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### Symposium: Expanding Compassion Beyond the COVID-19 Pandemic

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# Expanding Compassion Beyond the COVID-19 Pandemic

Eda Katharine Tinto & Jenny Roberts\*

## ABSTRACT

*Compassionate relief matters. It matters so that courts may account for tragically unforeseeable events, as when an illness or disability renders proper care impossible while a defendant remains incarcerated, or when family tragedy leaves an inmate the sole caretaker for an incapacitated partner or minor children. It matters too, as present circumstances make clear, when public-health calamities threaten inmates with literal death sentences. It matters even when no crisis looms, but simply when continued incarceration would be “greater than necessary” to achieve the ends of justice.<sup>1</sup>*

## I. INTRODUCTION

As COVID-19 spread throughout the country in the spring of 2020, calls to remember those incarcerated in our prisons became louder and more numerous. Incarcerated individuals, legal and community advocates, and families demanded action to prevent devastating outbreaks of the coronavirus in carceral settings.<sup>2</sup> In addition to calls for the provision of personal protective gear and the release of individuals whose cases were not yet adjudicated, pleas to release those already convicted became the focal point of demands. For the fortunate few who were released, it indeed seemed to be a miraculous function of the criminal legal system that their request for release was both heard and granted. “This was like the best day

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<sup>1</sup> United States v. Copeland, No. 02-CR-01120 (FB), 2020 WL 2537250, at \*2 (E.D.N.Y. May 19, 2020).

<sup>2</sup> “Carceral settings” includes both jails (generally holding pretrial detainees and those serving short sentences) and prisons (generally those serving sentences of more than one year). We use “prison” in this article as a general term to refer to all types of incarceration from which individuals are seeking release.

of my life, like I had hit the lottery,” said Ernest Boykin III after he was released from a federal prison in mid-July based on his medical vulnerability to COVID-19.<sup>3</sup>

Calls for the release of individuals currently serving a prison sentence are, in essence, calls for the exercise of compassion. Their release—in effect, a shortening of their prison sentence—is often justified when viewed through the lens of compassion. In this essay we broadly define compassion as a concern for the suffering of others that motivates a desire to help when one is able.<sup>4</sup> There are a number of formal state and federal mechanisms for the exercise of such compassion, with different names and eligibility requirements.<sup>5</sup>

In the context of the pandemic, the compassionate release of any incarcerated individual due to COVID-19 concerns is rooted in the understanding that prisons are unable to successfully prevent the massive spread of a virus, both because of sufficient lack of preparation and insufficient resources for appropriate testing and other protective measures, as well as the very nature of prison architecture and management. The physical set-up of virtually all prisons is inherently conducive to the spread of COVID-19 and, as a result, the chance of contracting COVID-19 in prison is much greater than in the community.<sup>6</sup> Consequently, the release of medically vulnerable prisoners is necessary to avoid their death or suffering due to severe illness. Furthermore, the release of other, less-vulnerable individuals serves to depopulate prisons—an act of compassion towards the health and lives of the prison staff and those who remain incarcerated. The release of these prisoners also demonstrates compassion by acknowledging that incarcerated individuals need not suffer in the modified, highly restrictive prison environment during a health pandemic and risk contracting the virus themselves.<sup>7</sup>

At first glance, calls for the release of incarcerated individuals appeared to be heard by those in power. As infection rates rose and the fear of outbreaks in correctional facilities proved warranted, federal, state, and local leaders vowed to

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<sup>3</sup> Zoe Tillman, “I Had Hit The Lottery”: Inmates Desperate To Get Out Of Prisons Hit Hard By The Coronavirus Are Racing To Court, BUZZFEED NEWS (Aug. 8, 2020, 7:42 AM), <https://www.buzzfeednews.com/article/zoetillman/coronavirus-prison-release-rules-inconsistency>.

<sup>4</sup> See generally *infra* Part II.A (drawing from psychology, philosophy, and other disciplines for definition of “compassion”).

<sup>5</sup> See *infra* Part I.

<sup>6</sup> See Kevin T. Schnepel, *COVID-19 in U.S. State and Federal Prisons*, COUNCIL ON CRIM. JUST. (Sept. 2020), [https://cdn.ymaws.com/counciloncj.org/resource/resmgr/covid\\_commission/FINAL\\_Schnepel\\_Design.pdf](https://cdn.ymaws.com/counciloncj.org/resource/resmgr/covid_commission/FINAL_Schnepel_Design.pdf) (finding that the COVID-19 mortality rate within prisons was twice the rate among the general public); see also Megan Wallace, et al., *COVID-19 in Correctional and Detention Facilities—United States, February–April 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 6, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6919e1-H.pdf>.

<sup>7</sup> See Wallace, *supra* note 6; see also Application for Release from Custody: Affidavit of Brie Williams, M.D. (filed Apr. 20, 2020) (No. 1:16-cr-00167-LAP), on file with authors; Meredith Greene, et al., *Older Adults in Jail: High Rates and Early Onset of Geriatric Conditions*, HEALTH JUST. (Feb. 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5816733>.

release large numbers of prisoners.<sup>8</sup> Despite these public pronouncements, however, as of the writing of this essay—almost a year after the calls for release began, yet still very much in the midst of the global pandemic—the goal of preventing massive waves of COVID-19 outbreaks and related death and illness has not been met. By January 26, 2021, more than 365,000 prisoners tested positive for COVID-19, and 2,314 prisoners died as a result.<sup>9</sup> Infection rates within prisons remain high and continue to rise. In September 2020, the infection rate within the Federal Bureau of Prisons was four times the national average.<sup>10</sup> By December 2020, the rate was over 4.77 times the national average.<sup>11</sup> Overall, the rate of COVID-19 cases reported by state and federal prisons combined was more than four times the rate of confirmed cases of U.S. residents.<sup>12</sup> Stated differently, by the end of 2020, one in every five prisoners had COVID-19, compared to one in twenty in the general population.<sup>13</sup> And this is despite an alarming lack of testing in jails and prisons.<sup>14</sup>

This is not to say that people did not get out. There was an initial drop in the jail and prison population, and there are many celebratory stories of individuals

<sup>8</sup> See, e.g., Josh Gerstein, *Barr to speed releases at federal prisons hard hit by virus*, POLITICO (Apr. 3, 2020), <https://www.politico.com/news/2020/04/03/barr-to-speed-releases-at-federal-prisons-hard-hit-by-virus-164175>; Tracey Tully, *1,000 Inmates Will Be Released from N.J. Jails to Curb Coronavirus Risk*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/nyregion/coronavirus-nj-inmates-release.html> (detailing New Jersey's efforts to release 1,000 state prisoners); Mark Gillispie, *Officials taking steps to reduce county jail populations*, AP NEWS (Mar. 21, 2020), <https://apnews.com/article/f169524cbc6ca3282938edac611593fc> (discussing measures implemented in Ohio's largest county to reduce the spread of COVID-19 in its prisons).

<sup>9</sup> *A State-by-State Look at Coronavirus in Prisons*, THE MARSHALL PROJECT, [https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons?utm\\_medium=email&utm\\_campaign=newsletter&utm\\_source=opening-statement&utm\\_term=newsletter-20201002-2179](https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20201002-2179) (last updated Jan. 28, 2021); see also COVID-19, FED. BUREAU OF PRISONS, <https://www.bop.gov/coronavirus/> (last visited Jan. 30, 2021) (reporting that 45,788 federal inmates have either “recovered” from COVID-19 or have a current, confirmed positive test, which is thirty-seven percent of the current federal prison population, not including those in private prisons and several other categories of inmates).

<sup>10</sup> SENTENCING RES. COUNSEL FOR THE FED. PUB. COMTY. DEFS., *THE COVID-19 CRISIS IN FEDERAL DETENTION* (Sept. 2020).

<sup>11</sup> SENTENCING RES. COUNSEL FOR THE FED. PUB. COMTY. DEFS., *THE COVID-19 CRISIS IN FEDERAL DETENTION* (Dec. 2020).

<sup>12</sup> Schnepel, *supra* note 6, at 3; see also Crystal Watson & Chris Beyrer, *COVID-19 and the US Criminal Justice System: Evidence for Public Health Measures to Reduce Risk*, John Hopkins Bloomberg School of Public Health (Oct. 15, 2020) (giving additional statistics demonstrating how COVID-19 has disproportionately affected people who are incarcerated).

<sup>13</sup> Beth Schwartzapfel, Katie Park & Andrew Demillo, *1 in 5 Prisoners in the US Has Had COVID-19*, THE MARSHALL PROJECT (Dec. 18, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19>.

<sup>14</sup> See, e.g., Rebecca Griesbach & Maura Turcotte, *Mississippi Prison Officials Tout Low Rates of Covid. The Reason May Be Fewer Tests*, N.Y. TIMES (Jan. 28, 2021).

released.<sup>15</sup> But the promises to release large numbers of prisoners did not come to fruition. Ineffective mechanisms of release and exceptions to release eligibility proved to whittle down initial promises. More fundamentally, limits to compassion were exposed, with decision-makers denying the release of many individuals and drastically limiting the number upon whom compassion was bestowed.<sup>16</sup>

For many, the demand for the release of those serving prison sentences during the pandemic is not driven solely by concerns of COVID-19 vulnerability. The call for the exercise of compassion is also motivated by the need to rectify well-documented, long-standing racial bias in the criminal legal system.<sup>17</sup> This bias infects all stages of the process, from arrest through plea bargaining, and the determination of the length of the sentence itself.<sup>18</sup> Furthermore, the call for compassion is also based on an awareness that, due to decades of sentencing individuals to increasingly longer sentences on the front end and reducing opportunities for release on the back end, many individuals remain in prison serving sentences that are unjust and unwarranted.<sup>19</sup> For those currently incarcerated, the exercise of compassion may be their last and only hope.<sup>20</sup>

As one group of public health experts and sentencing advocates stated, “The COVID-19 pandemic offers an invaluable opportunity to reshape collective thinking about structural racism, mass incarceration, and their social costs in the USA.”<sup>21</sup> When the COVID-19 crisis (hopefully) fades into the distance, there will still be many sick, elderly, and harshly sentenced prisoners, many of whom have already served decades in prison. The need for compassion will be strong for many decades

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<sup>15</sup> Emily Widra, *What do we know about the spread—and toll—of the coronavirus in state prisons?*, PRISON POL’Y INITIATIVE (June 24, 2020), <https://www.prisonpolicy.org/blog/2020/06/24/covidrates/>; see e.g., Ben Brazil, *UCI law students secure compassionate release for 74-year-old veteran*, L.A. TIMES: DAILY PILOT (Aug. 27, 2020), <https://www.latimes.com/socal/daily-pilot/entertainment/story/2020-08-27/uci-law-students-secure-compassionate-release-for-74-year-old-veteran>.

<sup>16</sup> See, e.g., Blakinger & Neff, *infra* note 39.

<sup>17</sup> See, e.g. Josh Salman, Emily Le Coz & Elizabeth Johnson, *Florida’s broken sentencing system*, HERALD-TRIBUNE (Dec. 12, 2016), <http://projects.heraldtribune.com/bias/sentencing/> (detailing a large-scale study that found major disparities in sentencing of similarly situated defendants based on race).

<sup>18</sup> See *infra* note 87–90; see also Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea Bargaining*, 59 B.C. L. REV. 1187 (2018).

<sup>19</sup> Leigh Courtney et al., *A Matter of Time: The Causes and Consequences of Rising Time Served in America’s Prisons*, URBAN INST., 10 (2017), <https://apps.urban.org/features/long-prison-terms/about.html>.

<sup>20</sup> Some incarcerated individuals may have appeals or post-conviction litigation pending based on fundamental errors in their trials or guilty pleas and sometimes based on innocence.

<sup>21</sup> Carlos Franco-Paredes et al., *Decarceration and community re-entry in the COVID-19 era*, THE LANCET 1, 4 (Sept. 29, 2020), [https://doi.org/10.1016/S1473-3099\(20\)30730-1](https://doi.org/10.1016/S1473-3099(20)30730-1).

to come. Yet as this pandemic has revealed, those holding the power to show compassion have, for the most part, failed to use it. Thus, this essay suggests a new approach to the exercise of compassion—one of presumptive compassion. Presuming compassion will flip the burden from asking an eligible prisoner to demonstrate why they are worthy of release to making the opposing party demonstrate why they should not be released.<sup>22</sup> More fundamentally, a presumption of compassion is grounded in an understanding of excessive and racially biased sentencing and a person's capacity to change.

This essay examines the promise and limits of the criminal legal system's ability to exercise compassion through the lens of its attempts to release prisoners during the COVID-19 pandemic. Part I reviews the mechanisms for release that advocates, actors within the system, and incarcerated individuals have turned to during this health crisis. It also examines the failures of such mechanisms to achieve their stated goals of release. Part II suggests how the system might exercise compassion more broadly and proposes the notion of "presumptive compassion" as a guiding standard for future release mechanisms and policies.

## II. ASKING FOR COMPASSION DURING THE COVID-19 PANDEMIC

The extreme risk of COVID-19 to those incarcerated became clear as the United States as a whole began to realize the many dangers of this virus. Caught off guard with little time to prepare, prisoners turned to existing mechanisms to ask for release, and they, along with their advocates and loved ones, begged leaders for the creation of new ones. Despite the hope that these avenues would lead to large numbers of releases, sadly, the reality did not meet the rhetoric.

### A. Avenues for the Exercise of Compassion

As it became clear that the nation's overcrowded jails and prisons would be among the deadliest places for inmates and staff alike during the COVID-19 pandemic,<sup>23</sup> some places turned to new or existing avenues for the release of a limited number of prisoners. These release avenues varied widely, with some led by local or state officials and others driven by lawsuits or individual requests. They ranged from judicial encouragement to release those already eligible for release<sup>24</sup> to

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<sup>22</sup> This would need to go hand-in-hand with a broadening of currently narrow eligibility requirements for release. See *infra* Part II.A.

<sup>23</sup> See *supra* note 9–13.

<sup>24</sup> See COURT OF APPEALS OF MD., ADMINISTRATIVE ORDER GUIDING THE RESPONSE OF THE TRIAL COURT OF MARYLAND TO THE COVID-19 EMERGENCY AS IT RELATES TO THOSE PERSONS WHO ARE INCARCERATED OR IMPRISONED, 2–3 (2020) (stating that judges “are encouraged to communicate with justice system stakeholders to identify at-risk incarcerated persons for potential release to protect [their] health . . . with careful regard for the safety of victims and communities . . . [and] the statutory rights of victims” and are also “encouraged . . . to consider carefully the introduction of defendants in

entirely new legislation allowing the release of medically vulnerable individuals or those close to the end of their prison sentence regardless of the crime of conviction.<sup>25</sup>

Those held in jails—at least those held pretrial on low-level charges or those serving short sentences for low-level convictions—had the most, quickest, and least complicated avenues for release.<sup>26</sup> And indeed, these individuals make up the largest group of those released during the COVID-19 pandemic. For example, individuals held on bond with pending misdemeanor or low-level felony charges were quickly identified and released from local jails in jurisdictions that wanted to lower the numbers of those incarcerated locally.<sup>27</sup> In one of the earliest COVID-19-related jail initiatives, negotiations among prosecutors, defense attorneys, and civil rights organizations led to a New Jersey Supreme Court Consent Order for the presumptive release of all those serving a county jail sentence as a condition of probation or because of a municipal court conviction.<sup>28</sup>

While data on jail releases is often incomplete and difficult to aggregate, current estimates show an overall jail population reduction of approximately 31% in the United States between the beginning of the pandemic and October 31, 2020,

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Maryland prisons, detention facilities, and other congregate placements.”). This Maryland Order did offer stronger language and guidelines for release from pretrial. *Id.* at 3–4 (stating that “judges shall consider” various factors, including any pre-existing conditions the defendant has, whether the facility is equipped to handle those conditions, and public safety generally).

<sup>25</sup> See *infra* notes 41 to 44 and accompanying text, discussing D.C. Compassionate Release Act.

<sup>26</sup> See *supra* note 2, explaining difference between jail and prison. It is important to recognize that the potential political cost to releasing those in jails, whether real or simply perceived, is lower. It is easier to show “compassion” to a person who has not yet been convicted of a crime and is often incarcerated primarily due to an inability to pay monetary bail. Indeed, it is hard to argue that their release is even a show of compassion, rather than a simple act of fairness or justice. The high risk of getting COVID-19 in a local jail far outweighs any risks related to release on a relatively minor charge that is still pending or from the punishment of a minor crime. Unfortunately, even an “easy call” like a serious reduction in the jail population did not occur in many jurisdictions.

<sup>27</sup> David Sachs, *Denver’s jail population is drastically shrinking, but that alone can’t stop deputies and inmates from getting coronavirus*, DENVERITE (Apr. 20, 2020), <https://denverite.com/2020/04/20/denvers-jail-population-is-drastically-shrinking-but-inmates-and-deputies-are-far-from-immune-to-coronavirus/> (“Between March 1 and April 15, the average daily number of inmates at the detention center and Denver County Jail fell by about 41 percent, or 749 people, according to data from the Denver Sheriff Department and internal government emails obtained by Denverite. The department counted 1,057 people in custody as of April 15. Judges and prosecutors give preference to inmates who are over 60, pregnant, have health problems that make COVID-19 riskier, have less than 60 days remaining on their sentence, have inexpensive bonds and those who are on “work-release.”); Justin Carissimo, *1,700 inmates released from Los Angeles County in response to coronavirus outbreak*, CBS NEWS (Mar. 24, 2020), <https://www.cbsnews.com/news/inmates-released-los-angeles-county-coronavirus-response-2020-03-24/> (noting how, by late March, the LA County Jail had released 1,700 individuals, or 10% of those held and how “[t]he inmates who were released were all serving time for non-violent crimes and had under 30 days left on their sentences.”).

<sup>28</sup> Consent Order, *In the Matter of the Request to Commute or Suspend County Jail Sentences*, 241 N.J. 404 (No. 084230) (2020), <https://www.njcourts.gov/notices/2020/n200323a.pdf>.

although that number varies by jurisdiction.<sup>29</sup> By contrast, the reduction of the prison population—those serving longer sentences—was significantly lower than that of the jails. The best estimate of the state and federal prison population decrease between February 28, 2020 and October 31, 2020 hovers at just five percent.<sup>30</sup>

A variety of release mechanisms led to these extremely modest prison population decreases. At one end of the spectrum were releases that came through existing mechanisms, such as the use of home confinement for eligible inmates. For example, Maryland has long had a home detention program for certain inmates in the state correctional system.<sup>31</sup> In April 2020, as COVID-19 raced through the Maryland prisons,<sup>32</sup> Governor Larry Hogan issued an Executive Order that authorized the Commissioner of Corrections to “immediately consider . . . for home detention” all inmates “[w]ho are eligible pursuant” to the existing home detention statute.<sup>33</sup> In other words, the Governor told the Commissioner that he was allowed

<sup>29</sup> Sharon Dolovich et al., *COVID-19 Related Jail Releases*, UCLA L. COVID-19 BEHIND BARS DATA PROJECT, [https://docs.google.com/spreadsheets/d/1X6uJkXXS-O6eePLxw2e4JeRtM41uPZ2eRcOA\\_HkPVTk/edit#gid=1678228533](https://docs.google.com/spreadsheets/d/1X6uJkXXS-O6eePLxw2e4JeRtM41uPZ2eRcOA_HkPVTk/edit#gid=1678228533) (last visited Jan. 30, 2021) (listing pre-pandemic national jail population as 261,002 and the total number of releases between February 28 and October 31, 2020 as 81,045, while noting that releases have not been uniform across the country); *Monitoring jail populations during COVID-19*, VERA INST. OF JUST., <https://www.vera.org/projects/covid-19-criminal-justice-responses/covid-19-data> (last visited Oct. 20, 2020) (showing pre-COVID jail population and “Latest Available” jail population with some jurisdictions showing more than 20% reduction and others showing increases). For example, in North Carolina, “the courts enacted a two-month moratorium on accepting newly sentenced individuals into prisons. By the time the moratorium was lifted in May, about 1,800 people were in county jails awaiting transfer to state prisons.” Damini Sharma, et. al, *Prison Populations Drop by 100,000 During Pandemic*, THE MARSHALL PROJECT (July 16, 2020), <https://www.themarshallproject.org/2020/07/16/prison-populations-drop-by-100-000-during-pandemic> (noting that the prison population drop was “not because of COVID-19 releases”).

<sup>30</sup> Sharma, *supra* note 29; *see also* Sharon Dolovich, *COVID-19 Related Prison Releases*, UCLA L. COVID-19 BEHIND BARS DATA PROJECT, [https://docs.google.com/spreadsheets/d/1X6uJkXXS-O6eePLxw2e4JeRtM41uPZ2eRcOA\\_HkPVTk/edit#gid=845601985](https://docs.google.com/spreadsheets/d/1X6uJkXXS-O6eePLxw2e4JeRtM41uPZ2eRcOA_HkPVTk/edit#gid=845601985) (last visited Jan. 30, 2021). This drop cannot be attributed solely to COVID-19-related releases. *See infra* notes 41–42 and accompanying text. *See also Responses to the COVID-19 pandemic*, PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/virus/virusresponse.html> (last updated Feb. 5, 2021) (“Prisons are releasing almost no one, especially when compared to local jails.”).

<sup>31</sup> MD. CODE ANN., CORR. SERVS. § 3-402 (West 2020) (“With the Secretary’s approval, the Commissioner may establish a home detention program under which an inmate in the custody of the Commissioner may live in a private dwelling that the Commissioner or the Commissioner’s designee approves.”).

<sup>32</sup> Hannah Gaskill, *Md. prisons release new COVID-19 data, quietly free more than 2,000 inmates*, WTOP NEWS (Apr. 21, 2020), <https://wtop.com/maryland/2020/04/state-prisons-release-new-covid-19-data-quietly-free-more-than-2000-inmates/> (noting how 70% of confirmed infections were correctional officers); *cf. With 1,100 COVID-19 Cases in Maryland Prisons, Critics Say State is Not Doing Enough*, WJLA (July 25, 2020), <https://wjla.com/news/local/maryland-prisons-covid> (noting that there had been a spike of recorded COVID-19 cases in Maryland prisons, but the state had also implemented universal testing and completed up to 35,000 tests at the time).

<sup>33</sup> Md. Exec. Order No. 20-04-18-01 (2020), <https://governor.maryland.gov/wp-content/uploads/2020/04/Prisoner-Release-4.18.20.pdf>. The Order also allowed “accelerate[d] consideration of



to use a long-standing mechanism that already allowed him to release inmates, to release inmates. Hogan issued a similarly limited Executive Order in November 2020;<sup>34</sup> neither order made any mention of medically vulnerable inmates.<sup>35</sup> Other state governors have issued Executive Orders suspending limits on existing “good” or “earned” time credit calculations to allow for earlier release for some inmates.<sup>36</sup>

Prisoners serving federal sentences sought release under 18 U.S.C. § 3582, another mechanism for “sentencing modification” that predated the COVID-19 pandemic. Under existing federal law and sentencing guidelines, prisoners are able to seek “compassionate release” for “extraordinary and compelling” reasons related to age, length of sentence served, and medical illness.<sup>37</sup> Historically, an individual could only seek compassionate release through the Bureau of Prisons (BOP), but the First Step Act of 2018 enabled a prisoner to petition for release in federal district court if the BOP denied their request.<sup>38</sup> This was significant because the BOP had approved only six percent of all such petitions between 2013–2017.<sup>39</sup> Consequently,

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parole,” but only for “otherwise eligible inmates who are at least 60 years old,” were not convicted of a crime of violence, and have a “record of good institutional adjustment” and “approved home plan.” *Id.* Other parts of the Order did make substantive changes to existing law and regulations, although these were relatively limited (e.g., the Order authorized the suspension of limitations on accrual of diminution credits, but only for those already within 120 days of mandatory release). *Id.*

<sup>34</sup> Md. Exec. Order No. 20-11-17-03 (2020), <https://governor.maryland.gov/wp-content/uploads/2020/11/Prisoner-Release-RENEWAL-11.17.20.pdf>.

<sup>35</sup> Although Maryland has both medical and geriatric parole, both place extreme limits on eligibility, effectively requiring an inmate to be near death or “physically incapable or presenting a danger to society.” MD. CODE ANN., CORR. SERVS. § 7-309 (medical parole); MD. CODE ANN., CRIM. LAW § 14-101 (geriatric parole). At least with respect to geriatric release, “zero inmates met the criteria that would have qualified them for release.” Op-Ed, *Maryland should release more elderly inmates*, BALT. SUN, (July 18, 2019), <https://www.baltimoresun.com/opinion/editorial/bs-ed-0718-elderly-inmates-20190718-nkfat7be7nfg5hlqqr7j2oj7xq-story.html>.

<sup>36</sup> See, e.g., Colo. Exec. Order No. D 2020 016 (Mar. 25, 2020), [https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20016%20Suspending%20Certain%20Regulatory%20Statutes%20Concerning%20Criminal%20Justice\\_0.pdf](https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20016%20Suspending%20Certain%20Regulatory%20Statutes%20Concerning%20Criminal%20Justice_0.pdf) (temporarily removing caps and criteria for earned time credit for inmates in state prisons).

<sup>37</sup> See 18 U.S.C. § 3582(c)(1)(A)(i) (permitting resentencing due to “extraordinary and compelling” reasons); U.S.S.G. § 1B1.13 (listing categories which provide extraordinary and compelling reasons, including terminal illness and inability to provide self-care in the prison due to a serious physical or medical condition).

<sup>38</sup> First Step Act, 18 U.S.C. § 3582(c)(1)(A)(i) (2018).

<sup>39</sup> Christie Thompson, *Frail, Old and Dying, but Their Only Way Out of Prison Is a Coffin*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/us/prisons-compassionate-release.html>. After the pandemic hit, the BOP compassionate release approval rate fell to two percent (albeit with a far larger number of petitions filed). See Keri Blakinger & Joseph Neff, *Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent Were Denied*, THE MARSHALL PROJECT (Oct. 7, 2020), <https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied>.

when COVID-19 hit, prisoners rushed to federal district courts to argue that the medical conditions that rendered them particularly vulnerable to COVID-19 (e.g. diabetes, heart conditions, and obesity) qualified as an “extraordinary and compelling” reason warranting compassionate release.<sup>40</sup>

At the other end of the spectrum from attempts to secure release through existing mechanisms was the creation of new legislation or administrative remedies specifically designed to protect vulnerable inmates from COVID-19 or to mitigate prison overcrowding. For example, in June 2020, the Council of the District of Columbia passed a law entitled “Motions for Compassionate Release for Individuals Convicted of Felony Offenses.”<sup>41</sup> The new law was part of comprehensive emergency legislation designed to address various aspects of the COVID-19 pandemic.<sup>42</sup> The compassionate release provision therefore specifically mentions “chronic or serious medical condition[s] . . . that cause[] an acute vulnerability to several medical complications or death as a result of COVID-19” as part of one category justifying release.<sup>43</sup> Another way in which the new D.C. Act is responsive to the emergency nature of COVID-19 in prison is how it allows the court to modify a defendant’s underlying sentence “[n]otwithstanding any other provision of law,” meaning that a judge can, for example, order immediate release even if the defendant has not yet finished serving a mandatory minimum sentence.<sup>44</sup>

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<sup>40</sup> See, e.g., *United States v. Joling*, 446 F.Supp.3d 1141 (D. Ore. 2020); *United States v. Somerville*, 463 F.Supp.3d 585 (W.D. Pa. 2020); *United States v. McCall*, 465 F.Supp.3d 1201 (M.D. Ala. 2020).

<sup>41</sup> D.C. Code Ann. § 24-403.04 (West 2020). This law applies to individuals convicted of felonies under the D.C. Code, and allows a court to modify their sentences if 1) “it determines the defendant is not a danger to the safety of any other person or the community”; and 2) the defendant meets one of the categories—which address the defendant’s age and time incarcerated, and medical conditions of the defendant or family—warranting release. *Id.* The Council made this legislation permanent in December 2020. Ann E. Marimow, *Sick, elderly prisoners are at risk for covid-19. A new D.C. law makes it easier for them to seek early release*, WASH. PO. (Dec. 30, 2020), [https://www.washingtonpost.com/local/legal-issues/sick-elderly-inmates-coronavirus-release/2020/12/29/5342816c-3fcd-11eb-8db8-395dedaaa036\\_story.html](https://www.washingtonpost.com/local/legal-issues/sick-elderly-inmates-coronavirus-release/2020/12/29/5342816c-3fcd-11eb-8db8-395dedaaa036_story.html).

<sup>42</sup> 67 D.C. Reg. 4178 (Apr. 10, 2020).

<sup>43</sup> This COVID-19 related category also requires the prisoner to be age 60 or older and to have served a certain amount of time in prison. D.C. Code Ann. § 24-403.04(a)(3)(B) (West 2020) (setting out these requirements for this subsection for eligibility for release). However, the statute also includes an expansive category that allows judges to grant release for “other extraordinary and compelling reasons” regardless of age or time already served. § 24-403.04(a)(3). Indeed, D.C. Superior Court judges have found “extraordinary and compelling reasons” and granted release in a number of cases where defendants had medical conditions that made them particularly vulnerable to COVID-19, such as obesity, chronic kidney disease, type 2 diabetes, and hypertension. See, e.g., *United States v. Fortune*, No. 2008 CF1 7699, at 1 (D.C. Super. Ct. Aug. 7, 2020) (releasing 35-year-old man who served 14 years for second-degree murder while armed, based on clinical obesity).

<sup>44</sup> D.C. Code Ann. § 24-403.04(a) (West 2020).

Other jurisdictions also sought new ways to quickly reduce the prison population as a means to protect the remaining prisoners and prison staff from COVID-19. For example, the Governor of California directed the state Department of Corrections to release thousands of prisoners who had six months or less of their sentence remaining.<sup>45</sup> Similarly, New Jersey passed legislation which speeds up the release of individuals with less than a year left of their sentence, with the Governor specifically noting that “[r]educing our prison population will undoubtedly further our mission to combat COVID-19.”<sup>46</sup> However, both of these states have significant limitations on eligibility, for instance based on type of offense or age of the individual.<sup>47</sup>

Finally, lawsuits filed on behalf of those incarcerated were another notable path for the release of the medically vulnerable and others. In California, a class action lawsuit led to a court order requiring San Quentin prison to release or transfer half of its prisoner population.<sup>48</sup> In other jurisdictions, lawsuits put pressure on executive or judicial branch actors to use existing avenues of release like home confinement or the granting of individual petitions.<sup>49</sup>

Despite these visible efforts, even the minor five percent decrease in the prison population between the start of the pandemic and late 2020 may not be due entirely to the release of prisoners still serving their sentences. It is possible that much of this decrease would have occurred even without COVID-19-motivated releases due to overall trends in crime and punishment.<sup>50</sup> Furthermore, to the extent that any decrease is COVID-19-related, experts have described how the prison population decrease is “largely due to prohibitions stopping new prisoners from being accepted from local jails, parole officers sending fewer people back to prison for low-level

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<sup>45</sup> John Myers & Phil Willon, *California to Release 8,000 Prisoners in Hopes of Easing Coronavirus Crisis*, L.A. TIMES (July 10, 2020), <https://www.latimes.com/california/story/2020-07-10/california-release-8000-prisoners-coronavirus-crisis-newsom>.

<sup>46</sup> Blake Nelson, *Murphy Signs Bill to Release Thousands of N.J. Prisoners Early Beginning the Day After Election Day*, NJ.COM (Oct. 20, 2020), <https://www.nj.com/news/2020/10/murphy-signs-bill-to-release-thousands-of-nj-prisoners-early-beginning-the-day-after-election-day.html>.

<sup>47</sup> *Id.*

<sup>48</sup> *In re Von Staich*, 56 Cal.App.5th 53 (2020); Bob Egelko, *San Quentin Must Release or Transfer Half Its Prisoners Because of Lack of COVID Care, Court Rules*, S.F. CHRONICLE (Oct. 21, 2020), <https://www.sfchronicle.com/bayarea/article/San-Quentin-must-release-or-transfer-half-its-15662794.php>.

<sup>49</sup> See, e.g., *Martinez-Brooks v. Easter*, 459 F.Supp.3d 411 (D.Conn. 2020) (issuing order to FCI Danbury to create a process to evaluate inmates for home confinement).

<sup>50</sup> Jacob Kang-Brown, et. al., *People in Prison in 2019*, VERA INST. OF JUST. (May 2020), <https://www.vera.org/publications/people-in-prison-in-2019> (“At the end of 2019, there were an estimated 1,435,500 people in state and federal prisons, down 2.2 percent from 2018.”).

violations, and court closures due to coronavirus leading to fewer people being sentenced.”<sup>51</sup>

In short, though a number of prisoners were released, neither existing nor new release mechanisms were the solution they were touted to be. As prisons began to accept new inmates and courts reopened just months into the COVID-19 pandemic,<sup>52</sup> prison populations remain high.<sup>53</sup> An understanding of the limits of the mechanisms used is not only essential for staving off more death and severe illness, but it is also central to planning for a future with more compassionate release, regardless of a pandemic.

### B. *Limits in the Mechanisms of Compassion*

Despite calls for the exercise of compassion—to reduce overcrowding and protect the medically vulnerable—most jurisdictions failed to release significant numbers of prisoners.<sup>54</sup> Attempts to exercise compassion during a pandemic exposed a number of problems, including procedural hurdles in mechanisms for release; practical barriers in the pre-release reentry process; the limits of avenues focused on individual rather than group release; restrictive eligibility requirements for release; and persistent systemic racism.

First, as recently highlighted by Lee Kovarsky, the failure of our criminal legal system to release large numbers of prisoners is in part the result of “a deficit in the deep structure of American discharge remedies.”<sup>55</sup> Our existing mechanisms for release are procedurally burdensome, slow, and contain legal standards under which it is difficult for the petitioner to prevail. Administrative exhaustion requirements for many federal claims operate to slow down the process despite the urgency for release due to the present health pandemic (or any situation involving a sick or

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<sup>51</sup> See Sharma, *supra* note 29.

<sup>52</sup> Court of Appeals of Md, Second Amended Administrative Order Lifting the Statewide Suspension of Jury Trials and Resuming Grand Juries (2020); see also Court of Appeals of Md., Administrative Order on the Progressive Resumption of Full Function of Judiciary Operations Previously Restricted Due to the COVID-19 Emergency (2020); Keegan Hamilton & Keri Blakinger, “Con Air” Is Spreading COVID-19 All Over the Federal Prison System, THE MARSHALL PROJECT (Aug. 13, 2020), <https://tinyurl.com/y6ozc39w>.

<sup>53</sup> Emily Widra, *Since you asked: Just how overcrowded were prisons before the pandemic, and at this time of social distancing, how overcrowded are they now?*, PRISON POLICY INITIATIVE (Dec. 21, 2020), <https://www.prisonpolicy.org/blog/2020/12/21/overcrowding/> (“10 months into the pandemic . . . 41 states are currently operating at 75% or more of their capacity, with at least nine of those state prison systems and the federal Bureau of Prisons are still operating at more than 100%.”).

<sup>54</sup> See *supra* notes 9–13.

<sup>55</sup> Lee Kovarsky, *Pandemics Risks and Remedies*, 106 VA. L. REV. ONLINE 71, 72 (2020); see also Brandon Garrett, *Five Takeaways from Prison Actions During COVID-19*, DUKE L. CTR. FOR SCI. & JUST. BLOG (May 22, 2022), <https://sites.law.duke.edu/cs-j-blog/2020/05/22/five-takeaways-from-prison-actions-during-covid-19>.

elderly inmate).<sup>56</sup> For instance, in the context of compassionate release motions in federal court, a prisoner must first ask for release from the Federal Bureau of Prisons (BOP) and wait a minimum of 30 days before filing a motion in federal court.<sup>57</sup>

For other types of claims, even if a prisoner jumps the procedural hurdles, the legal standards themselves are not easily met. For example, habeas corpus petitioners and those making federal civil rights claims pursuant to 42 U.S.C. § 1983 must meet the high burden of demonstrating a constitutional violation to justify release.<sup>58</sup> The Prisoner Litigation Reform Act (PLRA) adds further restrictions on when a petitioner may ask for release from a federal court.<sup>59</sup>

Similarly, mechanisms for “compassionate release” in many states have a very narrow definition of who qualifies for relief, often requiring a terminal illness, permanent incapacitation, or severe physical or cognitive impairments.<sup>60</sup> For example, to qualify for Alabama’s medical parole program, prisoners must typically be permanently incapacitated, terminally ill, or “geriatric,” defined as aged 60 or older with a chronic illness that is so life-threatening or debilitating that it necessitates assistance with daily life functions.<sup>61</sup> Between 2008 and 2018, only 58 individuals were approved for release under Alabama’s narrow mechanism.<sup>62</sup> Perhaps the most extreme state example is Illinois, where the only avenue for

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<sup>56</sup> See Kovarsky, *supra* note 55, at 81 (describing exhaustion requirements generally required for individual habeas petitioners).

<sup>57</sup> 18 U.S.C. § 3582(c)(1)(A) (2018); *see also* United States v. Holden, 452 F.Supp.3d 964, 977 (D. Or. 2020) (denying defendant’s motion for release for failure to exhaust administrative relief and holding that courts may not excuse such failure). Other legislatures have made the decision to bypass administrative exhaustion. For example, although defendants sentenced under the Code of the District of Columbia are also incarcerated in the federal BOP, *see* D.C. CODE § 24-101(b) (2020), the D.C. Compassionate Release Act allows individuals to file a motion immediately with the court, without having to first make a request of the BOP. D.C. Code Ann. § 24-403.04 (West 2020); *see also* text accompanying notes 41–44, discussing D.C. Compassionate Release Act.

<sup>58</sup> Kovarsky, *supra* note 55, at 89.

<sup>59</sup> *Id.* at 82 (explaining how the PLRA requires a three-judge panel to find both “(1) that crowding is the primary cause of the federal rights violation and (2) that no other relief helps.”).

<sup>60</sup> *See Everywhere and Nowhere: Compassionate Release in States*, FAMILIES AGAINST MANDATORY MINIMUMS (June 2018), <https://famm.org/our-work/compassionate-release/everywhere-and-nowhere>; *FAMM Compassionate Release: Ohio*, FAMILIES AGAINST MANDATORY MINIMUMS (June 2018), [https://famm.org/wp-content/uploads/Ohio\\_Final.pdf](https://famm.org/wp-content/uploads/Ohio_Final.pdf) (“Ohio provides compassionate release for eligible prisoners who are in imminent danger of death, terminally ill, or medically incapacitated.”).

<sup>61</sup> *See* ALA. CODE §§ 15-22-41 to -43 (2017) (Medical Parole Act); *see also* Alabama Board of Pardons and Paroles Operating Rules, Regulations, and Procedures, Rule 640-X-3-.05 (Medical Parole Consideration) (2017), <http://www.pardons.state.al.us/Rules.aspx/>; *see also* *FAMM Compassionate Release: Alabama*, FAMILIES AGAINST MANDATORY MINIMUMS (June 2018), [https://famm.org/wp-content/uploads/Alabama\\_Final.pdf](https://famm.org/wp-content/uploads/Alabama_Final.pdf) (providing an overview of compassionate release eligibility in Alabama).

<sup>62</sup> *See FAMM Compassionate Release: Alabama*, *supra* note 61, at 7.

compassionate release is to seek clemency from the Governor, who may commute a sentence based on an inmate's serious medical condition.<sup>63</sup> A Prisoner Review Board makes recommendations to the Governor on any clemency petitions, but the Board's sample clemency application only asks for "substance abuse and mental health" information and does not mention medical conditions.<sup>64</sup> Unsurprisingly, the Board only sends a few requests each year to the Governor, and only "if death is imminent."<sup>65</sup>

Second, the historical lack of attention to reentry services for those incarcerated can prove to be a barrier to the actual release of individuals. Delays in verifying release addresses, finding halfway home placements, and setting up appropriate medical care can cause delays of weeks, if not months, in the release of medically vulnerable prisoners.<sup>66</sup> In some states, requirements for in-custody pre-release programming counterintuitively slowed down release despite the system's recognition that these individuals were ready to return home. For example, in Tennessee, more than 1,000 prisoners were approved for release on parole before the COVID-19 outbreak, but they had to take a required in-custody reentry class prior to release.<sup>67</sup> Yet, due to the pandemic, this class was not offered in the correctional facilities. Prisoners approved for release on parole in Texas faced similar delays.<sup>68</sup> These situations illustrate a problematic inflexibility to remove or rethink such requirements at a time of an urgent health crisis—and frustrated efforts to release eligible individuals quickly.

Third, existing mechanisms for compassionate release are almost entirely mechanisms for the release of individuals rather than groups—which resulted in an inherently slow process and inconsistency in whether requests for release were granted. Requests for commutation of sentence, parole, or compassionate release

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<sup>63</sup> ILL. CONST. art. V, § 12.

<sup>64</sup> Sample Petition for Executive Clemency, State of Ill. Prisoner Rev. Bd., <https://www2.illinois.gov/sites/prb/Pages/prbexcleme.aspx>.

<sup>65</sup> *FAMM Compassionate Release: Illinois*, FAMILIES AGAINST MANDATORY MINIMUMS (June 2018), [https://famm.org/wp-content/uploads/Illinois\\_Final.pdf](https://famm.org/wp-content/uploads/Illinois_Final.pdf).

<sup>66</sup> This is based on the authors' own experience litigating compassionate release and parole cases as well as numerous communications with others providing such representation.

<sup>67</sup> Ben Hall, *Attorney Urges Tennessee to Release Inmates Already Granted Parole, Warns of COVID-19 Lawsuits*, NEWS CHANNEL 5 NASHVILLE (May 14, 2020, 7:55 PM), <https://www.newschannel5.com/news/newschannel-5-investigates/attorney-urges-tennessee-to-release-inmates-already-granted-parole-warns-of-covid-19-lawsuits>. But see Colo. Exec. Order No. D 2020 016 (Mar. 25, 2020), [https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20016%20Suspending%20Certain%20Regulatory%20Statutes%20Concerning%20Criminal%20Justice\\_0.pdf](https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20016%20Suspending%20Certain%20Regulatory%20Statutes%20Concerning%20Criminal%20Justice_0.pdf) (suspending the requirement that inmates complete a regimented disciplinary program before release).

<sup>68</sup> Reena Diamante, *Families Call for Release of Texas Prisoners Approved for Parole Amid Pandemic*, SPECTRUM NEWS 1 (May 15, 2020, 8:27 AM CT), <https://spectrumlocalnews.com/tx/san-antonio/news/2020/05/15/families-call-for-release-of-texas-prisoners-approved-for-parole-amid-pandemic->

require the review of an individual's case and often result in a debate about the merits of their request. This often requires legal filings, the work of several attorneys or staff on both sides of the issue, and a decision maker's time and effort.<sup>69</sup> Not only do the individual requests for release during the COVID-19 pandemic require an immense amount of system resources, the time delay in the processing of these requests has in some instances resulted in devastating consequences. For example, Saferia Johnson was serving a 46-month sentence for a non-violent offense when COVID-19 hit her federal prison.<sup>70</sup> She suffered from asthma and diabetes, and believed she qualified for home confinement under the program announced by Attorney General Barr.<sup>71</sup> Sadly, she passed away while incarcerated in August, after being denied for home confinement and while in the process of petitioning for compassionate release in federal court.<sup>72</sup> Individual-based mechanisms are—by their very definition—unable to effectuate the rapid release of large number of individuals.

Furthermore, different players in the criminal legal system have different views about the soundness of release, leading to inconsistent results across the country in these individual-based mechanisms. For instance, federal judges deciding compassionate release requests have had varying opinions on whether a medically vulnerable prisoner was sufficiently ill to warrant release or how best to determine a prisoner's risk of catching COVID-19 while imprisoned.<sup>73</sup>

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<sup>69</sup> See, e.g., *Criminal Standing Order of July 17, 2020: Order Establishing Procedures, Effective Immediately, for Filing Emergency Motions for Release from Custody Due to the COVID-19 Pandemic, Including Bond Review and Compassionate Release Motions and Rule 35 Motions to Reduce Sentence*, D.C. COURTS (2020), <https://www.dccourts.gov/sites/default/files/July-17-2020-amended-standing-order.pdf> (setting out the process for filing, government oppositions, replies, and hearings for compassionate releases).

<sup>70</sup> DeMicia Inman, *Mother Imprisoned for Non-violent Offense Dies from COVID-19 After Early Release was Denied*, THE GRIO (Aug. 6, 2020), <https://thegrio.com/2020/08/06/mother-dies-covid-19-denied-early-release>.

<sup>71</sup> *Id.*; see also Attorney General William Barr, *Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic*, OFFICE OF THE ATTORNEY GENERAL (Mar. 26, 2020), <https://www.justice.gov/file/1262731/download> (laying out the discretionary factors for Bureau of Prison personnel to grant home confinement).

<sup>72</sup> Inman, *supra* note 70; See also Blakinger & Neff, *supra* note 39 (telling the story of Marie Neba, who died from COVID-19 while awaiting compassionate release). At least twenty-four other federal prisoners have also died either while their compassionate release motions were pending or while awaiting release after a court granted their motion. SENTENCING RES. COUNSEL FOR THE FED. PUB. COMTY. DEFS., *The COVID-19 Crisis in Federal Detention* (Dec. 2020). Sadly, these types of deaths also happened before the pandemic. See, e.g., Brandon Sample, *Federal Prisoner Granted Compassionate Release Under First Step Act Dies in Prison*, COMPASSIONATE RELEASE (Mar. 27, 2019), <https://compassionaterelapse.com/federal-compassionate-release-dies> (describing how Steve Cheatham had been diagnosed with late-stage cancer, but he died in the time it took to receive a compassionate release order).

<sup>73</sup> See, e.g., *United States v. Fragoso*, No. 4:90-CR-00328 (S.D. Tex. July 17, 2020) (denying motion for compassionate release); see also Zoe Tillman, *"I Had Hit The Lottery": Inmates Desperate*

Prosecutors, too, are often very resistant to demonstrating compassion to convicted offenders. For example, “For years, federal prosecutors across the United States have routinely required that defendants who want to settle their cases either agree not to seek compassionate release in the event they become terminally ill while in prison, or delay making such a request for several months.”<sup>74</sup> It was only after a federal district court judge called the practice “appallingly cruel” in a recent decision that the United States Attorney’s office in that district announced that it would not continue to condition plea deals on such waivers.<sup>75</sup> Similarly, although the Department of Justice eventually issued guidance to its prosecutors about when they should concede that an individual has “extraordinary and compelling” health reasons for release (one basis for relief under the federal and DC compassionate release statutes), only some line prosecutors have followed that guidance, with others arguing that, despite these medical vulnerabilities to COVID-19, the person should not be released.<sup>76</sup> As one court bluntly critiqued, “Why would federal prosecutors exercise the tremendous discretion entrusted to them with such a lack of compassion?”<sup>77</sup> Prosecutors have also often objected to any broad avenues of release and only supported eligibility requirements that are extremely narrow and exclude

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*To Get Out Of Prisons Hit Hard By The Coronavirus Are Racing To Court*, BUZZFEED NEWS (Aug. 8, 2020, 7:42 AM ET), <https://www.buzzfeednews.com/article/zoetillman/coronavirus-prison-release-rules-inconsistency>.

<sup>74</sup> Nate Gartrell, *COVID-19 brings change in federal prosecutors’ handling of compassionate-release requests*, MERCURY NEWS (Aug. 24, 2020, 3:30 PM), <https://www.mercurynews.com/2020/08/24/before-covid-19-federal-prosecutors-routinely-required-defendants-not-to-seek-compassionate-release-as-part-of-plea-deals>; see also United States’ Opp’n to Def.’s Mot. for Compassionate Release from Custody at 2, United States v. Trent, No. 16-cr-00178-CRB-1, 2020 WL 1812242 (N.D. Cal. Apr. 9, 2020) (“Defendant’s plea agreement waiver of the right to seek § 3582 relief should be enforced. His motion [for compassionate release] should be denied on the ground of waiver alone.”).

<sup>75</sup> United States v. Osorto, 445 F.Supp.3d 103, 105 (N.D. Cal. 2020) (“Because this waiver provision undermines Congressional intent and is an unconscionable application of a federal prosecutor’s enormous power to set the terms of a plea agreement, the Court cannot approve of the proposed Plea Agreement in this case.”); *COVID-19 Brings Change In Federal Prosecutors’ Handling Of Compassionate-Release Requests*, DEF. SERVS. OFF. TRAINING DIV. (Aug. 27, 2020), <https://www.fd.org/news/covid-19-brings-change-federal-prosecutors-handling-compassionate-release-requests>.

<sup>76</sup> Compare Letter from United States Attorney’s Office for the District of Maryland, United States v. Cole, No. ELH-18-167, 2020 WL 4582702, at \*3 (D. Md. July 30, 2020) (conceding that “Defendant’s body mass index (BMI) above 30 constitutes an extraordinary and compelling reason warranting a reduction sentence” and the “Department continues to follow the CDC’s guidance in determining whether an extraordinary and compelling reason exists” (internal quotation and footnote omitted)) with United States’ Opp’n to the Def.’s Compassionate Release Mot. at 10, United States v. Kittrell, No. 2006 CF3 024322 (D.C. Super. Ct. Sep. 11, 2020) (failing to concede on “extraordinary and compelling” prong despite two documented medical conditions—obesity and type 2 diabetes—on the CDC guidance).

<sup>77</sup> Osorto, 445 F.Supp.3d at 110.



many from relief.<sup>78</sup> In short, in current mechanisms for release, there is much room for discretion in determining whether release is warranted even for a narrow group of eligible individuals. The end result has been limited expressions of actual compassion, and much more often, the denial thereof.<sup>79</sup>

Fourth, even when new broad mechanisms for release were announced, eligibility restrictions in these mechanisms resulted in smaller than expected numbers of prisoners ultimately released. For example, in response to the coronavirus pandemic, Attorney General William Barr directed the BOP to expand the quick release of prisoners convicted of non-violent offenses into supervised home confinement.<sup>80</sup> But the release of large numbers of prisoners was thwarted by a simultaneous revision to the risk assessment tool that ultimately further restricted who was eligible for the home confinement program.<sup>81</sup> A ProPublica investigation revealed that BOP officials had quietly changed the requirements for qualifying for release, making them more restrictive than the previous 2019 publicly available standards.<sup>82</sup> Thus, despite the 20% of federal prisoners who initially qualified for home confinement under the 2019 standards, as of May 21, 2020 only 1.8% of the BOP prisoner population (approximately 3,000 prisoners) had been released on home confinement.<sup>83</sup> Similarly, the Oklahoma Department of Corrections initially created a list of 126 prisoners with serious medical needs justifying release on medical parole, but then cut anyone with convictions for violent or sex offenses, or

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<sup>78</sup> See Michael Mroziak, *Prosecutor Says Proposed Elder Parole Bill "Ain't Flying" For New York's Violent Offenders*, WSKG (Jan. 27, 2020), <https://wskg.org/news/prosecutor-says-proposed-elder-parole-bill-aint-flying-for-new-yorks-violent-offenders/> (noting New York prosecutors' opposition to elder parole bills due to inclusion of "violent" offenders).

<sup>79</sup> See *supra* note 30.

<sup>80</sup> A.G. Barr, *supra* note 71; Attorney General William Barr, *Increasing Use of Home Confinement at Institutions Most Affected by COVID-19*, OFFICE OF THE ATTORNEY GENERAL (Apr. 3, 2020), <https://www.justice.gov/file/1266661/download>; Ian MacDougall, *Bill Barr Promised to Release Prisoners Threatened by Coronavirus — Even as the Feds Secretly Made It Harder for Them to Get Out*, PROPUBLICA (May 26, 2020), <https://www.propublica.org/article/bill-barr-promised-to-release-prisoners-threatened-by-coronavirus-even-as-the-feds-secretly-made-it-harder-for-them-to-get-out>.

<sup>81</sup> MacDougall, *supra* note 80.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* This number has now doubled. The BOP reports that by mid-January, 7,837 prisoners have been released on home confinement. See *COVID-19: Coronavirus*, Federal Bureau of Prisons, <https://www.bop.gov/coronavirus> (last visited Jan. 29, 2021). Of course, that uptick in release numbers came after devastating waves of COVID-19 in the BOP. See, e.g., Lisa Riordan Seville, *'Like a war zone': Prison that freed Paul Manafort early now ravaged by Covid*, NBC NEWS, (Dec. 19, 2020), <https://www.nbcnews.com/news/us-news/war-zone-prison-freed-paul-manafort-early-now-ravaged-covid-n1251783>, ("Nearly 75 percent of the 856 prisoners at FCI Loretto in Pennsylvania tested positive for Covid-19 in the last month.").

who had not yet served a mandatory sentencing term.<sup>84</sup> The list ended up with 14 names, 12 of whom the Parole Board ultimately approved for release.<sup>85</sup>

Fifth, the systemic racism that pervades the criminal legal system is exposed in the release context as well, thereby resulting in disproportionately fewer individuals of color being released during the pandemic.<sup>86</sup> The criminal histories of men of color, to take just one example, are often skewed due to racially biased policing tactics and charging and sentencing decisions.<sup>87</sup> Consequently, when eligibility for release takes into account the potential of recidivism and risk of danger to the community—two inquiries in which a person’s criminal history becomes relevant—fewer prisoners of color may be deemed appropriate for release.<sup>88</sup> Similarly, one study found that while “black and white inmates were equally likely to engage in rule-breaking activity, blacks were more likely to be officially reported for rule infractions.”<sup>89</sup> Consequently, when eligibility for release is premised in part on a consideration of a prisoner’s disciplinary history, prisoners of color are more likely to be excluded.

In sum, current mechanisms for compassion have failed to lead to the release of the large numbers of prisoners necessary to both protect the medically vulnerable and depopulate the jails and prisons to such an extent that the spread of COVID-19 could be at least somewhat contained in carceral settings. †

### III. ENSURING COMPASSION BEYOND THE COVID-19 PANDEMIC

Despite efforts to release incarcerated individuals during the COVID-19 pandemic, these mechanisms generally failed due to bureaucratic hurdles, strict eligibility requirements, and decision-makers who simply did not agree with the

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<sup>84</sup> Brianna Bailey, ‘What if something happens and he doesn’t get to come home?’, THE FRONTIER (Sept. 23, 2020), <https://www.readfrontier.org/stories/what-if-something-happens-and-he-doesnt-get-to-come-home>.

<sup>85</sup> *Id.*

<sup>86</sup> See, e.g., Emily Hoerner & Carlos Ballesteros, *Illinois Released White Inmates at Disproportionately High Rates Amid Pandemic, Report Shows*, INJUSTICEWATCH (June 17, 2020), <https://www.injusticewatch.org/news/2020/covid-release-disparity> (explaining the racial distribution of COVID-19-related releases in Illinois).

<sup>87</sup> See Marc Mauer, *The Endurance of Racial Disparity in the Criminal Justice System*, in POLICING THE BLACK MAN: ARREST, PROSECUTION AND IMPRISONMENT 30 (Angela J. Davis ed. 2017); Angela J. Davis, *The Prosecution of Black Men in Prison*, in POLICING THE BLACK MAN: ARREST, PROSECUTION AND IMPRISONMENT 178 (Angela J. Davis ed. 2017); see also POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT (Angela J. Davis ed. 2017). See also *supra* notes 17–18.

<sup>88</sup> See Berdejó, *supra* note 18, at 1237–38 (discussing how race works as a proxy for the risk of violence).

<sup>89</sup> Eric D. Poole & Robert M. Regoli, *Race, Institutional Rule Breaking, and Disciplinary Response: A Study of Discretionary Decision Making in Prison*, 14 LAW & SOC’Y REV. 931 (1980); see also Andrea C. Armstrong, *Race, Prison Discipline and the Law*, 5 UC IRVINE L. REV. 759, 770–71 (2015).

underlying premise of early release. That these failures happened even during a global crisis suggests that the mechanisms need to be changed. In what ways could the criminal legal system operate to show compassion quickly and broadly, and avoid the pitfalls witnessed in the last few months? We suggest that the answer, broadly speaking, is to presume compassion for all prisoners. Before we turn to that suggestion, we explore two preliminary questions: What do we mean by compassion, and to whom among the incarcerated should that compassion extend?

### A. *What is Compassion?*

Compassion is a concept explored in a variety of disciplines, including philosophy, theology, psychology, and evolutionary theory. As in law, there is no agreement about the definition of compassion in those fields.<sup>90</sup> The Latin *compati* means “to suffer with,”<sup>91</sup> and some definitions of compassion do not extend much further than sympathy or empathy.<sup>92</sup> Other definitions include the desire to help.<sup>93</sup> One group that included a Buddhist scholar, psychologists, and others who developed the Stanford compassion cultivation training defined compassion as “a multidimensional developmental process through four stages—(1) the awareness of suffering, (2) an affective concern for others, (3) a wish to relieve that suffering, and (4) a readiness to relieve that suffering.”<sup>94</sup>

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<sup>90</sup> PAUL GILBERT, COMPASSION: CONCEPTS, RESEARCH, AND APPLICATIONS 3 (2017) (“despite this progress [in research on compassion] there remains controversy and discussion around the actual nature of compassion, its definition and constituents.”).

<sup>91</sup> *Compassion*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/compassion> (last visited Oct. 20, 2020).

<sup>92</sup> GILBERT, *supra* note 90, at 4 (noting Oxford Dictionary (2016) definition of compassion as “Sympathetic pity and concern for the sufferings or misfortunes of others”).

<sup>93</sup> *Id.* at 5 (noting Cambridge University Dictionary (2016) definition of “a strong feeling of sympathy and sadness for the suffering or bad luck of others and a wish to help them”); see also *What is Compassion?*, GREATER GOOD MAGAZINE, <https://greatergood.berkeley.edu/topic/compassion/definition> (last visited Oct. 20, 2020) (“Compassion is not the same as empathy or altruism, though the concepts are related. While empathy refers more generally to our ability to take the perspective of and feel the emotions of another person, compassion is when those feelings and thoughts include the desire to help. Altruism, in turn, is the kind, selfless behavior often prompted by feelings of compassion, though one can feel compassion without acting on it, and altruism isn’t always motivated by compassion.”).

<sup>94</sup> Hooria Jazaieri et al., *Enhancing Compassion: A Randomized Controlled Trial of a Compassion Cultivation Training Program*, J. HAPPINESS STUD. § 4.2 (2012) (citing Geshe Thupten Jinpa, *Compassion Cultivation Training (CCT): Instructor’s Manual* (unpublished 2010)).

In the criminal legal system, mechanisms for compassion all include the ability to actually offer relief—that is, release from incarceration.<sup>95</sup> We thus define compassion broadly as “a concern for the suffering of others that motivates a desire to help *and* where there is the ability to help.”<sup>96</sup> Although in theory this broad definition encompasses a viable avenue for the actual expression of compassion towards all prisoners, in practice, so-called compassionate release mechanisms often have much narrower definitions of who is eligible for release. As discussed above, the predominant focus in current compassionate release mechanisms is on the elderly and the very sick or—in the case of new mechanisms responding to the COVID-19 pandemic—the medically vulnerable. Even within those narrow categories, there are usually further restrictions, such as blanket ineligibility for individuals convicted of certain violent or serious offenses.<sup>97</sup> A first step in introducing real compassion into the criminal legal system is to broaden the constricted legal definitions of who can *seek* compassionate release. (The next step—who should *get* compassionate release—is addressed below.)

Most compassionate release avenues deem those convicted of “violent” crimes ineligible.<sup>98</sup> But compassionate release should be completely untethered from the underlying crime of conviction—there should be no crimes that make a person ineligible to seek relief. Other aspects of the release mechanism might result in a denial, but blanket prohibitions on eligibility cut against what we know about recidivism rates of older prisoners, including those convicted of violent offenses, and the recidivism rates of those who serve lengthy sentences.<sup>99</sup> Such restrictions on eligibility result in very old, very sick individuals dying in prison, even if all signs point to rehabilitation and lack of dangerousness. As one recent study put it, “At least one important reason for the significant length of homicide sentences is fear that those who have killed before will eventually kill again. As we debate how best to reduce the social costs of incarceration policies, it matters whether this popular

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<sup>95</sup> That is the context relevant to this essay. In other areas of criminal law, compassion may look different, such as the granting of a pardon or the expungement of a criminal record. *See* U.S. CONST. art. II, § 2; MD. CODE ANN. CRIM. PROC. § 10-105 (West 2020).

<sup>96</sup> *See supra* text accompanying note 7.

<sup>97</sup> *See supra* text accompanying notes 61–66; *but see* D.C. Code § 24-403.04 (2020) (allowing all individuals convicted of a felony offense to seek compassionate release, with eligibility requirements that do not include any barriers based on the underlying offense).

<sup>98</sup> *See, e.g.*, Ala. Code § 15-22-43(e) (stating that “inmates convicted of capital murder or a sex offense” are ineligible for Medical Parole consideration). Of course, not all crimes deemed “violent” under state or federal codes actually require the use of violence. *See* Eli Hager, *When “Violent Offenders” Commit Nonviolent Crime*, THE MARSHALL PROJECT (Apr. 3, 2019), <https://www.themarshallproject.org/2019/04/03/when-violent-offenders-commit-nonviolent-crimes>.

<sup>99</sup> *See generally* J.J. Prescott, Benjamin Pyle, & Sonja B. Starr, *Understanding Violent Crime Recidivism*, 95 NOTRE DAME L. REV. 1643 (2020).

belief is actually true.”<sup>100</sup> What this study found—using a large national longitudinal dataset—was “that there are diminishing returns to very long sentences, even for homicide, and that the vast majority of individuals released after serving a sentence for homicide are not dangerous.”<sup>101</sup> One specific finding was that “older people who have served substantial sentences recidivate infrequently,” particularly those aged over 55 years or older.<sup>102</sup> Based on their findings, the study authors noted that “the empirical data suggest that policymakers could enact reforms for potential earlier release without substantial public-safety risk.”<sup>103</sup>

Eddie Wilson, recently released at age 62, benefitted from the fact that the D.C. Compassionate Release Act has no such blanket barriers to eligibility based on the crime of conviction.<sup>104</sup> Granting him release during the COVID-19 pandemic after he spent 44 years in prison, the judge noted that “the events that led to Mr. Wilson’s convictions and sentence in this case are grisly and impossible to fathom.”<sup>105</sup> After describing those events—which involved multiple rapes and murders committed by a group of men that included Mr. Wilson—the judge noted how, “Given the level of depravity involved in the underlying offenses, Mr. Wilson has a heavy burden to prove he is not a danger.”<sup>106</sup> The court found that Mr. Wilson met this burden, noting his “remarkable” prison disciplinary record, his participation in many programs, strong support from a number of prison staff, and a place to live upon his release.<sup>107</sup> Although other judges have similarly released individuals convicted of violent crimes under the D.C. Compassionate Release Act and under the First Step Act’s compassionate release provision (most if not all of them elderly and often very sick or medically vulnerable to COVID-19),<sup>108</sup> it is worth noting that these individual releases appear to be outliers. Most individuals in most jurisdictions, including in federal courts across the country, come up against blanket barriers based on the

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<sup>100</sup> *Id.* at 1644–45.

<sup>101</sup> *Id.* at 1645, 1647.

<sup>102</sup> *Id.* at 1695 tbl. 3.

<sup>103</sup> *Id.* at 1647.

<sup>104</sup> *United States v. Wilson*, No. 1975 FEL 97258, at 21 (D.C. Super. Ct. May 13, 2020).

<sup>105</sup> *Id.* at 2.

<sup>106</sup> *Id.* at 7. Given his age and years in prison served, Mr. Wilson met the other criteria under the Act, and government conceded as much. *Id.*

<sup>107</sup> *Id.* at 10–22.

<sup>108</sup> *See, e.g., United States v. Brooks*, No. 74 FEL 77607, 75 FEL 20323, at 1 (D.C. Super. Ct. Sept. 11, 2020) (releasing 72-year-old man convicted of three counts of rape while armed with a pistol; one count of rape while armed with a knife after 45 years in prison); *United States v. McCarthy*, 453 F.Supp.3d 520, 522–23 (D. Conn. Apr. 8, 2020) (granting compassionate release of defendant convicted of armed bank robbery).

crime of conviction or against judicial and prosecutorial resistance to release based solely on the underlying conviction.

Release mechanisms that effectively exclude those serving lengthy sentences are particularly problematic in a system that imposes severe penalties for exercising the right to trial rather than pleading guilty.<sup>109</sup> People sentenced after trial often end up spending far more time in prison, sometimes by decades, than they would have had they accepted the prosecution's plea offer—which presumably took the need for public safety and dangerousness into account at the time of that offer. Angelo Robinson's experience illustrates this "trial penalty" and how avenues of compassion are needed to correct earlier injustices. Charged with shooting through his bedroom door while guarding a drug stash and killing a friend at age 20, prosecutors offered Robinson a plea to manslaughter and fourteen years in prison. After his self-defense strategy at trial failed and he was convicted of murder, he received a sentence of 29 years to life.<sup>110</sup> It took years of work by the Ohio Justice and Policy Center's Beyond Guilt project to secure his release, which only happened after members of the victim's family and the local prosecutor agreed to release after Robinson had served 22 years. But as significant as Robinson's release was—and as significant as the 14 others released with assistance from Beyond Guilt in 2019 are—these individual acts of compassion "reduced Ohio's 49,000-person prison population by 0.0003 percent. It's like trying to empty the ocean with a teaspoon."<sup>111</sup>

Critically, excluding those serving lengthy sentences—whether due to a conviction for a violent offense, a recidivist sentencing enhancement, or a trial penalty—disproportionately hurts individuals of color, as they are first, disproportionately in prison, and second, disproportionately serving lengthy sentences.<sup>112</sup> For instance, according to the U.S. Sentencing Commission, Black offenders in federal court are significantly more likely than white offenders to have

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<sup>109</sup> See, *The Trial Penalty: The Sixth Amendment Right To Trial on the Verge of Extinction and How to Save It*, NAT'L ASS'N OF CRIM. DEF. LAWS 17–18 (2018), <https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct;AnOfferYouCantRefuse:HowUSFederalProsecutorsForceDrugDefendantsToPleadGuilty>, HUMAN RIGHTS WATCH, 102–112 (Dec. 5, 2013), [https://www.hrw.org/sites/default/files/reports/us\\_1213\\_ForUpload\\_0\\_0\\_0.pdf](https://www.hrw.org/sites/default/files/reports/us_1213_ForUpload_0_0_0.pdf).

<sup>110</sup> Barbara Bradley Hagerty, *Releasing People from Prison Is Easier Said Than Done*, THE ATLANTIC (July 8, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/releasing-people-prison/613741>.

<sup>111</sup> *Id.*

<sup>112</sup> See Christopher Ingraham, *Black Men Sentenced to More Time for Committing the Exact Same Crime as a White Person, Study Finds*, WASHINGTON POST (Nov. 16, 2017); Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (June 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>; See generally *Punishment and Prejudice: Racial Disparities in the War on Drugs*, HUMAN RIGHTS WATCH (May 2000), <https://www.hrw.org/legacy/reports/2000/usa/index.htm#TopOfPage>. See also Courtney et al, *supra* note 19; Mauer, *supra* note 87.

been subjected to certain mandatory minimum penalties.<sup>113</sup> In addition, for decades federal crack cocaine offenses have been punished more harshly than powder cocaine offenses.<sup>114</sup> Although Congress has started to address some of these injustices, many individuals remain imprisoned under sentencing laws that we now acknowledge are racially biased and unjust.<sup>115</sup>

Ending mass incarceration—to say nothing of dealing with viral outbreaks in prison—requires moving beyond solutions that only encompass individuals convicted of “non-serious, non-violent, and non-sexual” offenses.<sup>116</sup> Denying even the oldest, sickest prisoners the ability to die at home or refusing to recognize years of rehabilitation carries out what Bryan Stevenson has described as “institutionalized policies that reduce people to their worst acts and permanently label them ‘criminal,’ ‘murderer,’ ‘rapist’ . . . identities they cannot change regardless of the circumstances of their crimes or any improvements they might make in their lives.”<sup>117</sup> All prisoners have circumstances arise in their lives or the lives of their family that may require an exercise of compassion. As one court put it:

Must a term of imprisonment be set in stone, no matter what happens after it is imposed? Should a court be able to reduce a sentence when unforeseeable tragedies change its consequences? What if the defendant’s children are effectively orphaned by the death of their other parent? What if a debilitating injury makes it impossible for the defendant to care for him or herself in prison, or recidivate outside of it? What if a terminal diagnosis turns a brief term of imprisonment for a minor crime into a life sentence? What if a global pandemic poses a mortal risk to an immunocompromised inmate who nobody intended to die in jail? When should a court be able to consider such events and revise a previously imposed sentence accordingly?<sup>118</sup>

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<sup>113</sup> See U.S. Sent’g Comm’n, APPLICATION AND IMPACT OF 21 U.S.C. § 851: ENHANCED PENALTIES FOR FEDERAL DRUG TRAFFICKING OFFENDERS, at 32 (July 2018); U.S. Sent’g Comm’n, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, at 274 (Oct. 2011).

<sup>114</sup> See *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law*, ACLU (Oct. 2006), <https://www.aclu.org/other/cracks-system-twenty-years-unjust-federal-crack-cocaine-law?redirect=criminal-law-reform/cracks-system-twenty-years-unjust-federal-crack-cocaine-law>.

<sup>115</sup> See *infra* notes 116–117.

<sup>116</sup> Daniel Denvir, “Non-serious, Non-violent, Non-sexual”: Fixing Our Mass Incarceration Problem Means Getting Past the Easy Steps, SALON (Oct. 26, 2015), [https://www.salon.com/2015/10/26/non\\_serious\\_non\\_violent\\_non\\_sexual\\_fixing\\_our\\_mass\\_incarceration\\_problem\\_means\\_getting\\_past\\_the\\_easy\\_steps](https://www.salon.com/2015/10/26/non_serious_non_violent_non_sexual_fixing_our_mass_incarceration_problem_means_getting_past_the_easy_steps). See also MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015).

<sup>117</sup> BRYAN STEVENSON, JUST MERCY 17 (Chris Jackson ed., 2014).

<sup>118</sup> *United States v. Osorto*, 445 F.Supp.3d 103, 104 (N.D. Cal. 2020).

Ensuring broader eligibility for avenues of compassion is critical. However, broader eligibility will be meaningless if those who hold the power to grant compassion continue to deny it or dispense it with extreme caution without regard to evidence about recidivism. A procedural step may be most effective here, namely, the presumption of compassion.

### B. *The Presumption of Compassion*

Abolition of the carceral state could be seen as the ultimate expression of compassion—although compassion is perhaps not the best term to describe a movement that seeks to address a criminal legal system with deep roots in slavery and white supremacy.<sup>119</sup> But even many abolitionists support interim efforts of systemic reform; such reforms also carry enormous significance for prisoners and their families and communities.<sup>120</sup> With an eye on abolition and the massive de-escalation of incarceration rates in the United States, efforts to broaden both the way we think about compassion and the system's mechanisms for the demonstration of compassion should be one such reform effort.

Broadening compassion in the criminal legal system could take many forms. Although not the focus of this essay, it is critical to show compassion on the front end, for instance by eliminating money bail and decriminalizing homelessness-related crimes and many low-level offenses. In addition, as described previously, compassion on the back end must include an expansion of the categories of individuals who are eligible for mechanisms for release beyond the minor or non-violent offender.<sup>121</sup> Finally, reasons justifying release must be expanded beyond the narrow categories of terminal illness and extreme physical hardship to include factors such as length of sentence served, rehabilitation, and other equities.<sup>122</sup>

Another way to broaden the use of compassion in release mechanisms is to use a presumption of compassion. A presumption, or “something that is thought to be true because it is highly probable,”<sup>123</sup> is a familiar legal concept. Stated in another way, a presumption “inherently imports a conclusion of the judgment; and it is applied to denote such facts or moral phenomena, as from experience we know to

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<sup>119</sup> See generally ANGELA DAVIS, *ARE PRISONS OBSOLETE?* (2003); Allegra McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015); RACHEL HERZING AND JUSTIN PICHE, *HOW TO ABOLISH PRISONS: LESSONS FROM THE MOVEMENT AGAINST IMPRISONMENT* (Verso Books, 2021).

<sup>120</sup> Rachel Herzing, *Beyond Prisons*, POLITICAL EDUCATION at 46:05 (Apr. 3, 2020), <https://www.beyond-prisons.com/home/rachel-herzing-on-political-education>.

<sup>121</sup> See *supra* Part II.A.

<sup>122</sup> See *supra* notes 119-121.

<sup>123</sup> *Black's Law Dictionary* (11th ed. 2019).



be invariably or commonly connected with some other related fact.”<sup>124</sup> Although there are various types of legal presumptions and they function differently, a rebuttable presumption operates to shift the burden of persuasion to the opposing party, who may then attempt to overcome the presumption. One of the most well-known rebuttable presumptions in criminal law is the presumption of innocence. A person may not be found guilty of a crime unless the government proves their guilt beyond a reasonable doubt.<sup>125</sup> In the context of the early release of prisoners, we propose the same—a presumption of compassion. By this we mean, a presumption of release unless the government proves release is not warranted.

In a correctional system that must confront overincarceration, a presumption of compassion is appropriate because it is highly probable that the release of elderly, medically vulnerable, and unjustly-sentenced prisoners is warranted.

In a pandemic, we know that the release of medically vulnerable prisoners would save some number of lives and prevent the severe suffering of others. We further know that the release of some segment of prisoners would decrease the prison population, and, in a crisis of a highly contagious virus, would consequently help reduce the amount of illness in the remaining prisoners and prison staff.

But the reasoning behind a presumption of compassion applies beyond the pandemic context. For example, we know that the number of elderly prisoners in state and federal prisons is growing at a dramatic rate.<sup>126</sup> This is in part due to our history of imposing lengthy and mandatory prison sentences.<sup>127</sup> Many defendants who were sentenced under formerly severe sentencing regimes are now long-incarcerated senior citizens.<sup>128</sup> We also know that many of these elderly prisoners have a myriad of health problems. The recognized phenomenon of “accelerated aging” in prisons results in prisoners at a much younger age suffering from medical conditions and illnesses typically considered “geriatric.”<sup>129</sup> We also know that the risk of recidivism is substantially lower for elderly prisoners than for younger offenders.<sup>130</sup> Thus, the release of elderly prisoners would decrease the prison

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<sup>124</sup> *Id.* (quoting William Wills, *An Essay on the Principles of Circumstantial Evidence* 13–14 (1st Am. ed. fr. 3d London ed. 1852)).

<sup>125</sup> *In re Winship*, 397 U.S. 358 (1970).

<sup>126</sup> Brie Williams & Rita Abraldes, *Growing Older: Challenges of Prison and Reentry for the Aging Population in Greifinger R.B.* (eds) PUBLIC HEALTH BEHIND BARS (2007). Springer, New York, NY, [https://doi.org/10.1007/978-0-387-71695-4\\_5](https://doi.org/10.1007/978-0-387-71695-4_5).

<sup>127</sup> See Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 113–14 (2018).

<sup>128</sup> *Id.*

<sup>129</sup> Meredith Greene, et al., *Older Adults in Jail: High Rates and Early Onset of Geriatric Conditions*, HEALTH & JUST. (Feb. 17, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5816733/>.

<sup>130</sup> U.S. Sentencing Comm’n, *The Effects of Aging on Recidivism Among Federal Offenders* (2017), <https://www.ussc.gov/research/research-reports/effects-aging-recidivism-among->

population and the costs associated with incarceration, while, at the same time, not produce a significant increase of crime.<sup>131</sup>

Furthermore, broader notions of compassion and a belief in the potential of all individuals supports the premise that all prisoners may, at some point in their sentence, warrant early release. Whether due to a long sentence no longer legally justified or to demonstrated rehabilitation or both, a presumption of compassion supports a mechanism to reexamine all prison sentences at a future point in time. The inclusion of individuals who committed violent offenses as well as younger offenders who are serving lengthy sentences recognizes that individuals change while incarcerated—the person asking for release is not the same person he or she was at the time of their crime. This compassion is guided by the principle that no one should be defined by a single criminal offense or bound by their prior criminal history for the rest of their life.<sup>132</sup> This approach to compassion, combined with our knowledge of our country's history of decades of overly harsh and biased sentencing and overuse of the term “violent offender,”<sup>133</sup> supports a presumption of compassion for all prisoners.<sup>134</sup>

In short, a presumption of compassion recognizes that it is “highly probable” that many prisoners, indeed likely most, should be released early from prison. Whether due to medical conditions, age, rehabilitation, or a lengthy and biased sentence that is unwarranted, a presumption of compassion—that is, a presumption of early release—is factually based and morally grounded.

Presumptive compassion will function as a rebuttable presumption that a person will get released unless the government can articulate specific reasons to deny

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federaloffenders; The Ungers, *5 Years and Counting: A Case Study in Safely Reducing Long Prison Terms and Saving Taxpayer Dollars*, JUST. POL'Y INST. (Nov. 15, 2018), [http://www.justicepolicy.org/research/12320?utm\\_source=%2fUnger&utm\\_medium=web&utm\\_campaign=redirect](http://www.justicepolicy.org/research/12320?utm_source=%2fUnger&utm_medium=web&utm_campaign=redirect). See also Prescott et al., *supra* note 99.

<sup>131</sup> See Dept. of Justice, Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program* 49–51 (2013) (finding recidivism rates of those granted compassionate release much lower than average federal prisoner); *id.* at 45–46 (stating that broader use of compassionate release could potentially save taxpayers millions of dollars).

<sup>132</sup> As Bryan Stevenson so eloquently states, “Each one of us is more than the worse thing we’ve ever done.” STEVENSON, *supra* note 117, at 17–18. This approach also recognizes that there is vast disparity and overbreadth in what crimes are labeled “violent” and, that often, individuals are not serving lengthy sentences due to the seriousness of the offense, but rather under sentencing laws that punish recidivism regardless of the underlying offense. See also Justice Policy Institute, *Defining Violence: Reducing Incarceration by Rethinking America's Approach to Violence*, 30 (Aug. 2016) (explaining how prison and jail populations will not be reduced unless laws and policies towards “violent crime” are rethought).

<sup>133</sup> See Hager, *supra* note 98.

<sup>134</sup> A broad presumption for all prisoners also is based on research demonstrating that prison sentences could be shortened without an increase in recidivism. See William Rhodes et al., *The Relationship Between Prison Length of Stay and Recidivism*, BUREAU OF JUSTICE STATISTICS, 54 (2017).

release. A presumptive release mechanism would effectively speed up the process and move arguments away from eligibility, exhaustion of administrative remedies and requirements, and a focus on past criminal conduct. This does not necessarily mean there would be no eligibility requirements. For example, there could still be a minimum amount of time to serve, or particular requirements related to health or rehabilitation. But the emphasis would not be on a prisoner proving that they deserve release. Rather, the burden would fall on the government to demonstrate that the prisoner does not.<sup>135</sup> This rebalancing would decrease our system's insistence on finality, and it would recognize that the imprisonment of individuals ultimately imposes costs—both financial and moral—on our criminal legal system.<sup>136</sup>

Examples of presumptive compassion are beginning to appear in efforts at criminal justice reform. The Second Look Act, a bill introduced by U.S. House Representative Karen Bass and U.S. Senator Cory Booker, would enable federal prisoners who have served at least ten years in prison to petition a court to take a “second look” at the length of their imposed sentence.<sup>137</sup> Some states, like Vermont, are experimenting with “presumptive parole”—releasing parole-eligible individuals unless there are specific reasons not to.<sup>138</sup> Other states, including Illinois and New

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<sup>135</sup> A presumption of compassion may also mitigate judicial reluctance to release an inmate early when that reluctance is based in decision-making driven by cognitive biases such as the pressure to conform with one's peers rather than decision-making driven by evidence. See Katie Kronick, *Forensic Science and the Judicial Conformity Problem*, 51 SETON HALL L. REV. 509, 609–29 (2021). This is particularly important for compassion for those convicted of more serious offenses, where decision-makers are even more reluctant to exercise compassion.

<sup>136</sup> It is outside of the scope of this essay to explore the general concept of finality in criminal law jurisprudence and the idea of “sentence finality” more specifically. For explorations on this important topic, see Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151 (2014); Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the "Interests of Finality"*, 2013 UTAH L. REV. 561, 562–63 (2013); Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79 (2012); see also Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465 (2010) (documenting benefits of judicial sentence modification).

<sup>137</sup> See Second Look Act of 2019, S. 2146/ H.R. 3795, 116th Cong. (2019). Although not completely a presumption for all prisoners—they have to demonstrate that the interests of justice warrant a modification and a readiness of reentry—there is a presumption of release for a defendant who is 50 years or older. *Id.*; Bill Summary: The Second Look Act, FAMM (2019), <https://famm.org/wp-content/uploads/Second-Look-Act-of-2019-Bill-Summary.pdf>. A number of second look acts are under consideration in the states and the District of Columbia. See Second Look Sentencing, Families Against Mandatory Minimums (last visited Jan. 31, 2021), <https://famm.org/secondlook/#:~:text=Second%20Look%20in%20the%20States&text=D.C.%20currently%20allows%20minors%20who,before%20the%20age%20of%2025>.

<sup>138</sup> Jorge Renaud, *Eight Keys to Mercy: How to Shorten Excessive Prison Sentences*, PRISON POL'Y INITIATIVE 1, 5 (Nov. 2018), <https://www.prisonpolicy.org/reports/longsentences.html#presumptiveparole> (describing presumptive parole); Ellen Whelan-Wuest, *States Taking Action: Flipping the Script on Parole*, CSG JUSTICE CTR. (Sept. 29, 2020), [https://csgjusticecenter.org/flipping-the-script-on-parole/?mc\\_cid=4c9f799a1b&mc\\_eid=e3ad234afa](https://csgjusticecenter.org/flipping-the-script-on-parole/?mc_cid=4c9f799a1b&mc_eid=e3ad234afa).

York, are considering the concept of “elder parole”—allowing an opportunity for parole for older offenders in state systems that either have no parole or very limited opportunities for release.<sup>139</sup> Finally, some states that abolished parole decades earlier are now contemplating bringing it back.<sup>140</sup> There is also a role for the executive in presumptive compassion, with some state Governors “extend[ing] clemency eligibility categorically to groups of people in prison to mitigate structural issues or accomplish larger reform goals.”<sup>141</sup>

In addition, some mechanisms for release are expanding to show compassion towards individuals serving sentences no longer justified under current law. For instance, prior to the federal First Step Act of 2018, individuals with two prior felony drug offenses could receive a mandatory life sentence.<sup>142</sup> The First Step Act prohibited this mandatory life sentence for future cases, yet it failed to make this reform retroactive. This failure resulted in some individuals continuing to serve life sentences even though they would already be released if sentenced today for the same offenses.<sup>143</sup> In response, some federal courts have expanded the concept of

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<sup>139</sup> Raymon Troncoso, *Illinois State Senate Committee Focuses on Drug Penalty Reform, Elderly Parole*, BELLEVILLE NEWS-DEMOCRAT (Sept. 30, 2020), <https://www.bnd.com/news/politics-government/article246093885.html>; RJ Vogt, *After Stone Clemency, Activists Rally for Elder Parole*, LAW360 (July 26, 2020), <https://www.law360.com/access-to-justice/articles/1294870/after-stone-clemency-activists-rally-for-elder-parole>; S. 2144, 2019–2020 Leg. Sess. (N.Y. 2019). However, the introduction of elder parole in New York failed in part because prosecutors did not support a program which would contemplate the release of offenders convicted of violent crimes. See Mroziak, *supra* note 78.

<sup>140</sup> See Timothy Williams, *‘It Didn’t Work:’ States That Ended Parole for Violent Crimes are Thinking Again*, N.Y. TIMES (Feb. 13, 2020), <https://nyti.ms/37koDhr>. Although discretionary parole retains many of the problems of discretionary mechanisms of release, it is, at least in some cases, a successful avenue for early release. See Minyvonne Burke, *Black Man Serving Life Sentence for Stealing Hedge Clippers Granted Parole*, NBC NEWS (Oct. 16, 2020), <https://www.nbcnews.com/news/us-news/black-man-serving-life-sentence-stealing-hedge-clippers-granted-parole-n1243757>; Roy S. Johnson, *Disabled Iraqi War Vet Imprisoned for Medical Marijuana Possession Granted Parole*, AL.COM (Oct. 15, 2020), <https://www.al.com/news/2020/10/disabled-iraqi-war-vet-imprisoned-for-medical-marijuana-possession-granted-parole.html>.

<sup>141</sup> See, e.g., LEAH SAKALA ET AL., HOW GOVERNORS CAN USE CATEGORICAL CLEMENCY AS A CORRECTIVE TOOL, at viii (2020) [https://www.urban.org/sites/default/files/publication/102696/how-governors-can-use-categorical-clemency-as-a-corrective-tool\\_0\\_1.pdf](https://www.urban.org/sites/default/files/publication/102696/how-governors-can-use-categorical-clemency-as-a-corrective-tool_0_1.pdf) (giving examples of state governors use of categorical clemency).

<sup>142</sup> U.S. Sentencing Comm’n, Office of Educ. & Sentencing Practice, First Step Act (Feb. 2019) [https://www.ussc.gov/sites/default/files/pdf/training/newsletters/2019-special\\_FIRST-STEP-Act.pdf](https://www.ussc.gov/sites/default/files/pdf/training/newsletters/2019-special_FIRST-STEP-Act.pdf). Congress also restricted qualifying prior drug offenses to more serious trafficking-related convictions, and prospectively prohibited the consecutive “stacking” of firearm enhancements within one case. See *id.*

<sup>143</sup> See, e.g., United States v. Perez, No. 97-CR-00509- MORENO, 2020 WL 804267, at \*3 (S.D. Fla. Feb. 18, 2020) (recognizing in case where defendant is serving life that changes to mandatory life sentence by the First Step Act were not made retroactive); see also Daniel Suleiman, *Case Shows Why Federal “First Step Act” Sentencing Changes Must Be Retroactive*, BALT. SUN (Oct. 30, 2019), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-1031-retroactive-relief-20191030->

compassionate release, traditionally limited to age and health-related reasons, to include the consideration that a defendant would no longer be sentenced to the same lengthy prison term under today's laws and a defendant's rehabilitation over time.<sup>144</sup> Similarly, in 2014, Florida revised its mandatory minimum sentences related to opioid trafficking, but did not make those reforms retroactive, leaving hundreds of Florida prisoners imprisoned under outdated laws.<sup>145</sup> Consequently, the District Attorney's Office in Broward County, Florida reached agreements with 23 Florida prisoners to release them from their outdated sentences.<sup>146</sup> Ultimately, although a notable achievement, these efforts are insufficient as they depend on the actions and discretion of individual actors (i.e. judges and prosecutors), rather than legislation that would presume release for all who remain incarcerated past the point they would be imprisoned today.

We recognize that a presumption retains an aspect of a case-by-case analysis. But a presumption of release forces an articulation of why a person should *not* be released, as opposed to asking prisoners—many of whom are *pro se* and do not have a lawyer—to prove why they *should be* released. Presuming compassion is a limited reform in a broken system. But it offers the potential for the release of large numbers of unjustly imprisoned individuals and the broader potential to reshape how we think about sentencing and decarceration.

#### IV. CONCLUSION

There is no doubt that the COVID-19 pandemic has caused significant suffering and devastating losses. But the impulse to show compassion to those incarcerated is an inclination not to be ignored or to let slip away. Rather, this time can lead to a reimagining of how and to whom we show compassion. “[G]enuine

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2ccxow47vfbfpogkavkxrpe4xm-story.html (noting unfairness of not making gun enhancement changes retroactive).

<sup>144</sup> The Second Circuit was the first Circuit Court to both consider the question and agree that district courts have the authority to consider reasons justifying release beyond age and illness. See *United States v. Brooker*, 976 F.3d 228 (2d Cir. 2020). While the majority of district courts across the country to consider this question agree, a number of district courts disagree and believe compassionate release should be limited to its traditional categories related to medical illness. See *United States v. Fox*, No. 2:14-CR-03-DBH, 2019 WL 3046086, at \*2 (D. Me. July 11, 2019) (collecting cases); *United States v. Rodriguez*, 451 F. Supp.3d 392, 397–98 (E.D. Pa. 2020) (same).

<sup>145</sup> Emily L. Mahoney, *Hundreds Languish in Florida Prisons Under Outdated Mandatory Minimum Drug Sentences*, MIAMI HERALD (Nov. 13, 2019), <https://www.miamiherald.com/news/state/florida/article237117309.html>.

<sup>146</sup> C.J. Ciaramella, *Florida Inmates Serving Outdated Drug Sentences Released Early Following Reason Investigation*, REASON (Aug. 18, 2020), <https://reason.com/2020/08/18/florida-inmates-serving-outdated-drug-sentences-released-early-following-reason-investigation/>.

compassion . . . is unbiased and it is based on reason.”<sup>147</sup> A presumption of compassion for all prisoners is an act of genuine compassion.

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<sup>147</sup> DALAI LAMA, *THE POWER OF COMPASSION: A COLLECTION OF LECTURES BY HIS HOLINESS, THE XIV DALAI LAMA* 63 (Geshe Thupten Jinpa trans.) (1997).

