent to society's right to punish); J.E. McTaggart, *Hegel's Theory of Punishment*, *in* PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 40, 40–41 (Gertrude Ezorsky ed., 1972) (promoting the offender as a moral being with capacity for repentance).

[142] Immanuel Kant, *Justice and Punishment*, *in* PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 103, 104 (Gertrude Ezorsky ed., 1972).

[143] *See* Joe D. Whitley et al., *A Prisoner's Dilemma: COVID-19 and Motions for Compassionate Release*, PRACT. INSIGHTS COMMENT. (May 28, 2020) (describing the randomness of judicial rulings from a legal practitioner's perspective).

[144] People v. Rhoades, 115 N.E.3d 1238, 1243 (Ill. App. Ct. 2018).

[145] *Id.* at 1243–44.

[146] MACKENZIE, *supra* note 127, at 101, 112 (explaining that Greek tragedies portrayed that "life is neither fair, kind, nor ordered" to remind the public that they at least suffer injustice together).

Restorative and community justice approaches also call for greater victim and community input in sentencing, although they were initially only acceptable for the category of low-level nonviolent offenses which did not pose a physical threat to victims.[147] Their efficacy is unproven but promising. For example, some studies have indicated that the impact of victim statements in court-ordered proceedings does not tend to generate feelings of empathy or remorse among homicide offenders at the sentencing hearing, and that victims may not care or expect to receive an apology from the offender.[148] Additionally, specific deterrence and rehabilitation programs may be less effective with some neuroatypical offenders. Some offenders with mental health diagnoses demonstrate difficulty in finding empathy, and they may not respond as expected by the court or victim.[149] As shown below, a broader role for crime victim and community in sentencing could assist the court in determining whether incarceration is appropriate for offenders with mental health disorders.

B. Mental Health Research and the Meaning of Justice

In general, crime victims remain interested in retribution and deterrence as goals to ensure justice, including those victims who are also offenders. In one study, for example, offenders who have been raped in prison asserted that they perceive justice to require punishment of the perpetrator, and would not be satisfied with the mere opportunity to file a civil claim [150] Yet empirical research has also demonstrated that offenders subject to life in prison express distress over the denial of an opportunity for

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[147] *See* AHN-REDDING, *supra* note 12, at 195–96; Michael Wenzel et al., *Retributive and Restorative Justice*, 32 L. & HUM. BEHAV. 375 (2008).

[148] *See* Tracey Booth, *Victim Impact Statements and the Nature and Incidence of Offender Remorse: Findings from an Observation Study in Superior Sentencing Court*, 22 GRIFFITH L. REV. 430, 433 (2013) (noting that out of court voluntary restorative justice proceedings may have more positive impact).

[149] *See* Francesco Margoni & Luca Surian, *Mental State Understanding and Moral Judgment in Children with Autism Spectrum Disorder*, 7 FRONT PSYCHOL. 1478 (2016) (recommending treatment to develop empathy, as "ASD [autism spectrum disorder] individuals show the ability to produce a basic moral judgment by relying on external cues such as the action outcomes and the victims' emotional reactions"); Alan M. Leslie et al., *Transgressors, Victims, and Cry Babies: Is Basic Moral Judgment Spared in Autism?*, 1 SOC. NEUROSCIENCE 270 (2006).

[150] *See* Sheryl P. Kubiak et al., *Do Sexually Victimized Female Prisoners Perceive Justice in Litigation Process and Outcomes?*, 23 PSYCHOL., PUB. POL'Y, & L. 39 (2016).

redemption, which they feel cannot occur within the prison setting.[151] Over time, the criminal justice system and reform advocates have responded to criticism of punitive approaches by claiming to engage in rehabilitative measures that arguably deter crime and protect community safety.[152] In the context of some of its most stringent new measures, the criminal justice system has adopted criminal registry requirements, indefinite involuntary commitment of sex offenders, and other purportedly rehabilitative programming, which the courts have deemed to be civil, not punitive, actions, and therefore beyond the scope of constitutional protections for criminal defendants.[153] This approach is painted as humane and in the best interests of offenders, but risks the exercise of a different kind of state control over marginalized communities.[154]

For example, in 2020 the Supreme Court, Appellate Division, of the State of New York determined that the state Department of Corrections and Community Supervision had the statutory right to impose an additional lengthier term of sex offender treatment programming against the inmate's wishes.[155] The court acknowledged its traditional deference "to the discretion of correction officials on matters relating to the administration of prison facilities and rehabilitation programs."[156]

In Wisconsin, the involuntary commitment of prisoners with psychosis and delusions, including forced administration of psychotropic medications, may be authorized by prison authorities even without a finding of dangerousness.[157] Unlike the general population where a finding of dangerousness would be required for commitment, for prisoners the court

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[151] *See* Adelina Iftene, *The Bad, the Ugly, and the Horrible: What I Learned About Humanity by Doing Prison Research*, 43 DALHOUSIE L.J. 435, 443 (2020).

[152] *See, e.g.*, Andrea Craig Armstrong, *The Missing Link: Jail and Prison Conditions in Criminal Justice Reform*, 80 LA. L. REV. 1, 4 (2019).

[153] *See, e.g.*, Williams v. Annucci, 189 A.D. 3d 1839, at *2 (N.Y. App. Div. 2020) (holding that the sex offender management program is part of a remedial statute "intended to prevent future crime, rather than a penal statute imposing punishment for a past crime").

[154] *See generally* Jennifer A. Brobst, Miranda *in Mental Health: Court Ordered Confessions and Therapeutic Injustice for Young Offenders*, 40 NOVA L. REV. 387 (2016) (addressing the legal risks of court-ordered mental health treatment of juvenile sex offenders who are forced to disclose additional crimes).

[155] *Id.*

[156] Williams v. Annucci, 189 A.D. 3d 1839, at *2 (N.Y. App. Div. 2020).

[157] In re Mental Commitment of Christopher S., 878 N.W. 2d 109 (2016) (addressing a state correctional inmate diagnosed with schizophrenia paranoid type).

applied the state's statutory commitment scheme in which the inmate "can receive treatment for his or her mental illness" when the prison system cannot adequately provide it.[158]

Public health advocates often see their role as one of a beneficent power and service to society, with secondary attention paid to the autonomy of the individual. As Lawrence Gostin wrote:

> [P]roperly conceived correctional facilities could present a public health opportunity. Prior to incarceration, many inmates are in poor health, and many have communicable diseases, which are difficult to identify and treat among the poor, the homeless, and the disenfranchised. Society is ill-served by policies that fail to deal with, and even exacerbate, inmates' diseases during confinement . . .. Therefore, it is far more cost effective and beneficial to inmates, their families, and to society to use the period of confinement to reach this otherwise elusive group.[159]

However, individual autonomy is critical. Not all treatment options are efficacious or well tested, such as physical and chemical restraints for mental illness, which may have serious side effects.[160] The marginalized communities Gostin writes of are marginalized further if the criminal justice system imposes a coercive, medicalized regime. Public health scholar Scott Burris argues more clearly for patient autonomy and mutual respect in the prison setting, contending that "controlling TB is every bit as dependent on cooperation between health workers and patients as controlling HIV."[161] Even Sweden, a nation known for excellence in providing a social safety net, has experienced growing criticism of its welfare state for creating too much

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[158] *Id.* at 119.

[159] Lawrence O. Gostin, *The Resurgent Tuberculosis Epidemic in the Era of AIDS: Reflections on Public Health, Law, and Society*, 54 MD. L. REV. 1, 69–70 (1995).

[160] *See* Lamiece Hassan et al., *Prevalence and Appropriateness of Psychotropic Medication Prescribing in a Nationally Representative Cross-Sectional Survey of Male and Female Prisoners in England*, 15 BMC PSYCHIATRY 346 (2016) ("Whilst psychotropic drugs can help to manage symptoms of mental illness, they have also been linked with addiction, unpleasant side effects, physical health risks and even early mortality.").

[161] Scott Burris, *Prisons, Law and Public Health: The Case for a Coordinated Response to Epidemic Disease Behind Bars*, 47 U. MIAMI L. REV. 291, 306 (1992).

social control, learned helplessness, boredom, and crime, with criminologists seeing calls for punishment of crime, rather than treatment.[162]

Self-determination lies at the core of freedom, a fact which the dissenting justices in *Kahler v. Kansas* recognized in the context of criminal culpability, recalling early texts which set the test for insanity upon a showing of a mental disorder which "takes away from the party all moral agency and accountability."[163] Although reform of the insanity defense is beyond the scope of this article, the decision does require reflection on the value in respecting the autonomy of criminal defendants, including those with mental illness and intellectual disabilities. Punishment should be a means to some good, whether making amends, counseling against future harm, or restraint for public safety; and, from a theological perspective, St. Thomas Aquinas would argue that evil must be overcome by good, promoting "charity whereby we are bound to love all men."[164] Sentencing should also be cautious and critical in determining whether psychological measures and assessments are not misused in sentencing. For example, neuroimaging results related to psychopathy have evinced racial bias resulting in higher sentencing.[165]

One benefit is that mental health research promotes the value of censure to ultimately increase a sense of well-being in the individual who is censured. Communicative public condemnation of the offender is meant to create feelings of guilt, self-awareness and remorse,[166] but whether that can occur if the sentence is disproportionately severe or inequitable is doubtful. Regardless of the mental health status of the offender, there is a point when a sentence is simply too long to serve any rehabilitative purpose. In the

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[162] Henrik Tham, *From Treatment to Just Deserts in a Changing Welfare State in* BEWARE OF PUNISHMENT: ON THE UTILITY AND FUTILITY OF CRIMINAL LAW 89, 114, (Annika Snare ed., 1995).

[163] Kahler v. Kansas, 140 S. Ct. 1021, 1043 (2020) (Breyer, J., dissenting) (citation omitted).

[164] St. Thomas Aquinas, *Whether Vengeance is Lawful in* PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 135, 135 (Gertrude Ezorsky ed., 1972).

[165] *See* Allison J. Lynch & Michael Perlin, "I See What is Right and Approve, But I Do What is Wrong": Psychopathy and Punishment in the Context of Racial Bias in the Age of Neuroimaging (2015) (unpublished manuscript) (on file with author).

[166] *See* FRANCES E. GILL, THE MORAL BENEFIT OF PUNISHMENT: SELF-DETERMINATION AS A GOAL OF CORRECTIONAL COUNSELING 18–21 (2003) (describing counseling strategies where suffering will "pave the way for reflection on the wrongness of his offense" and the need to take responsibility).

United States, sentences for many are simply too long, which motivated the recent enactment of the First Step Act.[167]

Again, whether all offenders are able to attain a sense of reforming contrition from the criminal justice system is questionable. Juvenile offenders, who are still undergoing rapid brain and moral development, may be more receptive to learning empathy.[168] On the other hand, an offender's mere desire to reform without the skills or capacity to do so, because of addiction or mental illness, could be fruitless.[169] Perhaps the greatest pending risk of misusing mental health strategies are those that deprive offenders of autonomy by suppressing impulses through neurological treatment, and offering this as an alternative to prison:

> Even though the idea of preventing future crimes by neurotechnical treatment of criminals may, as indicated, strike some almost as science fictional, from a penal theoretical perspective, it is more déjà vu. A large part of the penal theoretical thinking of the last century was heavily influenced by rehabilitationist ideals.[170]

A less accommodating view of neuroscientific interventions in the criminal justice system suggests that public censure remains an important component of justice for all offenders, communicating a sense of retributive justice and respecting the autonomy of the individual offender.[171] That is, an

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[167] First Step Act of 2018, P.L. 115-391, 132 Stat. 5194 (2018). *See* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571 (2005) (addressing Supreme Court jurisprudence upholding long sentences against constitutional challenge and proposing retributive proportionality limits).

[168] *Compare* Carrie L. Masten et al., *Witnessing Peer Rejection During Early Adolescence: Neural Correlates of Empathy for Experiences of Social Exclusion*, 5 SOC. NEUROSCIENCE 496 (2010) (finding that adolescents who themselves feel social exclusion, may develop neural pathways that promote empathy), *with* Kristin N. Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive v. Rehabilitative Systems of Justice*, 97 CAL. L. REV. 1107, 1148 (2009) (questioning the effectiveness of victim impact statements in proceedings involving adolescents).

[169] GILL, *supra* note 166, at 29 (2003).

[170] Jesper Ryberg, *Neuroscientific Treatment of Criminals and Penal Theory in* TREATMENT FOR CRIME: PHILOSOPHICAL ESSAYS ON NEUROINTERVENTIONS IN CRIMINAL JUSTICE 2 (David Birks & Thomas Douglas, eds., 2018) (arguing that neurological treatments may provide rehabilitation and comport with retributivist purposes).

[171] David Berks, *Can Neurointerventions Communicate Censure? in* DAVID BIRKS & THOMAS DOUGLAS, TREATMENT FOR CRIME: PHILOSOPHICAL ESSAYS ON

anesthetized offender cannot be truly reformed, even if there is a utilitarian purpose in forced medication approaches, and the crime victim would yet again be silenced in the process.

IV. HOW EMERGENCY RESPONSES TO COVID-19 IN PRISONS REVEAL SYSTEMIC PRIORITIES

While sentencing theory can aid an evaluation of rational measures of justice, in reality, the practicalities of any ordered system are unpredictable and hybrid approaches emerge.[172] Public health emergencies force judges to prioritize which factors should take precedence in determining whether and when a prisoner could be released, including considerations of proportionality, perceived dangerousness to the community, crime victim perspectives, and health risks.

As seen from the Black Death in the Medieval Ages to modern crises such as the AIDS epidemic, plague can bring discredit to political leadership when it appears to fail to come to the defense of the common welfare, leading to lawlessness, distrust, and an incentive for governments to respond with harsh and restrictive policies.[173] Highly communicable contagions, such as the bubonic plague and smallpox, have impacted culture, class, and government throughout the centuries, and are increasing in occurrence as population and climate change bring different species in contact with each other.[174] Even today, culture and politics interfere with scientific and medical best practices. For example, despite a global vaccination campaign in effect since 2000, measles still killed over 140,000 persons worldwide in 2018, with some deaths involving parents who refused to allow their children to be vaccinated, although the campaign prevented an estimated 23.2 million child

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NEUROINTERVENTIONS IN CRIMINAL JUSTICE (2018) (suggesting that neurointerventions with harmful side effects would be the only means of communicating censure as punishment, which would be inhumane and unacceptable).

[172] *Cf.* Gabriel A. Fuentes, *Federal Detention and "Wild Facts" During the COVID-19 Pandemic*, 110 J. CRIM. L. & CRIMINOLOGY 441, 442 (2020) ("'wild facts' are 'subtle, unexpected particulars' that lie not in law but in human experience, and that militate against the mechanical and impersonal application of a society's laws.").

[173] *See* DAVID HERLIHY, THE BLACK DEATH AND THE TRANSFORMATION OF THE WEST 64, 69 (1997).

[174] *See* Robert S.Gottfried, *A Natural History of the Plague and Other Early European Diseases in* THE BLACK DEATH 29 (Don Nardo ed.,1999).

deaths.[175] More coercive modern public health approaches rapidly gaining political clout as the COVID-19 epidemic rages on are, at times, justifiably more concerned with the survival of the human species than with considerations of individual civil liberties. However, this temporary exercise in enhanced state control can shift public willingness towards diminishing civil liberties after the emergency subsides.

A. Pre-COVID-19 Legal Approaches to Contagion in Prison

In the prison system, the widespread and imminent risk of contagious disease permits a unique view into how the judicial system reevaluates the balance of interests between public and private priorities. According to the Supreme Court of Oregon, the role of government in such circumstances is paramount:

> As we all know, a novel coronavirus was first detected in late 2019, and it has spread rapidly across the globe, killing hundreds of thousands of people. Even more people have fallen ill, and healthcare systems in cities around the world have been overwhelmed, including in the United States. As the virus has spread, government leaders have taken actions to protect people in their jurisdictions from illness and death. They have done so in constantly changing circumstances, and they have responded to new information about the virus and its effects as it has become available.[176]

In 2020, when the deadly and highly contagious COVID-19 virus struck the prison environment with a vengeance,[177] judges and prison authorities were

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[175] Centers for Disease Control and Prevention, *Progress Toward Regional Measles Elimination – Worldwide, 2000–2018*, 68 MORBIDITY & MORTALITY WKLY. REP. 1 (Dec. 6, 2019), https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6848a1-H.pdf.

[176] Elkhorn Baptist Church v. Brown, 366 Ore. 506, 509 (2020) (addressing a challenge to the Governor's Executive Order to limit the size of gatherings to ensure social distancing and reduce COVID-19 transmission).

[177] *See* Emily Widra, *Visualizing Changes in the Incarcerated Population During COVID-19*, PRISON POL'Y INITIATIVE (Sept. 10, 2020), https://www.prisonpolicy.org/blog/2020/09/10/pandemic_population_changes/ (identifying higher rates of COVID-19 transmission and deaths in the prison population than in the general population); Dan Rozenzweig-Ziff, *Incarcerated Texans are Dying from COVID-19 at a Rate 35% Higher than Rest of the U.S. Prison Population, UT Study Finds*, TEXAN TRIB. (Nov. 10, 2020), https://www.texastribune.org/2020/11/10/texas-prison-deaths-coronavirus/.

faced with an influx of varied legal motions to release prisoners early for their own safety.

For example, in Illinois, Governor Pritzker issued an Executive Order pursuant to the state's Emergency Management Agency Act specifically setting aside statutory restrictions so as to grant the Department of Corrections Director "with discretion to use medical furloughs to allow medically vulnerable inmates to temporarily leave IDOC facilities, when necessary and appropriate and taking into account the health and safety of the inmate, as well as the health and safety of other inmates and staff in IDOC facilities and the community[.]"[178] By June 2020, the Centers for Disease Control and Prevention reported that the case rate for COVID-19 was 5.5 times higher among the prison and jail populations than among the general populations.[179] "Mass testing in select prisons revealed wide COVID-19 outbreaks, with infection rates exceeding 65% in several facilities."[180]

At the federal level, in March 2020, U.S. Attorney William Barr issued a memorandum encouraging the Bureau of Prisons to exercise its authority under 18 U.S.C. § 3624(c)(2) to permit home confinement rather than incarceration, in order to avoid risks to certain prisoners from COVID-19. Specifically, for "some at-risk inmates who are non-violent and pose minimal likelihood of recidivism and who might be safer serving their sentences in home confinement rather than in BOP facilities."[181] By January 2021, the Office of the Attorney General issued an additional memorandum reminding the Bureau of Prisons that home confinement measures were only temporary and that prisoners should be "recalled" to correctional facilities following the covered emergency period under the Coronavirus Aid, Relief, and Economic Security (CARES) Act if they had not completed their sentences.[182] By December 2020, approximately 12% of the federal prison

[178] Governor Pritzker, *COVID-19 Executive Order No. 19*, State of Illinois (April 6, 2020).

[179] Brendan Saloner et al., *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 JAMA 602, 602–03 (Aug. 11, 2020).

[180] *Id*. at 603.

[181] OFFICE OF THE ATTORNEY GEN., MEMORANDUM FOR DIRECTOR OF BUREAU OF PRISONS FROM THE ATTORNEY GENERAL: PRIORITIZATION OF HOME CONFINEMENT AS APPROPRIATE IN RESPONSE TO COVID-19 PANDEMIC (2020).

[182] *See* Memorandum Opinion from Jennifer L. Mascott, Deputy Assistant Attorney General to the General Counsel for the Federal Bureau of Prisons, on Home Confinement of Federal Prisoners After the COVID-19 Emergency (Jan. 15, 2021) (addressing the Coronavirus Aid, Relief, and Economic Security (CARES) Act); s*ee*

population had been transferred to home confinement, of which 40% would not have been eligible for such release without emergency authority.[183] No mention was made of crime victim input as a factor of consideration for the initial decision to engage in home confinement in these memoranda, nor of their input regarding return to a correctional facility.

Public health advocates and scholars were well aware that prisons would be among the hardest hit by a disease pandemic, because they had already experienced managing other contagions.[184] However, this current pandemic presented an opportunity to reduce growing concerns related to mass incarceration and to test the role and value of victim involvement in the criminal justice system. Also, in order to understand how a pandemic brings to light criminal justice system priorities, understanding the parallel coercive practices and policies of public health is also key. In an era involving more frequent global contagions, civil rights advocates in the United States, prior to the COVID-19 epidemic, had been arguing for greater attention to the constitutional rights to resist public health quarantines and the risk to civil liberties in granting public health authorities excessive, indiscriminate power.[185] Deep ethical concerns are at stake. For example, in *In re Washington,* a patient mother who had recently delivered a baby in the hospital refused to cooperate when she was ordered into quarantine for a diagnosis of non-infectious tuberculosis, and was forced by court order to remain in long-term quarantine in the county jail, rather than a health facility, to prevent the disease from becoming contagious.[186]

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also Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15,337 (2020). The "'covered emergency period'" starts on "the date on which the President declared a national emergency under the National Emergencies Act with respect to the Coronavirus Disease 2019 (COVID-19)" [March 13, 2020] and ends "30 days after the date on which the national emergency declaration terminates." CARES Act § 12003(a)(2).

[183] Memorandum Opinion from Jennifer L. Mascott, at 3.

[184] *See* Lawrence O. Gostin et al., *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 99 (1999) ("Population growth, urban migration, and overcrowding in the congregate settings of prisons, homeless shelters, mental institutions, nursing homes, and child care centers facilitate person-to -person transmission of disease.").

[185] *See* Wendy E. Parmet, *Quarantining the Law of Quarantine: Why Quarantine Law Does Not Reflect Contemporary Constitutional Law*, 9 WAKE FOREST J.L. & POL'Y 1 (2018).

[186] In re Washington, 304 Wis. 2d 98, 128 (2007).

Reflecting on the Ebola crisis that emerged in the summer of 2014 and other global epidemics, Professor Wendy Parmet argued that "quarantine is rarely an effective public health strategy, and no evidence exists that it has proven effective in reducing morbidity and mortality in the U.S. in the last half century."[187] Public health scholar Lawrence Gostin also called for less compulsory measures to curb contagions when he wrote, regarding the spread of tuberculosis, that coercive measures may counterintuitively deter more persons from seeking testing and treatment, thereby increasing the risk to public health.[188] In stark contrast, during the COVID-19 pandemic, when the disease was swiftly spreading among inmates, guards and other staff, prisoners cried out for greater quarantine and social distancing measures, or to be released if that could not be accomplished. Those most vulnerable to COVID-19 in the general population, low-income persons of color, have comprised those most likely to face higher incarceration rates in the United States.[189]

The numerous serious contagious illnesses that have stricken prison populations over the years have been approached with varying urgency by the courts.[190] Prior to the COVID-19 pandemic, prisoners had filed early release or transfer claims on the basis of medical conditions, including

[187] *See generally* Parmet, *supra* note 185, at 28– 29 (criticizing China, as well, for "wide-scale quarantines for SARS").

[188] Gostin, *supra* note 159, at 130.

[189] *See* Lucy Erickson, *The Disproportionate Impact of COVID-19 on Women of Color*, SOC'Y FOR WOMEN'S HEALTH RES. (Apr. 30, 2020), https://swhr.org/the-disproportionate-impact-of-covid-19-on-women-of-color/; Michael Ollove, *How COVID-19 in Jails and Prisons Threatens Nearby Communities*, PEW CHARITABLE TRUSTS: STATELINE BLOG (July 1, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/01/how-covid-19-in-jails-and-prisons-threatens-nearby-communities.

[190] *See generally* Uribe v. Perez, No. 5:17-00558 CJC (ADS), 2020 WL 1318358 (C.D. Cal. Mar. 3, 2020) (providing an overview of cases where the courts have found an unacceptable and serious health risk of disease in prison, such as MRSA, hepatitis C, HIV, and tuberculosis, as well as environmental hazards, such as tobacco smoke and asbestos, but declining to recognize norovirus as an unacceptable health risk).

dangerous airborne contagions[191] or exposure to bloodborne pathogens.[192] The courts considered whether the risks were those experienced primarily in prison or also in the society at large.[193] Even with the latitude to consider numerous factors, state decisionmakers have chosen not to weigh crime victims' perspectives to any significant extent in these early release cases. A prisoner's medical condition, however, has garnered attention, possibly more in previous years than during the reviews of COVID-19 compassionate release petitions, as will be discussed below.[194] This may have been due not only to timing, where the courts now face the urgency of a global pandemic, but to the sheer number of cases involved and the practical need to make a quick determination without a public hearing.

In any case, the courts consistently have recognized that the government has a duty to care for the health and safety of its prisoners. Under the common law *parens patriae* doctrine, the United States Supreme Court has held that prisoners under government supervision are entitled to a minimal level of medical care, a right that the general population does not have.[195] The Court referred to the "common-law view that '(i)t[sic] is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.'"[196] As Justice Stevens stated

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[191] *See, e.g.*, Jackson v. Brown, No. 1:13–cv–1055–LJO–SAB, 2015 WL 5522088 (E.D. Cal. Sept. 17, 2015) (denying a motion for judgment on the pleadings in a racial discrimination claim as to whether California state prison authorities were required to better protect at-risk African-American inmates from the deadly flu-like infection known as Valley Fever), *rev'd in part by* Hines v. Youssef, 914 F. 3d 1218 (9th Cir. 2019) (denying a race-based equal protection claim for risk of contracting Valley Fever).

[192] *See* Patel v. County of Orange, No. 8:17-cv-01954-JLS-DFM, 2019 WL 4238875 (C.D. Cal. June 19, 2019) (addressing plaintiffs' claim that being forced to clean up blood after an inmate's suicide, without adequate protective gear, caused them to experience "depression, insomnia, nightmares, an inability to eat, panic attacks, and loss of libido").

[193] Jackson v. Brown, 2015 WL 5522088, at *23 ("And to determine whether the risk posed is one society is willing to tolerate, the Court must assess whether the complained-of exposure to cocci and the resultant incidence rates of Valley Fever are similar to those of other communities where cocci are endemic.").

[194] *See infra* Part IV(B).

[195] *See* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 199-200 (1989); Estelle v. Gamble, 429 U.S. 97 (1976).

[196] Estelle, 429 U.S. 97 at 103-04.

in dissent in *Estelle v. Gamble*, "denial of medical care is surely not part of the punishment which civilized nations may impose for crime."[197]

Since the 1980s, human immunodeficiency virus (HIV), the virus that causes acquired immunodeficiency syndrome (AIDS) has remained a systemic concern among inmates in terms of adequacy of treatment, the risk of infection among inmates due to drug use and needle-sharing, and transmission through sexual contact.[198] The latter inferred a lack of security in the prison setting by the inability to prevent forced sexual contact, demonstrated in part by the necessity for the legal protections of the Prison Rape Elimination Act of 2003.[199] By 1997, the rate of confirmed AIDS in the U.S. prison population was "more than five times higher than the rate in the general population."[200] Ten years later, the incidence of AIDS in prison has remained three to five times the incidence in the general population.[201] While mandatory testing is not required by many jail or prison facilities, in some jurisdictions crime victims may require HIV testing of offenders if the victim was placed at risk of infection.[202] For example, in the State of New York victims of sexual violence offenses may require a defendant be tested for HIV and that the results be communicated to the victim and defendant.[203] Segregation of prisoners with HIV has, however, been successfully challenged as it restricts available programming and creates unnecessary and harmful stigma.[204]

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[197] *Id.* at 116 (Stevens, J., dissenting).

[198] *See generally* Basas, *supra* note 96.

[199] Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601 et seq. (enacting the first federal law intended to deter sexual violence against prisoners). *See also* David M. Siegal, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of* Wilson v. Seiter, 44 STAN. L. REV. 1541 (1992).

[200] Jin Hee Lee, *Excerpts from Jailhouse Lawyer's Manual, Fifth Edition, Chapter 22: AIDS in Prison*, 31 COLUM. HUM. RTS. L. REV. 355, 357 (2000).

[201] Liza Solomon et al., *Survey Finds that Many Prisons and Jails Have Room to Improve HIV Testing and Coordination of Postrelease Treatment*, 33 HEALTH AFFS. 434, 434 (2014), https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2013.1115.

[202] *Id.* at 440 (finding that 37% of prison systems studied mandate routine HIV testing of prisoners).

[203] *E.g.*, N.Y. CRIM. PROC. LAW § 390.15 (Westlaw 2021).

[204] *See* Henderson v. Thomas, 913 F. Supp. 2d 1267 (M.D. Ala. 2012) (holding that segregation of prisoners on the basis of HIV-status violates the Americans with Disabilities Act and the Rehabilitation Act, which permit suits against prisons as public entities). *But see* Onishea v. Hopper, 171 F.3d 1289 (11th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000) (denying relief to prisoners under section 504 of the

Tuberculosis has also posed challenges for inmates in correctional facilities. Because HIV causes a weakened immune system, it increases the risk by a hundred fold of developing active tuberculosis among those who have latent tuberculosis.[205] By 1980, in New York state correctional facilities, ninety-five percent of inmates with tuberculosis were infected with HIV, as well.[206] As an airborne disease, the close living quarters and lack of ventilation, as well as inadequate medical services, contributed to the tuberculosis crisis.[207] Lawrence Gostin attributed some of the rapid increase in transmission of tuberculosis to the overcrowding that occurred from mandatory sentencing of drug offenses in the 1990s and resulting mass incarceration.[208]

State jurisdictions evaluating early release claims will not employ the factors discussed below under the federal First Step Act of 2018 for compassionate release.[209] Indeed, state law varies more than federal as to which factors are relevant for release. At sentencing in Michigan, for example, the trial court would only consider the statutory element of "the seriousness of the circumstances surrounding" the defendant and the offense, in addition to a possible medical probation or commutation if the medical needs of the defendant were sufficiently serious at the time of sentencing.[210] The court in at least one case determined that it would not have been appropriate to impose a more lenient sentence later, even if the trial court had been aware of the pandemic at the time of sentencing.[211] Other efforts to obtain release in state court, such as judicial release to home confinement, may not be available even for heightened risks due to COVID-19 if the defendant was serving a mandatory term and did not produce substantial supporting documentation of risk from correction officials.[212] Still other states, such as California, have implemented a strict legislative requirement

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Rehabilitation Act, which prohibits discrimination against an individual with a disability).

[205] Lee, *supra* note 200, at 370 (citing Centers for Disease Control data).

[206] Gostin, *supra* note 159, at 51.

[207] *Id*. at 52.

[208] *Id*. at 53.

[209] *See infra* Part IV(B).

[210] People v. Johnson, No. 350186, 2021 WL 137274, at *4 (Mich. Ct. App. 2021).

[211] *Id.*

[212] *E.g.*, State v. Watkins, No. 20AP-313, 2020 WL 6503632, at *9 (Ohio Ct. App. 2020), *granting stay pending appeal*, 160 Ohio St. 3d 1516 (Ohio 2020).

of exhaustion of administrative remedies, including initiation of a compassionate release claim by prison or parole authorities, before a court of appeal will consider an order appealable.[213]

For state prisoners, medical parole continues to be an option for early release, when inmates have terminal health conditions or may be so incapacitated that they cannot care for themselves.[214] Such policies indicate that medical parole is an option when an existing medical condition changes. That is, "[g]enerally, medical parole consideration shall not be given to an offender when the offender's medical condition was present at the time of sentencing, unless the overall condition has significantly deteriorated since that time."[215] Medical concerns are not the sole consideration where the risk to public safety upon parole may result in a denial of a petition. Here, the crime victim's perspective offers important information to the court. The California Court of Appeals, for example, held that an inmate who had become a quadriplegic should receive medical parole as he no longer posed a threat to public safety, despite the court's recognition that he had been sentenced for the heinous crimes of physical and sexual violence against women, and continued to engage in similar behavior while incarcerated.[216] According to the court, "[w]e are satisfied that Martinez's behavior problems are 'some evidence' that he remains an angry, repulsive person," but he does not pose "a reasonable threat to public safety" if released.[217]

Another avenue for relief in state court is a writ of habeas corpus alleging illegal confinement due to medical need. For example, the Superior Court of Connecticut addressed a 58-year-old petitioner with HIV who filed a habeas corpus petition seeking release from state prison through emergency compassionate release or medical parole due to the risk of contracting

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[213] *See* People v. Bryant, 2020 WL 5012135, at *1 (Cal. Ct. App. 2020) (addressing the claim of an inmate convicted of second-degree robbery who had contracted COVID-19 in state prison).

[214] *See, e.g.*, Buckman v. Commissioner of Correction, 484 Mass. 14, 138 N.E. 2d 996 (2020) (holding that restrictive state regulations that require a diagnosis of terminal illness or incapacitation for a petition to initiate a claim for medical parole are void as against public policy).

[215] Ducksworth v. Louisiana Dep't of Pub. Safety and Corr., 298 So. 3d 757, 759 (La. Ct. App. 2020) (affirming a dismissal of a petition for medical parole with prejudice where the defendant presented no medical evidence that his laryngeal condition had become permanent).

[216] In re Martinez, 148 Cal. Rptr. 3d 657, 673 (Cal. Ct. App. 2012) (reversing denial of a habeas corpus petition for medical parole).

[217] *Id.* at 673-74.

COVID-19 and its significant risks associated with his lowered immune system.[218] The prisoner informed the court that he had hepatitis C, kidney problems, cirrhosis of the liver, high blood pressure, and bipolar disorder.[219] However, the writ was denied, in part, for procedural reasons: in Connecticut the granting of medical parole is only within the discretion of the Board of Pardons and Paroles, not the trial court, and his treating physician in the prison facility explained that petitioner's immunity had improved with medication while in prison.[220] In its decision, the trial court quoted the United States Supreme Court in *Farmer v. Brennan*, which held that "[t]he Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones" pursuant to the Eighth Amendment Cruel and Unusual Punishment Clause.[221]

If the prison authorities are not responsive, state and federal prisoners with medical needs may file constitutional claims under the Eighth and Fourteenth Amendments of the U.S. Constitution, which may provide compensatory damage awards as opposed to early release.[222] However, qualified immunity poses a challenge to claimants unless the claimant can demonstrate that the official violated a constitutional right and that the right was clearly established at the time of the conduct in question.[223] Potential constitutional claims include assertions that deprivation of medical and mental health treatment demonstrates the state's deliberate indifference to the prisoner's serious medical needs in violation of the Fourteenth Amendment Substantive Due Process Clause and the Eighth Amendment Cruel and Unusual Punishment Clause. For example, the estate of an inmate who committed suicide while in solitary confinement unsuccessfully brought a civil rights action against a municipal corrections facility responsible for

[218] McKinnon v. Comm'r of Corr., CV205000659S, 2020 WL 4814245 (Conn. Super. Ct. 2020).

[219] *Id.* at *3.

[220] *Id.* at *3-4 (explaining that the inmate had also tested negative for COVID-19).

[221] *Id.* at *2 (quoting Farmer v. Brennan, 511 U.S. 825, 832 (1994)).

[222] *E.g.*, Hill v. Marshall, 962 F.2d 1209, 1213-15 (6th Cir. 1992) (holding that deprivation of necessary tuberculosis medication constituted an Eighth Amendment violation, affirming jury's award of $95,000 in actual damages).

[223] Wood v. Moss, 572 U.S. 744, 745 (2014) (internal citations omitted).

monitoring the inmate.[224] It is a difficult standard to meet, where deliberation on the part of state actors is required, rather than mere negligence. In a deliberate indifference claim by an older inmate with Alzheimer's disease and other serious medical conditions who alleged delays in treatment, the court dispatched with the claim "because Dr. Murphy was the only physician treating more than two thousand inmates."[225]

All of these rights must be balanced against "legitimate penological interests."[226] Constitutional claims related to an inmate's serious health needs may consider risks to the public health, such as the denial of a due process and equal protection claim by a prisoner with HIV who was denied the right to conjugal visits in consideration of the risk of transmission to the visitor.[227] While these civil rights claims may be a wise legal strategy in many instances, if time is short and the emergency is urgent, they are not an effective approach. They simply take too long to achieve a disposition, particularly given their procedural hurdles.

In the early stages of the COVID-19 pandemic, compassionate release claims were not the first line of defense for inmates. In *Wilson v. Williams*, for example, the Sixth Circuit addressed a federal habeas corpus petition filed as a class action asserting an Eighth Amendment deliberate indifference claim for alleged failure to provide safe prison conditions during the pandemic in a low security facility with dormitory-style housing.[228] By April 2020, fifty-nine inmates and forty-six staff members had contracted COVID-19 in the facility, and six inmates had died.[229] The District Court granted a preliminary injunction and enforcement order against the Bureau of Prisons on April 22, 2020. Weeks later, on June 9, 2020, the Sixth Circuit addressed the Bureau of Prisons' interlocutory appeal. The Bureau of Prisons admitted the objective factor that the risk of COVID-19 had created "a

[224] Troutman v. Louisville Metro Dep't of Corr., 979 F.3d 472 (6th Cir. 2020) (affirming the lower court's determination that the municipality did not act with deliberate indifference to serious medical need).

[225] Wilson v. Adams, 901 F.3d 816, 822 (7th Cir. 2018).

[226] Turner v. Safley, 482 U.S. 78 (1987); *see* Estelle v. Gamble, 429 U.S. 97, 103 (1976).

[227] In the Matter of Doe v. Coughlin, 518 N.E.2d 536 (N.Y. 1987), *cert. denied*, 488 U.S. 879 (1988).

[228] Wilson v. Williams, 961 F.3d 829 (6th Cir. 2020). Habeas relief is also available to state prisoners who are unconstitutionally confined, pursuant to the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(a).

[229] *Id.* at 834.

substantial risk of serious harm leading to pneumonia, respiratory failure, or death."[230] But as to the subjective prong, the court in *Wilson*, in accord with several other federal Circuit Courts of Appeal, held that the Bureau of Prisons had not been deliberately indifferent to such risk despite the Bureau's struggle to cope with the rapidly evolving events of the pandemic.[231]

In vacating the preliminary injunction granted by the District Court in *Wilson*, the Sixth Circuit held that because the Bureau of Prisons had engaged in cleaning, social distancing, quarantine, and testing in the facility, "its failure to make robust use of transfer, home confinement, or furlough to remove inmates in the medically-vulnerable subclass . . . does not constitute deliberate indifference."[232] The court noted as a final point that the District Court should have more carefully considered "the legitimate concerns about public safety the BOP raised," as supported by the United States Supreme Court's instruction that when the Government is the opposing party in a motion for injunctive relief, the interests of the opposing party and the public interest merge.[233] Thus, where prisoners are concerned, the voice of the community and victim is ultimately that of the government. If crime victim rights are not available, the actual voice of the victim is rendered a nullity.

Administrative, procedural, and time-consuming hurdles are daunting in a case, such as the following, that involve the high risks of COVID-19 transmission in a state geriatric prison. In *Valentine v. Collier*, the United States Supreme Court denied an application to vacate the Fifth Circuit's stay of a preliminary injunction against the Texas Department of Criminal Justice.[234] Even Justices Sotomayor and Ginsberg wrote that "[n]othing in this Court's order, of course, prevents the Fifth Circuit from amending its stay. Nor does anything in our order prevent applicants from seeking new relief in the District Court, as appropriate, based on changed circumstances."[235] Yet the Fifth Circuit noted in originally issuing the stay of the District Court injunction that an enforcement order against the correctional facilities would prevent them "from responding to the COVID-

[230] *Id.* at 840.
[231] *Id.* at 841; *accord* Marlowe v. LeBlanc, 810 Fed. Appx. 302 (5th Cir. 2020) (per curiam); Swain v. Junior, 958 F.3d 1081 (11th Cir.) (per curiam).
[232] Wilson v. Williams, 961 F.3d at 844.
[233] *Id.* (citing Nken v. Holder, 556 U.S. 418, 435 (2009)).
[234] Valentine v. Collier, 140 S. Ct. 1598 (2020).
[235] *Id.* at 1601.

19 threat without a permission slip from the district court."[236] Thus, while time is of the essence for prisoners at risk of infection, the prison system also needs flexibility and discretion to adapt in an emergency. Also, the Fifth Circuit had identified the significant barrier to litigation under the Prison Litigation Reform Act, pursuant to 42 U.S.C. § 1997e(a), requiring inmates to exhaust all available administrative remedies prior to filing suit in federal court to challenge state prison conditions.[237] The United States Supreme Court has outlined very narrow exceptions,[238] which have not applied to most COVID-19 litigation for safer conditions. Thus, for the reasons shown above, compassionate release under the First Step Act of 2018 ultimately became the strategy of choice for most inmates seeking relief from the dangers of the pandemic as it serves as a swifter and more permanent remedy.

B. COVID-19 Compassionate Release Cases Under the First Step Act

The First Step Act of 2018, signed into law on December 21, 2018 by President Trump, allows a defendant to move a federal court to grant compassionate release after the defendant has "fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such request by the warden of the defendant's facility, whichever is earlier."[239] The thirty-day exhaustion period is substantially less than many other potentially applicable claims, and some jurisdictions have permitted waiver.[240]

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[236] Valentine v. Collier, 956 F.3d 797, 804 (5th Cir. 2020) (per curiam).

[237] *Id. See also* Baqer v. St. Tammany Par. Gov't, No. 20-980-WBV-JCW, 2020 WL 1820040 (E.D. La. Apr. 11, 2020); Denbow v. Maine Dep't of Corr., No. 1:20-cv-00175-JAW, 2020 WL 4736462 (D. Maine Aug. 14, 2020) (holding in a COVID-19 related federal habeas corpus claim that one of the remedies not exhausted was state post-conviction relief).

[238] Ross v. Blake, 136 S. Ct. 1850, 1859-60 (2016) (including when procedures are a mere "dead end," when an "opaque" administrative scheme cannot reasonably be accessed, and when prison officials "thwart" prisoners from using existing grievance processes).

[239] 18 U.S.C. § 3582(c)(1)(A) (2018).

[240] *See, e.g.*, U.S. v. Atwi, 455 F. Supp. 3d 426 (E.D. Mich. 2020) (permitting waiver of the exhaustion requirement for compassionate release); *but see* U.S. v. Brown, Crim. No. 3:18-CR-228-DPJ-FKB, 2020 WL 3213415 (S.D. Miss. June 15, 2020), *reconsideration denied*, 2020 WL 5723524 (S.D. Miss. 2020) (denying a compassionate release claim without prejudice for failure to exhaust administrative

Under the United States Sentencing Guidelines, the Sentencing Commission has stated that "extraordinary and compelling reasons" must exist for compassionate release.[241] There is currently a split in authority regarding the role of the Bureau of Prisons and whether federal courts may now "independently determine what constitutes other 'extraordinary and compelling reasons' for compassionate release."[242] Nevertheless, expressly stated factors include whether:

1) a defendant has a terminal or serious medical condition;

2) a defendant with deteriorating health is at least 65 years old and has served ten years or 75% of the term of imprisonment;

3) certain family circumstances arise in which a defendant must serve as a caregiver for minor children or a partner; or

4) the Bureau of Prisons determines other circumstances create "extraordinary and compelling reasons" for sentence reduction.[243]

As to the final catch-all factor, no particular sentencing theory, policy or goal is noted, which provides broad discretion to the trial court and the Bureau Prisons to favor the priorities that they wish when identifying reasons for granting or denying a motion for compassionate release. From a legal practitioner's perspective, any exercise of government discretion invites a degree of arbitrariness, and compassionate release decisions have been no different: "Whether a prisoner is released depends on a host of influences, including the judge who sentenced them, the warden over the facility where they are held, and the prosecutors. It involves politics, geographic influence and aspects of complete randomness beyond the prisoner's control."[244] Judges cannot help but be influenced by their "own

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remedies); U.S. v. Robinson, Crim. Action No. 1:17CR27-3, 2020 WL 3182719 (N.D. W. Va. June 15, 2020) (denial for failure to exhaust remedies).

[241] For a history of the compassionate release statutory framework, *see* Lindsey E. Wylie et al., *Extraordinary and Compelling: The Use of Compassionate Release Laws in the United States*, 24 PSYCHOL., PUB. POL'Y & L. 216 (2018).

[242] *See, e.g.*, U.S. v. Richardson, Crim. No. JKB-09-0288, 2020 WL 3267989 (D. Md. June 17, 2020) (federal courts may judge factors independently); *but see* U.S. v. Aruda, 472 F. Supp. 3d 847 (D. Haw. 2020) (only the Bureau of Prisons may judge the factors for compassionate release).

[243] U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 cmt. n.1(A)–(D) (U.S. SENTENCING COMM'N 2018).

[244] Joe D. Whitley et al., *A Prisoner's Dilemma: COVID-19 and Motions for Compassionate Release*, PRACT. INSIGHTS COMMENT, May 28, 2020, 2020 WL 2762836.

beliefs of morality and proper behavior"[245] when assessing release factors. While such a position is difficult to refute, in a cursory review of the appellate decisions regarding COVID-19 compassionate release in 2020 and 2021 to date, some preliminary patterns do emerge as to what is and is not considered of significance at this historic time.

1. Health and Safety of Prisoners

With respect to the first factor addressing "a terminal or serious medical condition," courts have generally looked to the CDC COVID-19 guidelines to define which medical conditions create a substantial risk of contracting the virus.[246] Courts and inmates have been expected to track the CDC's occasional revision of the list of risk factors during the pendency of an appeal.[247]

"The mere existence of COVID-19 in society" is not enough to warrant compassionate release, according to the Third Circuit in *United States v. Raia*, a case in which the court denied compassionate release to a 68-year-old inmate with Parkinson's disease, diabetes, and heart disease.[248] Prior to the pandemic, a similar position generally was taken, where the Fifth Circuit, in evaluating a deliberate indifference constitutional claim, asserted that "isolated examples of illness, injury, or even death, standing alone, cannot prove that conditions of confinement are constitutionally inadequate. Nor can the incidence of diseases or infections, standing alone, imply unconstitutional confinement conditions, since any densely populated residence may be subject to outbreaks."[249] This appears to be a consistent theme in compassionate release jurisprudence. The Southern District of Mississippi explained,

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[245] KENNEDY & SACCO, *supra* note 6, at 184-85.

[246] U.S. v. Patten, Crim. No. 18-cr-073-LM-1, 2021 WL 275444, at *3 (D. N.H. Jan. 27, 2021); *see COVID-19, People with Certain Medical Conditions* CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (updated Feb. 3, 2021).

[247] *See* U.S. v. Gionfriddo, No. 3:18-cr-00307 (JAM), 2020 WL 3603754, at *3 (D. Conn. July 2, 2020); U.S. v. Belcher, No. 2:19-CR-00019-1-JRG-CRW, 2020 WL 3620424 (E.D. Tenn. July 2, 2020).

[248] U.S. v. Raia, 954 F.3d 594 (3d Cir. 2020).

[249] Shepherd v. Dallas County, 591 F.3d 445, 454 (5th Cir. 2009) (affirming a jury verdict for a pretrial detainee denied access to medication with respect to a section 1983 federal civil rights claim).

> The Court agrees with other courts that have considered similar arguments and concluded that '[g]eneral concerns about the spread of COVID-19 or the mere fear of contracting an illness in prison are insufficient grounds to establish the extraordinary and compelling reasons necessary to reduce a sentence.' Were such concerns sufficient, every federal prisoner would be entitled to a sentence reduction under § 3582(c)(1)(A).[250]

However, legal arguments could be made that some inmates with hypertension or anxiety-related mental health disorders could face intolerable fears from the knowledge of the risks of COVID-19 and deep frustration with lack of control over the discretionary factors permitting home confinement or parole.[251] At least one court has mentioned in dicta that mental health deterioration as a basis for compassionate release would require a psychological evaluation to rule out malingering before such a petition would be granted.[252] And yet, in the general population, it is widely accepted among mental health clinicians that a patient with preexisting mental illness will experience a stronger response due to COVID-19 fears and social distancing, precipitating relapses and heightened paranoia and distress.[253]

The drug cases seem to represent a highly mixed approach with little recognition of the presence of addiction or the success of treatment. A striking commentary to the Sentencing Guidelines regarding compassionate release states that "rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of this policy statement."[254] For example, in *United States v. Buford*, the Eastern District of Michigan denied compassionate release to a 50-year-old inmate with a

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[250] U.S. v. Brown, Crim. No. 3:18-CR-227-DPJ-FKB, 2020 WL 5723524, at *3 (S.D. Miss. Sept. 24, 2020) (internal citation omitted) (relying on U.S. v. Koons, 455 F. Supp. 3d 285 (W.D. La. 2020)).

[251] *See, e.g.*, U.S. v. Mack, Crim. No. JKB-08-348, 2020 WL 3618985, at *2 (D. Md. July 2, 2020) (rejecting the stress of hypertension as an extraordinary and compelling reason for compassionate release, as it would be too similar a condition to "hundreds of other inmates").

[252] U.S. v. Ebbers, 432 F. Supp. 3d 421, 431 n.12 (S.D. N.Y. 2020).

[253] *See* Seshadri Sekhar Chatterjee, *Impact of COVID-19 Pandemic on Pre-existing Mental Health Problems*, 51 ASIAN J. PSYCHIATRY 102071 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7165115/.

[254] U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 cmt. n.3 (U.S. SENTENCING COMM'N 2018).

wife and children at home, who had been convicted of drug trafficking and who had a medical record of hypertension, asthma, diabetes, mild kidney disease, and had tested positive for COVID-19 but was asymptomatic.[255] The same court granted compassionate release to an inmate convicted of selling cocaine, who had a kidney condition, latent tuberculosis of the lungs, and who had family support.[256] Judge Haight made a considered point in her view of the crime victim rights movement that is not often made; that is, that in drug cases in particular, there is an intersection between offenders and victims from the same community.[257] "We have got to get serious about illegal drug use and anybody that wants to legalize drugs, please come sit in my court one day, one week and listen to the victims' stories and listen to the defendants' histories."[258]

The particularized factors that could have addressed the health and wellbeing of vulnerable prisoners seeking early release from COVID-19 have not been met with much compassion under the First Step Act. As discussed below, the prisoner's criminal record, disciplinary behavior in confinement, and time remaining on the sentence have mattered more to the courts, as an issue of risk of recidivism on public safety and proportionality. That is, just deserts and the government's view of the defendant's risk to society have predominated, not the prisoner's health risks during a global pandemic, nor his or her potential for rehabilitation, and, as will be shown below, not the exercise of crime victim rights which could inject more directly a community perspective.

2. Public Safety

Allowing a focus on public safety as a factor in compassionate release cases has been fairly consistent, although not usually inclusive of the crime victim's perspective. There is some debate as to the applicability of the Sentencing Guideline's policy statement regarding the First Step Act of 2018 in this regard.[259] Some courts have required consideration of the additional

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[255] U.S. v. Buford, No. 05-80955, 2020 WL 4040705 (E.D. Mich. July 17, 2020).

[256] U.S. v. Greene, Crim. No. 15-20709, 2020 WL 4581712 (E.D. Mich. Aug. 10, 2020).

[257] *Judge Lois Haight Interview Transcript*, *supra* note 61.

[258] *Id.*

[259] *See* U.S. v. Gunn, 980 F.3d 1178, 1181 (7th Cir. 2020) (holding that "the Guidelines Manual lacks an 'applicable' policy statement covering prisoner-initiated applications for compassionate release" under The First Step Act of 2018 and therefore existing policy statements are inapplicable). At least one subsequent

factor of whether the defendant is "a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g)."[260] For this particular factor, the federal courts have relied on the presentencing report considering the nature of the defendant's offense, length of criminal history, as well as infractions while in custody. Other public safety considerations include, for example, risks of violence, recidivism, and contagion, as shown below.

The Western District of North Carolina effectively held such factors to be a potentially permanent bar to compassionate release:

> The Court appreciates the defendant's efforts to rehabilitate himself through completing educational and substance abuse programs and the risk that COVID-19 poses to those in custody. However, the Court is not persuaded that the defendant would not pose a danger to the community upon his release because of his repeated history of committing serious offenses while on conditions of release.[261]

Courts have also accepted and relied in part on victim impact statements expressing continued fear for their safety, such as one in which the offender had only recently been arrested for hate crimes against the victim "and other Black members of our citizenry."[262] When crime victim and public safety are considered for prisoners seeking compassionate release, the Seventh Circuit indicated that when the nature of the offense included death threats rather than physical conduct, the inmate's terminal cancer and risk of contracting COVID-19 would not override the interest in public safety.[263] In

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decision has held that as 18 USC § 3553(a)(2)(C) already requires that a factor of sentencing include the need to "protect the public from further crimes of the defendant," whether section 3142(g) is applicable to ensure victim and public safety makes little difference. *See* U.S. v. Burnley, 834 F. App'x 270 (7th Cir. 2021); *see also* U.S. v. Aruda, 472 F. Supp. 3d 847 (D. Haw. 2020) (applying section 3553(a) to determine that a compassionate release petition should be denied as against public safety).

[260] U.S. SENTENCING GUIDELINES MANUAL § 1B1.13(2) (U.S. SENTENCING COMM'N 2018).

[261] U.S. v. Hardin, No. 3:17-cr-00200-RJC-DSC, 2020 WL 4700724 (W.D. N.C. Aug. 13, 2020) (relying primarily on the dangerousness factor to deny compassionate release).

[262] *See* U.S. v. Desimas, No. 2:20-cr-00222-RAJ, 2021 WL 289336, at *2 (W.D. Wash. Jan. 28, 2021).

[263] U.S. v. Burnley, 834 F. App'x 270 (7th Cir. 2021) (relying also on the inmate's lack of remorse and disciplinary violations while incarcerated).

contrast, the Eastern District of Pennsylvania granted a compassionate release petition for an ill prisoner who had served 17 years of a 20-year sentence for low-level drug dealing and who had no violent criminal record, also noting that he had a reentry plan and family.[264] The court explained that "[n]one of these reasons *alone* is extraordinary and compelling," but "taken together" they are, including the lack of risk to public safety.[265]

Finally, the very health condition that increases the risk of COVID-19 transmission may also form the basis of the reason to deny compassionate release in the interests of public safety, such as drug addiction and continued drug use[266] or an inmate who has already contracted COVID-19.[267] With respect to unsanitary and overcrowded jail conditions for pretrial detainees in Louisiana, the court agreed that it would serve the public interest if the detention facility took greater care of detainees, remarking: "Plaintiffs point out that pre-trial detainees are housed for a relatively short period of time and are often released back into the community, and that the injunction [to ensure COVID-19 safety precautions] will prevent unnecessary illness in a group of people who will soon return to live among the general population."[268] Thus, coercive public health interests in quarantine are shown to override the prisoner's own health risks and vulnerabilities.

3. Victim Impact

Only occasionally is the crime victim's voice ever noted or considered,[269] but it also seems that most federal compassionate release cases

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[264] U.S. v. Rodriguez, 451 F. Supp. 3d 392 (E.D. Pa. 2020).

[265] *Id.* at 401.

[266] *See* U.S. v. Aruda, 472 F. Supp. 3d 847 (D. Haw. 2020).

[267] U.S. v. Riley, No. 14-cr-30055, 2020 WL 4036381 (C.D. Ill. July 17, 2020).

[268] Baqer v. St. Tammany Par. Gov., 2020 WL 1820040, at *4, 14 (E.D. La. Apr. 11, 2020) (failing to circumvent the strict exhaustion requirements of the Prison Litigation Reform Act, and noting that Section 3142(g) also applies to release of pretrial detainees).

[269] *E.g.*, U.S. v. Apicella, No. 2:18-cr-49-FtM-38NPM, 2020 WL 7260760 (M.D. Fla. Dec. 10, 2020) (explaining that the victim's objection to compassionate release was taken into account and that release would violate the victim's right to reasonable protection under the Crime Victim's Rights Act, 18 U.S.C. § 3771(a)(1)); U.S. v. Bischoff, 460 F. Supp. 3d 122, 128 (D. N.H. 2020) (considering victim's opposition to compassionate release of an offender convicted of fraud, but granting release due to his health risks); U.S. v. Ebbers, 432 F. Supp. 3d 421 (S.D.N.Y. 2020) (explaining that the federal District Court had *sua sponte* required the Government to notify the victims in the case of the petition for compassion release in accordance with the Crime Victims' Rights Act).

addressed have been nonviolent or victimless.[270] Certainly, in some emotionally difficult cases, victims of crime may not wish to be heard on the matter of compassionate release,[271] or they may feel even more strongly regarding the need to communicate their wishes to the court.[272] They also may feel quite differently from each other regarding the same offender's petition for compassionate release.[273]

At the federal level, pursuant to the Crime Victims' Rights Act, victims of crime have the right to notice of any public court proceeding involving the crime or "of any release or escape of the accused."[274] Victims also have the right to be heard at any public proceeding involving "release, plea, sentencing, or any parole proceeding."[275] The key limitation is the term "public proceeding." With respect to managing compassionate release motions under section 603(b) of The First Step Act, in August 2020, the Chief Justice of the Southern District of Illinois issued an Administrative Order stating that "the U.S. Attorney's Office is permitted to provide notice of any motion for compassionate release to any victim."[276] The Order only briefly

[270] *E.g.*, U.S. v. Snow, Crim. Action No. 5:18-CR-52-TBR, 2021 WL 260667 (W.D. Ky. Jan. 26, 2021) (denying the petition of a victimless offender, where "[g]ranting him compassionate release when he has served only 14 months of a ten-year sentence would also lead to unwarranted sentence disparities and would be unjust in light of the serious and reckless nature of his crimes.").

[271] *E.g.*, U.S. v. Chambers, No. 08-cr-30057, 2020 WL 6270274 (S.D. Ill. Oct. 23, 2020), *pending appeal*, U.S. v. Chambers (7th Cir. 2020) (explaining the victim declined to comment regarding a petition for compassionate release by an offender convicted of enticement of minors and transportation of child pornography); U.S. v. Watson, No. 3:18-cr-00025-MMD-CLB-1, 2020 WL 4251802 (D. Nev. July 22, 2020) (requesting victim responses regarding a petitioner convicted of possession of child pornography, but receiving none).

[272] U.S. v. Cotterman, No. CR-07-01207-001-TUC-RCC (CRP), 2020 WL 6395444 (D. Ariz. Nov. 2, 2020) (holding that to release a child sexual abuse offender after only one-third of his sentence was complete "would be an affront to the victim's sense of justice").

[273] *See, e.g.*, U.S. v. Doobay, No. 3:16-cr-122-J-32MCR, 2020 WL 5749921 (M.D. Fla. Sept. 25, 2020) (noting that one crime victim supported release of a petition involving mail and wire fraud, while other crime victims in the case opposed release); U.S. v. Williams, 456 F. Supp. 3d 414 (D. Conn. 2020).

[274] Crime Victim Rights Act, 18 U.S.C. § 3771(a)(2) (2018).

[275] *Id.* at § 3771(a)(4).

[276] In re Compassionate Release Provision of the First Step Act of 2018, Admin. Order No. 265, (S.D. Ill.) (Aug. 14, 2020), https://www.ilsd.uscourts.gov/Forms/AdminOrder265FourthAmendment.pdf (addressing the First Step Act of 2018, P.L. 115-391, 132 Stat. 5194 (2018)).

recognized the Crime Victims' Rights Act, including its required notice to victims and a right to be heard in public hearings related to an inmate's release.[277] However, due to the "volume of motions being filed" within a short time,[278] a number of the decisions of courts in this jurisdiction appear to have occurred without a public hearing and involved "victimless" drug crimes, so crime victims were not usually involved.[279] The Administrative Order explicitly requested that the Bureau of Prisons provide counsel with the defendant's "medical records" for the six-month period prior to the filing of the motion for compassionate release, but made no mention of other types of records, including those involving crime victim perspectives and impacts.[280] The U.S. Attorney's Office would be given fourteen days to respond to a compassionate release motion,[281] and the court would rely heavily on the U.S. Probation Office to help determine factors that influence the decision to release the defendant early, broadly considering "the needs and/or risk of the defendant."[282]

Thus, the existence of rights does not equate to the availability of rights for victims of crime. The type of offense may have an impact. With respect to property crime victims and political corruption, some courts and crime victims have taken a harsh stance despite a lack of violence. Bernie Madoff's compassionate release petition was denied by the court, which took into account that 520 of his victims wrote to the court, of which 96% advocated for denial of release.[283] In *United States v. Gionfriddo*, the District

[277] *See* U.S. v. Haynes, 456 F. Supp. 3d 496 (E.D. N.Y. 2020) (deciding that victim statements and notification were not required under the Crime Victims' Rights Act because the court would assess the petition on the writings, not in a public hearing).

[278] In re Compassionate Release Provision of the First Step Act of 2018, *supra* note 276.

[279] Correspondence with Federal Public Defender for the Southern District of Illinois, Melissa Day (Jan. 12, 2021). "So far, I have not had any public hearings on cases with victims - and very few hearings whatsoever on the coronavirus compassionate release cases (I believe I had one or two hearings early on in the bond context, not in a straight compassionate release context). Most coronavirus compassionate release cases are simply decided on the briefs and review of the record. In my experience, most of these cases are 'victimless' in that they are drug cases." *Id.*

[280] In re Compassionate Release Provision of the First Step Act of 2018, *supra* note 276.

[281] *Id.*

[282] *Id.*

[283] U.S. v. Madoff, 465 F. Supp. 3d 343 (S.D. N.Y. 2020).

Court of Connecticut denied the compassionate release petition of a 69-year-old inmate with asthma, convicted of mail and wire fraud, who had been a former attorney and mayor, stealing over one million dollars from legal clients and his disabled brother.[284] The court took into account victim impact statements addressing the compassionate release petition, sharing that "[h]is most recent victims, the law firm and his brother, have voiced their objection to his early release, and expressed their concern that he might reoffend."[285] In *U.S. v. Davis*, the Central District Court of California denied compassionate release of an offender convicted of fraud, contemplating that some of the elderly victims in the case had expressed fears of the offender should they submit a victim statement or should the offender be released.[286]

One cannot help but question the imbalance in the number of victims willing to submit victim impact statements in cases involving nonviolent property crimes or on behalf of minor victims who likely have little say as to whether a family member submits a statement on their behalf. Far fewer cases involving adult victims of violent crime emerge upon review of COVID-19 compassionate release cases to date.[287] Whether the relative absence is due to fear, coercion, or love in a family-involved case, it does manifest that crime victim impact statements, in general, play a key role but cannot substantially assist the courts in ensuring equitable sentencing among offenders. In many cases, one must also question whether the Government actually complied with the Crime Victim Rights Act and notified the crime victim of the petition for compassionate release.[288] If no public hearing is

[284] U.S. v. Gionfriddo, 2020 WL 3603754

[285] *Id.* at *4. *See also* U.S. v. DiBiase, No. 12 Cr. 834 (ER), 2020 WL 5525629 (S.D. N.Y. Sept. 14, 2020) (denying compassionate release for an offender convicted of racketeering, considering, in part, multiple victim impacts statements objecting to release and expressing their continued trauma); U.S. v. Israel, No. 05 CR 1039 (CM) 2019 WL 6702522 (S.D. N.Y. Dec. 9, 2019) (considering the victim's objection to compassionate release related to a massive investor fraud scheme).

[286] U.S. v. Davis, No. EDCR 17-00277 JLS, 2020 WL 6600169 (C.D. Cal. Apr. 21, 2020).

[287] *See, e.g.*, U.S. v. Cannon, No. 3:17-CR-174, 2021 WL 231100, at *3 (D. Conn. Jan. 22, 2021) (denying a petition for compassionate release from an offender with a history of domestic violence and firearms offenses in the interests of public safety, without mention that the family victims ever exercised (or were notified of) their right to communicate their perspective to the court).

[288] *See* U.S. v. Webster, Crim. No. 3:91cr138 (DJN), 2020 WL 618828 n.1 (E.D. Va. Feb. 10, 2020) (judicially chastising the U.S. Attorney for failing to present or

held on a petition for parole or early release, then the federal Crime Victim Rights Act would not require that the victim be given an opportunity to be heard.[289] Even so, the courts will still speak for the victim in the absence of their express views, such as the District Court in the Eastern District of Virginia, which stated: "allowing this twice-convicted murderer to walk free before he has completed his sentence would be unjust to his victims and the public at large."[290]

The cases above represent instances in which the court directly based its decisions, at least in part, on victim impact statements related to COVID-19 compassionate release petitions. The question remains whether crime victims and offenders, who are often members of the same communities, would inform the court and Bureau of Prisons as to the relevant factors more effectively than the present approach to the crisis in which state actors may disregard or sidestep individual interests and rights. In other cases, the court noted the position of crime victims, but ruled differently. More often than not, the perspective of the larger community potentially impacted was also not considered. Although prisoners may be housed far away from where they had lived, or where they may be released, during imprisonment, prisoners remain residents of a larger community beyond the prison walls. This was made apparent where COVID-19 transmission passed into the correctional facilities and into the neighboring communities as staff went to and from work at the facility and prisoners were released.[291] Usurping the community and crime victim voice as a matter of state control disregards the porous nature of risks relevant to incarceration, where community voices are vital not only with regard to proportionality of sentencing, but also to public health risks.

Overall, the apparent message of many of the judicial decisions addressing First Step Act compassionate release petitions is that traditional theories of retribution, deterrence, and proportionality to ensure justice are paramount, rather than rehabilitation, and the crime victim rights movement

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mention attempts to notify the murder victim's family in a compassionate release hearing).

[289] *See supra* notes 269 and 270.

[290] U.S. v. Webster, 2020 WL 618828, at *8.

[291] *See* Michael Ollove, *How COVID-19 in Jails and Prisons Threatens Nearby Communities*, STATELINE BLOG, THE PEW CHARITABLE TRUSTS (July 1, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/01/how-covid-19-in-jails-and-prisons-threatens-nearby-communities.

has been marginalized yet again. Or rather, a crime victim's rights are perceived to be impactful only when a victim supports state control in the criminal justice system. For example, as the Southern District of Mississippi stated when denying a petition from a physically ill offender convicted of conspiracy to defraud the United States for an amount of at least $1.5 million, who was housed at a Louisiana correctional facility where the first inmate in the nation died of COVID-19:

> Longgrear did take responsibility for his actions and the Court considered that in imposing his sentence. However, Longgrear's charges were very serious and, as the recent victim letters show, many of his victims continue to suffer from his actions. Given that Longgrear has served less than 30 percent of the imposed sentence, reducing his sentence at this juncture would not effectively "reflect the seriousness of the offense ... promote respect for the law ... [or] provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A). It would also not "afford adequate deterrence to criminal conduct" under subsection (a)(2)(B).[292]

When crime victims do exercise their right to submit a victim impact statement to influence sentencing or early release, the act occurs at a critical stage in the proceeding, deemed worthy of protection by the presence of defense counsel.[293] This is so because "[a]mong the purposes of the CVRA is to make victims 'full participants' in the sentencing process and to 'ensure that the district court doesn't discount the impact of the crime on the victims.'"[294] Full participation by crime victims must be judicially screened and reviewed to ensure that participation is not unduly prejudicial, such as with the use of dramatic victim impact videos,[295] or by inserting racial prejudice or other forms of improper bigotry into the proceeding.[296] Courts must also anticipate that victims of crime may not all respond similarly, where studies have shown that victims exhibiting less emotion when

[292] U.S. v. Longgrear, No. 3:18-CR-77-CWR-FKB-1, 2020 WL 5416517, at *1 (S.D. Miss. Aug. 26, 2020).

[293] U.S. v. Yamashiro, 788 F.3d 1231, 1235 (9th Cir. 2015).

[294] *Id.*

[295] State v. Hess, 23 A.3d 373 (N.J. 2011) (including evocative music).

[296] *See* José Felipé Anderson, *Will the Punishment Fit the Victims? The Case for Pre-Trial Disclosure, and the Uncharted Future of Victim Impact Information in Capital Jury Sentencing*, 28 RUTGERS L.J. 367, 413 (1997).

delivering testimony and victim impact statements may influence courts to issue lower sentences, regardless of the victims' intent.[297] When all arbiters are individuals exercising judgment, subject to bias and cultural influence far removed from the community from which offenders and victims of crime reside, it makes sense that the interests of offenders and victims are heard clearly and consistently in court.

That many victims of crime may choose not to exercise their rights at sentencing or upon early release motions during the pandemic is no different from the pattern seen in pre-pandemic times,[298] except that the absence of public hearings and the procedural hurdles of early release motions during COVID-19 served as a formidable barrier to the exercise of crime victim rights. On an emotional level, victims of crime may not wish to revisit the trauma by continued involvement.[299] They face a history of mutual distrust between the communities most in need of protection by the criminal justice system and the criminal justice state actors who judge who deserves protection.[300] One way to move beyond this stalemate is a joining of forces.

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[297] Mary R. Rose, et al., *Appropriately Upset? Emotion Norms and Perceptions of Crime Victims*, 30 L. & HUMAN BEHAV. 203 (2006).

[298] KENNEDY & SACCO, *supra* note 6, at 188 (reporting a 1994 study that found that less than 18% of eligible victims or families attend sentencing, 15% submit written victim impact statements, and only 9% provide oral victim impact statements).

[299] *See* Dena M. Gromet, *Restoring the Victim: Emotional Reactions, Justice Beliefs, and Support for Reparation and Punishment*, CRIT. CRIM. 19 (2012) (suggesting that victims may not be able to predict whether a merciful or retributive position in a victim impact statement will provide them with greater satisfaction); KENNEDY & SACCO, *supra* note 6, at 201, 204 (explaining that some research has indicated that giving a victim impact statement does not tend to increase victim satisfaction with the criminal justice process, while other research demonstrates that victim-Offender reconciliation projects and mediation tend not to increase levels of restitution paid).

[300] *See* KENNEDY & SACCO, *supra* note 6, at 190; William S. Laufer and Robert C. Hughes, *Justice Undone*, 58 AM. CRIM. L. REV. 155, 173 (2021) (listing sexual violence crimes against women as the least reported type of crime, due in part to "the absence of a formal criminal justice response"); Ernst H. Weyand & Lori McPherson, *Enhancing Law Enforcement Response to Missing Person Cases in Tribal Communities*, 69 DEPT. OF JUSTICE J. F. L. & PRAC. 137, 138 (2021) (asserting that "a long history of distrust" with the United States government contributes to delayed reporting of missing persons in tribal communities); Andrea J. Ritchie, *#Sayhername: Racial Profiling and Police Violence Against Black Women*, 41 HARBINGER 187, 193 (Aug. 11, 2016) ("Young women of color, homeless and low-income women, lesbian and trans women, and women who are (or are perceived to

If the crime victim rights movement is willing to be more representative and inclusive alongside other civil rights advocates, including those representing criminal defendants, the justice system may be forced to reckon with the injustice of mass incarceration and the marginalization of crime victim rights. After all, each group arises from the communities most impacted by state criminal justice policies.

V. CONCLUSION

When government decision-making in criminal sentencing becomes too removed from the community that was and will be impacted by the defendant's conduct, then the public trust will erode and the justice system will lose its sense of justice.[301] This has resulted in dispassionate mandatory minimum sentences for nonviolent conduct and mass incarceration, and it has resulted in victims of crime feeling marginalized and revictimized by the justice system. Advocates for both crime victims and convicted offenders need to work together to avoid the pitfalls of a remote government meting out justice that inevitably treats vulnerable communities with disregard.

As debate over the criminal justice system's priorities and effectiveness rage on, adding in the voices of crime victims, members often from the same communities as the convicted offenders would render great benefit. False depictions of typical crime victims as irrational and bent on vengeance and typical criminal offenders as dangerous and bent on terror have impeded much needed reform of the justice system. The atrocity of mass incarceration of America's poorest young men and the rise of crime victims in low-income communities could have been avoided if the calls of their communities for better healthcare access, education, housing, and employment opportunities had been heard and respected.

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be) involved in the drug or sex trades are particularly targeted for sexual violence by police."); Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219, 1224 (2000) (identifying data that suggests that low-income African-American communities fear both crime victimization and police misconduct).

[301] *See* Scott Burris et al., *Federalism, Policy Learning, and Local Innovation in Public Health: The Case of the Supervised Injection Facility*, 53 ST. LOUIS U. L.J. 1089, 1092 (2009) ("Crafting interventions that effectively address the epidemic of addiction in this country is a difficult challenge, but the inherent challenges are greatly magnified by the functionally centralized and politically charged nature of drug policy in the United States."); REIMAN, *supra* note 7, at 170 ("Those who are in a position to change the [criminal justice] policy are not seriously harmed by its failure . . .").

Crime victims, suffering the aftermath of the criminal act, often do have an interest in the goals of retribution and deterrence, but with meaning and parity such that making amends and the possibility of closure are made more possible. Retribution with proportionality, informed by the mental health benefits of contrition, offers respect for the autonomy and agency of offenders, even at a time when the majority of inmates have disabilities, including neuroatypical conditions. If the state opts to diminish the goal of retribution to the extent that it employs a paternalistic means of social control, such as pharmaceutical incapacitation or extreme public health surveillance of offenders in a decarceral state, this could discount an offender's capacity for accountability. Of course, this specter was not an option during the COVID-19 pandemic, when the courts in compassionate release cases focused not on rehabilitation programming and human potential, but on retribution and restraint, despite the lethality of the contagion in close quarters

Although crime victims often support retribution as a critical factor in criminal justice, crime victims are not without compassion, nor are they bereft of an understanding that the criminal justice system's goals of deterrence and rehabilitation are meant to be protective of society. The majority of crime victims and communities impacted by crime also personally understand the circumstances leading to crime better than the court or justice system ever could. The community has a shared experience the challenges of lack of health care and mental health care, unemployment, and addiction, living in the same community or in the same household as the person convicted. A spousal victim of domestic violence may fully fear and understand the racial inequities that a call to 911 could bring to her abuser, a man more vulnerable to being incarcerated and less likely to obtain releasd during a pandemic. She herself may be at greater risk of contracting COVID-19 due to lack of quality health care and housing, family obligations, and working in the public sphere.[302] If the court and prison systems have failed to consider crime victim perspectives during this crisis due to expediency and longstanding neglect, they have also disregarded the voice of the defendant's own community affected by the decision. It is time that advocates for both crime victims and offenders combine efforts to represent a stronger and more effective advocacy approach to the injustices of the criminal justice system,

[302] *See* Lucy Erickson, *The Disproportionate Impact of COVID-19 on Women of Color*, SOC'Y FOR WOMEN'S HEALTH RES. (Apr. 30, 2020), https://swhr.org/the-disproportionate-impact-of-covid-19-on-women-of-color/.

as revealed by the response of the courts when the pandemic was raging alongside pivotal and historic social justice movements in the United States.