

WHAT CORONAVIRUS HAS TAUGHT US ABOUT UNNECESSARY INCARCERATION

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INTRODUCTION

Since the inception of the global COVID-19 pandemic, there has been a nationwide push to release from prisons, jails, and immigration detention centers nonviolent offenders and pretrial detainees who do not need to be incarcerated because they are “low risk” to their communities.¹ After all, prisons, jails, and other detention facilities are crowded and unsanitary.²

These facilities are closed environments, particularly susceptible to infectious epidemics.³ Inmates cannot exactly engage in recommended hygiene and social-distancing practices, especially because many correctional facilities utilize dormitory-style sleeping arrangements.⁴ Hand

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1. See Rekha Basu, *Compassionate Release Brings an Iowan Home From Prison and Underscores Scattershot COVID-19 Policies*, DES MOINES REG. (May 14, 2020, 3:52 PM), <https://www.desmoinesregister.com/story/opinion/columnists/rekha-basu/2020/05/14/covid-19-compassionate-release-brings-iowan-home-highlights-inequity/5186506002/>; Jason Fagone, *In California’s Crowded Prison System COVID-19 Takes the Vulnerable*, S.F. CHRON. (May 17, 2020, 6:00 PM), <https://www.sfchronicle.com/bayarea/article/In-California-s-crowded-prison-system-COVID-19-15273236.php>; James Queally, *ACLU Sues California to Block ICE Transfers, Reduce Prison Population Amid Coronavirus Outbreak*, L.A. TIMES (April 25, 2020, 2:11 PM), <https://www.latimes.com/california/story/2020-04-25/coronavirus-aclu-sues-california-ice-transfers-prison-population>; Timothy Williams, Benjamin Weiser & William K. Rashbaum, *“Jails Are Petri Dishes”: Inmates Freed as the Virus Spreads Behind Bars*, N.Y. TIMES (March 30, 2020), <https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html>; see, e.g., Brief for Public Health and Human Rights Experts, as Amicus Curiae Supporting Appellants, *United States v. Arguijo*, No. 20-50080, 2020 WL 231075 (9th Cir. Apr. 21, 2020) [hereinafter “*Arguijo Amici*”]. Other countries have also been releasing prisoners in response to the COVID-19 pandemic. See, e.g., *Afghanistan is Set to Release 60 Percent of Prisoners as Coronavirus Spreads*, N.Y. TIMES (May 8, 2020), <https://www.nytimes.com/2020/04/27/world/coronavirus-world-pandemic.html>.

2. See Fagone, *supra* note 1; Williams et al., *supra* note 1.

3. See *Arguijo Amici*, *supra* note 1, at 2.

4. See, e.g., *Banks v. Booth*, 459 F. Supp. 3d 143, 153–55 (D.D.C. 2020); *Arguijo Amici*, *supra* note 1, at 8-10; Michael Barajas, *How COVID-19 Upended Texas Prisons*, TEX. OBSERVER (May 13, 2020), <https://www.texasobserver.org/how-covid-19-upended-texas-prisons/>; Fagone, *supra* note 1. *But see* *Valentine v. Collier*, No. 4:20-CV-1115, 2020 WL 1899274, at *1 (S.D. Tex. Apr. 16, 2020) (granting a preliminary injunction ordering a correctional facility to take comprehensive coronavirus precautions, including providing inmates with masks, “unrestricted access to hand soap,” hand sanitizer in public areas of

sanitizer, because of its alcohol content, is considered contraband at correctional facilities.⁵ Correctional health systems are notoriously inadequate.⁶ Simply put, the threat to the public posed by the release of these detainees pales in comparison to the threat that keeping them locked up poses to their health.⁷

This Essay argues that the temporary policies of release from correctional institutions instituted in the wake of the coronavirus should continue indefinitely. Part I traces how the spread of COVID-19 in correctional facilities has impacted vulnerable prisoners. It then describes the humanitarian response to that crisis, including the reduction of custodial arrests and the early release of waves of inmates. Additionally, it notes the absence of a negative impact on community safety that these measures have had.

Part II argues that the success of the COVID-19 humanitarian response demonstrates that much incarceration is unnecessary in the first place. It describes the mechanisms of mass incarceration and argues that compassion should not be an extraordinary remedy for dangerous conditions of confinement. The Essay concludes that the new and more humane arrest and detention policies adopted in the wake of coronavirus should continue beyond the pandemic.

I. HUMANITARIAN RESPONSES TO COVID-19 IN PRISONS

In response to the pandemic, policy reforms have significantly reduced the population of incarcerated individuals. As demonstrated below, these new policies prove that public safety and compassion for vulnerable people in correctional facilities are not mutually exclusive.

A. *Corrections Crisis: Inmates' Heightened Risk of Infection*

COVID-19 is extremely contagious and has few effective treatments.⁸ Vaccines have only recently become available, and distribution is far from universal.⁹ Correctional facilities are particularly ill-equipped to prevent and control the spread of the coronavirus and to treat inmates who become infected.¹⁰ Correctional facilities have far higher rates of infection than the

the prison, and “bleach-based cleaning agents and CDC-recommended disinfectants” for their housing areas).

5. See Barajas, *supra* note 4; Williams et al., *supra* note 1.

6. See, e.g., Banks, 459 F. Supp. 3d at 153–54.

7. See Janet Reitman, “*Something Is Going to Explode*”: *When Coronavirus Strikes a Prison*, N.Y. TIMES MAG. (April 18, 2020), <https://www.nytimes.com/2020/04/18/magazine/oakdale-federal-prison-coronavirus.html>.

8. See *Arguijo Amici*, *supra* note 1, at 1.

9. See *COVID-19 Vaccines*, FDA (Jan. 14, 2021), <https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19-vaccines>.

10. See Banks, 459 F. Supp. 3d at 153; *Arguijo Amici*, *supra* note 1, at 8–9 (“It is common knowledge that outbreaks of contagious diseases are more common in jail settings than in communities at large.”); U.S. Department of Labor, Occupational Safety and Health

general population.¹¹ As a result, hundreds of thousands of cases of COVID-19 have been confirmed at local, state, and federal correctional facilities nationwide, as well as at immigration detention centers.¹²

As the U.S. District Court for the Southern District of New York recently noted:

The COVID-19 pandemic is extraordinary and unprecedented It presents . . . a heightened risk for incarcerated defendants . . . with respiratory ailments. . . .

Administration, Notice of Alleged Safety or Health Hazards, at 3–4 (on file with Author); *see, e.g.*, Samantha Michaels, *Want to Know How Fast Coronavirus Can Spread in Prison? Look at Arkansas*, MOTHER JONES (April 13, 2020), <https://www.motherjones.com/coronavirus-updates/2020/04/cummins-unit-prison-arkansas-coronavirus-spread/>; *see also* Basu, *supra* note 1.

11. *See, e.g.*, Banks, 459 F. Supp. 3d at 153 (“It is undisputed that, as of April 4, 2020, the infection rate in DOC facilities was over seven times the infection rate of the District of Columbia at large.”); Sam Fry, *Coldwater Prison Has More Than 600 COVID-19 Cases, Facility-Wide Testing Reveals*, BATTLE CREEK ENQUIRER (April 24, 2020, 5:20 PM), <https://www.battlecreekenquirer.com/story/news/local/2020/04/24/coronavirus-michigan-prison-lakeland-correctional-facility-600-covid-19-cases/3023594001/>; Jesse Paul, *138 Inmates at Prison in Northeast Colorado Test Positive for Coronavirus*, COLO. SUN (April 24, 2020, 2:14 PM), <https://coloradosun.com/2020/04/24/sterling-correctional-facility-coronavirus-outbreak/> (“A large outbreak of the new coronavirus has been reported at a prison in northeast Colorado after weeks of efforts by law enforcement officials to reduce the risk of a cluster among jail and prison inmates statewide.”); Sarah Volpenhein, *Marion Prison’s Virus Outbreak Seeps Into Public*, COLUMBUS DISPATCH (April 25, 2020, 4:39 PM), <https://www.dispatch.com/news/20200425/marion-prisonsquos-virus-outbreak-seeps-into-public> (noting that more than eighty percent of inmates at Ohio’s Marion Correctional Institution have tested positive for the coronavirus).

12. *See* THE MARSHALL PROJECT: A STATE-BY-STATE LOOK AT CORONAVIRUS IN PRISONS, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> (last visited Jan. 19, 2021); *see, e.g.*, Barajas, *supra* note 4; Basu, *supra* note 1; Sarah Betancourt, *Judge Seeks COVID-19 Test Data on ICE Detainees*, COMMONWEALTH (Apr. 24, 2020), <https://commonwealthmagazine.org/immigration/judge-seeks-covid-19-test-data-on-detainees/> (noting that 297 immigration detainees nationwide had tested positive for COVID-19); Fagone, *supra* note 1; Meagan Flynn, *Top Doctor at Rikers Island Calls the Jail a “Public Health Disaster Unfolding Before Our Eyes”*, WASH. POST (March 31, 2020), <https://www.washingtonpost.com/nation/2020/03/31/rikers-island-corona-virus-spread/>; Matt Hamilton, James Queally & Alene Tchekmedyan, *California Prisons and Jails Have Emptied Thousands Into a World Changed by Coronavirus*, L.A. TIMES (May 17, 2020, 5:00 PM), <https://www.latimes.com/california/story/2020-05-17/coronavirus-prison-jail-releases>; Kaley Johnson, *7th Inmate Dies From COVID at Fort Worth Prison – 8 Days Before His Scheduled Release*, FORT WORTH STAR-TELEGRAM (May 14, 2020, 2:54 PM), <https://www.star-telegram.com/news/coronavirus/article242740416.html>; Queally, *supra* note 1 (noting that “ICE has reported 317 coronavirus infections among detainees nationwide”); Jan Ransom & Alan Feuer, *“We’re Left for Dead”*: Fears of Virus Catastrophe at Rikers Jail, N.Y. TIMES (March 30, 2020), <https://www.nytimes.com/2020/03/30/nyregion/coronavirus-rikers-nyc-jail.html>; Williams et al., *supra* note 1; Arguijo Amici, *supra* note 1, at 9; *cf.* Nick Pinto, *Internal Prison Guard Email Contradicts Government’s Claims to Judges About Containing Coronavirus at Federal Detention Center*, THE INTERCEPT, April 10, 2020, 1:06 PM), <https://theintercept.com/2020/04/10/prison-coronavirus-mdc-bop/>.

Further, the crowded nature of municipal jails . . . present[s] an outside risk that the COVID-19 contagion, once it gains entry, will spread. And, realistically, a high-risk inmate who contracts the virus while in prison will face challenges in caring for himself.¹³

Prisoners tend to be less healthy with more preexisting medical issues than the general population, making them more susceptible to the virus.¹⁴ Just as in the country generally, COVID-19 is even more lethal for older inmates and inmates with underlying medical conditions.¹⁵ Hundreds of inmates and immigration detainees have died of coronavirus complications around the country.¹⁶

B. The Humanitarian Response

As a result of the heightened risk of infection described above, all levels of government have taken some steps to help ensure the safety of vulnerable inmates during the COVID-19 crisis.

1. State and Local Policy Changes

State and local governments have responded in a variety of ways to the spread of COVID-19 in correctional facilities. In response to the pandemic, the Montana Supreme Court has asked judges in local justice courts to release as many inmates as they can.¹⁷ The Los Angeles County, New York City, Cook County, Washington, D.C., and Cleveland jails have released vulnerable inmates charged with non-violent crimes or serving relatively

13. United States v. Hernandez, 451 F. Supp. 3d 301, 303, 304 (S.D.N.Y. 2020).

14. See Fagone, *supra* note 1.

15. See, e.g., Jones v. Wolf, 467 F. Supp. 3d 74, 87 (W.D.N.Y. 2020); Centers for Disease Control and Prevention: People Who Are at Higher Risk for Severe Illness (Mar. 31, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html>.

16. See, e.g., Barajas, *supra* note 4; Basu, *supra* note 1; Hamilton et al., *supra* note 12; Johnson, *supra* note 12; Olivia P Tallett, *Immigrant Held at Conroe Detention Center Died From COVID-19, Family Says*, HOUS. CHRON. (May 14, 2020), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Immigrant-held-at-Conroe-detention-center-died-15271445.php>.

17. See Hamilton et al., *supra* note 12 (“In short order, the coronavirus pandemic has ushered in a sweeping and historic emptying of California’s overcrowded prisons and jails, as officials have dramatically lowered the number of people held in custody to avert deadly outbreaks. State data show California’s prisons have released about 3,500 inmates while the daily jail population across 58 counties is down by 20,000 from late February.”); Seaborn Larson, *Montana Supreme Court to City, County Judges: Release Inmates if Possible*, MISSOULIAN (March 23, 2020) https://missoulian.com/news/state-and-regional/crime-and-courts/montana-supreme-court-to-city-county-judges-release-inmates-if/article_da87780f-8b5a-5d54-a5fb-95fc19b6f685.html.

short sentences to decrease the spread of the virus.¹⁸ The Los Angeles Sheriff’s Department and Philadelphia Police Department have stopped arresting people for minor crimes.¹⁹ The Judicial Council for the State of California directed local courts to set “zero bail” for defendants charged with misdemeanors or low-level felonies.²⁰ The Baltimore City State’s Attorney’s Office is declining to prosecute minor offenses like trespassing, drug possession, and prostitution during the coronavirus pandemic on the ground that doing so would not affect public safety.²¹ Scores of smaller cities and counties have followed suit, releasing low-risk detainees and issuing citations in lieu of new custodial arrests.²²

2. Federal Executive and Legislative Action

As of this writing, federal prisons have had nearly 49,000 confirmed cases of COVID-19 among inmates and staff.²³ The Attorney General has instructed the U.S. Bureau of Prisons (“BoP”) to prioritize the transfer of low-risk prisoners who have served at least half of their sentences to home confinement when necessary to protect their health.²⁴ Congress ratified this decision in the Coronavirus Aid, Relief and Security Act (CARES) Act, which authorized the Attorney General to expand and accelerate the scope

18. *See, e.g.*, Queally, *supra* note 1 (noting that the average daily incarcerated population in California had fallen from approximately 72,000 to approximately 54,000 between February and April 2020); Williams et al., *supra* note 1; Banks v. Booth, 459 F. Supp. 3d 143, 153–55 (D.D.C. 2020).

19. *See* Queally, *supra* note 1 (“The [California] Judicial Council ordered bail be set at zero for a wide array of misdemeanors and nonviolent crimes earlier this month, aiming to cut back on the number of new additions made to the state jail population.”); Williams et al., *supra* note 1.

20. *See* Hamilton et al., *supra* note 12.

21. *See* Williams et al., *supra* note 1.

22. *See* PRISON POLICY INITIATIVE: RESPONSE TO THE COVID-19 PANDEMIC (April 24, 2020), <https://www.prisonpolicy.org/virus/virusresponse.html>; *see also* Tom Nolan, *What Policing During the Pandemic Reveals About Crime Rates and Arrests*, PBS NEWSHOUR (April 15, 2020), <https://www.pbs.org/newshour/nation/what-policing-during-the-pandemic-reveals-about-crime-rates-and-arrest>; Tracey Tully, *1000 Inmates Will Be Released from N.J. Jail to Curb Coronavirus Risk*, N.Y. TIMES (March 23, 2020), <https://www.nytimes.com/2020/03/23/nyregion/coronavirus-nj-inmates-release.html>.

23. *See* FED. BUREAU OF PRISONS, COVID-19 CASES, www.bop.gov/coronavirus (last visited January 19, 2021).

24. *See* Declaration of Jennifer A. Broton, United States v. Stahl, No. 18-CR-694-RA, April 23, 2020 (S.D.N.Y.) [hereinafter “Broton Declaration”], at 2, 7; Memorandum from Andre Matevosian, Acting Assistant Director Correctional Programs Division to Hugh J. Hurwitz, Assistant Director Reentry Services Division (April 22, 2020) [hereinafter “DoJ Guidance”] (on file with Author), at 2 (noting that “in order to prioritize its limited resources, BOP has generally prioritized for home confinement those inmates who served a certain portion of their sentences, or who only have a relatively short amount of time remaining on those sentences”).

of the releases, even though the U.S. Probation Office lacked the capacity to monitor the released inmates electronically.²⁵

In April, the Attorney General issued additional guidance accelerating coronavirus-based compassionate releases.²⁶ According to BoP, it has increased its use of home confinement by more than fifty percent since March 2020, releasing an additional 1,501 inmates to home confinement.²⁷ In determining whether to grant home confinement, BoP prioritizes the release of inmates in low- and minimum-security facilities and considers, *inter alia*, the seriousness of the offense of conviction, inmates' conduct in prison, and risk assessments of the danger that inmates pose to the community if released to home confinement.²⁸ Inmates who do not qualify for release to home confinement can be transferred to halfway houses instead.²⁹

3. Federal Judicial Intervention

In addition to the BoP release program, in hundreds of individual cases, courts have granted early “compassionate release” from prison. They have done so under the new First Step Act,³⁰ or by granting habeas relief for inmates who are particularly vulnerable to coronavirus due to their age, underlying health conditions, and the prevalence of the disease in

25. See Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-236, 134 Stat. 281 (2020) (authorizing the Attorney General to expand the cohort of inmates who could be considered for home confinement); see also Memorandum from the Attorney General to the Director of the Bureau of Prisons (April 3, 2020) (authorizing the Director of BoP immediately to maximize transfers to home confinement of all vulnerable inmates incarcerated at institutions in which COVID-19 is materially affecting operations, and instructing the Director of BoP to consider release for a much broader pool of at-risk inmates regardless of whether they were previously eligible for release under the CARES Act); see Broton Declaration, *supra* note 24, at 4–5.

26. See Memorandum from the Att’y Gen. to Director of the Bureau of Prisons (April 3, 2020), <https://www.justice.gov/file/1266661/download>.

27. See Broton Declaration, *supra* note 24, at 6; see also DoJ Guidance, *supra* note 24, at 2 (“Consideration should be given to whether the inmate has demonstrated a verifiable reentry plan that will prevent recidivism and maximize public safety, including verification that the conditions which the inmate would be confined upon release would present a lower risk of contracting COVID-19 than the inmate would face in his or her BOP facility.”).

28. See Broton Declaration, *supra* note 24, at 2–3, 6; DoJ Guidance, *supra* note 24, at 1–2.

29. See Broton Declaration, *supra* note 24, at 7; DoJ Guidance, *supra* note 24, at 3–4 (“If an inmate does not currently qualify for home confinement under BOP criteria, they should be reviewed for placement in a Residential Reentry Center and for home confinement at a later date . . .”).

30. See First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018) (codified at 18 U.S.C. § 3582(c)(1)(A)) (authorizing courts to reduce terms of imprisonment if, *inter alia*, “extraordinary and compelling reasons warrant such a reduction”).

correctional facilities.³¹ For example, in *United States v. Logan*,³² the U.S. District Court for the Northern District of New York ordered that Logan,

31. See *Samy v. United States*, No. 16-CR-20610-1, 2020 WL 1888842, at *4 (E.D. Mich. Apr. 16, 2020) (granting Samy compassionate release based in part on COVID-19); *United States v. Coker*, No. 14-CR-085-RLJ-DCP-20, 2020 WL 1877800, at *6 (E.D. Tenn. Apr. 15, 2020) (granting Coker compassionate release based in part on COVID-19); *United States v. Cosgrove*, 454 F. Supp. 3d 1063, 1069 (W.D.W. 2020) (granting Cosgrove compassionate release in part based on COVID-19); *United States v. Kataev*, No. 16-CR-00763-LGS-5, 2020 WL 1862685, at *2 (S.D.N.Y. Apr. 14, 2020) (granting Kataev compassionate release in part based on COVID-19); *United States v. Ben-Yhwh*, 453 F. Supp. 3d 1324, 1327 (D. Haw. 2020) (granting Ben-Yhwh compassionate release based in part on COVID-19); *United States v. Smith*, 454 F. Supp. 310, 315 (S.D.N.Y. 2020) (granting Smith compassionate release based in part on COVID-19); *United States v. Wen*, 454 F. Supp. 3d 187, 197 (W.D.N.Y. 2020) (granting compassionate release to Wen in part based on COVID-19); *United States v. Burrill*, 445 F. Supp. 3d 22, 27 (N.D. Cal. 2020) (granting Burrill compassionate release based in part on COVID-19); *United States v. Sawicz*, 453 F. Supp. 3d 601, 605 (E.D.N.Y. 2020) (finding that the combination of the COVID-19 pandemic and Sawicz's hypertension constituted an extraordinary and compelling reason for his early release and waiving the ordinary thirty-day exhaustion period in light of the COVID-19 pandemic); *United States v. Tran*, No. 08-CR-197-DOC, 2020 WL 1820520, at *2–3 (C.D. Cal. Apr. 10, 2020) (ordering Tran's immediate compassionate release prior to the expiration of the ordinary thirty-day administrative-exhaustion period); *United States v. Foster*, No. 14-CR-324-02, slip op. at 10 (M.D. Pa. Apr. 3, 2020) (finding that Foster's high likelihood of contracting a fatal case of COVID-19 constituted "extraordinary and compelling" circumstances warranting his compassionate release from imprisonment); *United States v. Zukerman*, 451 F. Supp. 3d 329, 336 (S.D.N.Y. 2020) (granting immediate compassionate relief to Zukerman and waiving the ordinary thirty-day exhaustion period because his continued detention in federal prison would pose an unacceptable "risk of severe illness or death" in light of his diabetes, hypertension, and obesity); *United States v. Brannan*, No. 15-CR-80-01, 2020 WL 1698392, at *1 (S.D. Tex. Apr. 2, 2020) (ordering Brannan's immediate compassionate release prior to the expiration of the ordinary thirty-day administrative-exhaustion period); *United States v. Resnick*, 451 F. Supp. 3d 262, 269–70 (S.D.N.Y. 2020) (finding that Resnick's "high susceptibility to COVID-19" constituted an extraordinary and compelling reason for compassionate release from prison); *United States v. Colvin*, 451 F. Supp. 3d 237, 241 (D. Conn. 2020) (finding that Colvin's diabetes, "which substantially increases her risk of severe illness if she contracts COVID-19," constituted "extraordinary and compelling reasons" for her early release); *United States v. Mace*, No. 17-CR-00618-DJB, slip op. at 4 (S.D. Tex. Apr. 1, 2020); *United States v. Perez*, 451 F. Supp. 3d 288, 294 (S.D.N.Y. 2020) (immediately reducing Perez's sentence of imprisonment to time served based on "the extraordinary threat posed – in his unique circumstances – by the COVID-19 pandemic"); *United States v. Rodriguez*, 451 F. Supp. 3d 392, 407 (E.D. Pa. 2020) (finding that the confluence of COVID-19 with diabetes and hypertension constituted an extraordinary and compelling reason for compassionate release); *United States v. Williams*, No. 04-CR-95-MCR, 2020 WL 1751545, at *3 (N.D. Fla. Apr. 1, 2020) ("Williams' cardiovascular and renal conditions compromise his immune system, which, taken with his advanced age, put him at significant risk for even more severe and life threatening illness should he be exposed to COVID-19 while incarcerated. . . . Based on these facts, the Court finds that Williams' deterioration in physical health is sufficiently serious to satisfy the medical criteria for a reduction in sentence."); *United States v. Muniz*, No. 4:09-CR-199-1, 2020 WL 1540325, at *1 (S.D. Tex. Mar. 20, 2020) (releasing Muniz from his 188-month sentence for drug conspiracy in light of his vulnerability to COVID-19); Amended Order Granting Compassionate Release, *United States v. Powell*, No. 94-CR-0316-ESH, 2020 WL 1698194, at *1 (D.D.C. Mar. 28, 2020).

who suffers from diabetes and a litany of cardiovascular ailments, be released early from his 148-month sentence of imprisonment at the Federal Correctional Institution in Fort Dix, New Jersey, for conspiring to distribute cocaine.³³ His release was based on his “particular vulnerability to contracting a deadly case of COVID-19,” in conjunction with his “demonstrated rehabilitation while in prison,” which constituted “an extraordinary and compelling reason for compassionate release.”³⁴

In *United States v. Bess*,³⁵ the U.S. District Court for the Western District of New York ordered Bess’s immediate compassionate release, based on his “advanced age,” lengthy history of diabetes and cardiovascular ailments, and the low risk of danger that his release posed to his community, despite his twelve prior criminal convictions.³⁶ At the time of his release, Bess had served forty-one months of his eighty-four-month sentence of imprisonment for possessing methamphetamine with the intent to distribute it.³⁷

In *United States v. Love*,³⁸ the U.S. District Court for the Western District of Michigan ordered Love’s immediate compassionate release, pursuant to the First Step Act, from his 114-month term of imprisonment for armed robbery due to Love’s special vulnerability to the coronavirus pandemic based on his underlying medical conditions.³⁹ The court concluded: “Love has articulated a specific fear of infection and demonstrated that infection might be serious and/or fatal. Therefore, the Court finds that extraordinary and compelling reasons exist to grant Love’s request for compassionate release.”⁴⁰

Courts have also granted pretrial and presentence release to vulnerable inmates under the Bail Reform Act, finding that the coronavirus pandemic constituted a compelling reason for their releases.⁴¹ In addition, courts have granted release to immigration detainees who have filed class-action lawsuits challenging the conditions of their confinement in light of the coronavirus pandemic.⁴²

32. See generally *United States v. Logan*, No. 12-CR-00308-LEK (N.D.N.Y. Apr. 22, 2020).

33. *Id.* at 2.

34. *Id.* at 8 n.4, 11.

35. *United States v. Bess*, 455 F. Supp. 3d 53 (W.D.N.Y. 2020).

36. *Id.* at 65–68.

37. *Id.* at 55.

38. *United States v. Love*, No. 1:14-CR-00004-PLM (W.D. Mich. Apr. 21, 2020).

39. See *id.* at 1–2.

40. *Id.* at 4.

41. See, e.g., *United States v. Mason*, No. 1:18-CR-1065-JMC (D.S.C. April 28, 2020) (granting Mason presentence release pursuant to 18 U.S.C. § 3142(i) due to the compelling reasons created by her medical vulnerability to COVID-19). But see *Banks v. Booth*, 459 F. Supp. 3d 143, 161 (D.D.C. 2020) (declining to order additional releases of pretrial and post-conviction inmates in the Washington, D.C. jails beyond the releases that the District of Columbia Department of Corrections had already allowed under its emergency statutory authorization).

42. See, e.g., *Betancourt*, *supra* note 12 (reporting that the district court had ordered forty-seven Immigration and Customs Enforcement detainees released from a local facility

C. Community Impact of the COVID-19 Humanitarian Response

These reforms demonstrate that the humanitarian treatment of prisoners is consistent with the maintenance of public safety. Despite the occasional alarmist media statement,⁴³ the result of these compassionate releases from prisons and jails has not been a crime wave. On the contrary, crime rates have plummeted since the onset of social-distancing measures.⁴⁴ The large-scale reduction in arrests has not been accompanied by an increase in reported crimes.⁴⁵ The crime decreases are likely not attributable only to quarantine orders, as they are consistent with crime-rate decreases during other, non-pandemic periods of easing zero-tolerance policing practices. For example, the relaxation of proactive policing practices after the high-profile death of Eric Garner coincided with a reduction in violent crimes.⁴⁶ Similarly, a protest work “slowdown” by NYPD officers in 2015, in which officers deliberately limited their investigations and arrests during collective bargaining, resulted in dramatically fewer arrests, but it did not result in a corresponding rise in crime.⁴⁷ Therefore, there is evidence that it would be safe to continue these humanitarian polices post-pandemic.

II. ANALYSIS: THE GAPS BETWEEN THEORY AND PRAXIS

While the recent compassionate releases are part of a sensible humanitarian policy, they also raise some obvious questions: why were so many people who did not need to be incarcerated locked up in the first place? Why did it take a public-health crisis to get them out? Certainly, pretrial detention is not supposed to happen to defendants who pose little to no risk of flight or danger to their communities, in light of the presumption

“to reduce crowding in facilities and help avoid the spread of COVID-19”); Stephen Rex Brown, *N.J. Judge Orders Release of 5 ICE Detainees as Coronavirus Outbreak Mounts in Jails*, N.Y. DAILY NEWS, (Apr. 13, 2020, 1:38 PM), <https://www.nydailynews.com/new-york/ny-ice-detainees-released-coronavirus-20200413-42td6yso2zcellmqmzj4r4f4oa-story.html>; Queally, *supra* note 1.

43. See, e.g., Queally, *supra* note 1 (noting that Orange County District Attorney Todd Spitzer has argued that the California Judicial Council’s elimination of bail for many offenses has allowed “dangerous criminals” to capitalize on the pandemic to get out of custody).

44. See Stefanie Dazio, Franklin Briceno & Michael Tarm, *Crime Drops Around the World as COVID-19 Keeps People Inside*, ABC NEWS (April 11, 2020, 10:38 AM), <https://abcnews.go.com/Health/wireStory/crime-drops-world-covid-19-people-inside-70098369>; Nolan, *supra* note 22.

45. See Nolan, *supra* note 22 (“The fact that serious crime figures have remained comparatively static, or have fallen in some cities, calls into question the notion that arrests of lower-level offenses can prevent the commission of serious crimes . . .”).

46. See Christopher M. Sullivan & Zachary P. O’Keeffe, *Evidence That Curtailing Proactive Policing Can Reduce Major Crime*, 1 NATURE HUMAN BEHAV. 730, 730 (2017).

47. See Lauren Gambino, *NYPD “Slowdown” Saw No Tickets Issued for New Year Low-Level Crimes*, THE GUARDIAN (Jan. 10, 2015, 3:45 PM), <https://www.theguardian.com/us-news/2015/jan/10/nypd-issued-no-tickets-low-level-crimes-new-years>.

of innocence.⁴⁸ Even most post-guilt sentencing regimes require sentencing courts to consider the risk of re-offense—both in terms of the likelihood and the impact of any new crimes—and prohibit them from imposing sentences “greater than necessary” for retribution and protection of the public.⁴⁹

This Part describes how the mass incarceration crisis has resulted from courts’ failures to demonstrate a consistent commitment to the restraints that these sentencing principles are designed to place on unnecessary incarceration. It then argues that humanitarian policies adopted in the wake of COVID-19 should continue indefinitely.

A. Mass Incarceration

The United States has long had a crisis of overincarceration, not just of prison inmates convicted of nonviolent crimes, but also of pretrial and immigration detainees convicted of nothing. There are many reasons for this phenomenon. Judges often assess whether defendants pose an unacceptable risk of community danger based not on scientifically validated risk instruments, but rather on intuition about the sufficiency of someone’s character, employment, residence, or community ties.⁵⁰ Other times, draconian sentencing laws contribute to mass incarceration, as do cavalier judicial attitudes toward throwing away the lives of defendants, particularly younger, poorer, blacker ones, in the interest of vague notions of just desert.⁵¹

Simply put, courts often sentence people to prison and hold people in jail awaiting trial on relatively minor, nonviolent charges not because those people are dangerous and society needs to be protected from them, but because it is just easier and seems less risky to the community than releasing

48. See 18 U.S.C. § 3142 (2018) (requiring federal magistrate judges to release defendants pending trial on their own recognizance or on conditions unless they determine “that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community”).

49. See 18 U.S.C. § 3553(a) (2018) (“Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary...(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”).

50. See generally Brandon Buskey, *Wrestling with Risk: The Questions Beyond Money Bail*, 98 N.C. L. REV. 379, 388 (2020) (discussing the lack of consistent legal standards for analyzing bail determinations); Paul Heaton, *The Expansive Reach of Pretrial Detention*, 98 N.C. L. REV. 369, 369 (2020) (noting that judges often rely on a combination of personal experience, heuristics, and local norms in formulating bail decisions).

51. See Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 849 (2001) (explaining how the “war on crime” treats offenders as inanimate sources of dangers); Nicola Lacey, *Government as Manager, Citizen as Consumer: The Case of the Criminal Justice Act 1991*, 57 MODERN L. REV. 534, 538 (1994).

them.⁵² In several of the COVID compassionate-release cases described above,⁵³ prisoners were granted early release from incarceration in part because their releases posed no danger to society. The obvious implication is that, had it not been for the heightened risk from COVID-19, they would still be unnecessarily incarcerated.⁵⁴ Sometimes, these detentions result because the public price of releasing inmates who do not pose a significant risk to the community can be enormous. For example, New York recently faced an angry public backlash in response to the reform of its unjust cash-bail system.⁵⁵

These unnecessary detentions are driven by a feedback loop that perpetuates mass incarceration. In scientific terms, detaining a person who would not have posed a danger if they had been released is a “false positive.” Releasing a person who does pose a danger is a “false negative.” These two categories are prediction errors. The crucial distinction between these two types of errors is that the system gets immediate feedback on its false negatives. If a defendant is given a non-custodial sentence and immediately commits a second crime or if a defendant on pretrial release commits a serious crime while out on bail, it is front-page news. But there is no feedback mechanism for false positives. In other words, we never know that a pretrial detainee or a prison inmate would not have posed a danger had they been released. This is colloquially referred to in courthouses as the “Dateline effect”—judges only end up in the news when they release people whom, in retrospect, they should not have.⁵⁶

B. Compassion as an Extraordinary Remedy

Because much incarceration is unnecessary, the humane arrest and detention policies adopted in the wake of the pandemic should continue. Of course, COVID-19 poses a serious threat to health, particularly for individuals with heightened vulnerability due to age or underlying medical conditions. For those on the “outside,” living under the Damocles sword of this invisible assassin is extraordinary and unprecedented. For inmates in prisons and jails, however, the threat of dying from a combination of unsafe conditions and inadequate medical care is omnipresent. Simply put, imprisonment is always a significant threat to an inmate’s health and well-being.

52. See Buskey, *supra* note 50, at 387–88.

53. See *supra* Section I.B.3.

54. See, e.g., *United States v. Bess*, 455 F. Supp. 3d 53, 65–66 (W.D.N.Y. 2020).

55. See Jesse McKinley, *The Bail Reform Backlash That Has Democrats at War*, N.Y. TIMES, (Feb. 14, 2020), <https://www.nytimes.com/2020/02/14/nyregion/new-york-bail-reform.html>; Jesse McKinley, Alan Feuer & Luis Ferré-Sadurní, *Why Abolishing Bail for Some Crimes Has Law Enforcement on Edge*, N.Y. TIMES, (Dec. 31, 2019), <https://www.nytimes.com/2019/12/31/nyregion/cash-bail-reform-new-york.html>.

56. See Buskey, *supra* note 50, at 387–88 (“For those deemed low risk, the judge may tend to revert to her instincts rather than risk being in a headline for the next notorious crime.”).

For example, there is a robust academic literature on the devastating effect that pretrial detention has on detainees.⁵⁷ For example, a recent study published in the *American Economic Review* demonstrates that pretrial detention significantly increases the probability of conviction, primarily by inducing guilty pleas.⁵⁸ A study in the *Journal of Legal Studies* similarly demonstrates that high bail increases the likelihood of both conviction and recidivism.⁵⁹ Paul Heaton notes how pretrial detention has substantial downstream effects on defendants, including increasing the likelihood of conviction and the severity of sentence and reducing future employment and access to social safety nets.⁶⁰ Courts have acknowledged the negative impact of overcrowded conditions on pretrial detainees.⁶¹ An aging population in the federal prison system in the United States has led to chronic disease and inadequate medical treatment.⁶²

The U.S. Sentencing Guidelines have long authorized federal judges to release BoP inmates when they suffer from serious physical and mental illnesses or can no longer care for themselves due to advanced age.⁶³ Until the coronavirus pandemic, however, BoP approved only six percent of the

57. See, e.g., Will Dobbie, Jacob Goldin & Crystal Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AMER. ECON. REV. 201, 201 (2018); Arpit Gupta, Christopher Hansman & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471, 471 (2016); Heaton, *supra* note 50; Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 711 (2017) (finding that misdemeanor defendants who are detained pending trial are twenty-five percent more likely to plead guilty, forty-three percent more likely to be sentenced to a term of imprisonment, and receive sentences that are more than double); Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J. L. & ECON. 529, 543, 548 (2017) (finding that pretrial detention increases the likelihood of conviction thirteen percent for felony defendants and increases long-term recidivism); Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. L. ECON. & ORG. 511, 532, 534 (2018) (finding that pretrial incarceration increases the likelihood of conviction thirteen percent, increases postconviction terms of imprisonment by forty-two percent, and increases court fees by forty-one percent).

58. See Dobbie et al., *supra* note 57.

59. See Gupta et al., *supra* note 57.

60. See Heaton, *supra* note 50, at 370.

61. See, e.g., *Brown v. Plata*, 563 U.S. 493, 531–32 (2011).

62. See Kimberly A. Skarupski, Alden Gross, Jennifer A. Schrack, Jennifer A. Deal, and Gabriel B. Eber, *The Health of America's Aging Prison Population*, 40 EPIDEMIOLOGICAL REV. 157, 157 (2018); Andrew P. Wilper, Steffie Woolhandler, Wesley Boyd, Karen E. Lasser, Danny McCormick, David Bor & David U. Himmelstein, *The Health and Health Care of U.S. Prisoners: Results of a Nationwide Survey*, 99 AMER. J. PUB. HEALTH 666, 669 (2009).

63. See U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. Sent'g Comm'n 2004) (containing the Commission's policy statement relating to compassionate release from prison and recommending that courts reduce sentences of imprisonment when there are "extraordinary and compelling reasons" to do so, including serious physical or mental illness or age-related deterioration, and when the defendant "is not a danger to the safety of any other person or to the community").

5,400 applications for compassionate release that it received; 266 inmates died in BoP custody awaiting judicial review of their requests.⁶⁴

The lack of compassion shown for the incarcerated under ordinary, non-pandemic circumstances often defies the rigid and narrow cabining of legal language. These failures of compassion are not just “abuses of discretion” or violations of the due process concept of the “least restrictive alternative.” They are also failures of these legal concepts themselves to capture the complexity of the dehumanization of the incarcerated; the division between those dispossessed inmates on the “inside” and the legitimate, “law-abiding” citizens in the outside world.

Like all other pandemics, COVID-19 will pass. The new, more humane arrest and detention policies adopted in its wake should not. Congress and the States should continue the expansion of alternatives to imprisonment beyond the duration of the pandemic, including home confinement and the granting of compassionate release under the CARES Act.

CONCLUSION

One thing that the COVID-19 humanitarian response has demonstrated is that public safety and individual freedom are not disjunctive; societies do not have to choose between incarceration and safety. It is widely recognized that the United States is the most carceral nation on the planet.⁶⁵ The compassionate releases triggered by the coronavirus pandemic are a natural experiment, a chance to see the hidden alternate universe without knee-jerk incarceration; a universe where judges, prosecutors, and corrections officials actually weigh the adverse effects of incarceration and not just the risks of foregoing it. The United States should have the moral courage to act on the results of this experiment.

64. See Christie Thompson, *Old, Sick and Dying in Shackles*, THE MARSHALL PROJECT (Mar. 7, 2018), <https://www.themarshallproject.org/2018/03/07/old-sick-and-dying-in-shackles>. Prior to the adoption of the First Step Act in 2018, prisoners seeking compassionate release had to petition BoP and could not apply directly to federal courts for release. See *Crowe v. United States*, 430 F. App'x. 484, 484–85 (6th Cir. 2011); *United States v. Love*, No. 1:14-CR-00004-PLM, slip op. at 2 (W.D. Mich. Apr. 21, 2020). See also § 3582(c)(1)(A) (granting federal courts jurisdiction over inmates' motions for compassionate relief if BoP failed to grant release thirty days after request); *United States v. Beck*, 425 F.Supp.3d 573, 587 (M.D.N.C. 2019) (“[T]he terms of the First Step Act give courts independent authority to grant motions for compassionate release . . . , thus establishing that Congress wants courts to take a *de novo* look at compassionate release motions.”).

65. See Williams et al., *supra* note 1.