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Can COVID-19 Teach Us How to End Mass Incarceration?

AMY FETTIG*

In this essay, the author argues that federal, state and local government response to the COVID-19 epidemic in prisons and jails was largely incompetent, inhumane, and contrary to sound public health policy, resulting in preventable death and suffering for both incarcerated people and corrections staff. However, the lessons learned from these failures provide a roadmap for policy priorities and legal reform in our ongoing need to decarcerate and end the era of mass incarceration, including: (1) rolling back extreme sentences, recalibrating sentences generally and providing for “second look” mechanisms to those currently serving sentences beyond 10 years; (2) ensuring that decarceration efforts center racial justice as a goal both prospectively and retrospectively; and (3) promoting voting rights for all incarcerated people and those living in the community with a felony conviction.

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INTRODUCTION

The history of America's response to the COVID-19 pandemic will not be pretty. In some respects, we might look to the wondrous accomplishments of science, the speedy discovery and production of the vaccine, and the resilience of millions of individuals responding to the economic and human costs of the virus with care and creativity. In other respects, however, we find widespread incompetence, indifference, opportunism, and sheer inhumanity that inflicted preventable suffering and death in communities across the nation, especially communities of color. The plight of the millions of people trapped in our prisons during the pandemic surely fits in the latter category.

Serious and sustained thought and analysis should be given to both our successes and our failures in dealing with the COVID-19 pandemic. Hopefully, lessons will be learned, and actions will be

taken to better prepare for the next global human challenge we will inevitably face. But closer to home, there are some immediate and dire lessons to learn. Furthermore, there are legal and policy choices we must make with respect to our criminal justice system—choices to not only save lives, but also bring the system to a more rational, human-centered approach to crime and punishment.

In this essay, I examine what has been happening inside prisons during the pandemic; the inadequate official responses to those conditions; the punitive excess in our criminal legal system that fostered this inadequate response; and what we can learn from these failures to implement concrete systematic change that will help end the era of mass incarceration in the United States.

I. WHAT HAPPENED TO INCARCERATED PEOPLE DURING THE PANDEMIC?

Thousands of incarcerated people were killed by the pandemic,¹ but they are not just statistics. It is important to remember that the tragic and overwhelming number of deaths caused by the pandemic, and our response to it, are ultimately about individual lives cut short. Take the life of Clarence Givens as an example.² Clarence was a long-time correspondent with my office because of our work with individuals serving extreme sentences.³ Unfortunately, Clarence was also an exemplar of the irrationality of America’s extreme punishment paradigm.

In 1996, the State of Wisconsin sentenced him to the ludicrous sentence of 110 years in prison “for selling less than three grams of heroin to an undercover informant.”⁴ Because Clarence had previously committed nonviolent offenses, the State charged him as a

¹ *COVID Behind Bars Data Project*, UCLA L. BEHIND BARS DATA PROJECT, <https://uclacovidbehindbars.org/> (last visited Nov. 1, 2021) (collecting and analyzing public information about the coronavirus pandemic in prisons, jails, youth facilities and immigration detention centers across the United States).

² Clarence Givens’ story is set forth more fully in my colleague’s recent publication. See ASHLEY NELLIS, *NO END IN SIGHT: AMERICA’S ENDURING RELIANCE ON LIFE IMPRISONMENT 20–22* (2021), <https://www.sentencingproject.org/wp-content/uploads/2021/02/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf>.

³ *Id.*

⁴ *Id.* at 20.

habitual offender, meaning he was eligible for a much longer sentence “regardless of the severity of his present offense.”⁵ Such habitual offender laws have a long and checkered history of being both disproportionately inflicted on Black defendants like Clarence⁶ and having little to no deterrent value, especially for drug-related crimes.⁷ Ultimately, habitual offender laws have normalized extreme and irrational sentences that in no way present a balanced approach to justice while also depriving individuals and communities of freedom for minimal, if any, public safety benefit.

During his long incarceration, Clarence developed prostate cancer and underwent two hip replacement surgeries.⁸ As a result of these surgeries, he was eventually confined to a wheelchair.⁹ Frail and sick, Clarence spent years in prison but maintained an exemplary record.¹⁰ As the threat of COVID-19 advanced across the country, Clarence—like so many others desperate to avoid the ravages of the virus in institutional settings—naturally sought his release through official channels.¹¹ As an older person with pre-existing health issues, Clarence was especially vulnerable to the virus and did not present a threat to the community.¹² As the pandemic raged through Wisconsin prisons, Clarence’s family wanted him to come home so that he could live in a safer environment.¹³ But no government mercy was given to Clarence.¹⁴ Instead, in November 2020, he developed a high fever.¹⁵ His cellmate wrote to my office

⁵ *Id.*

⁶ See, e.g., Charles Crawford et al., *Race, Racial Threat, and Sentencing of Habitual Offenders*, 36 *CRIMINOLOGY* 481, 503 (1998) (“Logistic regression showed that defendants with longer prior records or more serious criminal charges were more likely sentenced as habitual, as were defendants from places with a higher percentage of black residents. But after the effects of these factors and others are accounted for, it is clear that race does indeed matter in habitual offender sentencing.”).

⁷ See Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 *J. CRIM. L. & CRIMINOLOGY* 10, 11 (1995).

⁸ NELLIS, *supra* note 2, at 20.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

and described how other prisoners in their housing pod donated vitamins and tea to try and nurse Clarence back to health.¹⁶ Unfortunately, Clarence was admitted to the hospital the day after this letter was sent.¹⁷ Within twenty-four hours of his admission, Clarence was unconscious and breathing on a respirator.¹⁸ On December 7, 2020, he died of COVID-19 at the age of sixty-eight.¹⁹

Clarence's tragic and likely preventable death represents one of the thousands of lives lost in our prisons and jails.²⁰ American correctional institutions are uniquely unable to control respiratory diseases, such as COVID-19, because of poor ventilation, overcrowding that makes social distancing impossible, poor sanitation, and indifferent—or worse—access to appropriate medical care.²¹ Early in the pandemic, correctional institutions in states across the country failed to provide masks and other personal protective equipment, consistently test inmates and staff for COVID-19, and adequately quarantine those who did test positive.²² As a result of these prevailing conditions and leadership failures, correctional institutions have been Petri dishes for the pandemic.²³ In fact, incarcerated individuals “have been 5.5 times more likely to get COVID-19 and have suffered a COVID-19 mortality rate 3 times higher than the general public.”²⁴ The most recent count, based on available data, indicates that more than 2,300 people have died of COVID-19 in prisons and jails, and this is likely an under-count.²⁵

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See *COVID Behind Bars Data Project*, *supra* note 1.

²¹ Emily Widra & Dylan Hayre, *Failing Grades: States' Responses to COVID-19 in Jails & Prisons*, ACLU (June 25, 2020), <https://www.aclu.org/report/failing-grades-states-responses-covid-19-jails-prisons>.

²² *Id.*

²³ See *id.*; UNLOCK THE BOX, SOLITARY CONFINEMENT IS NEVER THE ANSWER 3 (2020), <https://static1.squarespace.com/static/5a9446a89d5abbfa67013da7/t/5ee7c4f1860e0d57d0ce8195/1592247570889/June2020Report.pdf>.

²⁴ Emily Widra, *New Data Gives a Detailed Picture of How COVID-19 Increased Death Rates in Florida Prisons*, PRISON POL'Y INITIATIVE (Apr. 27, 2021), <https://www.prisonpolicy.org/blog/2021/04/27/florida-prison-mortality/>.

²⁵ ERIKA TYAGI ET AL., A CRISIS OF UNDERTAKING: HOW INADEQUATE COVID-19 DETECTION SKEWS THE DATA AND COSTS LIVES 6 (2021), https://uclacovidbehindbars.org/assets/cfr_report_final.pdf (collecting and

There are many medically vulnerable people, like Clarence, living behind bars.²⁶ In the era of mass incarceration, extreme sentences keep large numbers of people in prison for longer periods of time.²⁷ Indeed, we now have more people—over 200,000—serving life or virtual life sentences in American prisons than comprised our entire prison population in 1970.²⁸ As prison populations have increased so too has the age of those making up the prison populations.²⁹ In fact, between 2000 and 2016, the percentage of people in state prisons who are fifty-five years of age or older more than tripled resulting in nearly 150,000 older Americans in those institutions.³⁰ Older adults have been hit the hardest by the COVID-19 pandemic.³¹ People sixty-five and older face the greatest risk of hospitalization and death due to COVID-19, accounting for nearly 80% of all COVID-19 deaths as of September 29, 2021.³² The risks for older adults are even more pronounced among the incarcerated as they tend to suffer from more chronic health conditions than their free world counterparts.³³ The combination of poor access to medical care and the stress of prison life means that by age fifty, incarcerated people often exhibit health problems more commonly seen in people many years older.³⁴ Thus, it should come as no surprise that the incarcerated population is extremely vulnerable to COVID-19.

analyzing public information about impact of COVID-19 in prisons, jails, youth facilities, and immigration detention centers across United States).

²⁶ See, e.g., Weihua Li & Nicole Lewis, *This Chart Shows Why the Prison Population Is So Vulnerable to COVID-19*, MARSHALL PROJECT (Mar. 19, 2020, 2:45 PM), <https://www.themarshallproject.org/2020/03/19/this-chart-shows-why-the-prison-population-is-so-vulnerable-to-covid-19>.

²⁷ See *id.*

²⁸ NELLIS, *supra* note 2, at 4.

²⁹ See *id.*

³⁰ Li & Lewis, *supra* note 26.

³¹ Meredith Freed et al., *COVID-19 Deaths Among Older Adults During the Delta Surge Were Higher in States with Lower Vaccination Rates*, KAISER FAM. FOUND. (Oct. 1, 2021), <https://www.kff.org/policy-watch/covid-19-deaths-among-older-adults-during-the-delta-surge-were-higher-in-states-with-lower-vaccination-rates/>.

³² *Id.*

³³ Li & Lewis, *supra* note 26.

³⁴ *Id.*

Due to the nature of COVID-19, the vulnerability of the incarcerated population, and the conditions of our prisons, these institutions have become leading hotspots for COVID-19.³⁵ Moreover, the movement of staff between correctional facilities and their communities, coupled with the close contact between staff and incarcerated people, enables the virus to spread into and out of these facilities.³⁶ According to The Marshall Project, more than 114,000 prison staff members nationwide had tested positive for COVID-19 by June 2021.³⁷ As of May 2021, One Voice, a nonprofit group that tracks correctional officers' deaths, found that 219 officers and forty-one correctional staff had died of COVID-19 since March 2020.³⁸ In contrast, the group notes that in a typical year, "about eleven officers lose their lives" while on duty.³⁹

While the pandemic transformed prisons into hotbeds of infection and death, incarcerated people were subject to increasingly dire conditions.⁴⁰ Many prisons reacted to the pandemic by locking facilities down or leaving prisoners in solitary or near-solitary-like conditions of severe isolation and immobility for months at a time.⁴¹ Both Solitary Watch and the Marshall Project found that at least 300,000 people were placed in solitary since the advent of the pandemic, a stunning increase of nearly 500% over pre-pandemic levels.⁴² Likewise, facilities ended visitation, isolating many incarcerated people from friends and family—a reality that continues to endure.⁴³ And programs in facilities were suspended, which left

³⁵ Eddie Burkhalter et al., *Incarcerated and Infected: How the Virus Tore Through the U.S. Prison System*, N.Y. TIMES (Apr. 10, 2021), <https://www.nytimes.com/interactive/2021/04/10/us/covid-prison-outbreak.html> (noting that correctional facilities have been outbreak clusters in the United States).

³⁶ *A State-By-State Look at 15 Months of Coronavirus in Prison*, MARSHALL PROJECT (July 1, 2021, 1:00 PM), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

³⁷ *Id.*

³⁸ Luke Barr, *More Than 250 Correctional Officers Died From COVID-19*, ABC NEWS (May 14, 2021, 4:34 PM), <https://abcnews.go.com/US/250-correctional-officers-died-covid-19/story?id=77689370>.

³⁹ *Id.*

⁴⁰ *See, e.g.*, UNLOCK THE BOX, *supra* note 23, at 1.

⁴¹ *Id.* at 3.

⁴² *Id.* at 1, 4.

⁴³ Cary Aspinwall et al., *How Prisons in Each State Are Restricting Visits Due to Coronavirus*, MARSHALL PROJECT (July 30, 2021, 10:15 AM),

individual prisoners suffering from extreme idleness and delayed the possibility of early release for other prisoners who needed to complete these programs for such consideration.⁴⁴ On top of all this, staffing shortages at all levels not only mean that lockdowns in facilities are more common,⁴⁵ but also that basic services, such as medical and mental health care, have worsened—even where care is often routinely bad to begin with.⁴⁶

COVID-19 created a perfect storm of toxic conditions that challenged prisons and the outside community to avert a humanitarian crisis. The response to this crisis tells us much about what ails the criminal legal system and our continued inability to confront and end mass incarceration in any meaningful way.

<https://www.themarshallproject.org/2020/03/17/tracking-prisons-response-to-coronavirus>.

⁴⁴ See, e.g., Paul DeBenedetto, *Despite Call to Lower Prison Populations Amid COVID-19, Some Freeze Early Release Programs*, INDEPTH (Aug. 13, 2020, 8:28 PM), <https://www.houstonpublicmedia.org/articles/news/criminal-justice/2020/08/13/379718/despite-calls-to-lower-prison-populations-amid-covid-19-some-freeze-early-release-programs/>; Peter Medlin, *COVID Shut Down Most Prison Education Programs. Here's How Incarcerated Students Have Kept Learning*, N. PUB RADIO (Apr. 13, 2021, 6:02 AM), <https://www.northern-publicradio.org/education/2021-04-13/covid-shut-down-most-prison-education-programs-heres-how-incarcerated-students-have-kept-learning>.

⁴⁵ Alexandra Marquez & Jordan Smith, *America's Federal Prisons Face a Massive Shortage of Workers*, CNBC (Aug. 16, 2021, 2:58 PM), <https://www.cnn.com/video/2021/08/16/americas-federal-prisons-face-a-massive-shortage-of-workers.html> (noting that severe worker shortages in some federal prisons require prison workers like cooks and counselors to work as correctional officers); Associated Press, *Inmates Spend More Time in Cells Because of Staff Shortages*, U.S. NEWS & WORLD REP. (Oct. 7, 2021), <https://www.usnews.com/news/best-states/kansas/articles/2021-10-07/inmates-spend-more-time-in-cells-because-of-staff-shortages> (detailing increased cell lock down and less access to programs due to staff shortages in Kansas); Ali Oshinskie, *DOC Unions Concerned About Staff Shortages in Prisons*, CT MIRROR (Sept. 15, 2021), <https://ctmirror.org/2021/09/15/doc-unions-concerned-about-staff-shortages-in-prisons/> (staffing shortages exacerbated by pandemic in Connecticut Department of Corrections raising safety concerns for officer union).

⁴⁶ See Keri Blakinger, *Prisons Have a Health Care Issue — And It Starts at the Top, Critics Say*, MARSHALL PROJECT (July 1, 2021, 6:00 AM) <https://www.themarshallproject.org/2021/07/01/prisons-have-a-health-care-issue-and-it-starts-at-the-top-critics-say>.

II. HOW DID GOVERNMENTS RESPOND TO THE COVID-19 CRISIS BEHIND BARS?

The public health threat that COVID-19 presented to our correctional institutions was immediately obvious. Even before they became coronavirus hotspots, medical, public health, and criminal justice experts and practitioners called for substantial depopulation in these facilities because prison infrastructure and policies are incompatible with basic Centers for Disease Control and Prevention guidelines and the heightened health vulnerability of incarcerated populations to the virus.⁴⁷ Early recognition of the problem, however, did not lead to sufficient measures to ameliorate conditions that would prevent suffering and death.⁴⁸ Instead, the response of federal, state, and local governments was largely characterized by a disorganized and piecemeal approach that failed to provide meaningful and comprehensive strategies, such as lowering the population in prisons, to confront the predictable spread of the virus.⁴⁹

And once a vaccine was developed, very few states and jurisdictions prioritized incarcerated people for vaccination, despite public calls to protect one of our most demonstrably vulnerable populations.⁵⁰

⁴⁷ See, e.g., NAT'L ACADEMIES OF SCIENCES, ENG'G, & MED. ET AL., *DECARCERATING CORRECTIONAL FACILITIES DURING COVID-19: ADVANCING HEALTH, EQUITY, AND SAFETY* 11–19 (Emily A. Wang et al. eds., 2020), <https://www.nap.edu/read/25945/chapter/1> (addressing “importance of depopulating congregate living and working areas, particularly high-risk settings like correctional facilities”).

⁴⁸ *Id.* at 102.

⁴⁹ See Oluwadamilola T. Oladeru et al., *A Call to Protect Patients, Correctional Staff and Healthcare Professionals in Jails and Prisons During the COVID-19 Pandemic*, 8 HEALTH & J. 17, 17 (2020) (“The United States’ uneven, piecemeal race to ‘flatten the curve’ has highlighted its own weaknesses in its ability to respond to a pandemic. Nowhere are these weaknesses more apparent than in U.S. correctional facilities.”).

⁵⁰ See Tiana Herring & Emily Widra, *Just Over Half of Incarcerated People are Vaccinated, Despite Being Locked in Covid-19 Epicenters*, PRISON POL'Y INITIATIVE (May 18, 2021), <https://www.prisonpolicy.org/blog/2021/05/18/vaccinationrates/> (noting that most states did not prioritize vaccination for incarcerated people, despite case rates of COVID-19 being four to five times higher than general population, resulting in just 55% of people in prison being vaccinated seven months after vaccines were first distributed).

Taken together, these failures demonstrate blind spots in our collective responsibility towards our fellow human beings. Furthermore, these shortcomings highlight why mass incarceration writ large has been such an intractable issue, despite widespread understanding that its human and fiscal costs cannot be justified for an alleged public safety benefit. An examination of these failures during the COVID-19 pandemic reveals the key areas that require rethinking if our goal is to create a more humane and just legal system that focuses on decarceration.

A. *The Failure to Adequately Decarcerate*

A consensus report by the National Academies of Sciences, Engineering, and Medicine issued recommendations that prisons can employ to limit the number of people exposed to the virus while also protecting the broader communities to which these individuals return.⁵¹ First, it recommended that meaningful and effective decarceration amidst the pandemic could limit the number of people exposed to the virus while also protecting the broader communities to which these individuals return.⁵² The report went on to recommend that the correctional officials and public health authorities assess the population levels of their facilities in order to follow the public health guidelines.⁵³ Factors to consider during this assessment include overcrowding, the physical design of the facilities, current prison conditions, and delivery of health services to the incarcerated population.⁵⁴ The report also set out clear guidelines for implementing COVID-19 testing and facilitating quarantines in the community for fourteen days (if needed) before released individuals could return to their families or group housing.⁵⁵ It further recommended the development of plans to ensure a safe re-entry for incarcerated persons to communities that include identifying housing resources; addressing access to public benefits, such as the Supplemental

⁵¹ NAT'L ACADEMIES OF SCIENCES, ENG'G, & MED. ET AL., *supra* note 47, at 4–8.

⁵² *Id.* at 15–16.

⁵³ *Id.* at 5.

⁵⁴ *Id.*

⁵⁵ *Id.* at 7.

Nutrition Assistance Program; and working with community health systems for access to health care.⁵⁶

Sensible policy options were and are available to federal, state, and local leaders to confront COVID-19 behind bars.⁵⁷ But very few comprehensive policies were put in place to reduce the public health threat that conditions of confinement in prisons and jails present to the people who live and work in these institutions and the communities in which they are located.⁵⁸ Instead of viewing the pandemic as a chance to comprehensively decarcerate our bloated prisons, jurisdictions adopted a mish-mash of early release mechanisms, enhanced earned time credits, increased compassionate release, and occasionally sentence commutations.

These measures did result in some releases. But most were directed at a limited population that did not allow for the most vulnerable to be released.⁵⁹ In the state prisons, even some of the most expansive measures, such as New Jersey's Senate Bill 2519,⁶⁰ which led to the release of more than 2,000 people,⁶¹ was limited to incarcerated adults or youth within 365 days of scheduled release and excluded people sentenced for murder and certain sex offenses, regardless of whether they, too, were close to release.⁶² Similarly, in Virginia, a budget amendment allowed the director of the Department of Corrections to release some imprisoned people with less

⁵⁶ *Id.* at 96–98.

⁵⁷ *See id.* at 14 (recognizing the various strategies available to protect people in correctional facilities, such as decarceration, physical distancing, and implementation of testing protocols).

⁵⁸ *See, e.g.,* Danielle Wallace, *Correctional Officers Are Driving the Pandemic in Prisons*, CONVERSATION (Aug. 18, 2021, 8:12 AM), <https://theconversation.com/correctional-officers-are-driving-the-pandemic-in-prisons-164741> (noting correlation between increased COVID-19 infection rates in prison and surrounding community).

⁵⁹ *See* Keri Blakinger & Joseph Neff, *31,000 Prisoners Sought Compassionate Release During COVID-19. The Bureau of Prisons Approved 36*, MARSHALL PROJECT (June 11, 2021, 6:00 AM), <https://www.themarshallproject.org/2021/06/11/31-000-prisoners-sought-compassionate-release-during-covid-19-the-bureau-of-prisons-approved-36> (“[W]ardens denied nearly 23,000 requests because the person ‘does not meet criteria.’”).

⁶⁰ S. 2519, 219th Leg., Reg. Sess. (N.J. 2020).

⁶¹ Tracey Tully, *2,258 N.J. Prisoners Will be Released in a Single Day*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/04/nyregion/nj-prisoner-release-covid.html>.

⁶² N.J. S. 2519.

than one year left on their sentence, but this measure excluded people sentenced to a Class 1 felony or a sexually violent offense.⁶³ In Washington, D.C., a notably progressive jurisdiction, the City Council modified its criminal code to expand eligibility for compassionate release during the pandemic to those who have served at least twenty years in prison and are at least sixty years old.⁶⁴ The amended version allows individuals to cite their age, health, or other “extraordinary and compelling reasons” as justification to petition the court for release.⁶⁵ Although the new law does not include any explicit carve-outs for the nature of conviction, the D.C. Court of Appeals temporarily blocked the release of a person with a rape conviction, despite a lower court ruling that his health condition justified release under the law.⁶⁶ The law’s requirement that most petitioners demonstrate service of at least 20 years also broadly limits its applicability.⁶⁷ Moreover, court data demonstrates that although the D.C. courts adjudicated 562 release requests by July 2021, only 176 people had been granted release under the emergency provisions enacted in the spring of 2020.⁶⁸

Orders to reduce incarcerated populations by governors also broadly restricted release to persons with nonviolent offenses or those nearing release.⁶⁹ For example, in California, early releases were first allowed for people serving sentences “for non-violent offenses, who do not have to register as a sex offender, and who had

⁶³ Press Release, Virginia Dep’t of Corr., Legislature Approves Authority for Virginia DOC to Release Some Offenders Early During Pandemic (Apr. 24, 2020), <https://vadoc.virginia.gov/news-press-releases/2020/legislature-approves-authority-for-virginia-doc-to-release-some-offenders-early-during-pandemic/>.

⁶⁴ Omnibus Public Safety and Justice Amendment Act of 2020, ch. 403, sec. 1203, § 24-403, 68 D.C. Reg. 19 (2021) (codified as amended at D.C. CODE § 24-403.04 (2021)).

⁶⁵ D.C. CODE § 24-403.04 (2021).

⁶⁶ Paul Duggan, *D.C. Appeals Court Halts Covid-Related ‘Compassionate Release’ of Convicted Rapist*, WASH. POST (Aug. 15, 2021, 5:20 PM), https://www.washingtonpost.com/local/legal-issues/court-blocks-prison-covid-release/2021/08/10/be3d63de-f6ce-11eb-9738-8395ec2a44e7_story.html.

⁶⁷ § 24-403.04.

⁶⁸ Duggan, *supra* note 66.

⁶⁹ Widra & Hayre, *supra* note 21.

60 days or less to serve” in April 2020.⁷⁰ Then, in July 2020 this was expanded to those with 180 days or less to serve on their prison term.⁷¹ In Kentucky, the Governor signed executive orders commuting the sentences of 352 people sentenced to low-level felonies.⁷² And in Maryland, the Governor signed an executive order authorizing early release to elderly persons and those nearing the completion of their sentence but precluded those convicted of sexual offenses from eligibility.⁷³

Government action at the federal level also proved entirely inadequate. Federal prisoners have been afforded only two possibilities for release: home confinement and compassionate release.⁷⁴ In March 2020, Congress expanded the eligibility criteria for home confinement and the Attorney General ordered Bureau of Prisons (“BOP”) officials to let more people go.⁷⁵ As a result, 23,700 were sent home.⁷⁶ But as the pandemic swept through the BOP, thousands began seeking compassionate release.⁷⁷ The number of petitions skyrocketed from 1,735 in 2019 to nearly 31,000 since the onset of the virus.⁷⁸ Despite the need for urgency, however, the BOP director approved only thirty-six requests, even less than the fifty-five such requests approved in 2019 before the onset of the pandemic.⁷⁹ Fortunately, the federal courts have stepped in and granted

⁷⁰ *Actions to Reduce Population and Maximize Space*, CAL. DEP’T OF CORRECTIONS & REHAB., <https://www.cdcr.ca.gov/covid19/frequently-asked-questions-expedited-releases/> (last visited Nov. 11, 2021).

⁷¹ *Id.*

⁷² Joe Sonka, *Gov. Beshear Commutes Sentences of Additional 352 State Inmates in Response to COVID-19*, LOUISVILLE COURIER J. (Apr. 28, 2020, 10:20 AM), <https://www.courier-journal.com/story/news/politics/2020/04/28/beshear-commutes-sentences-352-kentucky-inmates-response-covid-19/3038367001/>.

⁷³ Office of Governor Lawrence J. Hogan, Jr., *Implementing Alternative Correctional Detention and Supervision*, Md. Exec. Order No. 20-11-17-30 (Nov. 17, 2020), <https://governor.maryland.gov/wp-content/uploads/2020/11/Prisoner-Release-RENEWAL-11.17.20.pdf>.

⁷⁴ Blakinger & Neff, *supra* note 59.

⁷⁵ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 12003(b)(2), 134 Stat. 281, 516 (2020).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

compassionate release to several thousand people, despite BOP's intransigence.⁸⁰

For context, prisons nationwide oversaw a growth in their confined population by more than 700% between year ends 1972 and 2009.⁸¹ By May 2020, state prisons, which confine more than half of incarcerated individuals, had decreased their confined population by only 4% (from 1,260,393 to 1,207,710).⁸² At the federal level, the BOP downsized its incarcerated population by just 14% between March and November 2020 (from 175,315 to 154,396), remaining dangerously overcrowded.⁸³ By October 2021, that population had increased to 156,098 people.⁸⁴

It is worth noting that decarceration of jails was more successful at the beginning of the pandemic.⁸⁵ Jurisdictions initially controlled admissions by giving citations rather than formal arrests; ensuring that most offenses did not result in custodial holds; and suspending low-level arrests.⁸⁶ As a result, jail populations were reduced by 22% between January 2020 and July 2020 (from 738,400 to 575,952 people).⁸⁷ But since then, populations have again risen as jurisdictions discontinued population reduction measures.⁸⁸ The result of these lax policies is that from June 2020 to March 2021, local jail populations rebounded by 73,800 to a total of 647,200 people—a population increase of 13% in just nine months.⁸⁹ The return to pre-

⁸⁰ *Id.*

⁸¹ Carlos Franco-Paredes et al., *Decarceration and Community Re-entry in the COVID-19 Era*, 21 LANCET INFECTIOUS DISEASES e10, e11 (2021), <https://www.thelancet.com/action/showPdf?pii=S1473-3099%2820%2930730-1>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Federal Inmate Population Statistics*, FED. BUREAU PRISONS, https://www.bop.gov/about/statistics/population_statistics.jsp#pop_report_cont (last updated Oct. 28, 2021).

⁸⁵ JACOB KANG-BROWN ET AL., VERA INST. OF JUST., *PEOPLE IN JAIL AND PRISON IN SPRING 2021* 1 (2021), <https://www.vera.org/downloads/publications/people-in-jail-and-prison-in-spring-2021.pdf>.

⁸⁶ JAMES AUSTIN ET AL., *THE IMPACT OF COVID-19 ON CRIME, ARRESTS, AND JAIL POPULATIONS A PRELIMINARY ASSESSMENT* 12 (2020), [http://www.jfa-associates.com/publications/jss/Impact%20of%20COVID-19%20on%20Crime%20\(prelim\).pdf](http://www.jfa-associates.com/publications/jss/Impact%20of%20COVID-19%20on%20Crime%20(prelim).pdf).

⁸⁷ Franco-Paredes et al., *supra* note 81, at e11.

⁸⁸ *See* KANG-BROWN ET AL., *supra* note 85, at 1.

⁸⁹ *Id.*

pandemic policies is especially disconcerting in light of the evidence that the decreased jail population helped to reduce the spread of the virus without harming public safety.⁹⁰

Beyond the failure to decarcerate a sufficient number of people to save lives both inside and outside prisons, troubling evidence emerged that decarceration during the pandemic was exacerbating racial disparities.⁹¹ Sadly, this evidence was not surprising. For example, analyses examining these racial disparities in Illinois and Connecticut found that the number of white people who were decarcerated during the pandemic is substantially higher than the number of Black people decarcerated during this period.⁹² Likewise, research has found that incarceration for alleged offenses that could be safely managed without incarceration in the community has likely harmed public safety and has increased racial health disparities during the pandemic.⁹³ These findings further support the growing consensus among public health experts that large-scale decarceration as a response to COVID-19 should be implemented to protect incarcerated people and to mitigate the spread of both the virus and any increase in racial disparities as a result of the impact of COVID-19.⁹⁴ Similarly, experts believe that decarceration is a key element for policies related to biosecurity and pandemic preparedness.⁹⁵

Another glaring government misstep in the pandemic response in prisons is that some states are still attempting to build more prisons rather than reducing prison populations, in spite of the deadly lessons that states should have drawn from the pandemic.⁹⁶ The approach in Nebraska, a state with the second most overcrowded

⁹⁰ See Kelly Servick, *Pandemic Inspires New Push to Shrink Jails and Prisons*, SCI. (Sept. 17, 2020), <https://www.science.org/content/article/pandemic-inspires-new-push-shrink-jails-and-prisons>.

⁹¹ See Franco-Paredes et al., *supra* note 81, at e13.

⁹² *Id.* at e11.

⁹³ Eric Reinhart & Daniel L. Chen, *Carceral-Community Epidemiology, Structural Racism, and COVID-19 Disparities*, PNAS, May 25, 2021, at 1.

⁹⁴ *See id.*

⁹⁵ *Id.*

⁹⁶ See, e.g., Paul Hammel, *Nebraska Moves Forward with Plan for New \$230 Million Prison to Relieve Overcrowding*, OMAHA WORLD-HERALD (Apr. 23, 2021), https://omaha.com/news/state-and-regional/crime-and-courts/nebraska-moves-forward-with-plan-for-new-230-million-prison-to-relieve-overcrowding/article_3f6318b2-43c1-11eb-aae3-478f84b04353.html.

system in the country (after Alabama), is a prime example.⁹⁷ Nebraska reduced its prison population during the pandemic by a mere 6% from the end of 2019 through March 2021.⁹⁸ Instead of expanding decarceration efforts, the Nebraska Department of Correctional Services proposed building a new prison, and the governor vetoed legislation that would have made many people eligible for parole earlier.⁹⁹ During this same period, Alabama's dangerously overcrowded prison population declined by a modest 11%.¹⁰⁰ Rather than using the opportunity afforded by the pandemic to solve the longstanding problems of Alabama's bloated prison system, Governor Kay Ivey is instead planning to build three new prisons at a cost of \$1.3 billion.¹⁰¹ Alabama's state legislature is attempting to offset this enormous cost by using approximately \$400 million of the state's share of federal pandemic relief funds.¹⁰² At the same time, the legislature failed to pass proposed sentencing reforms that could have reduced long-standing overcrowding without new facilities.¹⁰³

B. *The Failure to Prioritize Vaccination for Incarcerated Populations*

The stunning failure to protect incarcerated populations through decarceration during the pandemic might have been partially offset by the stunning scientific victory that led to the development of the COVID-19 vaccine and its release in December 2020.¹⁰⁴ This

⁹⁷ *Id.*

⁹⁸ KANG-BROWN ET AL., *supra* note 85, at 6. Only three states reduced their prison populations by less than 10% during the pandemic: Arkansas (down 9.4%); Mississippi (down 9.1%), and Nebraska (down 6%). *Id.* at 13–14.

⁹⁹ *Id.*

¹⁰⁰ *See id.* at 6.

¹⁰¹ Kim Chandler, *Alabama Trying to Use COVID Relief Funds for New Prisons*, ASSOCIATED PRESS (Sept. 27, 2021), <https://apnews.com/article/coronavirus-pandemic-business-prisons-montgomery-kay-ivey-8a7d30c43f4e61987051368a9604fda9>.

¹⁰² *Id.*

¹⁰³ Brian Lyman, *Alabama Legislative Leaders See Possibility of Special Session on Prisons*, MONTGOMERY ADVERTISER (May 19, 2021, 11:38 AM), <https://www.montgomeryadvertiser.com/story/news/2021/05/19/alabama-legislative-special-session-prison-construction-possible/5162045001/>.

¹⁰⁴ *See* Katie Rose Quandt, *Incarcerated People and Corrections Staff Should Be Prioritized in COVID-19 Vaccination Plans*, PRISON POL'Y INST. (Dec. 8, 2020), <https://www.prisonpolicy.org/blog/2020/12/08/covid-vaccination-plans/>.

achievement has given many people hope that the death and suffering caused by the virus behind bars might soon be ameliorated.¹⁰⁵ By any measure, incarcerated people should have been high on the priority list to receive the vaccine. It was clear very early in the pandemic that the infection rate in prisons was much higher than that in the general population, and that the virus was much deadlier to prison populations.¹⁰⁶ Despite this data, in a November 2020 study conducted by the Prison Policy Institute, only ten states included incarcerated people in their phase 1 vaccine distribution plans, and eight states failed to list incarcerated people in any phase of vaccine distribution.¹⁰⁷ Correctional institutions have been slow to offer vaccines to incarcerated people,¹⁰⁸ and both incarcerated people and staff have been slow to agree to vaccination.¹⁰⁹ The reasons for this reluctance are likely multi-faceted, but many point to the widespread distrust of prison officials and prison medical treatment, the lack of basic public health education, information given to incarcerated populations by corrections systems, and entrenched political views and polarization of corrections staff members.¹¹⁰ Regardless of the reason, by mid-May 2021, nationwide data for people in prisons established that only fifty percent of people in prisons had even received one dose of the vaccine.¹¹¹ As a result, there has been a significant number of preventable deaths among incarcerated people and corrections staff.¹¹² In the state of Nevada, for example, one-

¹⁰⁵ *See id.*

¹⁰⁶ *See* Reinhart & Chen, *supra* note 93, at 6.

¹⁰⁷ Quandt, *supra* note 104.

¹⁰⁸ *See* Herring & Widra, *supra* note 50.

¹⁰⁹ Sarah N. Lynch, *Vaccinated Prisoners, Unvaccinated Guards Illustrate Biden's Tricky Road Ahead*, REUTERS (July 29, 2021, 5:02 PM), <https://www.reuters.com/world/us/vaccinated-prisoners-unvaccinated-guards-illustrate-bidens-tricky-road-2021-07-29/> (noting that only 50% of federal Bureau of Prisons employees had been fully vaccinated as of June 2021 despite being offered a shot and that only 34% of staffers in a federal prison in Oakdale, Louisiana, where 70% of prisoners were vaccinated against coronavirus, had taken the shot due to their political beliefs).

¹¹⁰ *See, e.g., id.* (“‘It’s just the distrust,’ said [Ronald] Morris, who told Reuters he decided it was best for him personally to get the [COVID-19] shot to protect his family. ‘It depends what side of the political spectrum you’re on or what part of the country that you’re in.’”).

¹¹¹ Herring & Widra, *supra* note 50.

¹¹² *See* Reinhart & Chen, *supra* note 93, at 6.

third of COVID deaths in prisons occurred in 2021 after the vaccines became available.¹¹³

These glaring examples of government incompetence and indifference have characterized much of corrections policy both before and during the pandemic. Indeed, the overriding ethos of mass incarceration barely faltered despite the unprecedented challenge, suffering, and death that COVID-19 presents to correctional institutions and surrounding communities. Even when an opportunity to minimize harm arose with the arrival of the vaccine, intentional indifference continued to characterize government response to saving the lives of incarcerated people.

III. LESSONS LEARNED FROM GOVERNMENT RESPONSE TO THE PANDEMIC THAT MIGHT INFORM ONGOING EFFORTS TO END MASS INCARCERATION

Over a year into the pandemic, mass incarceration continues to thrive in America.¹¹⁴ The current data available from the Vera Institute of Justice estimates that the total number of people incarcerated in federal and state prisons and local jails dropped by 14% from approximately 2.1 million in 2019 to about 1.8 million by June 2020, followed by a small decline of 2% by March 2021.¹¹⁵ These numbers reflect an abstract and unfulfilled story of what drives mass incarceration, and our inability to reform our corrections systems—or handle a life-threatening crisis in a rational and humane way.

Any honest evaluation of the lessons learned from the pandemic and its impact on our efforts to end mass incarceration must start with the individuals who are directly impacted. For me, that means understanding what happened to Clarence Givens in the Wisconsin system. Examining Clarence's case, the first question must be: why is anyone serving a 110-year sentence in the first place? And the second must be: what possible public safety reasons are there for keeping a wheelchair bound sixty-eight-year-old in prison?

Related to both Clarence's extreme sentence as a "habitual offender" and to his callous treatment at the hands of Wisconsin's Department of Corrections is the fact that he was Black. Wisconsin has

¹¹³ Herring & Widra, *supra* note 50.

¹¹⁴ See, e.g., KANG-BROWN ET AL., *supra* note 85, at 1.

¹¹⁵ *Id.*

the highest Black imprisonment rates in the nation.¹¹⁶ One in every thirty-six Black people in Wisconsin is behind bars.¹¹⁷ This is a larger rate of Black incarceration than the national average, where one in every eighty-one Black adults is serving time in state prison.¹¹⁸ Race permeates all aspects of our criminal legal system;¹¹⁹ it brought Clarence to prison for a 110-year sentence, and it likely played a role in officials' decision to keep him there despite his clear vulnerability to COVID-19.

Clarence and his fellow incarcerated people were unable to express their outrage to elected government leaders or hold them accountable for the deplorable response to the pandemic in prisons and the preventable suffering and death that resulted.¹²⁰ Without the check of the ballot box, incarcerated people have little ability to influence criminal legal policy or reform.¹²¹ The result is decades of mass incarceration policies that go unchecked and politicians who feel little compunction to serve the needs of all the people they allegedly represent in our democracy.

The failures stemming from the pandemic indicate there are mass incarceration reforms that must be implemented moving forward: we must roll back extreme sentencing, recalibrate the excessive punitiveness of our entire punishment paradigm, and implement routine mechanisms to return individuals to the community if they are not an ongoing public safety threat. Most importantly, we must center racial justice in all efforts to decarcerate if we are to actually end mass incarceration and ensure that those most directly impacted by the criminal legal system can participate in our democracy.

¹¹⁶ ASHLEY NELLIS, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* 5 (2021), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *See, e.g.*, Franco-Paredes et al., *supra* note 81, at e10 (“Inequities in the US criminal justice system stem from enduring the systemic effect of racial oppression . . .”).

¹²⁰ *See generally infra* Section III.C (analyzing effects of the systemic disenfranchisement of formerly and currently incarcerated populations on the democratic process).

¹²¹ *Id.*

A. *Current extreme sentencing policies sustain mass incarceration and must be reformed with shorter sentences and opportunities for release.*

During the pandemic, releases from correctional facilities have been piecemeal and seemingly uninformed by either public health or rational public safety goals.¹²² Decarceration efforts focused on people whose sentences were close to completion and individuals with low-level convictions; however, these efforts excluded whole categories of individuals with little regard for their vulnerability, their actual risk to public safety if released, or the concrete numbers of people who needed to be released in order to run correctional facilities safely.¹²³ In short, the official response to the pandemic across many jurisdictions centered on extracting long sentences regardless of any justifiable public safety rationale.¹²⁴

In the disastrous handling of the pandemic behind bars, we can see that our political leaders, corrections systems, and the public are largely trapped in a mindset of “punitive excess.”¹²⁵ During the pandemic, this mindset became even more deadly for both incarcerated

¹²² See Franco-Paredes et al., *supra* note 81, at e12 (“Federal guidance on COVID-19 for correctional facilities has had an inadequate effect in protecting individuals who are susceptible SARS-CoV-2 by not recommending a substantial population reduction in jails and prisons as a crucial intervention.”).

¹²³ See *id.* at e11 (critiquing decarceration efforts implemented in response to the COVID-19 pandemic).

¹²⁴ See *id.* at e12 (“[T]he USA does not embrace scientific evidence that supports the depopulation of correctional facilities to mitigate the spread of the virus and criminological evidence that suggests this policy would not harm public safety.”).

¹²⁵ Scholars Jeremy Travis and Bruce Western have described the era we live in as one of “punitive excess.” See Jeremy Travis & Bruce Western, *The Era of Punitive Excess*, BRENNAN CTR. FOR JUST. (April 13, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/era-punitive-excess>. More people under correctional supervision than at any other time in our history. *Id.* We have criminalized social problems, such as homelessness and mental illness, while using the criminal legal system to support the legacy of white Supremacy in America by further entrenching extreme punishment. See *id.* What has emerged is not only a vast system of state supervision in both institutions and the community, but a sentencing policy focused on extreme and often mandatory sentences that bears little relation to actual public safety needs. See *id.*

people and corrections staff.¹²⁶ “Punitive excess” in our criminal legal system drives mass incarceration and shapes our policy priorities and national orientation towards maximizing incarceration as a default practice—at any cost.¹²⁷

Our national tendency towards excessive punishment and extreme sentencing is demonstrated by the number of people now serving life or virtual life in prison. As previously mentioned, over 200,000 people are now serving life in prison, which is more than the amount of people who served a prison sentence for any crime in this country in 1970.¹²⁸ This statistic suggests one in seven people in prison are serving a life term.¹²⁹ Additionally, “two-thirds of people serving life are people of color, with 46% Black and 16% Latinx.”¹³⁰ Moreover, “[o]ne in 5 Black men in prison is serving a life sentence”¹³¹ Extreme sentences have also affected women: one in every fifteen women in prison are serving a life sentence.¹³² And because our addiction to long sentences started in the late 1980’s and early 1990’s, incarcerated individuals have grown old behind bars at record rates; for example, 30% percent of people serving life sentences are aged fifty-five and older.¹³³

Given the data and the reality of the pandemic response to decarceration, how should we move forward in our attempts to end mass incarceration? While there are so many lessons to learn from the

¹²⁶ See generally Reinhart & Chen, *supra* note 93, at 1 (“During the COVID-19 pandemic, American jails and prisons have predictably emerged as the world’s leading sites of COVID-19 outbreaks.”).

¹²⁷ See Travis & Western, *supra* note 125 (“[T]he ‘Era of Punitive Excess’ [is] . . . the modern expression of society’s need to marginalize the poor and people of color through criminalization and punishment [and] has become a stubborn social fact.”).

¹²⁸ See NELLIS, *supra* note 116, at 4.

¹²⁹ *Id.* (noting the statistic includes those prisoners serving sentences of life without parole, life with parole, and virtual life).

¹³⁰ *Id.* at 18 (noting people of color serve life sentences at a disproportionate measure).

¹³¹ *Id.* at 4.

¹³² *Id.* at 18. However, “[o]ne in 4 women in California prisons and one in 5 women in Massachusetts prisons has life.” *Id.* The number of women serving life sentences has increased at a rate of almost one-third of that for men during the last decade, even though only 3% of “lifers” are women. *Id.*

¹³³ See *id.* at 20 (noting expansion of life sentences, prolonged time for parole case review, and abolishment of parole have contributed to an increase in the elderly prison population).

pandemic, it is clear there is a pressing need to lower the incarcerated population as quickly as possible. To meet this need, we must rethink our entire sentencing structure. Research has made it clear that lengthy sentences impede the elimination of mass incarceration and even sustain it.¹³⁴ For example, prison terms have lengthened since the onset of our national preference for “punitive excess” despite evidence that long sentences: (1) incapacitate people after they have “aged out” of criminal activity; (2) can be reviewed and reduced for most people with little effect on public safety; (3) have limited deterrent value; and (4) detract from more effective investments in public safety.¹³⁵ Given this reality, rolling back extreme sentencing must be a priority for leaders, advocates, and community members concerned with ending mass incarceration.

The pandemic demonstrated both the paucity of current mechanisms for release¹³⁶ and the reluctance of local, state, and federal officials to utilize the relatively few tools that now exist.¹³⁷ For this reason, more effort and work must be put into developing “second look” review mechanisms that allow courts, prosecutors, and parole boards to reconsider the appropriateness of continued incarceration for individuals who demonstrate they are ready to return home.¹³⁸ It should not take the corrections system more than ten years to empower an individual with the skills necessary to live crime-free after release. These reviews should be in line with other recommendations from national experts¹³⁹: automatically begin at ten years into a sentence, “with a rebuttable presumption of resentencing,” and “[s]ubsequent hearings should occur within a maximum of two

¹³⁴ See, e.g., NAZGOL GHANDNOOSH, A SECOND LOOK AT INJUSTICE 9 (2021), <https://www.sentencingproject.org/wp-content/uploads/2021/05/A-Second-Look-at-Injustice.pdf> (noting the existence of “evidence that long prison terms are not just inhumane and ineffective, but are in fact *counterproductive* to public safety . . .”).

¹³⁵ See *id.* at 4 (discussing rationales behind sentencing reform); see also *id.* at 10–12, for a more in-depth discussion on the ineffective nature of long sentences.

¹³⁶ See *id.* at 29 (noting medical and compassionate release programs are available but rarely result in decarceration).

¹³⁷ See *id.* at 32 (discussing New York’s “reluctance . . . to use medical parole or commutations . . . [and] its decision to not prioritize COVID-19 vaccine access to imprisoned people”).

¹³⁸ See *id.* at 8 (examining the rationales behind “second look” legislation).

¹³⁹ See, e.g., *id.* at 9 (listing faith groups, victim advocacy organizations, criminological experts, and legal experts who support extreme sentencing reform).

years.”¹⁴⁰ Moreover, an individual’s crime of conviction should not automatically prohibit a “second look” at their case. “Second look” reviews should involve individualized, case-by-case expert evaluations rather than decisions based on political viability and calculations of political risk.¹⁴¹ Most importantly, these reviews should analyze racial disparities in sentencing, discuss where racial disparities are likely to arise, and suggest actions to correct these disparities where they are found.¹⁴²

Shortening excessive prison terms and expediting releases will help us both end mass incarceration and mitigate the harm of the next pandemic.

B. *Achieving and accelerating racial justice and eliminating racial disparities must be a goal of any effort to decarcerate.*

Another key lesson of the pandemic is that racial justice must always be centered in any effort to end mass incarceration. The slow and inadequate response to the pandemic in correctional institutions confirmed the concern shared by many lawyers and advocates: that systemic racial disparities in our prisons and jails, and underlying structural racism in the criminal legal system, could lead to incompetent and even fatal treatment of the incarcerated population.¹⁴³ Tragically, these concerns were legitimized when elected leaders and government officials proved unwilling to take the necessary steps to decarcerate in order to save lives.¹⁴⁴

Decarceration efforts during the pandemic failed to address racial disparities or confront racial injustice in the criminal legal

¹⁴⁰ *Id.* at 34.

¹⁴¹ *See id.*

¹⁴² *Id.*

¹⁴³ *See* Franco-Paredes et al., *supra* note 81, at e10 (noting laws and policies behind mass incarceration deepen racial disparities, which in turn cause health issues such as suicidal ideology, drug and alcohol addiction, and an increased risk in internal diseases).

¹⁴⁴ *See* Reinhart & Chen, *supra* note 93, at 1 (“early warnings from public health experts were followed by delayed and inadequate policy action”); *see also* Franco-Paredes et al., *supra* note 81, at e11 (“In response to the growing number of COVID-19 outbreaks in these facilities, public health experts, civil rights attorneys, and advocacy groups have made urgent appeals for prison depopulation.”).

system.¹⁴⁵ This fact is all the more surprising given the ongoing racial reckoning in this country that began with the murder of George Floyd, an unarmed African American man in Minneapolis, at the hands of police officer, Derek Chauvin.¹⁴⁶ Despite greater public awareness of the role of racism in the policing of Black communities, this awareness did not translate into policies focused on the impacts of structural racism present in our prisons and inflicted upon the prison population.¹⁴⁷ These racial impacts are very real: Black Americans are five times as likely to be incarcerated in state prisons as white Americans, and Latinx individuals are 1.3 times as likely to be incarcerated in state prisons than their white counterparts.¹⁴⁸ Nationally, one in eighty-one Black Americans per 100,000 is in state prison.¹⁴⁹ And more than half the prison population is Black in twelve states.¹⁵⁰

Not surprisingly, the failure to treat pandemic response in correctional institutions as a racial justice issue has also led to racially disparate outcomes of decarceration efforts in some systems.¹⁵¹ Both the failure of political leadership to take the necessary action to prevent suffering and death in correctional settings during the pandemic, and the racially disparate decarceration outcomes that did occur, further point to the need to take proactive, anti-racist measures.

One tool for the proactive and explicit confrontation of racism and resulting racial disparities in the criminal legal system is the use

¹⁴⁵ See Franco-Paredes et al., *supra* note 81, at e10 (“Experts in correctional health and human rights have argued that these decarceration levels are insufficient and raised concerns that pandemic responses could be exacerbating racial disparities.”).

¹⁴⁶ See NELLIS, *supra* note 116, at 4 (noting that the uprisings after Floyd’s murder called for police and public safety reform).

¹⁴⁷ See *id.* (“When former Minneapolis police officer Derek Chauvin killed George Floyd . . . the world witnessed the most racist elements of the U.S. criminal legal system on broad display.”).

¹⁴⁸ *Id.* at 5.

¹⁴⁹ *Id.*

¹⁵⁰ See *id.* (listing the twelve states where over half of the prison population is Black).

¹⁵¹ See Franco-Paredes et al., *supra* note 81, at e11 (noting in some states, white prisoners have been decarcerated at a substantially higher rate than Black prisoners during the COVID-19 pandemic).

of racial impact statements.¹⁵² Lawmakers use racial impact statements to evaluate potential racial disparities in proposed legislation to identify the unforeseen or unacknowledged racial impacts of certain policy choices.¹⁵³ The model is similar to fiscal or environmental impact statements, which also forecast the effects of certain policy changes.¹⁵⁴ To date, nine states and the Minnesota Sentencing Guidelines Commission have adopted mechanisms to utilize racial impact statements.¹⁵⁵ Still, more is needed to undo the decades of laws and policies that have created the racial disparities in our prisons and jails. Retroactive racial justice evaluations of our criminal statutes and policies are required to minimize or eliminate the racially disparate impacts of these laws. Careful analysis of policies that determine who is incarcerated and for how long, such as so-called “truth in sentencing” policies, “habitual offender laws,” mandatory minimums, early release mechanisms, parole release and revocation policies, must be done through a racial impact lens.¹⁵⁶ The repeal of laws and changes in current policies and practices that create racial disparities will be required not only to create a more just and equitable system, but also to end the era of mass incarceration.

C. *Ensuring the voting rights of all people, regardless of incarceration or felony conviction status, is necessary to end mass incarceration.*

The pandemic demonstrated political leaders remain unresponsive to the needs of incarcerated people and their communities.¹⁵⁷

¹⁵² See Nicole D. Porter, *Racial Impact Statements*, SENT’G PROJECT (June 16, 2021), <https://www.sentencingproject.org/publications/racial-impact-statements/>.

¹⁵³ *Id.*

¹⁵⁴ See Leah Sakala, *Can Racial and Ethnic Impact Statements Address Inequity in Criminal Justice Policy?*, URB. INST.: URB. WIRE (Feb. 23, 2018), <https://www.urban.org/urban-wire/can-racial-and-ethnic-impact-statements-address-inequity-criminal-justice-policy> (“[R]acial impact statements are tools used in criminal justice policymaking to determine whether pending bills, if enacted, are likely to create or exacerbate disparate outcomes among people of different races or ethnicities.”).

¹⁵⁵ See Porter, *supra* note 152.

¹⁵⁶ See generally NELLIS, *supra* note 116, at 14–17 (discussing biased prison policies and practices as well as recommendations to cure these policies’ negative effects).

¹⁵⁷ See *supra* note 142.

The consequences of this lack of response provoke questions about how to ensure officials are held accountable for both the end of mass incarceration and the devastating impacts mass incarceration has on the lives of so many. It is difficult to imagine that those responsible for the disastrous government response to the pandemic in our prisons would not face accountability or consequences for their inaction; however, this is the situation we now face.¹⁵⁸ The underlying cause of the lack of consequences is fairly straightforward: We have a democracy deficit, which allows political leaders to escape accountability for the harm they cause.¹⁵⁹

This democracy deficit can be attributed to the systemic disenfranchisement of the overwhelmingly poor people of color most impacted by the pandemic in correctional facilities.¹⁶⁰ These individuals have almost no voice in elections and therefore possess only limited means with which to demand better treatment by their own government; their forced silence results in their inability to hold their own government accountable through the political process.¹⁶¹

As of October 2020, more than 5.2 million Americans remained unable to vote due to a felony conviction.¹⁶² In forty-eight states, a felony conviction can result in the loss of an individual's voting rights both in prison and in the community. Most of those

¹⁵⁸ See PANDEMIC OVERSIGHT, PANDEMIC RESPONSE ACCOUNTABILITY COMM., <https://www.pandemicoversight.gov> (last visited Nov. 7, 2021) (demonstrating the federal government's pandemic accountability program focuses on fraud and other financial crimes).

¹⁵⁹ See *infra* notes 160–61 and accompanying text (explaining the democratic consequences of the systematic disenfranchisement of incarcerated and formerly incarcerated individuals).

¹⁶⁰ See KEVIN MUHITCH & NAZGOL GHANDNOOSH, EXPANDING VOTING RIGHTS TO ALL CITIZENS IN THE ERA OF MASS INCARCERATION 3 (2021), <https://www.sentencingproject.org/publications/expanding-voting-rights-to-all-citizens-in-the-era-of-mass-incarceration/> (noting reforms to limit felony disenfranchisement rarely include prison populations which overwhelmingly consist of poor people of color).

¹⁶¹ See *id.* at 2 (“People in prison are counted when drawing electoral districts that determine political representation, even though most lack the right to vote. . . . By restricting the franchise, states deny fundamental democratic rights and representation that are otherwise guaranteed to all citizens.”).

¹⁶² CHRISTOPHER UGGEN ET AL., LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 10 (2020), <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>.

disenfranchised are not in prison but are living in the community under probation or parole supervision or have completed their sentences.¹⁶³ Still, almost all people in prison are denied the right to vote: at present, only Maine, Vermont, Puerto Rico, and the District of Columbia allow incarcerated people to exercise their franchise.¹⁶⁴ Notably, nearly two-thirds of the over 700,000 people routinely housed in local jails are held pre-trial with no conviction and are legally entitled to vote.¹⁶⁵ The remaining population in jails largely consists of individuals convicted of a misdemeanor offense, which does not result in disenfranchisement.¹⁶⁶ Yet, only a few of the hundreds of thousands of individuals in jails during an election will actually be able to exercise their right to vote thanks to a lack of polling places and a lack of access to absentee ballots and information.¹⁶⁷

Unsurprisingly, like all aspects of the criminal legal system, racial disparities in the system cause a devastating loss of political power for Black and Brown communities: as of 2020, one of every sixteen Black Americans has lost their right to vote due to felony disenfranchisement laws.¹⁶⁸

While these enormous loopholes in our democracy undermine the voice of justice-impacted populations generally, they disproportionately impact Black and Brown communities due to the presence of massive racial disparities in the criminal legal system.¹⁶⁹ The denial of voting rights to incarcerated people as well as those with prior felony convictions ensures that political leaders are not held accountable for the harms of mass incarceration and the laws, policies, and practices that fuel it.¹⁷⁰ Additionally, the government's ability to disenfranchise particular communities through the use of mass

¹⁶³ *Id.* at 8 (noting only one-quarter of the disenfranchised population is currently in jail or prison while half of the remaining disenfranchised population have fully completed their sentences).

¹⁶⁴ MUHITCH & NAZGOL, *supra* note 158, at 8.

¹⁶⁵ NICOLE D. PORTER, VOTING IN JAILS 5 (2020), <https://www.sentencingproject.org/publications/voting-in-jails/>.

¹⁶⁶ *Id.*

¹⁶⁷ *See generally id.* at 5 (discussing barriers which prevent eligible voters from voting while incarcerated).

¹⁶⁸ *See* UGGEN ET AL., *supra* note 162, at 4.

¹⁶⁹ *See* discussion *supra* Section II.C (analyzing the racial disparities in the criminal legal system).

¹⁷⁰ *See* discussion *supra* Section III.C (discussing the democracy deficit).

incarceration and excessive punishment permanently silences and disempowers incarcerated individuals and their communities.¹⁷¹ Therefore, in order to end mass incarceration, we must guarantee that the right to vote is never contingent on felony status or justice involvement. Democracy cannot long exist where the criminal legal system acts as its gatekeeper.

CONCLUSION

When I reflect on the ongoing lessons of COVID-19 in this age of mass incarceration, I think back to Clarence Givens. In a just society, Clarence would be alive today; he would be home with his family, protected from the pandemic by a vaccine, and supported by a society that cares for its elders. But Clarence never had a chance to live in that America: not as a Black man and especially not as a victim of our senseless mass incarceration system. Instead, Clarence died as he served a life sentence for a drug crime he committed decades earlier. Clarence and the thousands of others killed by the pandemic cannot benefit from the hard lessons of COVID-19, but we can. And we must.

¹⁷¹ See *supra* notes 159–61 and accompanying text.