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## THE PANDEMIC AS A PORTAL: REIMAGINING CRIME AND PUNISHMENT IN COLORADO IN THE WAKE OF COVID-19

### ABSTRACT

There is growing recognition that the phenomenon of mass incarceration fails to achieve public safety, perpetuates cycles of harm in communities, and is costly and ineffective. Most experts agree that it will be impossible to achieve a meaningful decrease in our rates of mass incarceration without considering our response to violent crime. And yet, most recent reform efforts, including those in Colorado, have targeted the “low-hanging fruit” of nonviolent offenses or very limited categories of extreme sentences, such as the death penalty and life without parole sentences for juveniles. In this Article, we argue that the reason this approach has been so limited is because of false and persistent dehumanizing narratives about people who commit acts of violence. These narratives also dominate broader public conversations about crime and punishment and legitimize other excessive and draconian sentences. After unpacking these myths and their consequences for mass incarceration, we examine their impact on Colorado's anemic response to reducing jail and prison populations during the COVID-19 pandemic. Finally, at this significant moment in history, we argue that instead of tiptoeing around the edges of carceral reform, we should be radically reimagining crime and punishment in our state so that we can build a ladder to reach the fruit higher up the tree. For this approach to succeed, we must come to understand crime and violence as multidimensional social problems. We must reimagine justice as a means of holding individuals accountable for their actions while also repairing harm. Simultaneously, we must acknowledge the current damage mass incarceration inflicts upon human beings and expand space for healing in correctional facilities. With those \*338 rungs of the ladder in place, we will be positioned to reach higher and decarcerate in a meaningful way.

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### \*339 INTRODUCTION

As criminal defense attorneys, we have had significant exposure to the tragedy of mass incarceration. We have personally witnessed the counterproductive, harmful effects it has on our clients, their families, and other players in the criminal legal system. We have also watched, frustrated, for years as the narrative animating attempts to reform the system continually and unnecessarily dehumanizes the people ensnared in its web and produces ineffectual results.<sup>1</sup> Enter the COVID-19 pandemic, which has had a devastating impact on jail and prison populations.<sup>2</sup> The pandemic, and the criminal legal system's response to it, have exposed some essential truths about the way we approach incarceration, both nationally and here in Colorado.<sup>3</sup> We were inspired to write this Article because we believe the pandemic presents an unparalleled moment in which to better inform the public about the issue of mass incarceration and reimagine our approach to crime and punishment.

Part I describes the scope of the problem of mass incarceration. It also discusses the issues created by the demonstrably false but pervasive \*340 narratives that crime and violence are the exclusive product of individual choice and that those who commit acts of violence are “monstrous others,” who are either unworthy or incapable of redemption.<sup>4</sup> It describes how, informed by these false and simplistic narratives, most recent efforts to reduce prison populations have simply nibbled around the edges of carceral reform and have largely avoided tackling the issue of lengthy sentences for adults convicted of violent crime. Even worse, many of these reforms have taken a dichotomous approach that seeks relief for one category of incarcerated persons<sup>5</sup> at the expense of others.<sup>6</sup> It then discusses how these approaches to reform are not only insufficient to make significant changes



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to the prison population in this country and our state but also demonize adults who commit acts of violence and legitimize excessive punishments imposed upon adults, including life without parole and virtual life sentences.<sup>7</sup>

Part II addresses the COVID-19 pandemic.<sup>8</sup> In dramatic fashion, the pandemic illuminates the urgent need to drastically reduce the number of people behind bars in prisons and jails. However, the approach to decarceration in response to COVID, both nationally and here in Colorado, mirrors the ineffectual reform efforts described above.<sup>9</sup> The pandemic has powerful lessons to teach us about the tragedy of mass incarceration, if we are willing to listen.

In Part III, we first discuss each of these lessons in turn.<sup>10</sup> The pandemic has revealed that mass incarceration is not only a social and racial justice issue but also a pressing public health issue.<sup>11</sup> Moreover, the significant outbreaks and subsequent fatalities that have occurred in jails and prisons demonstrate once and for all the deep inadequacy of the “low-hanging fruit” approach to reform and the need to reduce incarcerated populations on a far broader scale than we have in the past.<sup>12</sup> Finally, the rapid spread of COVID-19 within and beyond correctional facilities painfully, yet powerfully, demonstrates that we are all connected, in ways both mundane and profoundly spiritual.

After discussing these lessons, we conclude Part III by suggesting how we can use the pandemic as a portal to step into a world that sheds the too-modest and flawed approaches of the past and reorients us towards a better and bolder solution.<sup>13</sup> First, we must lay the groundwork for achieving meaningful change by dismantling the pervasive, false, dehumanizing narratives about people who commit acts of violence. We must instead advance a more nuanced and accurate narrative about crime, violence, and mass incarceration as inextricably intertwined with other social and structural issues such as education, health care, economic opportunity, racism and income inequality. We must also rethink our retributivist, punitive narrative about “justice” and reconceive of it as a restorative tool that repairs harm. Second, as we work to change narratives, we must also expand opportunities for healing and growth inside correctional settings. While we aspire to a future where these human cages cease to exist, we must acknowledge the humanity and present suffering of people in prison. Finally, with these foundations in place, we can begin to bring about substantive changes to ways that the legislative, executive, and judicial branches respond to mass incarceration. We must work towards inclusive and retroactive sentencing changes that confront head-on the issue of lengthy sentences for violent crime and provide meaningful opportunities for release. We must push the Governor of Colorado to use the power of executive clemency on a broader scale, and we should expand the use of restorative justice practices in our judicial system as a viable alternative to lengthy sentences for violent crime.

People in ivory towers make careers out of studying the American criminal legal system. Yet, the true experts on this issue are not academics but the people who have been directly affected by mass incarceration. We felt it was important for this Article to include their voices and perspectives. To that end, we circulated a summary of our Article amongst multiple residents of the Colorado Department of Corrections (CDOC) during the writing process. The number and nature of the responses we received both overwhelmed and inspired us and reinforced our belief that there are countless individuals behind bars in this state who have tremendous potential to make valuable contributions to society. We have worked to include as many of these perspectives as possible throughout the Article.<sup>14</sup> However, the incarcerated individuals we connected with have so much more to offer. We hope that this is just the beginning, and that going forward, we can continue to include the voices of the incarcerated in conversations about the criminal legal system whenever possible. These voices should be both heard and heeded.

### I. MASS INCARCERATION AND OUR LOVE AFFAIR WITH PUNISHMENT

“America has long had a love affair with punishment .... [A]t virtually every decision point in the criminal justice system, we choose the more punitive option over any available alternative .... We control each other, punish each other, and throw each other away. In the criminology field, this tendency even has its own term: people call it ‘American penal exceptional-ism.’”



- Danielle Sered<sup>15</sup>

“If only the walls of every courtroom, jail and prison could talk. That way we could all see what truly takes place within them or as a result of the dark shadows of their veils: the desperate prayers; the quivering pleas; the starved quests for fulfillment; the meted-out injustices; the craze-inducing monotonies; the soul-chilling lonely nights; the indignities resigned to for survival; the secretly shed tears; the insufferable heartaches and sorrows; the loss of hope; the loss of faith; the shattered family ties ... the denial of basic human needs; the callousing of hearts; the stolen humanity. These are merely silent echoes of the legal system and resounding atrocities of imprisonment. They are portions of suppressed truths which need to be heard.”

- Sean Marshall

Resident of Denver Reception and Diagnostic Center<sup>16</sup>

#### *A. Mass Incarceration: A Uniquely American Tragedy*

The United States is the world leader in mass incarceration.<sup>17</sup> “[I]n the early 1970s, a total of [200,000] people were incarcerated in state and \*343 federal prisons” in this nation.<sup>18</sup> The incarceration rate, compared to that of most European countries, was relatively stable for the better part of the previous century.<sup>19</sup> Not so today. Currently, there are approximately 2.3 million people behind bars in this country as a result of involvement in the criminal legal system.<sup>20</sup> In sheer numbers, America incarcerates more people than any other country in the world.<sup>21</sup> Additionally, our country holds the dubious distinction of having the world's highest incarceration rate.<sup>22</sup> America locks up an average of 698 per 100,000 people, which is four to eight times the per capita incarceration rate of other liberal democracies such as Canada, England, and Germany.<sup>23</sup>

The mass incarceration system imposes tremendous collateral consequences and social, political, and cultural costs upon the justice-involved individuals who are caught up in its churn. These costs include the loss of the right to vote,<sup>24</sup> the loss of public benefits,<sup>25</sup> the loss of access to public housing,<sup>26</sup> barriers to obtaining employment,<sup>27</sup> and the unquantifiable psychological and emotional impact on incarcerated individuals, their children, and their family members.<sup>28</sup> Our nation's proclivity for punishment is also incredibly expensive. In a 2017 report, the Prison Policy Initiative estimated that our “system of mass incarceration costs the government and families of justice-involved [individuals] at least \$182 billion every year.”<sup>29</sup>

\*344 Mass incarceration also disproportionately impacts people and communities of color.<sup>30</sup> While the overall incarceration rate in this nation is noteworthy, when broken down by race, the results are jaw-dropping. In 2010, the incarceration rate in the United States for Black Americans was 2,306 per 100,000, and the incarceration rate for Latinx individuals was 831 per 100,000, compared to 450 per 100,000 for white Americans.<sup>31</sup> People of color comprise 37% of the U.S. population but 67% of its prison population.<sup>32</sup> As a nation, we also overwhelmingly incarcerate indigent people of all races.<sup>33</sup> Tatianna Manon-Davis, an incarcerated woman who lives with these injustices, writes:

As a nation where do we begin eradicating such injustice? I could go on about the unfairness of the justice system. The more important issues are identifying necessary steps needed to finalize true change regarding the unequal scales of justice regarding systemic racism[.] How can we change the viewpoint of white America or the face of racism as it pertains to mass incarceration[?]<sup>34</sup>



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Finally, not only is mass incarceration racist, oppressive, and expansive, but it also fails to fulfill any of its alleged purposes.<sup>35</sup> First and foremost, it has failed to make us safe. If incarceration worked to stop violence, the United States would have one of the lowest crime rates in the world, given its penchant for punishment.<sup>36</sup> Instead, it is a nation with a homicide-by-firearm rate of 29.7 per one million people, compared with Canada's 5.1 per 1 million, Germany's 1.9 per one million, and Australia's 1.4 per one million.<sup>37</sup> It is a nation in which an estimated 3.3 million individuals were victims of violent crime in 2018.<sup>38</sup> And it is a nation in which every year nearly 3,000 young men of color are murdered before their 25th birthday.<sup>39</sup>

\*345 Mass incarceration also fails to meaningfully reduce crime of any variety; in fact, it increases crime.<sup>40</sup> Imprisonment does not rehabilitate, but rather, it frequently does the exact opposite.<sup>41</sup> Incarcerated people are separated from their families and support networks.<sup>42</sup> They are placed in a dehumanizing institution that subjects them to physical victimization.<sup>43</sup> The carceral environment is extremely isolating and hampers “prosocial [relationships with people] on the outside.”<sup>44</sup> Upon release, formerly incarcerated people are stigmatized and discriminated against as they seek access to public benefits, housing, and jobs.<sup>45</sup> As a result, “[m]ost criminologists would predict that, on balance, [incarcerated people] become more, rather than less, criminally oriented due to their prison experience.”<sup>46</sup>

Visith Ny has been incarcerated for twenty years and explains the way prison and extreme sentences change people:

I came in with guys that started doing time with me[:] and now[,] they are different. Time got to them. They lost hope. Their mind[s] are out of it. The best way for me to describe it is, like the Harry Potter's books. There are these creatures called “Dementors,” they suck the life out of people. Make them into zombies. I feel like that's what isolation does and prison is the dementors.<sup>47</sup>

A Bureau of Justice Statistics analysis of data on released prisoners from 2005 to 2010 in thirty states revealed a recidivism rate of 67.8% during the first three years of release and 76.6% within five years of release.<sup>48</sup> This is unsurprising when one considers that the prison experience \*346 is characterized by precisely the same key factors that cause violence in the first place.<sup>49</sup> Research has shown that, on an individual level, violence is caused by “four key drivers: shame, isolation, exposure to violence, and a diminished ability to meet one's economic needs.”<sup>50</sup> Notably, prison is characterized by these same four features.<sup>51</sup> In other words, our nation's “response to violence ... is characterized by” the same features that are known “drivers of violence.”<sup>52</sup>

Simply put, mass incarceration is not only a tragedy but a uniquely American one. “Incarceration is not just a dimension of how we punish crime in our country. It exists at such a scale that it is a defining feature of our culture. It is who we are, who we have become.”<sup>53</sup>

Mass incarceration is no less of a tragedy here in Colorado. Colorado's incarceration rate is slightly below the nation's average at 635 per 100,000.<sup>54</sup> This rate is over four times the rate at which Mexico and Guatemala incarcerate their citizens, seven times the incarceration rate of France and Switzerland, nine times the incarceration rate of Sweden, and twelve times higher than Finland and Norway's rates.<sup>55</sup> Black people comprise just 4.6% of the population in Colorado but 18% of the prison population.<sup>56</sup> Colorado's state prison population has grown from 2,658 individuals in 1980 to approximately 17,500 individuals at the time of this writing, with another 12,800 on parole.<sup>57</sup> “The state prison budget [has] exploded by almost 1,288% over the past [thirty-five] years.”<sup>58</sup>

\*347 *B. Complex Causes and a Simplistic Narrative: How and Why We Allowed This to Happen*



## 1. Complex Causes: “How” Mass Incarceration Came to Be

The causes of mass incarceration are complex, to say the least. Entire books, if not careers, are devoted to the subject.<sup>59</sup> Historians, sociologists, criminologists, economists, and legal scholars continually debate precisely what caused the dramatic spike in incarceration rates in America over the last forty years,<sup>60</sup> although most experts agree that a rise in crime rates is not a significant contributor.<sup>61</sup>

Some posit that the racially-motivated decision to incarcerate countless individuals convicted of nonviolent, low-level drug offenses through the “War on Drugs” is the primary reason that incarceration rates in the United States have increased exponentially since the 1970s.<sup>62</sup> The number of individuals incarcerated in the United States for drug offenses increased dramatically, especially in the 1980s.<sup>63</sup> However, in recent years, many experts have argued that this explanation overlooks other key drivers of mass incarceration rates, including shifts in prosecutorial behaviors;<sup>64</sup> the fractured and diffused way in which our nation metes out criminal punishment across a network of local, state, and federal systems;<sup>65</sup> the complex role that political institutions play in shaping criminal \*348 punishment policy;<sup>66</sup> and perhaps most notably, incarceration rates and sentence lengths (including post-sentencing law and policy) for violent crime.<sup>67</sup>

The notion that any real solution to mass incarceration must include confronting the issue of violent crime has become widely accepted by many scholars and activists at this point in time, even though the public narrative about mass incarceration continues to focus on nonviolent drug offenders.<sup>68</sup> The public perception of mass incarceration has been heavily influenced by Michelle Alexander's popular book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, published in 2008, which focused on the devastating effects of the War on Drugs on the Black community.<sup>69</sup> However, in a New York Times article published ten years later, even Alexander recognized that “the failure of some academics like myself to squarely respond to the question of violence in our work has created a situation in which it almost seems like we're approving of mass incarceration for [people convicted of violent crime].”<sup>70</sup> She also acknowledged the need to bring more attention to the issue of violence and the fact that building more prisons will never reduce or eradicate violence.<sup>71</sup>

## 2. The False Narratives: “Why” Mass Incarceration Happened

Significant attention is devoted to explaining *how* mass incarceration developed as a social phenomenon. However, these prevailing expert explanations still do not adequately account for *why* we, as a state and as a nation, have allowed the practice of caging millions of residents to continue unabated and to spiral out of control. This *why* is important to consider and understand, given the incontrovertible evidence that mass incarceration has been counterproductive and harmful in so many ways.

\*349 In our view, our country stomachs and condones mass incarceration because of the stories society<sup>72</sup> tells about people who commit violent crimes. Undergirding the policy and sentencing decisions and other contributions to the mass incarceration behemoth is a distinctive narrative with two overlapping strains. One is a poorly informed story about free will.<sup>73</sup> The other is a myth about the lack of humanity of the people we incarcerate.<sup>74</sup>

The first strain of the narrative centering on free will, or choices, deemed the “crime master” narrative by social psychologist Craig Haney, is the “legal fiction” that “crime is the simple product of equally free and autonomous ‘bad’ choices made by persons who are acting unencumbered by their past experience and present circumstances.”<sup>75</sup> This narrative is a direct outgrowth of outdated nineteenth century beliefs that “the causal locus of people's behavior resides exclusively inside them, and the corresponding notion that social problems, such as crime, can and should be addressed primarily by acting directly on those persons who engage in it.”<sup>76</sup>



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The second strain of the narrative centers around “an imagined monstrous other ... who is not quite human like the rest of us, who is capable of extraordinary harm and incapable of empathy, who inflicts great pain but does not feel it as we do, a monster we and our children [must] be protected against at any price.”<sup>77</sup> Echoing the scholars who opine that “[t]he rise of mass incarceration was a political process that began in the 1960s with a concern about controlling the [B]lack urban \*350 poor and built on early [twentieth] [c]entury discourses that portrayed [B]lack people as inherently criminal,”<sup>78</sup> Sered notes that this narrative about the “imagined monstrous other” is “not race-neutral.”<sup>79</sup> Its origins can be traced back to the narrative of racial difference that was used to justify centuries of slavery.<sup>80</sup>

America's persistent tendency to dehumanize people who become involved in the criminal legal system is so pervasive that it has infused every stage of the process--from the point of arrest (as we have seen with the multitude of deaths of unarmed Black men and women during the arrest process, including most recently with the death of George Floyd),<sup>81</sup> to the juncture at which prosecutors determine what charges to bring and what plea bargain to offer, to the moment when judges impose a sentence, and throughout incarceration.<sup>82</sup> Through dehumanization, we rob convicted and incarcerated people of their “status as moral beings worthy of being treated with the same dignity and respect that is accorded to all other people.”<sup>83</sup>

This narrative about violence as a simplistic act of free will committed by a monstrous “other” has been decisively challenged in recent years by social scientists and psychologists, who, supported by years of scientifically valid research, have taken a more nuanced social, historical, and contextual view.<sup>84</sup> We now know that violent crime does not occur within a vacuum and that people's behavior and choices are often shaped by their life experiences with trauma, abuse, neglect, and mental illness, as well as constrained by societal forces including poverty and racism.<sup>85</sup> \*351 As Kevin James, a resident of Buena Vista Correctional Facility, explains:

Cruelty breeds callousness. Abandonment nurtures distrust. Violence scars the conscience. Neglect excuses greed. Instability destroy[s] self-esteem .... Once I arrived at the point in my life where I was willing to look at my own traumatic life experiences, I became willing to accept the impact it had on the way I live. Thereby expanding my ability to recognize and even empathize with the suffering or trauma experienced by others.<sup>86</sup>

These realizations are not new. Psychiatrist James Gilligan, who worked extensively with incarcerated persons during his time as Director of Mental Health for the Massachusetts state prison system, acknowledged over twenty years ago that in order to understand violence and prevent it, it is imperative to acknowledge “that human agency or action is not only individual; it is also, unavoidably, familial, societal, and institutional.”<sup>87</sup> Notably, “[h]uman violence is much more complicated, ambiguous and, most of all, tragic, than is commonly realized or acknowledged.”<sup>88</sup> Haney more recently notes that “much criminal behavior occurs in response to highly criminogenic past experiences (especially trauma and maltreatment) and problematic present situations.”<sup>89</sup>

These scientifically supported findings are consistent with our own personal experiences as criminal defense lawyers. During our combined twenty-plus years of experience practicing criminal law,<sup>90</sup> we have worked with many individuals who have committed very serious acts of violence. Our clients are complex humans, just like we all are. Many are survivors of violence themselves. They have often experienced community conditions that are full of criminogenic risk factors, such as poverty or systemic racism. Most have also experienced some combination of childhood abuse, neglect, or trauma, or suffer from conditions including serious mental illness. Most violence is also situational and occurs when a specific set of risk factors collides with certain environmental conditions.<sup>91</sup>

Nehemiah Chavez, who is serving a 128-year sentence for attempted second-degree murder, and whose story is discussed below,<sup>92</sup> wrote us a letter about his situation in which he vividly describes these dynamics \*352 at work.<sup>93</sup> Mr. Chavez discusses growing up in extreme poverty and experiencing multiple forms of abuse as a child.<sup>94</sup> He explains, “[i]t was not my



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fault so I should have never accepted the guilt and shame that made me insecure, it should [h]ave never had the power to create my identity.”<sup>95</sup> Before he reached that realization, Mr. Chavez masked his emotions through drugs and alcohol.<sup>96</sup> He joined a gang and sought affirmation: “Being praised, accepted, loved, for somebody who has never felt that, would cause anyone to be willing to do whatever it took to maintain that status [...] [W]hy do you think gang-members can be so loyal?”<sup>97</sup>

One of the biggest misconceptions about violence is that it is an immutable trait, rather than a state.<sup>98</sup> There are many times when an act of violence is an isolated incident. A person who commits an act of violence is not, per se, a “violent person” who is incapable of existing peacefully and safely in society forevermore. Even after committing a horrible act of violence, people can change. People can--and do--grow. They can heal. They can age out of violence. And they often do so despite enduring conditions of incarceration that are designed to produce the opposite result.<sup>99</sup> These truths are borne out by the numbers. Contrary to popular belief, people convicted of violent and sexual offenses have re-arrest rates that are lower than other types of crime, including property, drug, or public order offenses.<sup>100</sup> One reason is because “age is one of the main predictors of violence.”<sup>101</sup> “The risk for violence peaks in adolescence or early adulthood and then declines with age, yet we incarcerate people long after their risk has declined.”<sup>102</sup>

Darcy Matlock's lived experiences with long-term incarceration corroborate this research:

Many of us who have served [twenty plus] years have used the time to reflect upon our lives, behaviors, choices[,] and actions and have come to deep realizations about causes and effects, personal responsibility and accountability, shame and guilt, regrets and remorse, forgiveness--the list goes on and on. We have matured and “aged out” of criminal thinking and behaviors. It has been statistically proven we \*353 are unlikely to reoffend in any way and are not a threat to public safety.<sup>103</sup>

Damian Arguello, who is presently incarcerated at Arkansas Valley Correctional Facility, writes about the impact of this narrative on the incarcerated.<sup>104</sup> He references the quote by Johann von Goethe, “If you treat an individual as he is, he will remain how he is. But if you treat him as if he were what he ought to be and could be, he will become what he ought to be and could be,”<sup>105</sup> before continuing:

I think of this in the context of what the false narrative communicates to us as incarcerated individuals. In here they label us as “offenders.” For so long it seems like ... this is what you are, this is what you will always be and in case you forget, we're gonna remind you every waking moment ... for the rest of your life. It takes a strong mind and an even stronger resolve to break free from such archaic thinking.<sup>106</sup>

Despite ample evidence that the narratives described above are false, lawmakers readily adopt and accept these antiquated myths, instead of relying on objective research.<sup>107</sup> Elected officials often base crime policy on “a single crime without any evaluation of overall programs or approaches.”<sup>108</sup> Barkow notes that government's approach to criminal punishment policy is highly unusual, as in most other areas of governance:

We do not have our elected officials set policies based on their intuitive reactions to outlier stories that make the news and arouse the public. We do not, for instance, jettison a therapeutic drug based on one bad outcome. We do not abolish all air travel because of one accident.<sup>109</sup>





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The media also reinforces these myths by its simplistic and sensationalized portrayals of crime.<sup>110</sup> Ultimately, these false narratives continue \*354 to animate the entire criminal legal system in this country to this day. Once a person is branded “violent” by the criminal legal system, “the widespread perception is that they still are violent despite stellar prison conduct records; ample evidence of rehabilitation through education, volunteering, and other programs; and mounting research about deterrence and aging out of crime.”<sup>111</sup> Why?

This narrative endures for several reasons. First, it helps people make sense of the world, leaving no room for nuance, complexity, or shades of gray.<sup>112</sup> It does not require deep thought or introspection. Adopting the viewpoint that involvement in the criminal legal system is “nothing more than [the result] of blameworthy free choices” is also easy and attractive because this narrative effectively absolves society from taking responsibility for any of the complex social, environmental, and contextual factors that play a role in creating conditions conducive to violence and crime.<sup>113</sup> Haney notes that the criminal legal system's reliance on the “crime master” narrative “mask [s] the underlying causes, [and] hold[s] the victims of mistreatment and structural injustice accountable for the consequences of social historical events and circumstances over which they often had little or no control.”<sup>114</sup> Clinging to these antiquated ideas to avoid these difficult truths may be the uncomplicated path, but it also ensures that we will never meaningfully address the broader societal inequities that play a role in shaping individuals' behavior.

Additionally, the public readily adopts these false narratives because they offer the illusion of safety.<sup>115</sup> If people who commit violent acts fundamentally differ from the rest of us, we can simply “fix” the problem by banishing them from our midst. Finally, if they are both not-quite-human and acting purely out of their own free will, we need not concern ourselves further with their well-being. We can simply forget they exist. Nor do we need to feel any responsibility for their fate. Put another way:

[I]f ... there is something about the person we seek to punish that is fundamentally different from us, less than us, we become more capable \*355 of disabling our empathy, of telling ourselves that the pain they feel will not be like ours because they are not like us.<sup>116</sup>

Ultimately, these false narratives make it possible for society to engage in the unconscionable practice of caging millions of human beings for decades on end or, in many instances, for entire lifetimes, even though excessive periods of incarceration are counterproductive.<sup>117</sup>

### *C. The Narrative at Work: The “Low-Hanging Fruit” Approach to Reform*

At this point in the mass incarceration crisis, the need for reform is obvious to both sides of the aisle. Even many conservatives, who “for decades declared themselves to be the party of ‘law and order’” and whose “commitment to ‘tough on crime’ policies helped [them] win elections in the latter half of the 20<sup>th</sup> century,”<sup>118</sup> have now acknowledged that the current system is, at the very least, expensive and ineffective and that something must be done.<sup>119</sup> And yet, the vast majority of reform efforts that have been undertaken to reduce the prison population have adopted an anemic, “low-hanging fruit” approach that creates false dichotomies, often seeking to achieve relief for one group at the expense of another.<sup>120</sup>

#### **1. Enacting Reforms that Exclude Crimes Involving Violence**

The bulk of recent criminal justice reform efforts exclusively target individuals convicted of nonviolent offenses. These reforms either specifically exempt those convicted of violent offenses or reduce penalties for nonviolent offenses while explicitly increasing punishment for violent crime.

For example, in 2016, Maryland passed a reform bill that cut sanctions for nonviolent crimes while increasing punishments for violent crimes “in order to avoid looking ‘soft on crime.’”<sup>121</sup> Additionally, “in 2011[,] Louisiana passed H[B] 138, a geriatric



parole bill allowing parole \*356 consideration for people who have been incarcerated for at least ten years and are at least [sixty] years old.”<sup>122</sup> However, the bill excluded those with “violent or sex offense[]” convictions, “which accounted] for two-thirds of the people who [otherwise met the] requirements.”<sup>123</sup> As a result, “only 2,600 people became eligible for parole under this new law, while 5,700 people remained ineligible because of past convictions.”<sup>124</sup> And in 2010, South Carolina’s legislators passed bipartisan sentencing reform that equalized the penalties for possession of crack and powder cocaine, authorized greater use of alternatives to incarceration for people convicted of nontrafficking drug offenses, and reduced the maximum penalty for burglary.<sup>125</sup> However, simultaneously, “lawmakers also added two dozen offenses to the violent crime list and expanded the number of crimes that are eligible for [life-without-parole] sentences.”<sup>126</sup>

Colorado has been no different. In 2013, Colorado’s legislature passed two bills geared towards reducing collateral consequences for individuals convicted of drug offenses.<sup>127</sup> Colorado Senate Bill 13-250 drastically reformed penalties for drug offenses and created an opportunity for individuals who pled guilty to certain drug possession or low-level distribution felonies to have their felony convictions vacated in exchange for a level one misdemeanor conviction upon successful completion of a community-based sentence.<sup>128</sup> Colorado Senate Bill 13-123 similarly created opportunities for relief from collateral consequences for individuals sentenced to probation, community corrections, or other alternative sentences.<sup>129</sup> However, both bills explicitly excluded individuals with prior convictions for violent crimes from eligibility.<sup>130</sup> In 2018, \*357 Colorado House Bill 18-1109 expanded the criteria for discretionary parole of special needs offenders but specifically excluded individuals “convicted of certain class [one] and class [two] felonies.”<sup>131</sup> And in 2019, Colorado Senate Bill 19-143 changed the state’s parole system to make it more difficult to revoke parole based on a technical violation, but excluded individuals on parole due to violent offenses.<sup>132</sup>

Some see this approach as a legitimate strategy to achieve incremental change.<sup>133</sup> Pfaff notes that many “reformers” have posited that “drug reform is the easiest and most politically viable reform to implement. Do that first, then build on that victory to attack the tougher issues, like how we punish violent crimes.”<sup>134</sup> Despite this professed strategy, however, reforms that include violent crime never seem to materialize. “[F]or all the talk of ‘low-hanging fruit,’ there does[] [not] appear to be anyone building ladders to pick the fruit higher up in the tree.”<sup>135</sup>

Part of the reason this strategy has failed to achieve broader reform is because it is not just a product of political compromise but a direct outgrowth of the false “crime master” and “monstrous other” narratives.<sup>136</sup> These narratives have helped oversimplify the issues at hand and ensure that the public continues to erroneously believe there are two distinct categories of people in prison: (1) individuals who are imprisoned for nonviolent, low-level offenses who can be safely released, and (2) people convicted of violent offenses who are “a homogenously irredeemable \*358 threat to social welfare.”<sup>137</sup> This way of thinking is so firmly entrenched in the public discourse that alternative perspectives “are rarely raised in public policy debates about how best to address and reduce crime rates and have had little or no influence in shaping criminal law doctrine.”<sup>138</sup>

The negative effects of these false narratives trickle down to the few reform efforts that focus on sentencing reform for violent crime. It is particularly painful to watch how frequently those in our own legal community have embraced dehumanizing rhetoric while advocating for their specific reform effort.

## 2. Fighting to Abolish the Death Penalty While Legitimizing Life Without Parole as an Acceptable Alternative

The fight to abolish the death penalty is a prime example. As with mass incarceration, the United States continues to be an outlier with respect to capital punishment, clinging tenaciously to its use and legitimacy even as it has fallen out of favor with most Western democracies.<sup>139</sup> In addition to being morally repugnant, the use of the death penalty in the United States is deeply flawed due to the inadequate compensation and poor quality of defense counsel in many jurisdictions, pervasive racial and geographic disparities, and exceedingly high rates of reversal.<sup>140</sup> As the most extreme legal sanction available, the death penalty helps define the scale of punishment that American society views as reasonable and fair.<sup>141</sup> Thus, abolishing the death



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penalty is an important first step on the road to the reformation of extreme sentences altogether. But many efforts to abolish the death penalty have included an explicit endorsement of life without parole as an acceptable alternative precisely because of its harshness and cruelty.

For example, during an unsuccessful effort in 2012 to end the death penalty in California via a ballot referendum, the ACLU of Northern California posted an article on its website affirmatively touting life without parole as an attractive alternative to the death penalty.<sup>142</sup> According to the ACLU, the purported benefits to society of a life-without-parole sentence include admittedly unconstitutional living conditions.<sup>143</sup> The article boasts:

Spending even a small amount of time in California's overcrowded, dangerous prisons is not pleasant. Spending thirty years there, growing sick and old, and dying there, is a horrible experience. This is especially true given the unconstitutional failure to provide adequate health care to California's prisoners.

Prisoners condemned to die in prison are not given any special treatment and, in fact, have less access to programs than other prisoners. They are housed in high security facilities with few privileges, far away from any relatives, and in crowded group cells.

....

Life without parole provides swift, severe, and certain punishment .... Sentencing people to die in prison is the sensible alternative for public safety and murder victims' families.<sup>144</sup>

Similarly, when the Connecticut legislature abolished the death penalty in 2012, it did so by brokering a compromise that ensured that incarcerated persons who previously might have received the death penalty would serve life without parole in twenty-two-hour-a-day solitary confinement with “little if no interaction with others; no physical contact, ever, with family; and only a brief period of two hours or so a day outside of cramped, concrete cells.”<sup>145</sup> While the constitutionality of this statute is currently being challenged in federal court, “[t]he thinking at the Capitol was that [this compromise] would allow abolitionists to vote their conscience while telling constituents that they were voting for something arguably worse than death for the killers.”<sup>146</sup>

The debate over abolishing the death penalty in Colorado took a similar tone. After years of effort on the part of advocates, Colorado's legislature finally achieved abolition of the death penalty in 2020.<sup>147</sup> During testimony before the Senate Judiciary Committee in 2019 on a previous, similar bill that ultimately failed, a prominent capital defense attorney testifying in support of abolition stated:

My clients deserve the deepest darkest circles of hell. That [is] what they deserve. But the issue for this body is not what the perpetrator of the most fiendish acts on earth deserves, the issue for this body is to determine what do we as society do with people like this. We have a right to be made safe from people like this .... [A former client] is now in a prison in Wisconsin .... He [is] locked in his cell [twenty-three] hours a day. He [is] allowed out by himself in a cage. He will never progress out of that circumstance .... Once victims understand we can be safe from these people, we can incapacitate them, what is the point of the death penalty?<sup>148</sup>



Overall, death penalty abolitionists have made great strides in recent years. Since 2007, ten states have abolished the death penalty,<sup>149</sup> and there has been over a 70% decline in death sentencing over the past decade.<sup>150</sup> However, as this discussion highlights, many of these strides have come at the cost of throwing people serving life-without-parole sentences under the proverbial bus by perpetuating the myth that people who commit acts of violence are so fiendish and monstrous that they are unredeemable and therefore deserve inhumane treatment.

### 3. Advocating for the End of Juvenile Life Without Parole While Implicitly Condoning the Same Punishment for Adults

The campaign to abolish life-without-parole sentences for crimes committed by juveniles has played out in similar fashion. As with the death penalty, imposing life-without-parole sentences upon children is unquestionably barbaric and out of step with most other parts of the world.<sup>151</sup> However, the argument that these sentences are unconstitutional hinges on the fact that juveniles' brains are underdeveloped, and that therefore, they are less culpable for acts of violence than their adult \*361 counterparts.<sup>152</sup> In practice, this argument easily slides into an implicit endorsement of the “crime master” and “monstrous other” narratives as they pertain to adults. As Marie Gottschalk notes, “Stressing that teenagers are not fully culpable reinforces in a backhanded way the idea that adults who commit serious crimes should have known better and thus are fully culpable.”<sup>153</sup>

Over the last ten years, this reform effort has been quite successful. The U.S. Supreme Court found mandatory life-without-parole sentences for children convicted of nonhomicide offenses unconstitutional in *Graham v. Florida*<sup>154</sup> in 2010.<sup>155</sup> It then extended that ruling to include homicide offenses in *Miller v. Alabama*<sup>156</sup> in 2012<sup>157</sup> and made clear that these rulings applied retroactively in *Montgomery v. Louisiana*<sup>158</sup> in 2016.<sup>159</sup>

However, the Court has also fully embraced the juvenile/adult dichotomy emphasized by advocates. These cases “inscribe into constitutional law an optimistic account of the potential of adolescents, but at the expense of introducing into the case law an extremely bleak vision of adults.”<sup>160</sup> “Justice Kagan's majority opinion in *Miller* ... relies throughout [on] an essentialized categorical distinction between ‘adolescents’ and ‘their distinctive (and transitory) mental traits,’ and adults who are categorically more ‘culpable’ and less pliable.<sup>161</sup> Thus, “[w]hile introducing new procedural limits on the sentencing of children, then, the lasting significance of the juvenile [life without parole] cases could be to reaffirm as the default rule that the Constitution imposes no meaningful limits on mass imprisonment.”<sup>162</sup>

As these anecdotes demonstrate, many of the current reform strategies rely upon achieving relief for one category of incarcerated people at the detriment of others. While this may be a winning short-term strategy, the negative impact of this dichotomous approach is likely significant in the long run.<sup>163</sup>

#### \*362 D. Consequences: Ignoring Math, Disabling Empathy, and Normalizing Excessive Punishment

There are significant consequences that flow from the infiltration of the insidious, false narratives about the “crime master” and “monstrous other” into the efforts to solve the problem of mass incarceration, discussed below in turn.

##### 1. Ignoring Math

First and foremost, exclusively focusing reform efforts on nonviolent offenses while refusing to extend any type of relief to those convicted of violent offenses means that we will never truly achieve a large-scale reduction in the prison population nationwide, given that “54 percent of people incarcerated in state prisons were convicted of violent crimes.”<sup>164</sup> Achieving significant reform by targeting nonviolent offenses is also impossible in the State of Colorado, where a full 61% of incarcerated men were convicted of a violent offense.<sup>165</sup> As M.C., an incarcerated man, writes, “we must have or find the courage to call



out and hold accountable those who are in opposition with us and/or those who attempt to implement ‘symbolic’ or ‘superficial’ changes.”<sup>166</sup>

In recent years, there has been a modest decline of approximately 7% in the U.S. prison population.<sup>167</sup> This overall decline is a result of some states, such as Alaska and New Jersey, decarcerating at a fairly significant rate of well over 30%, while the incarceration rate in other states such as Arkansas and Washington has actually increased by double digits.<sup>168</sup> For its part, Colorado has done only slightly better than average. Since reaching its peak prison population in 2008, Colorado has reduced its prison population by 14.7%.<sup>169</sup>

While this decrease is a step in the right direction, it is not enough to meaningfully reverse course on mass incarceration any time soon. Researchers estimate that “[i]f the states and the federal government maintain this pace of decarceration, it will take [seventy-two] years ... to cut the U.S. prison population in half.”<sup>170</sup> This is largely a result of the decision to exclude violent crime from reform efforts described above. \*363 While there has been a 26% reduction in the incarceration rate for drug offenses and a 14% reduction rate in property offenses since 2007, the imprisonment rate for violent offenses has only declined by 2%.<sup>171</sup> Pfaff notes, “[a]lmost any way you cut it, the majority of those in prison, and a large majority of those serving long terms, have been convicted of violence.”<sup>172</sup> While enacting reforms aimed at violent crime is understandably politically challenging for many reasons, “[n]one of that, of course, changes the math.”<sup>173</sup>

## 2. Disabling Empathy

Beyond the math, however, lies a deeper concern--the reformers' decision to embrace and perpetuate the “crime master” and “monstrous other” narratives while seeking to nibble around the edges of the carceral state affirmatively damages the prospects for more impactful and inclusive reform in two very important ways.

First, continually distinguishing between people who have committed nonviolent and violent offenses serves to further and unjustifiably demonize those convicted of violent offenses in the public's imagination and in policy debates.<sup>174</sup> These distinctions perpetuate the erroneous notion that those convicted of violent offenses are of a fundamentally irredeemable nature.<sup>175</sup> For example, “[t]he battle against the war on drugs has been premised” upon providing relief for those convicted of drug and other nonviolent offenses “in order to get tough with the ‘really bad guys.’”<sup>176</sup> This strategy has had the effect of reinforcing the fallacy that mass incarceration can be meaningfully addressed by focusing only on nonviolent crime and has also “reinforced the misleading belief that there are two distinct and immutable categories of offenders, violent ones and nonviolent ones.”<sup>177</sup>

This dichotomy is false, as explained above. But if we continue to demonize and “otherize” people who commit acts of violence, we will fail to fully appreciate our misguided and destructive approach to crime and punishment. When we embrace the false narrative, “[w]e remove our ability not only to empathize [] but [also] to think, to act rationally, and to make decisions that prioritize healing, safety, and justice.”<sup>178</sup>

### \*364 3. Normalizing Excessive Punishment

Second, this approach to reform has underhandedly legitimized and normalized lengthy and extreme sentences for violent crime, which, in turn, limits the potential for more meaningful reform in the future.<sup>179</sup> The combination of deliberately excluding people convicted of violent offenses from most sentencing reforms and tacitly (or in some cases, explicitly) embracing life without parole for adults who commit acts of violence has led to widespread acceptance of lengthy sentences of incarceration.<sup>180</sup> By “uncritically accept[ing]” life without parole as both a viable alternative to the death penalty and an acceptable punishment for adults, some reformers “have helped normalize a sanction that, like the death penalty, does not accord at all with human rights and sentencing norms in other developed countries.”<sup>181</sup>



Stated differently, by enacting criminal justice reforms that almost exclusively prioritize relief for people convicted of nonviolent offenses while simultaneously excluding (or worse, increasing punishment for) individuals convicted of violent offenses, “[w]e trim the edges of the tree while we inadvertently water its roots.”<sup>182</sup> Consequently, the tree “appears smaller for a moment, but it grows back quickly and stronger.”<sup>183</sup>

### *E. Life Without Parole and Other Excessive Sentences: The Fruit Borne of the “Low-Hanging Fruit” Approach*

#### **1. Life Sentences**

Considering the foregoing, it is perhaps unsurprising that sentences of life without parole and other excessive punishments have skyrocketed during the age of mass incarceration, both nationally and here in Colorado.<sup>184</sup> Over the past three decades, the population of individuals serving life without parole has increased a hundredfold.<sup>185</sup> Today, the incarceration rate for life sentences alone in the United States is 64 per 100,000, which is higher than the total incarceration rate for the Scandinavian nations of Denmark, Finland, and Sweden.<sup>186</sup>

This trend has largely gone unnoticed by reformers who have expended nearly all their available oxygen on nonviolent offenses and the \*365 outermost edges of sentences for violent offenses, such as the death penalty and juvenile life without parole.<sup>187</sup>

Since 2003, the Washington, D.C.-based Sentencing Project has undertaken a series of five national studies of the scope of life sentences.<sup>188</sup> These studies have revealed a significant increase of rates of life sentences.<sup>189</sup> “Nearly five times the number of people are now serving life sentences in the United States as were in 1984, a rate of growth that has outpaced even the sharp expansion of the overall prison population during this period.”<sup>190</sup> This explosion of life sentences occurred despite the fact that violent crime rates have been steadily dropping since the early 1990s.<sup>191</sup> Additionally, “[a] comprehensive 2016 international analysis of life imprisonment found that the number of people serving life imprisonment in the United States is higher than the combined total in the other 113 countries surveyed.”<sup>192</sup> Today, one in seven prisoners in the United States, or 13.9% of the prison population, is serving a life or “virtual” life (defined as a sentence of fifty years or more) sentence.<sup>193</sup>

In Colorado, the number of life-sentenced prisoners has similarly exploded. In 2016, the number of life-sentenced prisoners was 173% of, or 1.7 times, the state's total prison population in 1970.<sup>194</sup> As of June 18, 2020, there are 778 individuals serving a sentence of life without parole, or death-in-prison sentence, in the CDOC.<sup>195</sup> These sentences have been disproportionately imposed on people of color. Approximately 32%, or 246, of individuals serving a life-without-parole sentence are Black, and \*366 another 219, or 28%, are categorized by the CDOC as Hispanic.<sup>196</sup> There are also another 270 individuals serving life with parole sentences.<sup>197</sup> Eighty-nine of these individuals (or 33%) are Black, and sixty-three (or 23%) are Hispanic.<sup>198</sup>

This exponential growth in life sentences is not the result of a dramatic uptick in the homicide rate but rather is attributable to changes made to Colorado's sentencing scheme for class one felonies. Before July 1, 1977, an individual who received a life sentence for a class one felony was required to serve at least ten calendar years before being considered for parole.<sup>199</sup> Individuals who received such a sentence on or after July 1, 1977, and before July 1, 1985, were required to serve twenty calendar years before being considered for parole.<sup>200</sup> In 1985, the law again changed requiring life-sentenced individuals to serve forty calendar years before submitting an application for parole.<sup>201</sup> Then, in 1990, the Colorado legislature eliminated parole altogether for life sentences imposed for class one felonies.<sup>202</sup> Thus, what was once a ten-year sentence with a subsequent opportunity for release has now become a death-in-prison sentence. Darcy Matlock asks, “[W]hy was a life sentence defined as [ten] years, then [twenty], then [forty], then death by imprisonment? Who determined the value of life to be so much less for the perpetrator during this period?”<sup>203</sup>



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Lori McLuckie, a woman serving a life sentence that was imposed in 1989 (requiring her to serve forty calendar years before being eligible for parole), describes watching the number of women sentenced to life without parole increase before her eyes, beginning in the early 1990s:

It seemed that overnight, perspective was lost. From where I sat, I started seeing women coming in with this draconian sentence. First, just one woman; an anomaly, a shocking curiosity. Sometime later, another. Then another. The shock of it started to wear off a little, and I'm ashamed to say that I stopped paying attention after a while. When I next looked, it seemed that women with this sentence were teeming all around me. They were everywhere. I realized that this \*367 sentence was not at all being reserved for the most severe or extreme cases anymore. It was apparent that first-degree and felony murder convictions were being pursued and won by the justice system, without any of the sense of gravitas that had once been applied.<sup>204</sup>

Ms. McLuckie describes the psychological toll this sentence has taken:

[A]ll but a few of these women have not prevailed in their struggle for legal sanity. They sit here. There are a lot of them. In May 2019, one woman at [Denver Women's Correctional Facility] serving a sentence of Life Without Parole committed suicide by hanging herself. This gives us a clue about what it feels like to have this sentence.<sup>205</sup>

She concludes by sharing her perception that Colorado politicians and members of the public have become desensitized to such lengthy sentences:

It truly does seem like the Colorado justice system has lost all perspective on the meaning of [l]ife, and the gravity and the implications of a [life-without-parole] sentence. They seem to have become so inured to it that it [is] as though it means very little to them. Yet, it means [everything to the many, many people who have been caught up in this insanity].<sup>206</sup>

Our state's first-degree-murder statute is one of the most expansive in the country.<sup>207</sup> In Colorado, first-degree murder is defined not only as the intentional killing of another human being “[a]fter deliberation and with ... intent” but also as felony murder and extreme-indifference-murder.<sup>208</sup> A person also commits first-degree murder in Colorado if he \*368 or she sells a controlled substance to a minor on school grounds and the minor dies as a result of ingesting the substance or if a person in a position of trust knowingly causes the death of a child under twelve.<sup>209</sup> Despite this expansive definition that encompasses a wide range of conduct, Colorado law provides for only a single punishment for first-degree murder: life without parole.<sup>210</sup> As Ms. McLuckie alludes to, this one-size-fits-all penalty for an incredibly wide range of conduct is one reason Colorado's life-without-parole population has risen so dramatically since the early 1990s.<sup>211</sup>

## 2. Other Extreme Sentences

In addition to the 1,048 individuals serving life and life-without-parole sentences in Colorado, there are another 1,716 individuals serving term-of-year sentences of forty years or greater.<sup>212</sup>

### a. Aggravating Factors, Crimes of Violence, and Extraordinary Risk Offenses

To understand why so many individuals in Colorado are serving lengthy sentences, it is important to understand that several Colorado sentencing statutes act in conjunction with one another. Colorado law \*369 provides presumptive penalty ranges



for different felony levels.<sup>213</sup> As previously noted, a class one felony results in a minimum sentence of life imprisonment.<sup>214</sup> A class two felony has a range of eight to twenty-four years of imprisonment, and the ranges decrease as the alleged severity of the felony decreases.<sup>215</sup>

However, these presumptive ranges are just the beginning of a sentencing range. Additional factors can cause the sentence length to increase exponentially. If the court finds aggravating circumstances,<sup>216</sup> it must sentence a person to a minimum “of at least the midpoint in the presumptive range” and up to “twice the maximum term.”<sup>217</sup> The maximum presumptive sentence can also be increased if a person is convicted of an offense that is delineated as an “extraordinary risk” crime<sup>218</sup> or \*370 qualifies as a “crime of violence.”<sup>219</sup> There is a significant amount of overlap with respect to the statutory definitions of “extraordinary risk crimes” and “crimes of violence.” Many offenses qualify as both, thus requiring courts to increase the sentence twice.<sup>220</sup>

## b. Habitual Offenses

Colorado's habitual offender statute, which arose out of the “three strikes” era of criminal justice,<sup>221</sup> also drastically impacts sentencing. If a person is convicted of a felony<sup>222</sup> and has two previous felony convictions within ten years of the commission of the triggering offense, the person must be sentenced to three times the maximum presumptive range for the currently-charged felony.<sup>223</sup> This is known as the “little” habitual.<sup>224</sup> If a person was convicted of three prior felony convictions, the person must be sentenced to four times the maximum presumptive range, known as the “big” habitual.<sup>225</sup> And a person already convicted as a “big” habitual who is then convicted of a crime of violence must be sentenced to life imprisonment and is not eligible for parole until the person serves at least forty calendar years, known as the “super” habitual.<sup>226</sup> \*371 Finally, under the “three strikes” provision, a person must be sentenced to life imprisonment if the person (1) was convicted of any class one felony, class two felony, or any class three felony that is a statutory crime of violence; and (2) has been twice convicted previously for any such felonies.<sup>227</sup> The habitual offender statute mandates the court to impose these punishments.<sup>228</sup>

The effects of the draconian habitual offender statute cannot be overstated. For instance, in a 2011 article about the zealous use of habitual offender laws in the Eighteenth Judicial District Attorney's Office, Westword Magazine profiled a man named Dennis Pauls, who decided to leave an Easter lily on his ex-wife's doorstep when he moved away from Colorado in spite of a restraining order that prohibited him from having contact with her.<sup>229</sup> His ex-wife called the police to report a violation of the restraining order, and, as a result, the police issued a warrant for his arrest.<sup>230</sup> After moving to Florida, Mr. Pauls suffered a panic attack at his new home in Naples, Florida, causing a police welfare check.<sup>231</sup> While there, the police discovered the outstanding Colorado warrant, and Mr. Pauls was extradited to Arapahoe County.<sup>232</sup> There, he learned that he was being charged with felony stalking.<sup>233</sup> Because he had prior felony convictions (a forgery, two drunk-driving convictions, and a deferred sentence for harassment), he was being charged as a habitual offender and faced between twenty-four and thirty-two years in prison.<sup>234</sup>

Prosecutors refused to drop or reduce the stalking charge, despite Mr. Pauls's ex-wife pleading with them to do so.<sup>235</sup> “The case ... became a matter of ... principle [for Mr.] Pauls.”<sup>236</sup> He refused to accept a plea offer, represented himself, and won.<sup>237</sup> However, this result is atypical. The availability of the habitual offender law has become a coercive plea-bargaining tool for prosecutors, as most people in Mr. Pauls's predicament take a plea deal out of fear of facing the habitual counts.<sup>238</sup> Public defender Jim O'Connor explained that most people charged with habitual offender counts plead guilty, even though these plea offers “are way out of whack with their conduct.”<sup>239</sup> This is because “[h]ardly any of them want to stare down the risk of that kind of time and go to trial,” \*372 even if people have a viable defense against the highest counts charged.<sup>240</sup>

Few, if any, avenues for relief exist for individuals sentenced under these draconian habitual offender laws. The Eighth Amendment and its Colorado counterpart prohibit “cruel and unusual” punishment.<sup>241</sup> On their face, these excessively lengthy sentences may be fairly characterized, at least in layman's terms, as “cruel.” However, paradoxically, because these sentences





are statutorily mandated and frequently imposed, they rarely meet the definition of “unusual.”<sup>242</sup> To the contrary, these lengthy sentences have become normalized and legitimized with the help of the “crime master” and “monstrous other” narratives, thereby precluding relief under the Eight Amendment. Cruelty is condoned as long as it is “usual.”<sup>243</sup>

### c. The Interplay Between Highly Punitive Sentencing Schemes

These sentencing schemes often work in tandem with one another to produce sentences that amount to the functional equivalent of a death-in-prison sentence. The legislature passes criminal justice bills that overlay one another, resulting in excessive sentences that perhaps no one anticipated. The appellate courts then review sentences imposed under these laws and conclude that they must apply the plain language of the statutes and cannot question the purpose of these laws.<sup>244</sup> Consequently, defendants continue to receive absurdly lengthy sentences.

To begin, it is important to understand the distinction between consecutive and concurrent sentences. “When a [person] is convicted of multiple offenses, the ... court has the discretion to impose either concurrent or consecutive sentences.”<sup>245</sup> If the offenses “are supported by \*373 identical evidence” then they must run concurrently, except that the court can impose consecutive sentences if multiple victims are involved.<sup>246</sup> However, the crime of violence statute then dictates that a court “shall sentence a person convicted of two or more separate crimes of violence arising out of the same incident so that his or her sentences are served consecutively rather than concurrently.”<sup>247</sup>

Because of the interplay between the habitual offender sentencing statute, the crime of violence statute, and its consecutive sentencing requirement, Nehemiah Felipe Chavez is serving 128 years in prison for attempted, inchoate offenses during which no one was killed.<sup>248</sup> Mr. Chavez was convicted “of two counts of attempted second-degree murder,” which the jury found as “crimes of violence,” and “one count of attempted manslaughter,” all of which arose from a single incident.<sup>249</sup> At sentencing, “[t]he district court [also] found ... three prior [convictions] and adjud[ged] [Mr. Chavez] a habitual offender.”<sup>250</sup> The trial court imposed the sentences consecutively as required by the crime of violence statute.<sup>251</sup> As a result, Mr. Chavez received 64 years for each attempted second-degree murder conviction and 12 years for the attempted manslaughter, resulting in the 128-year sentence.<sup>252</sup>

Mr. Chavez challenged the length of his sentence, arguing that it is “unjust and unreasonable” to treat more harshly a person who commits multiple crimes of violence arising out of a single occasion than a person “who commits multiple crimes of violence ... [in] separate and distinct criminal episodes.”<sup>253</sup> The Colorado Court of Appeals explained that the legislature mandated this result; thus, there was nothing “unjust or unreasonable” about it.<sup>254</sup>

Consequently, Mr. Chavez is serving the functional equivalent of a life-without-parole sentence, even though his crimes were inchoate and no one died. According to CDOC's website, Mr. Chavez's parole-eligibility date is December 28, 2072.<sup>255</sup> In a letter, he remarks: “I see the parole board [in] 2072 which means I'll be 91 by the time I get \*374 my first chance at freedom, good thing I work out, haha! Listen, I keep a sense of humor because of my faith and what I believe.”<sup>256</sup>

Notwithstanding his sense of optimism and humor, Mr. Chavez's sentence is grossly disproportionate to his crimes of conviction.<sup>257</sup> His excessively lengthy sentence is also unnecessary for public safety, considering the empirical data on declining recidivism rates that correspond with advancing age,<sup>258</sup> and counterproductive, considering the tremendous psychological and emotional cost of this 128-year sentence to Mr. Chavez and his family.<sup>259</sup>

Finally, incarcerating Mr. Chavez for the rest of his life also disregards any possibility for growth or change, even though, roughly eight years into his sentence, he has already accepted responsibility and desires to make a positive impact on others.<sup>260</sup> He explains that “after receiving my sentence, I was lost, sad, angry, hurt, [and] confused[,]” because “with the sentence I had



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been given, I already felt dead and all alone, so what did I have to lose?”<sup>261</sup> However, “[a]t the bottom of hopelessness I made a choice. I dared to believe and hope against all hope.”<sup>262</sup> He continues:

I'm going through this so I can help somebody later on down the line. Maybe [there are] books inside of me that I couldn't write unless I went through all I've been through. Books that will reach down the halls of time to touch young lives in a way that nobody else can .... I just know there is reason and purpose behind everything in life, whether or not you fulfill yours is your choice[.] [M]e, I'm going to use it all in positive and productive ways.<sup>263</sup>

Mr. Chavez's determination to make meaning out of his life despite the draconian sentence he received is exemplary of why Colorado's sentencing laws-- and the illogical consequences of their interplay--should be reevaluated and changed to provide a meaningful opportunity for release. As discussed in Part III, many people serving lengthy sentences have transformed themselves during their years in prison and have much <sup>375</sup> to offer the world.<sup>264</sup> Nevertheless, at least up until this point, the legislature and the courts have been immune to the unfairness and senselessness of these excessive sentences.

### d. Conclusion

The deficiencies of the current approach and the need for a new, more inclusive, and accurate narrative have been clear for quite some time. However, as discussed in Part II, the COVID-19 pandemic has abruptly revealed the devastating costs of mass incarceration and the inadequacies of the current reform approach in a dramatic fashion.

## II. THE PANDEMIC AND ITS WAKE-UP CALL

“As an infectious disease clinician with a public health degree in the dynamics of infectious disease epidemics and pandemics, I am concerned about the inevitable spread of COVID-19 in jails, prisons, community corrections facilities, and juvenile detention centers .... This epidemic has the potential to become the Coming Prison Plague ... prompt reduction in incarcerated populations overall, is necessary to reduce the impact of this outbreak.”

- Dr. Carlos Franco-Paredes<sup>265</sup>

“It's torture. It's physical, emotional torture ....[I]t's hard not being able to hear their voice and knowing the day to day, or how they're being treated .... These men are already in a compromised position, there's nothing they can do to get away from it. If they get it, you just have to pray that they'll be okay.”

- Carmen Covert, partner of an incarcerated individual at Sterling Correctional Facility<sup>266</sup>

### A. The Pandemic's Implications for Jails and Prisons

On March 11, 2020, the World Health Organization officially made its inevitable announcement following Wuhan, China's Municipal Health Commission's first reports of the “viral pneumonia” on December 31, 2019:<sup>267</sup> the outbreak of COVID-19, a disease caused by a novel corona- <sup>376</sup> virus, was a global pandemic.<sup>268</sup> The disease, first believed to be primarily a respiratory illness and now understood to manifest in over three dozen ways, can cause a dizzying array of symptoms and long-term effects. It also has a fatality rate of roughly ten times that of the flu.<sup>269</sup>



Experts believe the coronavirus strain causing COVID-19 mainly spreads through person-to-person contact, primarily through respiratory droplets produced when an infected person coughs or sneezes.<sup>270</sup> According to the Centers for Disease Control and Prevention (CDC), viral spread is more likely when people are in close contact, or are within six feet of one another.<sup>271</sup> Notably, between 25% and 45% of infected people are asymptomatic and never show symptoms of infection but can transmit the disease to an uninfected person.<sup>272</sup> Additionally, individuals can transmit the disease presymptomatically, meaning they may spread the virus before they exhibit symptoms.<sup>273</sup> “The [CDC] estimates 40% of coronavirus transmission happens before people feel sick.”<sup>274</sup>

Throughout 2020 and 2021, the pandemic has dramatically impacted most aspects of public life for millions worldwide, as governments have ordered shutdowns and imposed restrictions on school, business, workplace, restaurant, and retail operations to mitigate viral spread.<sup>275</sup>

Since the earliest days of the pandemic, the implications for jails and prisons were obvious. People primarily transmit the disease through close, person-to-person contact, and social distancing is impossible in jails and prisons, especially given that many jails and prisons nationwide \*377 routinely operate either at, or significantly over, capacity.<sup>276</sup> Moreover, incarcerated individuals “are disproportionately likely to have chronic health conditions that make them especially vulnerable to viral infections.”<sup>277</sup> People in correctional facilities also often lack access to adequate hygiene products.<sup>278</sup> Even under normal circumstances, many of these facilities struggle to provide adequate medical care for their burgeoning populations.<sup>279</sup> Therefore, it is unsurprising that, along with nursing homes and cruise ships, jails and prisons have become COVID-19 hotspots.<sup>280</sup> In December 2020, as the pandemic entered its tenth month, at least 275,000 people--one in five incarcerated individuals in the United States--had been infected, “more than 1,700 have died and the spread of the virus behind bars shows no sign of slowing.”<sup>281</sup>

Because the United States is both the world epicenter for the pandemic and the world leader in incarceration,<sup>282</sup> the public health implications are significant. While mass incarceration has always posed serious threats to public health,<sup>283</sup> the COVID-19 pandemic has exposed these risks in dramatic fashion.<sup>284</sup> Historian Heather Ann Thompson notes that “[t]he COVID-19 outbreak is essentially a reaping of what we’ve sown with mass incarceration, from a public health perspective.”<sup>285</sup> Or, as Corbin Brewster, chief public defender in Tulsa County, Oklahoma, stated, “Basically, the sh[–] hit the fan .... COVID-19 is just a magnifying glass for all the problems in the [American] criminal justice system.”<sup>286</sup>

The public health implications of the spread of COVID-19 in correctional facilities extend far beyond the people incarcerated within their walls. Correctional staff, medical personnel, other employees, and visitors from the community visit and return home from prisons every day. Jails and prisons also admit and release individuals on a daily basis.<sup>287</sup> \*378 Thus, a COVID-19 outbreak at a jail or prison puts the entire community in which the facility is located, as well as the communities to which the formerly incarcerated people return, at heightened risk of contracting the disease.<sup>288</sup>

Given these public health risks, the pandemic has galvanized the criminal defense community to fight for the release of as many incarcerated people as possible.<sup>289</sup> However, the results of these efforts have been limited. An analysis by The Marshall Project and The Associated Press found that between March and June of 2020, the state and federal prison population decreased overall by 8% but that “this year’s decrease has not come because of efforts to release vulnerable prisoners for health reasons and to manage the spread of the virus raging in prisons.”<sup>290</sup> Rather, “head counts have dropped largely because prisons stopped accepting new prisoners from county jails to avoid importing the virus, court closures meant fewer people were receiving sentences and parole officers sent fewer people back inside for low-level violations, according to data and experts.”<sup>291</sup>

### ***B. Colorado's Failure to Significantly Mitigate the Risks of COVID-19 in Correctional Settings***



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Despite significant efforts by advocates to mitigate the spread of COVID-19 in correctional facilities, the results have been insufficient. In a June 2020 report grading states' responses to COVID-19 in jails and prisons, the Prison Policy Initiative gave Colorado a D- grade for its response to the pandemic.<sup>292</sup> The report makes clear that *no* state, including Colorado, adequately responded to mitigate the COVID-19 threat in its correctional facilities.<sup>293</sup>

\*379 Like most states, Colorado has taken a piecemeal and tentative approach in responding to the coronavirus spread throughout correctional facilities in the state.<sup>294</sup> Similar to national trends, both jail and prison populations decreased throughout the state during 2020.<sup>295</sup> However, like what has occurred nationally, this decrease is attributable to a myriad of factors, some of which are related to the pandemic and some of which are not.<sup>296</sup> Moreover, analysts do not expect the decrease in the prison \*380 population will last; they predict that by 2023, it will once again be significantly higher than it is now.<sup>297</sup>

Prisons and jails have become the sites of many of the largest COVID-19 outbreaks in the state.<sup>298</sup> For instance, in the El Paso County jail, which only started providing cloth masks in November 2020, more than 700 people tested positive in one week.<sup>299</sup> At the time of this Article's publication, a total of 8,669 individuals incarcerated in the CDOC-- approximately 54%--have tested positive for COVID-19.<sup>300</sup> 1,444 Sterling Correctional Facility residents have tested positive for COVID-19.<sup>301</sup> Additionally, there have been 943 cases at Arkansas Valley Correctional Facility, 1,085 positive cases at Bent County Correctional Facility, 770 positive cases at Fremont Correctional Facility, 743 cases at Limon Correctional Facility, 516 positive cases at Buena Vista Correctional Complex, 793 cases at Crowley County Correctional Facility, 401 cases at Four Mile Correctional Facility, 358 cases at Arrowhead Correctional Facility, and 326 cases at Trinidad Correctional Facility.<sup>302</sup> A total of 29 people incarcerated in the CDOC have died.<sup>303</sup>

Moreover, as explained below, Colorado's inadequate response to mitigating the spread of COVID-19 in correctional facilities has followed the general pattern of reforms described in Section I.C that ignore or exclude people who have committed acts of violence and perpetuate the insidious false narratives described in Section I.B.

### 1. Early Efforts to Reduce Colorado's Prison Population

As chief executive officer of the State, Governor Jared Polis has broad authority to suspend certain laws to facilitate the CDOC's ability to depopulate state prisons.<sup>304</sup> On March 25, 2020, he initially issued Executive Order D 2020 016.<sup>305</sup> This order, among other things, afforded the CDOC the discretion to award additional earned time credits as appropriate to accelerate release dates; provided the CDOC with the discretion \*381 to "identify interim criteria for Special Needs Parole and refer persons who meet those criteria to the Parole Board"; and suspended the requirement that incarcerated persons complete "a regimented inmate discipline program" in order to be released into an intensive supervision program.<sup>306</sup> Governor Polis subsequently extended that order on April 23, 2020.<sup>307</sup>

Instead of taking full advantage of this enhanced discretion, on May 6, 2020, the CDOC subsequently issued criteria for assessing individuals for early release on special needs parole that categorically excluded anyone whose case involved a victim with no exceptions.<sup>308</sup> During the two months the executive order was in effect, the CDOC released just 290 people, less than 2% of the prison population.<sup>309</sup> For some perspective, the CDOC houses over 2,000 people over the age of 60--a number that does not account for additional individuals who may be at high risk of severe illness if they contract COVID-19 due to an underlying medical condition.<sup>310</sup> As discussed in Part I, significant empirical evidence demonstrates that recidivism rates not only decline with age but are also significantly lower than average for people convicted of violent offenses.<sup>311</sup> C.G., a woman serving a life sentence, writes:



[A]ll people deserve second chances. Those of us who have been in prison for a long time are not the same people we were when we got here. With this pandemic, non-violent offenders are given more and better chances to be released. When will we lifers get our chance?<sup>312</sup>

As a coalition of criminal justice advocates stated in response to these meager results, “hundreds of medically vulnerable, sick or elderly prisoners who pose no threat to public safety, but who face a serious risk of dying of COVID-19 in Colorado's crowded prisons” remain imprisoned.<sup>313</sup> Paradoxically, although Governor Polis signed a bill into law on March 23, 2020, abolishing the death penalty,<sup>314</sup> the state government's failure to ameliorate the risk of COVID-19 to the medically vulnerable \*382 means that any incarcerated person's prison sentence could become a death sentence.

In yet another turn of disappointing events, at the end of May 2020, Governor Polis allowed portions of his orders, which provided the CDOC with the aforementioned enhanced discretion, to expire.<sup>315</sup> Accordingly, since May 22, 2020, the CDOC has been without even the modest tools previously at its disposal to further depopulate the state's prisons.

## 2. An Isolated Event

Unfortunately, the Governor's decision to allow his executive orders to expire was likely informed by the fact that one week earlier, Cornelius Haney, a man who had been released in April 2020 by the CDOC on special needs parole, was arrested on first-degree murder charges.<sup>316</sup> Despite the fact that the CDOC routinely releases people convicted of all types of offenses on parole without incident, these quiet success stories are never newsworthy.<sup>317</sup> However, the media immediately seized upon Mr. Haney's story, posing the question, “how many people released during this pandemic have committed violent crimes?”<sup>318</sup> Mr. Haney had been eligible for parole since 2017 and his mandatory release date was set for August 2020, so his release was only accelerated by a few months.<sup>319</sup> Even so, this unfortunate, isolated event appeared to dramatically impact the Governor's willingness to engage in further efforts to depopulate Colorado's prisons and mitigate the spread of COVID-19 throughout correctional facilities.

Shortly after the executive orders expired, the ACLU and partners sued Governor Polis and the CDOC seeking a court order compelling the CDOC to “perform its legal duties under the Colorado Constitution by identifying and prioritizing the safety, and release or transfer, of Medically Vulnerable Prisoners housed in CDOC facilities, as well as immediate \*383 implementation of necessary physical distancing and hygiene measures.”<sup>320</sup> The lawsuit asked the court to prioritize evaluation for release for all medically vulnerable incarcerated people, a plan to release people--whether medically vulnerable or not--to allow for adequate social distancing, and other protective measures to increase sanitation and medical protections.<sup>321</sup>

Likely influenced by the media's reaction to the Haney case, Governor Polis disappointingly and readily adopted the rhetoric of the false narratives discussed in Section I.B in response to the suit.<sup>322</sup> In a news conference just hours after the lawsuit was filed, he remarked, “[i]t's no surprise that there are some in the advocacy community that want to use the pandemic as an excuse for other reforms .... We will vigorously defend against any lawsuit that seeks to turn this pandemic into an effort to release dangerous criminals.”<sup>323</sup> The predictable but lamentable reaction to the Haney case by both the media and Governor Polis dates back to Willie Horton and the presidential campaign of 1988. When Michael Dukakis was the governor of Massachusetts, Mr. Horton, a Black man, was charged with sexually assaulting a white woman and stabbing her \*384 boyfriend while furloughed from a Massachusetts prison.<sup>324</sup> During the presidential campaign, then-presidential candidate George H.W. Bush and others released ads that were “a brazen appeal to racial fears” and argued that Governor Dukakis was soft on crime.<sup>325</sup> However, the furlough program at issue was not created by Dukakis, and, in fact, was considered a success, “with over 99 percent of those furloughed returning to prison without incident.”<sup>326</sup> According to Senator Richard Durbin, D-IL, “[t]he ghost of Willie Horton has loomed over any conversation about sentencing reform for over 30 years.”<sup>327</sup> Before this incident, nearly 10%



of incarcerated people received a furlough, and nationally, people convicted of murder served an average of only eight years before they were paroled or commuted.<sup>328</sup>

After Willie Horton and the ad campaign, “lawmakers worried that any change that resulted in the release of someone who would then go on to commit another violent crime could be political suicide.”<sup>329</sup> Incarcerated people immediately sensed the long-term impact.<sup>330</sup> A group of lifers in a Massachusetts prison wrote to lawmakers a few weeks after the incident: “We ask that you treat (Horton's) case as it is, which is an individual case and does not and should not reflect on the ... people who have accepted the responsibility ... and are serving their time in a very positive and productive manner.”<sup>331</sup> Unfortunately, their calls went unheeded. The ad campaign around Willie Horton influenced a generation of politicians and ushered in a new era of mass incarceration and a politics of fear and racism.<sup>332</sup> Within this context, we must understand Colorado's response when one person released four months early was then subsequently charged with a violent offense.

### 3. Reverberations from the False Narrative

The fallout over Colorado's COVID-19 vaccination plan also reveals the ways in which the false narratives discussed in Section I.B can easily infiltrate any discussion involving incarcerated people, and can \*385 cause politics, not health policy, to determine the fate of Colorado's incarcerated population.<sup>333</sup>

Originally, the Colorado Department of Public Health and Environment developed a vaccination plan that prioritized people who live in congregate housing situations, including college students living in dorms, seasonal workers at ski areas, people living in homeless shelters, and people in jails and prisons.<sup>334</sup> This initial plan “was the product of months of deliberation by members of the [S]tate's medical advisory group[.]”<sup>335</sup> It also reflected CDC recommendations that states should prioritize vaccinating incarcerated people and people living in homeless shelters because such populations are particularly vulnerable and vaccinating them could prevent community spread.<sup>336</sup> However, George Brauchler, the former District Attorney for the 18th Judicial District, then wrote an editorial in the *Denver Post* expressing outrage that people in prison would receive the vaccine before elderly people.<sup>337</sup> He wrote that the CDC recommended that elderly people should be prioritized for the vaccine, not “[i]ncarcerated child abusers.”<sup>338</sup> Brauchler then claimed that Polis was “doubling down on vaccinating [the] notorious killers” whose sentences Polis commuted to life without parole after Colorado abolished the death penalty in March 2020, “even before the elderly parents of those they killed in cold blood.”<sup>339</sup> He concluded the editorial with the following warning: “If this outrageous plan remains in place, the family of every elderly Coloradan who contracts and dies from COVID while prisoners get vaccinated will have one person to look to for answers: Jared Polis.”<sup>340</sup>

Social media exploded with “the accusation that state leaders were coddling convicts ....”<sup>341</sup> Soon after, the vaccination plan created by physicians, public health officials, and experts in bioethics “quickly unraveled.”<sup>342</sup> At a news briefing, a FOX-News reporter asked Governor Polis about Brauchler's opinion piece and Polis responded that there was “no way” that the vaccine would be given to “prisoners before it goes \*386 to people who haven't committed any crime.’ He let out a short laugh as he pronounced the word ‘prisoners.’”<sup>343</sup>

The State then released a revised vaccine plan that demoted people living in congregate settings and did not prioritize incarcerated people at all.<sup>344</sup> The Governor's office later claimed that the state was not discriminating against incarcerated individuals. Polis's spokesperson told the media, “Inmate status will not make a difference in terms of timing of receipt of the vaccine .... Someone who falls into a category for early priority of the vaccine and is in custody will receive the vaccine at the same time as someone in the same category who is outside our correctional facilities.”<sup>345</sup> This assertion ignores the obvious point that people living in a congregate correctional setting are not similarly situated to people living in the community, as they are far more likely to contract COVID-19 than nonincarcerated people, are disproportionately likely to have chronic health conditions, and are also disproportionately Black and Latinx.<sup>346</sup>



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Polis's about-face was deeply disappointing in contrast to other states, such as Connecticut, Delaware, Maryland, Massachusetts, Nebraska, New Mexico, and Pennsylvania, that have made incarcerated individuals a top priority for vaccines.<sup>347</sup> The State's change in plans also reveals the insidious nature of the false narratives about crime and violence described in Section I.B and demonstrates how quickly politicians often default to embracing these narratives when confronted with criticism.

In all, “[t]his episode illustrates how a system of preferences geared to stop the virus where it is most destructive may clash with other values in a nation that incarcerates more people than does any other.”<sup>348</sup> The politics of fear changed public health policy and left incarcerated people without access to the vaccine as the virus rages in the confined settings.

### C. Conclusion

In many ways, Colorado's response to calls to decarcerate in the face of the public health crisis presented by the spread of COVID-19 in jails and prisons mirrors the broader, typical “low-hanging fruit” approach to reform discussed in Part I. To the extent that any depopulation efforts have been undertaken in the first place, they categorically exclude persons convicted of violent crime regardless of age, medical vulnerability, \*387 evidence of rehabilitation, or current risk assessment—ensuring a very small reduction in the prison population at best. The media immediately sensationalized an isolated act of violence committed by a formerly incarcerated person<sup>349</sup> and stoked fear in the hearts of “low-information, high-salience” members of the public who are all-too-eager to embrace simplistic, false narratives about violence. As a result, elected officials adopted the very same rhetoric and jettisoned further opportunities to decarcerate.<sup>350</sup> And when incarcerated individuals were prioritized for vaccine distribution in a plan developed with the input of public health professionals, critics were quick to attack, playing upon the false narratives that are so deeply embedded in public discourse about the criminal legal system.<sup>351</sup> In response, the state government quickly backtracked, implicitly endorsing these narratives as well.<sup>352</sup>

The State's reluctance to release elderly incarcerated people is particularly dismaying. While age makes it unlikely that this population poses any danger in society,<sup>353</sup> age also makes this population incredibly vulnerable to serious complications from COVID-19 while incarcerated.<sup>354</sup> During the early days of the pandemic, both of us undertook volunteer work to facilitate release for elderly persons incarcerated in the CDOC. We spoke with incarcerated men and women in their seventies and eighties who have been in prison for many decades and now live in wheelchairs, need to wear diapers, can barely speak, and are fully cognizant that they may not have much longer to live. These individuals are long past the point of posing any risk to society. Continuing to incarcerate them at great financial cost to the State serves absolutely no penological purpose and simultaneously poses great risks to their health.<sup>355</sup> Allowing them to be reunited with their families before dying is the sensible and compassionate thing to do.<sup>356</sup> The State's reluctance to release \*388 these elderly and infirm people in the midst of an unprecedented worldwide pandemic reflects just how deeply the criminal legal system has internalized false and dehumanizing narratives about violent crime.

Nevertheless, there is reason for hope. Unquestionably, the pandemic, coupled with the difficult but much-needed reckoning with our country's racial injustice that has unfolded almost simultaneously, has been a painful experience. But as discussed in Part III, if we can learn from this difficult moment, we can transform the way we as a country, and as a state, approach crime and punishment. The moment is here.

## III. STEPPING THROUGH THE PORTAL

“Historically, pandemics have forced humans to break with the past and imagine their world anew. This one is no different. It is a portal, a gateway between one world and the next. We can choose to walk through it, dragging the carcasses of our prejudice and hatred, our avarice, our data banks and dead ideas, our dead rivers and smoky skies behind us. Or we can walk through lightly, with little luggage, ready to imagine another world. And ready to fight for it.”



- Arundhati Roy<sup>357</sup>

“It seems that changing the narrative on violent offenders involves a cultural shift in how our society views crime, punishment, rehabilitation, and the possibility of redemption. The need to change legislation and policy is obvious [from] the statistics and facts .... I think it will also take powerful stories of growth and change to move their hearts .... Though the shadow of their crime will always be there, and the story of their victims will never go away, the resilience of men still trying to do what's right can inspire us all.”

- Sam Mullikin, Resident of Denver Diagnostic and Reception Center<sup>358</sup>

### *A. Lessons Learned from the Pandemic*

As the country reflects on what this difficult moment in history can teach us, we should consider a tragedy with a critical lesson from our nation's shameful history of racial injustice. Emmett Till, a fourteen-year-old Black child from Chicago who was visiting relatives in the \*389 Mississippi Delta, was abducted by two white men in August 1955 for supposedly flirting with, and whistling at, a white woman at a grocery store from which he had purchased candy the previous week.<sup>359</sup> The men beat and mutilated him.<sup>360</sup> Then they drove him to the Tallahatchie River, shot him, and cast him into the river.<sup>361</sup> When his bloated body was found three days later, his “right eye had been dislodged from its socket, his tongue choked out of his mouth, the back of his skull crushed[,] and his head penetrated by a bullet.”<sup>362</sup> Following these horrific events, Emmett Till's mother held an open casket funeral because she wanted the world to see what she saw.<sup>363</sup> “Let the people see what they did to my boy,” she declared.<sup>364</sup> Ms. Till-Mobley permitted photographers from American magazines and newspapers to take photos of her son's body before the funeral service.<sup>365</sup> These photographs serve as a searing, tangible reminder of the realities of racial violence.<sup>366</sup>

Ms. Till-Mobley's decision to reveal her son's mutilated body forced people to see and acknowledge racial violence. Nobody could claim ignorance. Yet, today, the suffering imposed by the mass incarceration system is largely hidden from public eye. Prisons occupy the “geography of nowhere.”<sup>367</sup> They are often located in unpopulated areas “so that both the facilities and the people they hold are invisible to most of the general public.”<sup>368</sup> But much like Emmett Till's open casket, the momentous events of 2020--the COVID-19 pandemic, coupled with the widespread protests against racial injustice following George Floyd's death--make all of the grotesque failings of mass incarceration and our system of criminal punishment undeniably visible. While all of this is difficult to look at, we cannot unsee it, nor can we look away.

These events provide opportunity for introspection. In this moment in history, we should be asking: what can the pandemic teach us about the way we think about crime, punishment, and incarceration? Who do \*390 we incarcerate and why? While this momentous time in history is still unfolding, some lessons have emerged from the chaos.

First, the sheer existence of mass incarceration is not only a racial justice issue, as has long been recognized; it is a pressing public health issue.<sup>369</sup> We cannot lock away thousands of people behind bars in cramped living quarters and expect these places to become anything other than incubators of disease. This public health issue is only compounded by the fact that COVID-19 has disproportionately affected Black and Latinx communities, who are also incarcerated at disproportionately high rates in Colorado and throughout the country.<sup>370</sup> “Given the extent to which prisons have contributed to the coronavirus pandemic and compounded the existing racial inequalities in the criminal justice system, the pandemic has made one thing clear: Tackling coronavirus will require us to radically rethink our system of justice.”<sup>371</sup>





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Second, if the “low-hanging fruit” approach was woefully insufficient to address mass incarceration during “normal” times, it is a dangerous and reckless approach to addressing mass incarceration amid a global pandemic. Despite very modest efforts to release individuals convicted of low-level or nonviolent offenses from jails and prisons, the disease has spread like wildfire and has caused many fatalities as a result.<sup>372</sup>

Third, and even more importantly, the pandemic has taught us that we are all connected in ways both mundane and profoundly spiritual. On the surface, COVID-19 demonstrates this truth in a very literal sense. When it comes to infectious disease, the conditions caused by mass incarceration create a significant health and safety risk not only to the residents of jails and prisons but to the correctional officers and staff who interact with those residents and, in turn, to their spouses, children, elderly relatives, and entire communities.<sup>373</sup>

Perhaps, however, the virus also has a deeper lesson to teach us about connection and the ways in which we think about violent crime. In many ways, we treat violent crime in this country as though it were a disease that can be solved by a form of social distancing, an exile of people from society and into cages. Once a person commits an act of violence, we condemn them to a lengthy (and often permanent) life of banishment \*391 in prison. This approach relies on the assumption that if society rids itself of people who commit acts of violence, the violence will simply go away.

But this idea is a fallacy. We cannot punish our way out of the epidemic of violent crime. We have tried as a nation and have failed. Instead, we must seek to understand violence as the complex social problem that it is.<sup>374</sup> As discussed in Part I, perhaps we are afraid to understand violence in this way because we sense that doing so would force us to reckon with society's significant role in creating today's violence, racism, and system of mass incarceration.<sup>375</sup> Moreover, taking responsibility for a complex problem largely of our own creation is far more difficult than simply heaping punishment upon individual “bad actors.” However, it is important “to learn what causes violence so that we can prevent it, rather than being limited to punishing it.”<sup>376</sup> Only then can we begin to heal from the deep wounds that mass incarceration has inflicted on our country.<sup>377</sup>

False narratives that people who commit crimes are either “crime masters” who have simply made nefarious life choices or “monsters” who are fundamentally different than the rest of us are the foundation of the harmful and unjust system of mass incarceration.<sup>378</sup> These narratives are like noxious but odorless gases that infuse every aspect of the criminal legal system so insidiously that society breathes them in like air, day in and day out, often without even realizing they are there. They have fueled irrational responses to crime and punishment over the last forty years in this country, disabled empathy, and enabled society to condone the dehumanization of millions of human beings. These narratives have also undergirded the State of Colorado's apathetic response to requests to the COVID-19 crisis afflicting the state's jails and prisons.<sup>379</sup> Unless we \*392 dismantle these fundamentally false narratives, “take on the story at its roots and topple it once and for all,”<sup>380</sup> we can never meaningfully address mass incarceration.

People in prison do not cease to be human simply because they live behind bars. How we treat the incarcerated implicates our own humanity. In South Africa, one word describes this interconnectedness: *ubuntu*.<sup>381</sup> While the word does not have direct translation into English, *ubuntu* broadly means, “[a] person is a person through other persons.”<sup>382</sup> “[*Ubuntu*] suggests that in engaging others we realize our own humanity and that healing truth is human truth. It is about *who* people are, not simply *what* they do.”<sup>383</sup> Mullikin describes his current path of “helping others find healing and hope” as “very much in the spirit of *ubuntu*.”<sup>384</sup> He explains, “[i]t's my belief that we are each responsible to each other in this respect.”<sup>385</sup>

### ***B. Reimagining Crime and Punishment: An Action Plan***

Once we recognize our interconnectedness and common humanity, it is clear the status quo cannot continue. The question then becomes, when it comes to our jails and prisons, how can we use the pandemic as a portal to step into a world that sheds the too-modest approaches of the past and reorients us towards a real, bolder, and better solution?



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While the need to change our sentencing laws and decarcerate more broadly is obvious, we cannot simply jump to these solutions without first laying the groundwork. In order to move beyond the “low-hanging fruit” approach to reform, we must “build[] [the] ladder[]” so that we may reach “the fruit higher up [in] the tree.”<sup>386</sup>

The ladder has two components. First, backed by decades of solid empirical research, we must advance a forceful and nuanced counternarrative that accurately portrays violence as the complicated social problem it is.<sup>387</sup> We must also begin to change the narrative about the nature of “justice,” and shift from a framework that prioritizes punishment at all costs, to a restorative model that is centered around healing and accountability. Critically, these efforts must involve creating proximity to those who have lived experience with crime and mass incarceration. Sean Marshall writes:

**\*393** What [the public] need[s] to see is that the “monsters” they have created in their minds are not real. We must humanize the dehumanized. Everything else is seemingly irrelevant [until we take this step]. Our words (and others like them) will continually fall upon deaf ears until a shared humanity is established. That must precede everything. Meaningful conversations and change won't begin without it.<sup>388</sup>

Second, we must expand opportunities for healing and connection in prison to empower incarcerated individuals to take meaningful accountability and transform their lives. These efforts are critical to successful reentry, as formerly incarcerated individuals can only succeed if they are equipped with the tools to do so.<sup>389</sup> Opportunities for growth and change also serve as powerful motivators for hope. As Mullikin beautifully explains, “[t]he importance of healing and hope cannot be overstated for those of us inside. It's a truth that hurt-people hurt people.”<sup>390</sup>

After we begin the foundational work of building the ladder, we can begin to reach the higher branches. We must aim to decarcerate inclusively and avoid an approach that only achieves modest success for one group of individuals at the expense of others. We must advocate for the legislature to enact changes to our draconian sentencing laws that do not categorically exclude violent crime, urge the Governor to use his clemency power more frequently, and increase the use of alternative frameworks to punishment, such as restorative justice, for violent offenses.

As M.C. states:

[I]t is incumbent upon us to work hand in hand to make all aware, then to build a coalition to crystallize actionable steps, that can be done individually as well as collectively. Colorado is uniquely positioned, and it is vital that we use the momentum of this moment to push for policies that will help to foster the type of judicial and prison system reform that we envision.<sup>391</sup>

In short, significant changes to our sentencing and punishment scheme are essential if we are going to successfully cure the cancer of mass incarceration. But these changes are only achievable if we simultaneously work to convince the public that the cancer is worth curing in the first place and acknowledge that we must also treat those who are suffering from it.

### **\*394 1. Convincing the Public to Care: Changing Narratives About Crime, Violence, and Justice**

#### **a. The New Narratives: Understanding Crime and Violence as Multidimensional Social Problems, and Justice as a Means to Repair Harm**

A fundamental problem with the current discourse about mass incarceration, crime, and violence is that society conceives of these topics as belonging exclusively in the “criminal justice” silo, rather than appreciating the close relationship between crime and other social issues like health care, education, and economic opportunity.<sup>392</sup> At its core, mass incarceration is less about crime or violence and more about the multidimensional social problems and inequities that create the conditions that inherently



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give rise to crime and violence.<sup>393</sup> Yet, presently, “jail expansion has been chugging along largely because law enforcement continues to absorb social welfare work--mental and physical health, education, [and] family unification.”<sup>394</sup>

Angel Parker, an organizer, domestic-violence counselor, and violence survivor points out that if we properly invested in housing, jobs, and education; provided comprehensive physical and mental healthcare and drug treatment; and created better resources for trauma and violence survivors to keep them safe and help them to heal, “[t]he murder rate would undoubtedly go down.”<sup>395</sup> Likewise, in her seminal book, *Are Prisons Obsolete*, Angela Y. Davis explains that dismantling mass incarceration requires “positing decarceration as our overarching strategy” and envisioning “a continuum of alternatives to imprisonment--demilitarization of schools, revitalization of education at all levels, a health system that provides free physical and mental care to all, and a justice system based on reparation and reconciliation rather than retribution and vengeance.”<sup>396</sup>

These shifts are not only philosophical in nature, they are also concrete and economic. Every dollar spent on incarcerating a person is a dollar that is not spent on education, mental health treatment, or community **\*395** support services.<sup>397</sup> This is especially true in Colorado where the legislature is hamstrung by the Taxpayer's Bill of Rights (TABOR).<sup>398</sup> Under TABOR's revenue cap, lawmakers typically cannot create or expand programs without “mak[ing] cuts elsewhere” or seeking permission from voters to raise taxes.<sup>399</sup> TABOR reveals the multidimensional nature of mass incarceration, as the money spent on prisons directly takes away from critical needs such as educational programs, job creation programs, and affordable housing.<sup>400</sup>

As of 2019, the CDOC budget neared \$1 billion dollars.<sup>401</sup> And now more than ever, with the public safety net in crisis due to the pandemic,<sup>402</sup> we must focus on a better and more transformative reallocation of resources. R.F., a woman who has served thirty years in prison explains, “The Colorado Department of Corrections received me as a new arrival in the year 1991. Every year since that time, Colorado taxpayers have incurred the cost for my stay ... The question is could I better serve Colorado by becoming a productive member of society?”<sup>403</sup>

In order to change the narrative about violence and crime, we must view crime through a transformative justice framework. “Transformative justice ... is a political framework and approach for responding to violence, harm[,] and abuse,” which asks, “[w]hat social circumstances promoted the harmful behavior?” and “[w]hat structural similarities exist between this incident and others like it?”<sup>404</sup> Only then can we “actively cultivate the things we know prevent violence such as healing, accountability, resilience, and safety for all involved.”<sup>405</sup> In other words, decarceration is also about creation: the creation of positive social programs, **\*396** quality schools, new jobs, mental health and substance abuse treatment, affordable housing, parks, and so much more.<sup>406</sup>

In addition to changing the narrative about violence and crime, we must begin to change the narrative about what “justice” means. Although we operate as though our criminal legal system is a forgone conclusion, it is not. Our current system of retributive justice focuses exclusively on punishment as a response to wrongdoing: “U.S. justice systems typically rely on incarceration as the single blunt instrument in their toolbox--all without any data-driven indications that it is the tool most likely to secure the short- and long-term safety of the survivors and others who have a stake in the outcome.”<sup>407</sup> Our retributive model is built on an adversarial system, which narrowly focuses on adjudicating guilt.<sup>408</sup> And yet, in the vast majority of cases that churn through our criminal legal system, criminal responsibility is not the primary issue--approximately 94% of people adjudicated in the state criminal justice system plead guilty and 97% plead guilty at the federal level.<sup>409</sup> In these situations, there are other visions and models of justice that offer substantial benefits far beyond what our current system offers.<sup>410</sup>

Restorative justice is one such model. The restorative justice movement has its roots in a variety of religious traditions and indigenous communities.<sup>411</sup> “Most modern justice systems focus on a crime, a law-breaker[,] and a punishment. But [restorative justice] considers harm done and strives for agreement from all concerned--the victims, the of-fender[,] and the community--on making amends.”<sup>412</sup> Restorative justice centers on people rather than rules or laws.<sup>413</sup> It “views wrongdoing as a damaged



connection, a tear in the web of relationships, a wound in the community, whether it's a village, a city neighborhood, or an entire country. Because people are interconnected, any wrongdoing ripples out to harm the whole.”<sup>414</sup>

Howard Zehr, one of the leaders of the modern American restorative justice movement, explains that the retributive theory our current \*397 system is based on “believes that pain will vindicate,” although it is often counterproductive for all involved.<sup>415</sup> In contrast, restorative justice includes “acknowledgment of victims' harms and needs, combined with an active effort to encourage offenders to take responsibility, make right the wrongs, and address the causes of their behavior.”<sup>416</sup> sujatha baliga, Director of the Restorative Justice Project at the California-based Impact/Justice, explains: “Instead of asking what law was broken, who broke it and how should they be punished[,] we ask who is harmed, what do they need and whose obligation is it to meet those needs? [Restorative justice] invites us to a paradigm shift about these three questions.”<sup>417</sup>

On a practical level, restorative justice is an approach that “includes a diverse set of practices focused on stakeholder involvement and repair of harm.”<sup>418</sup> “The most common practice [in the United States] centers on facilitated face-to-face meetings between stakeholders including the victim and the offender ....”<sup>419</sup> “Other [models] of restorative justice processes include family group and community group conferencing, peacemaking and sentencing circles, and neighborhood-based accountability boards.”<sup>420</sup> Restorative justice practices can serve as a complete alternative to retributive practices, or as a supplement or adjunct to other sentencing processes.<sup>421</sup> Moreover, these processes can occur at various stages of the criminal legal process, including prior to the filing of a criminal case, prior to or following a guilty plea, prior to sentencing, or even post-sentencing.<sup>422</sup>

Sered notes that we claim our current, highly retributive model of justice is “for” victims: “[W]e have built mass incarceration [in survivors' names].”<sup>423</sup> Yet, mass incarceration fails “as a violence intervention strategy.”<sup>424</sup> Consequently, “it is survivors who carry some of the heaviest burdens when incarceration fails to produce the safety it promises.”<sup>425</sup> \*398 Thus, restorative justice can offer a better way both for people who have caused harm and people who have been harmed.

In Section III.B.3.c, we offer some concrete suggestions to increase restorative justice practices in Colorado.<sup>426</sup> However, as previously noted, we must first create a culture and conditions that are conducive to more practical reforms. Doing so requires a narrative shift in the public discourse about justice from a dialogue about punishment and incarceration to a conversation about accountability and healing. As Sliva argues, transforming the criminal legal system “will never happen until we face our fear of facing each other.”<sup>427</sup>

## **b. Implementing These Alternative Narratives by Amplifying the Voices of Those Who Have Lived Experience with Mass Incarceration**

Implementing these alternative narratives about crime, violence, and justice requires many different voices. First, those of us occupying the professional spaces within (or related to) the criminal legal system—including lawyers, legislators, and others who work in interconnected fields like education, health care, and economic development—must educate ourselves and maximize every opportunity to encourage a more nuanced conversation about crime. Educators advocating for higher pay, health care workers advocating for a better system, and parents advocating for free preschool and after-school programs should all be constituents in the effort to decarcerate. Moreover, there is data to support these efforts: while the false but predominant narratives about crime, violence, and “justice” discussed above have consistently failed to improve public safety and strengthen communities, the narratives surrounding transformative justice and restorative justice are supported by solid empirical research.<sup>428</sup>

We must be bold enough to push back against reactionary tendencies and call them out for what they are when they occur so that we can progress beyond the familiar cycle epitomized by Willie Horton. We must find ways to infuse both private and public discussions about the criminal legal system with facts and information that support these alternative narratives. And we must resist, as much as possible, the sorts of dichotomous reforms discussed in Part I that have the backhanded effect of perpetuating false narratives and legitimizing harmful and excessive punishments.<sup>429</sup>



\*399 However, while we must do our part as lawyers and professionals, we cannot change the false and simplistic narrative about violence and crime alone, or even with the help of academics and researchers. Importantly, we must create space for another vital group of experts--incarcerated people, formerly incarcerated people, and their families--to participate in the conversation, share their stories, demonstrate their own humanity, and participate in the fight for their own liberation.

Including the voices of those directly impacted by mass incarceration is important for at least three reasons. First, the criminal legal process today is so automated and sanitized that it has become detached from the fact that all its processes and outcomes fundamentally alter and impact human lives.<sup>430</sup> As Mullikin describes:

My own experience with the legal system left me feeling confused and frustrated. I felt like I was out of the loop. I tried to ask questions but was never made to understand the process or our strategy. I knew I was guilty, but instead of taking accountability, I felt compelled to “fight my case.” It wasn’t until all my legal options were exhausted that I could get in touch with the feelings of shame I had suppressed.<sup>431</sup>

Giving voice to the perspectives of those directly impacted in discussions about these narrative shifts is a powerful way to remind politicians and the public that the system impacts actual human beings.

Second, the voices of incarcerated people and their loved ones should be valued during broader discussions about policy and social change because the conversation about mass incarceration is incomplete without them.<sup>432</sup> People who have lived in prison have unique, firsthand experience and perspective.<sup>433</sup> As Tatianna Manon-Davis declares, “I am looking for my voice to make a change.”<sup>434</sup> And, as Sondia Roberts explains, “I am so passionate about the fight for the criminal injustice within our system, it’s like burning a hole in my stomach. I feel like a lone soldier fighting to be heard.”<sup>435</sup> Listening to their voices involves trust from those of us on the “outside” that incarcerated people have something \*400 important to contribute.<sup>436</sup> Paulo Freire in *Pedagogy of the Oppressed* explains the danger of people from the outside trying to impose change.<sup>437</sup> He writes that some people think that they are working with the oppressed:

They talk about the people, but ... do not trust them[.] ... [T]rusting ... people is the indispensable precondition for revolutionary change. A real humanist can be identified more by his trust in the people, which engages him in their struggle, than by a thousand actions in their favor without that trust.<sup>438</sup>

Third, as discussed in Section I.B.2, one reason that false narratives about crime and violence persist is that by design, incarcerated people are functionally banished from the segments of society that wield power and do not interact with many members of the public as a result.<sup>439</sup> While impacted communities know all too well the devastation that mass incarceration wreaks, nonimpacted, predominantly white and wealthy communities live a world apart from mass incarceration.<sup>440</sup> S.B., an incarcerated woman, explains, “[w]hen you don’t know how broken a system is, why would you ever invest your time, energy, or attention into it?”<sup>441</sup>

Proximity is powerful. Opportunities for personal interaction with incarcerated people who have committed acts of violence is one of the simplest and most powerful ways to transform the false public perception that those who commit crimes are simply irredeemable “monsters.” As Bryan Stevenson, founder and executive director of the Equal Justice Initiative, states, “Proximity has taught me some basic and humbling truths, including this vital lesson: Each of us is more than the worst thing we’ve ever done.”<sup>442</sup> The more proximate people on the outside become with people on the inside, the easier it is to see this essential truth and the harder it is to ignore our shared humanity.<sup>443</sup>



**\*401 c. Practical Proposals for Changing Narratives, Hearts, and Minds**

The work of changing narratives not only requires multiple different voices, but also requires a multipronged approach. One space that provides fertile ground for sewing the seeds of change in hearts and minds is law school. Law students are the next generation of lawyers, and as such, it is vitally important to find opportunities for as many law students as possible to interact with incarcerated people. While proximity is important for students who want to become public defenders, it is just as critical for students who intend to become prosecutors and judges to have personal interaction with incarcerated people. Even if students ultimately end up practicing law in unrelated fields, being proximate to the human suffering of mass incarceration is a powerful experience, and memories of it will likely endure. Having such an experience in law school may well influence the type of pro bono work law students decide to take on in the future or cause them to become more engaged with social justice issues on their own time. The possibilities for reverberations are ample.

These interactions could take the form of clinical opportunities. Clemency work, which, as described in Section III.B.3.b, focuses on correcting injustices and extending mercy, is a particularly valuable experience for students to get to know and understand the stories of incarcerated people on a human, rather than a transactional, level. Moreover, every law student is required to take a criminal law course.<sup>444</sup> Professors should use this opportunity to expose students to the realities of mass incarceration and find ways to invite an incarcerated person or a formerly incarcerated person to give a guest lecture. Expanding opportunities for “inside/out” classes, where incarcerated and free students learn together, would also provide opportunities for meaningful dialogue and exchanges.<sup>445</sup> This exposure could open eyes and even change career paths for countless students. Additionally, while our effort to include incarcerated voices in this Article is one small step, law schools would do well to **\*402** create space for incarcerated writers to share their perspectives in law reviews and journals.<sup>446</sup>

Outside of law schools, the CDOC should create a legislative committee comprised of incarcerated people to provide comments on criminal justice bills debated in the legislature.<sup>447</sup> Every year, politicians create laws that affect the lives of thousands of incarcerated people. However, currently incarcerated people cannot vote and therefore lack a voice.<sup>448</sup> Incarcerated persons should be viewed as important stakeholders on issues that directly affect them. Incarcerated people should be able to testify about legislation that affects them directly and share their personal perspective. It is very possible that nobody in the legislature anticipated or intended for Mr. Chavez to serve a 128-year sentence. The interplay of criminal sentencing statutes is complex and, for lawmakers, can seem very abstract. The best people to remind legislators of the consequences are those who experience the consequences. If Mr. Chavez could testify and explain more about his background, his alleged offense, his growth, and his 128-year sentence, perhaps the legislature would revisit the sentencing scheme that allowed this to occur.

Finally, public events, such as the TEDx event organized at San Quentin State Prison in California and in Ohio, provide a valuable opportunity for discourse.<sup>449</sup> The San Quentin event's sponsor noted, “I think it is important to get outside people in so they can meet the men and be moved like I was.”<sup>450</sup> Similarly, forums like the University of Denver Sturm College of Law's annual Civil Rights Summit, which is open to the public, could be held inside of a prison.<sup>451</sup> In Colorado, the climate is ripe for events such as these to succeed.

**\*403** In sum, what we envision is not carceral voyeurism, or “tourism within walls,”<sup>452</sup> but rather authentic human interaction between the “inside” and the “outside” in the spirit of *ubuntu*. This, we know, will change hearts and minds.

**2. Treating the Cancer of Mass Incarceration: Expanding Space for Healing Within Correctional Facilities**

**a. Why It Matters**

Imagining and working towards a more equitable and just society that can prevent violence from happening in the first place, and helping people heal when it does, is the foundation that will make large-scale decarceration possible. However, as we work to advance alternative narratives about crime, violence, and justice, we must also acknowledge the present suffering of those currently incarcerated. As Angel Sanchez, a Legislative Analyst with the Florida Rights Restoration Coalition who was formerly



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incarcerated, stated, “I yearn to empower and alleviate the inhumane treatment of the imprisoned, even if it is within existing structures. I believe that the prison system is like a social cancer: we should fight to eradicate it but never stop treating those affected by it.”<sup>453</sup> And, as Sondia Roberts writes: “Let the individuals who inhabit our unjust system help cure the criminal cancer.”<sup>454</sup>

Providing healing spaces for people who are incarcerated is a critical component of the remedy to mass incarceration for several reasons. First, it is important to recognize that our current model of retributive justice perpetuates, rather than heals, trauma on all sides.<sup>455</sup> The adversarial system of justice is designed for the small percentage of cases in which factual guilt is at issue, and, even in those cases, it has its many flaws.<sup>456</sup> But it does an even worse job of achieving any measure of “justice” or facilitating healing for anyone involved in the process in the much larger number of cases where factual guilt is not the primary issue.<sup>457</sup> We need to acknowledge these shortcomings of our existing, retributive system, and provide opportunities to reflect, process, and heal.

\*404 Second, creating these healing spaces in prison acknowledges the humanity of people who are incarcerated and their capacity for growth and change. As discussed in Part I, the American prison environment is presently characterized by the same key factors that cause violence in the first place.<sup>458</sup> Mullikin, who has been incarcerated in the Colorado Department of Corrections for fifteen years, powerfully describes the experience of prison: “Prison's lack of humanity, and its disconnection, breeds isolation and a sense of hopelessness. It's like being caught in a feedback loop, pulling you deeper the longer you're exposed to it.”<sup>459</sup> He explains that his involvement with Seven Habits on the Inside<sup>460</sup> and restorative justice was “instrumental in reshaping my inner landscape.”<sup>461</sup> Through the programs and self-reflection, he reached the powerful realization:

To be deserving, like redemption, is a way of living, not a state of being. The shame and guilt of the life I have taken weigh heavily upon me. The knowledge of what I have done, the lessons I have learned, and the principles I have come to value, define who I am now. I'm a man dedicated to a path of healing and redemption. For me, it's an ideal to strive for, not a destination to reach. I can never take back what I have done or balance the scales by good works. But neither can I live without trying.<sup>462</sup>

William S. Graham, a resident of Denver Reception and Diagnostic Center, also writes of the need for a supportive prison environment conducive to growth in a poem entitled *I See Prison*:

I envision a world where liberties are not deprived when you arrive  
You aren't given a knife but a book to help you survive  
Where your art keeps you alive and supports your kids  
Where people don't always ask or wonder what you did  
Where greatness isn't hid

\*405 \_\_\_\_

Yes my friends, I envision a world where we all grow, we all care, and we all rise

But that world seems light years away from where we are now

A world I see with my eyes



I see prison

What do you see?<sup>463</sup>

Finally, addressing the complex needs of incarcerated people, many of whom have histories of trauma and victimization, helps foster success upon release from prison.<sup>464</sup> In this way, the United States is once again out of step with other countries.<sup>465</sup>

### **b. Towards Rehabilitation and Healing**

There is a growing realization in Colorado that the state prison system's long history of punishment “doesn't work.”<sup>466</sup> To that end, over the last few years, several programs have brought transformative change to the lives of incarcerated people inside the CDOC.<sup>467</sup> It is important for this trend to continue.

For example, the University of Denver Prison Arts Initiative (DU PAI) made national news when residents of Sterling Correctional Facility staged a production of *One Flew Over the Cuckoo's Nest* in the Fall of 2019 and took it on tour, performing it for residents of two other prisons in the state as well as members of the public.<sup>468</sup> Later that year, members of the public were invited inside Denver Women's Correctional Facility to watch a performance of *A Christmas Carol*.<sup>469</sup> The women also performed the show at the Newman Center for the Performing Arts, which marked the first time a group of incarcerated individuals performed in public in the United States.<sup>470</sup> DU PAI also produces a podcast, conducts \*406 arts-based workshops, puts on family events, and produces a newspaper for incarcerated residents.<sup>471</sup>

T.M., who is serving a life sentence and is actively engaged with DU PAI, credits the program for creating space within him for healing. He writes:

I have been incarcerated for [twenty-two] years now, and as the man I am today I am so motivated to do more. [Twenty-one] of those years I operated with little to no hope at times .... I didn't care about my life. This last year I have met people that outweigh the magnitude of my mistakes, and operate with a hope that took realizing that the best of me was still in me.<sup>472</sup>

Redemption Road CrossFit, founded at Limon Correctional Facility in 2017 by a group of incarcerated individuals, has, in the words of Damian Arguello, “used the concept of ‘shared suffering’ to break down the walls of separation we often build between ourselves out of stereotypes and false beliefs about each other.”<sup>473</sup> The program “has created a community of athletes within the prison system whose mission it has become to be the best versions of themselves they can be, in all areas of their lives.”<sup>474</sup> The program brings volunteers into facilities to help with classes and training.<sup>475</sup> In December 2019, Limon hosted the first-ever CrossFit competition inside a prison, which paired twenty-five “outsiders” and five correctional officers with thirty “insiders” from the program inside Limon.<sup>476</sup> Residents at Limon and Fremont Correctional Facility have also had the opportunity to become certified CrossFit trainers through seminars held by CrossFit, Inc. at the facilities.<sup>477</sup> These individuals are the first incarcerated individuals to ever have taken part in such \*407 an event.<sup>478</sup> In addition to Limon and Fremont, Redemption Road has also expanded to Sterling and Arkansas Valley Correctional Facilities.<sup>479</sup>





There are also many impressive programs operating inside the CDOC that have been designed, created, and/or run entirely by incarcerated individuals. For example, Pathway to Freedom at Sterling Correctional Facility, developed by M.C. and M.F., is a “lifers and long-term peer program” that offers classes and workshops for its members on topics ranging from victim-impact awareness, education, mental health, community service, and re-entry “to Colorado’s largest stigmatized and most forgotten prison population.”<sup>480</sup> The classes are led by incarcerated peers, “who have over 120 years of prison experience in making relevant change and working together with administration and the community to achieve maximum healing.”<sup>481</sup> The goal is to inspire personal change and growth amongst CDOC residents serving long-term sentences, who “ha[ve] a profound influence over the prison population as a whole.”<sup>482</sup> M.C. writes:

Our ideal goal for P.T.F. would be to work with D.O.C. and legislators to establish an official program that would create an actual pathway-to-freedom. If you accomplish XYZ, serve 15 or 20 years, complete certain programs, maintain positive behavior, one will have earn[ed] an opportunity to be a member of our society again.<sup>483</sup>

A group of long-term incarcerated people at Denver Reception and Diagnostic Center serving long-term sentences have likewise created several programs geared towards positive change and personal growth. R.A. writes, “[w]e believe ultimately our rehabilitation and redemption is our own dilemma .... We feel that the onus for self-improvement falls squarely on our shoulders.”<sup>484</sup> The group created programs with names such as S.U.R.G.E. (“Seeking Understanding Reaching Goals Everyday”), C.A.T.C.H. (“a project aimed at first timers 18 to 25 yrs. old”), E.V.O.L.V.E. (“a class for everybody with a spiritual element”), and Addiction and Recovery, as well as their “own anti-recidivism team called S.M.A.R.T.”<sup>485</sup> The Denver Reception and Diagnostic Center “is \*408 an intake and classification facility,” and is the entry point for individuals serving prison sentences across the state.<sup>486</sup> Thus, these group members are able to reach individuals early on in their incarceration. R.A. notes, “[W]e believe we can build the mechanisms to promote positive growth .... We understand that we learn from each other good or bad so we want to teach the right things.”<sup>487</sup>

Other CDOC resident-driven initiatives have targeted gang-involvement. Rhidale Dotson and Cedric Watkins have developed several initiatives designed for individuals who are a part of prison gang culture. The idea behind these programs was “to teach [participants] that there were things in their lives-- their family, their community, their religion and their career goals--that were more important than gang affiliation, that would help them shift from a culture of blame and retaliation to one of responsibility and hope.”<sup>488</sup> Several years ago, the CDOC launched a system-wide gang-intervention program that was “built on the ideas pioneered” by Dotson and Watkins.<sup>489</sup> Today, Dotson continues to design and promote programs that will bring about positive changes within the prison system. He explains:

Above all else, I am committed to making a lasting impact on a system that claims to do one thing, but consistently acts in ways contrary to all it publicly espouses. Rather than complain about things that can be changed, I have dedicated my time, talent, and energy into becoming a scholar/warrior/creator with the capacity to create a future for people where prison, poverty, and prejudice have much less power to harm us all.<sup>490</sup>

Finally, several of the women who contributed their voices to this article from Denver Women’s Correctional Facility are core members of a mentorship program called “Women of Influence,” designed for women serving life or other long-term sentences who are ready to make transformative changes in their lives. As with some of the other programs described above, W.O.I.’s programming is designed to help participants change their lives and obviate the need for long-term incarceration through self-improvement, education, and service to the community.<sup>491</sup>

Notably, the programs described above were all initiated by people serving life without parole or other long-term sentences. This fact in and \*409 of itself is a testament to the need for more accurate and nuanced narratives about people who are incarcerated



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for serious crimes. It also speaks to the remarkable strength and resilience of these individuals. As Dotson notes, “[w]e have been conditioned to believe that programs are the solution to the problem, which is not true ... *people* are the solution.”<sup>492</sup>

All of these programs have undoubtedly made a positive impact on Colorado's incarcerated community. However, it is equally clear that there is a need for more. There is a particular need for more trauma-informed programming that helps incarcerated individuals understand and process their past experiences. As Tatianna Manon-Davis writes:

There is a need for a safe haven for [incarcerated people] to be able to express how they feel about their current circumstances and past trauma. [We need to be able] to peel back the layers of [our] past to determine how to heal, where it first started and why we make some of the choices we make.<sup>493</sup>

In response to correspondence from us, Ms. Manon-Davis also created an anonymous survey for other women to complete about additional programming that would be helpful. Survey responses indicated a great need for more trauma-informed programming,<sup>494</sup> educational opportunities,<sup>495</sup> and classes centered around re-entry.<sup>496</sup>

DU PAI, Redemption Road, and the other programs mentioned above do not place restrictions on who can participate, and indeed, many of those developed by incarcerated individuals were specifically designed for those serving life and other long-term sentences. However, in speaking with incarcerated people throughout the state, we heard many people express frustration that people serving life sentences are excluded \*410 from other programming because the CDOC often prioritizes participation for people who will be released. As D.R., a woman sentenced to life without parole, explained, “everything is a fight ... because [most] classes are for people who are leaving.”<sup>497</sup> The CDOC should work to ensure that everyone can participate in programming that helps provide hope and meaning.

Finally, tragically, the pandemic placed many vital aspects of these programs on hold.<sup>498</sup> Many incarcerated people we communicated with expressed how difficult the pandemic has been for them. C.G. writes:

Enter the COVID-19 pandemic. The world has changed dramatically and we in prison have been strongly affected. As a lifer, I am supposed to find some sort of meaning in a life behind bars and my only hope for doing this is through programs, education, and work. Since the pandemic started this has all been taken away, indefinitely. We have zero educational programs, no church, library or gym, and few jobs. Visits no longer exist.<sup>499</sup>

Darcy Matlock explains that she had worked in the canine program, worked as a library clerk, worked as a facilitator in Alternatives to Violence, and worked as a member of Women of Influence.<sup>500</sup> However, once COVID-19 hit, her world changed:

I have not worked since April 8 and have had no visits since my newest grandson was born in December. The suspension of visits, classes, programs, groups, work, and religious fellowship has been devastating to all of us. There is nothing to help inmates recover, rehabilitate, gain life or employment skills, get an education, etc.<sup>501</sup>

C.N. writes:

We are always on lockdown it seems anymore. It's like being in the hole. Not being able to have air. Can only come out of our room for an hour every three days to shower or use the phone. This is our new normal ... the new normal is very hard.<sup>502</sup>



It is important for the CDOC not to allow the restrictive conditions created by the pandemic to become the “new normal.” Once the crisis has passed, additional opportunities for healing, growth, and connection should continue to be a high priority for Colorado.

### \*411 3. Implementing the Cure to Carceral Cancer: Changing Our Response to Violent Crime

#### a. Legislative Changes

Once we begin the groundwork of advancing alternative narratives for thinking about crime, violence, and justice, amplifying the voices of those with direct experience with these issues, and recognizing the truth that people are capable of redemption and change, the time will be ripe to push to ensure that Colorado's sentencing statutes reflect these values. These efforts must work in tandem. As Pfaff notes, “The relationship between attitudes and laws is complex. People's attitudes set limits on what legislators can do, but laws often shape how people think about issues and how to respond to them. It is vital to attack mass incarceration on both fronts.”<sup>503</sup>

A comprehensive sentencing reform plan for Colorado is beyond the scope of this Article, but several animating principles should serve as guideposts. First, Colorado sentencing statutes should allow space for contextualizing crime and considering individual circumstances. Ironically, contextualized, in-depth investigation into a person's background and social history is constitutionally mandated by the U.S. Supreme Court in cases where the death penalty is sought<sup>504</sup> but does not routinely occur in any other kind of criminal case.<sup>505</sup> Colorado sentencing statutes should allow for this sort of sentencing evidence to be considered in other types of cases, especially those where significant terms of incarceration are at stake, so that judges can make individualized sentencing decisions. We must also revamp our one-size-fits-all first-degree murder statute and make reasonable and more nuanced distinctions between penalties for different degrees of responsibility and culpability.

Second, and relatedly, we must abolish all mandatory sentences, especially those that do not provide the opportunity for release. We must begin by abolishing life without parole, which is a punishment of equal barbarity to the death penalty in every functional way. “By denying hope to individuals who in many cases have made significant personal transformations, [sentences of life without parole] are fundamentally inhumane.”<sup>506</sup> D.R. further writes, “When you have this sentence, everything \*412 is a fight. It is like your life doesn't matter anymore. The underlying message sometimes feels like, go kill yourself by any means necessary ....”<sup>507</sup>

Empirical data demonstrates that excessively lengthy sentences do not provide a public benefit. “Our current approach to punishing those convicted of violence is almost entirely blind to mountains of sophisticated research about violent behavior .... [H]arsh sentences ... incapacitate people longer than necessary and provide little deterrence in exchange.”<sup>508</sup>

As Darcy Matlock articulates, “[w]hat real purpose is served by throwing people away for decades or until death? This does not bring back victims, erase the past, or make anything better. Yes, I and many others have committed truly reprehensible acts, but impulsive, one-time, out-of-control actions should not define us.”<sup>509</sup> Rachel Barkow also points out that although sentencing lengths take on a talismanic significance once they are enacted by the legislature, the number of years of imprisonment imposed for any particular time is essentially arbitrary “and based in nothing. There's no science behind any of it. These are random numbers thrown out for people.”<sup>510</sup>

Lessons from other countries teach us that valuing human life at the legislative and policy level translate into valuing human life at the individual level.<sup>511</sup> A reduction in sentence length does not have to come at the expense of public safety. The maximum prison sentence in Norway, which has a significantly lower recidivism rate than the United States, is twenty-one years.<sup>512</sup> Danish law allows for indeterminate life sentences for murder, which are rarely imposed, but even life-sentenced individuals are eligible for a “pardoning hearing” after twelve years.<sup>513</sup> The average time spent incarcerated on a life sentence in Denmark



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is sixteen years.<sup>514</sup> According to noted prison abolitionist Ruth Wilson Gilmore, in Spain, where murder is quite rare, when a person kills another person the average \*413 time spent in prison is seven years.<sup>515</sup> Gilmore says that Spain's policy tells its people, “[W]here life is precious, life *is* precious.”<sup>516</sup>

We should replace all of our sentencing schemes that require mandatory, lengthy prison sentences with sentences that provide a meaningful opportunity to be considered for release on parole within a certain number of years.<sup>517</sup> In 1992, C.N. was arrested at the age of twenty.<sup>518</sup> Twenty-eight years later, her two children are grown and she is now a grandmother of five.<sup>519</sup> Time passes, mothers become grandmothers, people change and grow, and yet, other than executive clemency, the law currently provides no mechanism to acknowledge that change.

Third, we should ensure that a robust and evidence-based parole process is in place; create a presumption of parole by which “an individual will be released after a specified period of time unless circumstances suggest otherwise”;<sup>520</sup> and revise the special needs parole statute to remove the exemptions for persons convicted of class one felonies as well as class two felony crimes of violence in which the person has served fewer than ten years imprisonment, to include those people currently excluded.<sup>521</sup> As discussed in Section I.C, the modification of this statute \*414 in 2018 is a prime example of the low-hanging fruit approach to reform that excludes people who commit violent crimes in unnecessary and harmful ways.<sup>522</sup>

Finally, once sentencing reforms are enacted, we must work to identify ways to provide retroactive relief to those who were sentenced under the excessively punitive laws of the past.<sup>523</sup>

There are significant costs to the type of “wrongful incarceration” that occurs when sentencing reforms are enacted but there is no mechanism for retroactive relief.<sup>524</sup> Specifically, the “defendant will continue to suffer improper punishment for which the state will continue to pay.”<sup>525</sup> Incarcerated individuals and their families should not be forced to bear these senseless costs simply for the sake of finality.<sup>526</sup> While retroactivity \*415 may be little more than an afterthought to policy makers, for incarcerated individuals and their families, it can mean the difference between freedom and years of senseless and cruel exile by incarceration, if not death in prison. Retroactivity is thus an important vehicle for hope.

### b. Increase the Use of Executive Clemency

Besides sentencing reform, the Governor should exercise executive clemency as an additional antidote to excessive sentences. By imposing mind-bogglingly lengthy sentences for violent crime and in many cases, depriving individuals of any meaningful opportunity for release, our current system of punishment creates significant barriers to healing and hope.<sup>527</sup> Hope is the proprietary product of an appeal. But, of course, most appeals are not successful.<sup>528</sup> T.M. describes watching the feeling of hope “leave with a devastating fall,” as many people in prison “give up [after losing] their direct appeals.”<sup>529</sup> He explains, “Hope gives the purpose to move forward in life, and without it, life loses the shine that makes all the pain worth it.”<sup>530</sup> We would do well to change this dynamic and create a world in which hope is made possible not just by “fighting your case,” but by deep reflection, accountability, sincere apology, and the pursuit of rehabilitation and redemption. Creating a world in which these things matter means creating a world that recognizes that even people who have made horrible mistakes in their lives have the capacity for change. R.F. explains, “Clemency is to moderate the severity of punishment through an extended hand of mercy.”<sup>531</sup>

“The Framers deemed the clemency power so fundamental that it was placed alongside the commander-in-chief powers of the president in [Article II of the \[United States\] Constitution](#).”<sup>532</sup> The Colorado governor's clemency power is likewise enshrined in the state constitution.<sup>533</sup> In the nineteenth and much of the twentieth century, executive clemency \*416 was viewed as a vital part of the criminal legal system.<sup>534</sup> Back then, “[e]xecutive clemency was a key mechanism to manage the prison population, correct miscarriages of justice, restore the rights of former offenders, and make far-reaching public statements about



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the criminal justice system.”<sup>535</sup> But in more modern times, the Willie Horton effect has had a chilling effect on the use of clemency, both federally and at the state level.<sup>536</sup> This is unfortunate and should change.

Executive clemency should be revived and used more robustly. Colorado presently lacks an independent nonprofit organization that could serve as a clemency clearinghouse, vetting and providing legal assistance to clemency candidates and funneling their applications to the Governor's Executive Clemency Advisory Board. The creation of such an organization could streamline and invigorate the clemency review process in the hopes of increasing clemency grants to provide a second chance to individuals who have transformed their lives and are ready to contribute to society.

Moreover, there are currently many people in Colorado's prison systems, including those convicted of serious crimes like murder, who have transformed their lives, deserve a second chance, and have much to offer the world. D.R. writes:

A Life Without Parole sentence is a hard pill to swallow, and to be honest I can't say that I truly have swallowed it. Somewhere along the way I “cheeked” it and spit it out of my mouth. I feel at times that I have the spirit of a lioness. I want the very best for everyone, and I refuse to lay down and accept less than that.

....

I have used prison to rehabilitate myself .... No matter what classes were available, I jumped on them. I refused to be told no. I was as persistent as one could be, until the door busted open. Some people stop, but I did not .... I soon began to form a relationship with God and myself. Then the healing began to take place. At this point in my life all I want to do is help other women find hope.<sup>537</sup>

And Juvencia Townsend writes, “[a]lthough the system will forever be that built on top of injustice after injustice[,] still I rise and set my mind free.”<sup>538</sup>

Providing these remarkable people with a second chance through clemency would enable them to be examples to the public of just how \*417 misguided the prevailing false narratives about crime and violence are. Darcy Matlock writes:

We have so much to offer! If released we could share our experiences, lessons, and strengths, and be catalysts for change--part of the solution rather than a continued part of the problem. Instead of being an ever-increasing drain on society and its resources, we could be out there working, teaching, mentoring, speaking out against violence, and encouraging, or even creating, alternatives. We can demonstrate what works. We could be making some amends. We are capable of redemption--we just need a chance, or a second chance.<sup>539</sup>

D.R. similarly adds:

I would like to be a voice for the incarcerated. I have so many ideas and goals. I would love to travel the world and tell my story (our story), along with other women who obtained freedom. We would tell our stories, and have finger food afterward, mingling with people who are incarcerated, answering questions. Being the real problem solvers. Working toward change. This is just one goal.<sup>540</sup>



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Granting clemency to those who have been rehabilitated would also provide a powerful message of hope to other incarcerated people fighting to make meaning out of their lives and hold onto positive change despite living in an environment that often makes mere survival a daunting task. Many people serving life without parole describe the inspiring effect of watching other similarly situated people receive a grant of clemency.<sup>541</sup> As Damian Arguello writes, “Hope is the fuel that burns the desire to change in our hearts ... without it there is nothing.”<sup>542</sup>

While increasing the use of clemency will not on its own end mass incarceration, it provides the Governor with a platform to express the State's values. “As such, it shapes the wider political environment in which issues of crime and punishment are debated and criminal justice policy is forged.”<sup>543</sup>

### c. Expand Opportunities for Restorative Justice

Finally, we should increase the use of restorative justice practices as alternatives to lengthy prison sentences. Colorado “leads the nation in developing law to use restorative justice in adult and juvenile criminal matters.”<sup>544</sup> However, presently, restorative justice in Colorado (and elsewhere) is most frequently used as an option in low-level or misdemeanor \*418 cases, many of which may never have been formally filed otherwise or likely would have been dismissed.<sup>545</sup> Thus, restorative justice's current presence in the legal system is stymied by the same low-hanging fruit approach that other criminal justice reforms have taken.

This should change. Restorative justice practices are well-equipped to respond to violence and address the underlying causes.<sup>546</sup> “Substantial research in the United States, Australia, Canada, and the United Kingdom has demonstrated that restorative justice can be an effective response to violent crime, reducing recidivism rates by as much as 44 percent and helping to break cycles of violence.”<sup>547</sup> Colorado recently took a small step in this regard when, in 2017, the State legislature “passed legislation intended to increase the inclusion of restorative justice conferences in plea bargains by authorizing the district attorney to consent to a suitability assessment for participation.”<sup>548</sup> However, for this legislation to be impactful, district attorneys must “buy in” and believe that restorative justice can serve as a more productive alternative to lengthy terms of incarceration in serious cases.

Common Justice, Sered's organization, provides one successful example of a restorative justice-based diversion program for violent offenses. The organization has forged a successful partnership with the Brooklyn District Attorney's Office<sup>549</sup> to operate an alternative to incarceration and victim services program for serious and violent felonies; this program has had a tremendous success rate.<sup>550</sup> At the time Sered wrote her book in 2018, the program had been operational in its current form for six years, and “only one person [had] been terminated because of a new crime.”<sup>551</sup> Colorado should likewise become a leader in expanding its use of restorative justice to include more serious offenses.

D.R. speaks to the need to apply restorative justice principles even in the most serious situations:

\*419 [B]y no means do I take for granted the value of human life. All life is precious and valuable. We all bring purpose and meaning to life. When one life is taken for any reason it destroys families, communities and the ripple ... effect goes a long way: I want to be a part of the solution and not the problem.<sup>552</sup>

During our interviews while writing this piece, several individuals expressed sincere remorse for their crimes and a desire to attempt to repair the harm that they have caused.<sup>553</sup> Opportunities for victim-offender dialogues do exist in Colorado in certain circumstances, but it is important to continue the conversation about whether there is a way to expand such offerings.<sup>554</sup>

Restorative justice ideals continue to be relevant long after the fact. Many of the incarcerated people who contributed to this Article see and experience the failings of our retributive model and understand the value of restorative justice. S.B. writes:



I feel that just as those who have committed crimes should be held accountable for their actions, the victims (or family members of) should be cared for with more than just a guilty verdict. If restorative justice, therapy, and healing became a bigger topic of conversation and practice, we would see a lot of things change within our society and our prison system.<sup>555</sup>

Restorative justice and the transformative justice framework discussed in Section III.B.1 recognize the interconnectedness of each of us, demand accountability, and acknowledge the complexities that lead to harm.<sup>556</sup> We believe that these frameworks are guideposts for moving in the right direction. While Zehr acknowledges that some of these visions may feel utopian, he writes, “I believe in ideals. Much of the time we fall short of them[,] but they remain a beacon, something toward which to aim, something against which to test our actions. They point a direction.”<sup>557</sup> To meaningfully address the problems of violence and crime, Colorado must move in the direction towards these ideals.

#### \*420 CONCLUSION

For all the destruction COVID-19 has wrought, it also presents an unparalleled opportunity to recreate our system of punishment in the United States, starting here in Colorado. The pandemic has exposed the fallacy of a system of mass incarceration that took years to create and has revealed the shortcomings of an approach to reform focused only on those convicted of nonviolent offenses. The pandemic also presents us with an extraordinary opportunity for our system of punishment to internalize the concept of *ubuntu*-- the notion that our humanity is inextricably bound up with the humanity of those in prison, whose lives society has so casually thrown away because of misguided sentencing practices and damaging, simplistic public narratives about violence. While the pandemic has forced us apart, it has also taught us how interconnected we really are. Just like a communicable disease, hope and healing are contagious. In the new post-pandemic world that we will be forced to create, it is time for our system of punishment to incorporate this fundamental moral truth. Once it does, we must proceed to decarcerate--boldly, broadly, and without delay.

#### Footnotes

<sup>d1</sup> Director, The Powell Project. J.D., Harvard Law School, 2004; M.Phil. Cambridge University, 2000; B.A. Wellesley College, 1999. The Powell Project's mission is to fight against, and provide relief from, the extreme and excessive sentencing practices that have come to define the American criminal legal system. The Author dedicates this Article to J.S., B.W., and G.G., whose words do not appear in this Article, but whose lived experiences with life sentences were the inspiration behind it.

<sup>dd1</sup> Deputy State Public Defender - Appellate Division, Office of the Colorado State Public Defender. J.D., Harvard Law School, 2014; B.A. Pomona College, 2009. All views expressed are her own. The Author dedicates this Article to her clients and all who are incarcerated. Both Authors would like to thank Isadora Ruyter-Harcourt for her research and insightful editing assistance, Maureen Cain for her valuable feedback, as well as the student editors of the *Denver Law Review* for their hard work, comments, and suggestions. “[W]hile there is a soul in prison, I am not free.” - Eugene V. Debs.

<sup>1</sup> See, e.g., Susan Abraham, *Through the Lens of Restorative Justice: A Re-Humanizing*, 64 N.Y.L. SCH. L. REV. 11, 17 (2020).



- 2 Alexandria Macmadu et al., *COVID-19 and Mass Incarceration: A Call for Urgent Action*, 5 LANCET PUB. HEALTH e571, e571-72 (2020).
- 3 *See infra* notes 283-90, 293-300 and accompanying text.
- 4 *See infra* notes 75-91 and accompanying text.
- 5 The criminal legal system dehumanizes those that it incarcerates, using names like criminal, offender, felon, inmate, convict, and prisoner. Alexandra Cox, *The Language of Incarceration*, 1 INCARCERATION 1, 5 (2020). In prison, people are identified as numbers. Each of these steps makes it easier to dehumanize and otherize. *Id.* As Juvencia Townsend, an incarcerated woman explains, “My life seemed to no longer matter as I was referred to as inmate #95062 stripping every sense of dignity I had left in my soul.” Letter from Juvencia Townsend to authors (July 7, 2020) (on file with authors). As advocates, we know that people in prison are so much more than a number or a label. They are children, siblings, parents, grandparents, friends, companions, entrepreneurs, artists, athletes, intellectuals, leaders, advocates, and more. Therefore, the decision to use person-first language in this Article, in lieu of these labels, is a deliberate one. Language has power, and we all carry complex identities. By labeling people, we deprive them of these complexities. See Cox, *supra*, at 2-5, 8-9, for a discussion of the growing use of “people first” language in the incarceration context from a historical and theoretical perspective.
- 6 JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 23--24 (2017).
- 7 *See* discussion *infra* Section I.D.2.
- 8 *See infra* Part II.
- 9 *See infra* notes 292-315 and accompanying text.
- 10 *See infra* Part III.
- 11 *See* Meredith Minkler et al., *Seizing the Moment: Policy Advocacy to End Mass Incarceration in the Time of COVID-19*, 47 HEALTH EDUC. & BEHAV. 514, 515 (2020) (describing the scope of infection rates in Chicago's Cook County Jail, an Ohio state prison, and anticipating the total number of deaths in U.S. prisons due to COVID-19).
- 12 *See* Barbara Bradley Hagerty, *Releasing People From Prison is Easier Said Than Done*, ATLANTIC (July 8, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/releasing-people-prison/613741/>.
- 13 *See* discussion *infra* Section III.B.3.
- 14 We provided the incarcerated individuals whose voices are included in the Article the choice to be identified by their full name or initials. We defaulted to using initials in most instances where the individual did not express a clear preference.





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- 15 DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 51 (2019).
- 16 SEAN J. MARSHALL, DISCARDED LIVES 19 (2019).
- 17 *Criminal Justice Facts*, THE SENT'G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited Dec. 2, 2020).
- 18 MARC MAUER & ASHLEY NELLIS, THE MEANING OF LIFE: THE CASE FOR ABOLISHING LIFE SENTENCES 7 (2018).
- 19 PFAFF, *supra note 6*, at 1.
- 20 Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>. Slideshow 1 provides a breakdown of the number of individuals in state prisons, federal prisons, juvenile correctional facilities, local jails, immigration detention facilities, Indian Country jails, military prisons, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories. *Id.*
- 21 *Incarceration Rates by Country 2020*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/incarceration-rates-by-country> (last visited Dec. 2, 2020).
- 22 Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL'Y INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html>.
- 23 *See id.*; *see also* PFAFF, *supra note 6*, at 1.
- 24 *See, eg.*, JEAN CHUNG, THE SENT'G PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 4, 6 (2019). Chung notes that, “[a]s of 2016, 6.1 million Americans were prohibited from voting due to laws that disenfranchise citizens convicted of felony offenses.” *Id.* at 1.
- 25 Paul T. Crane, *Incorporating Collateral Consequences into Criminal Procedure*, 54 WAKE FOREST L. REV. 1, 16 (2019).
- 26 MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 142--43 (2012).
- 27 SERED, *supra note 15*, at 173.
- 28 *Id.* at 8; *see also* Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/>.
- 29 Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>. The Authors note that this figure is significantly more than



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the \$81 billion figure cited by the Bureau of Justice Statistics, which only addresses the cost of running the corrections system. *Id.* The \$182 billion figure, in contrast, includes policing and court costs, as well as “all of the other costs that families have to pay to support their incarcerated loved ones.” *Id.*

30 Robert D. Crutchfield & Gregory A. Weeks, *The Effects of Mass Incarceration on Communities of Color*, 32 ISSUES SCI. & TECH. 109, 109-10 (2015).

31 *U.S. Incarceration Rates by Race and Ethnicity, 2010*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/graphs/raceinc.html> (last visited Jan. 3, 2021).

32 *Criminal Justice Facts*, *supra* note 17.

33 *See* CRAIG HANEY, CRIMINALITY IN CONTEXT: THE PSYCHOLOGICAL FOUNDATIONS OF CRIMINAL JUSTICE REFORM 217--47 (2020).

34 Letter from Tatianna Manon-Davis to authors (July 6, 2020) (on file with authors).

35 However, as Alec Karakatsanis points out, the criminal justice system is “only broken if you think that [creating a society of equality and justice and liberty and public safety] are its purposes. If you actually think that its purpose is controlling certain populations, oppressing certain people, conserving the hierarchies of wealth and power, then it's actually functioning very well.” Alice Speri, *The Criminal Justice System is Not Broken. It's Doing What it was Designed to Do*, INTERCEPT (Nov. 9, 2019, 8:32 AM), <https://theintercept.com/2019/11/09/criminal-justice-mass-incarceration-book/> (quoting author Alec Karakatsanis discussing his book *Usual Cruelty*).

36 SERED, *supra* note 15, at 7.

37 Zack Beauchamp, *America Doesn't Have More Crime Than Other Rich Countries. It Just Has More Guns*, VOX (Feb. 15, 2018, 8:55 AM), <https://www.vox.com/2015/8/27/9217163/america-guns-europe>.

38 *See* RACHEL E. MORGAN & BARBARA A. OUDEKERK, BUREAU OF JUST. STATS., CRIMINAL VICTIMIZATION, 2018 at 1 (Eric Hendrixson & Jill Thomas eds., 2019).

39 SERED, *supra* note 15, at 7.

40 *See, e.g.*, DON STEMEN, VERA INST. OF JUST., THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER 2 (2017).

[H]igh rates of imprisonment break down the social and family bonds that guide individuals away from crime, remove adults who would otherwise nurture children, deprive communities of income, reduce future income potential, and engender a deep resentment toward the legal system .... At the individual level, there is also some evidence that incarceration itself is criminogenic, meaning that spending time in jail or prison actually increases a person's risk of engaging in crime in the future.

*Id.*



41 *See id.*

42 *See id.*

43 SERED, *supra* note 15, at 66 (quoting Francis T. Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S, 53S (2011)).

44 Cullen et al., *supra* note 43, at 53S.

45 *See id.*

46 *Id.*

47 Letter from Visith Ny to authors (July 10, 2020) (on file with authors).

48 MATTHEW R. DUROSE ET AL., BUREAU OF JUST. STATS., *RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010* at 1 (Morgan Young & Jill Thomas eds., 2014). Recidivism, and the lack of reentry services and collateral consequences that contribute to the high rates of individuals who return to prison, is a complex and extensive topic. A full discussion of this worthy subject is beyond the scope of this Article. In a recent book about his findings from an extensive empirical reentry study conducted in Boston, Harvard sociologist Bruce Western notes: “Recidivism is usually viewed as a behavioral problem--a continuation of criminal conduct or a failure of rehabilitative transformation .... [But] for the reentry study respondents these powers of decision-making and self-discipline battled hard with human frailty, demography, and the criminal justice system itself.” BRUCE WESTERN, *HOMEWARD: LIFE IN THE YEAR AFTER PRISON* 8 (2018).

49 SERED, *supra* note 15, at 67.

50 *Id.* Sered distinguishes between “individual-level causes of violence” and “community conditions like poverty and disenfranchisement.” *Id.*

51 *Id.*

52 *Id.*

53 *Id.* at 8.

54 Wagner & Sawyer, *supra* note 22.

55 *Incarceration Rates by Country 2020*, *supra* note 21.



56 *QuickFacts: Colorado*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/CO> (last updated July 1, 2019); see *Departmental Reports and Statistics: Inmate Population Profile*, COLO. DEP'T OF CORR., <https://www.colorado.gov/pacific/cdoc/departamental-reports-and-statistics> (last visited Jan. 3, 2021).

57 *Incarceration Crisis in Colorado*, COLO. CRIM. JUST. REFORM COAL., <https://www.ccjrc.org/did-you-know/incarceration-crisis-in-colorado/> (last visited Jan. 3, 2021); *Departmental Reports and Statistics: Dashboard Measures*, COLO. DEP'T OF CORR., <https://www.colorado.gov/pacific/cdoc/departamental-reports-and-statistics> (last visited Jan. 3, 2021).

58 See *Incarceration Crisis in Colorado*, *supra* note 57.

59 See for example PFAFF, *supra* note 6; RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* (2018); JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2018); ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016); MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2015); JAMES KILGORE, *UNDERSTANDING MASS INCARCERATION: A PEOPLE'S GUIDE TO THE KEY CIVIL RIGHTS STRUGGLE OF OUR TIME* (2015); ALEXANDER, *supra* note 26; BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006), for additional discussions on the causes of mass incarceration.

60 See Christopher Wildeman, *Mass Incarceration*, OXFORD BIBLIOGRAPHIES, <https://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0033.xml> (last updated Apr. 24, 2012).

Whether called mass incarceration, mass imprisonment, the prison boom, the carceral state, or hyperincarceration, this phenomenon refers to the current American experiment in incarceration, which is defined by comparatively and historically extreme rates of imprisonment and by the concentration of imprisonment among young, African American men living in neighborhoods of concentrated disadvantage. Although there is scholarly consensus about how to define mass incarceration, there is some level of disagreement over its causes and consequences.

*Id.*

61 See PFAFF, *supra* note 6, at 3-4; MAUER & NELLIS, *supra* note 18, at 74.

62 See PFAFF, *supra* note 6, at 5-6; FORMAN, JR., *supra* note 59, at 22.

63 See, e.g., PFAFF, *supra* note 6, at 31-32; *Criminal Justice Facts*, *supra* note 17.

64 See, e.g., BARKOW, *supra* note 59, at 51-55; PFAFF, *supra* note 6, at 127-59.

65 See PFAFF, *supra* note 6, at 13 (“A major barrier to reform ... is the fractured nature of our criminal justice system. In fact, there is no single ‘criminal justice system,’ but instead a vast patchwork of systems that vary in almost every conceivable way.”); Mona Lynch, *Mass Incarceration, Legal Change, and Locale: Understanding and Remediating American Penal Overindulgence*, 10 *CRIMINOLOGY & PUB. POL'Y* 673, 674 (2011) (noting “how much of the criminal law and policy that resulted in mass incarceration is local at its core, emanating in large part from specific regions of the nation and then diffusing from there”).



66 See, e.g., BARKOW, *supra* note 59, at 105-24.

67 See *Criminal Justice Facts*, *supra* note 17; PFAFF, *supra* note 6, at 185-202; FORMAN, JR., *supra* note 59, at 47.

68 Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG. (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html>.

Less than one in five nationally are in prisons or jail for drug offenses, but this notion proliferated in the wake of the overwhelming popularity of Michelle Alexander's "The New Jim Crow," which focuses on the devastating effects of the war on drugs, cases that are primarily handled by the (relatively small) federal prison system. It's easy to feel outrage about draconian laws that punish nonviolent drug offenders, and about racial bias, each of which Alexander catalogs in a riveting and persuasive manner. But a majority of people in state and federal prisons have been convicted of what are defined as violent offenses, which can include everything from possession of a gun to murder.

*Id.*

69 Jennifer Schuessler, *Drug Policy as Race Policy: Best Seller Galvanizes the Debate*, N.Y. TIMES (Mar. 6, 2012), <https://www.nytimes.com/2012/03/07/books/michelle-alexanders-new-jim-crow-raises-drug-law-debates.html>.

70 Kushner, *supra* note 68.

71 *Id.*

72 Throughout this Article, we use the term "society" as shorthand to describe three primary groups of people: (1) the legislators, prosecutors, judges, and other public officials who participate in law-making and the administration of the American criminal legal system; (2) the media; and (3) the large segment of the American general public that is uninformed about, and unimpacted by, mass incarceration. We acknowledge that this term is an imperfect one. Certainly, not all public officials or journalists think alike. Moreover, a significant (and ever-increasing) number of Americans *have* been directly impacted by mass incarceration, particularly in communities of color. See BRIAN ELDERBROOM ET AL., FWD.US, EVERY SECOND: THE IMPACT OF THE INCARCERATION CRISIS ON AMERICA'S FAMILIES 17, 21, 28-29 (2018). A 2018 study by the criminal justice non-profit FWD.us and Cornell University found that 64% of U.S. adults have had an immediate or extended family member spend time in jail or prison. *Id.* at 24. The study found that "Black people are 50 percent more likely than white people to have had a family member incarcerated, and three times more likely to have had a family member incarcerated for one year or longer." *Id.* at 10. Proximity to mass incarceration commonly engenders a more nuanced understanding of it. See, e.g., Leandra Fernandez, *Empathy and Social Justice: The Power of Proximity in Improvement Science*, CARNEGIE FOUND.: CARNEGIE COMMONS BLOG (Apr. 21, 2016), <https://www.carnegiefoundation.org/blog/empathy-and-social-justice-the-power-of-proximity-in-improvement-science/>. Thus, by using the term "society" we do not mean to suggest that there are not significant numbers of Americans who reject the false narratives about crime and violence we describe in this article. Nevertheless, as described *infra*, the predominant narratives about these topics disseminated in public spaces and relied upon by public officials remain uninformed, untrue, and antiquated.

73 See HANEY, *supra* note 33, at 3.

74 See SERED, *supra* note 15, at 11.



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75 HANEY, *supra* note 33, at 3.

76 *Id.* at 4.

77 SERED, *supra* note 15, at 11.

78 Pamela Oliver, *What the Numbers Say About How to Reduce Imprisonment: Offenses, Returns, and Turnover*, 103 MARQ. L. REV. 1073, 1121 (2020) (first citing ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 29 (2016); and then citing KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 85 (2010)). “[B]lack criminality would become one of the most commonly cited and longest-lasting justifications for black inequality and mortality in the modern urban world.” Coates, *supra* note 28 (quoting Khalil Gibran Muhammad, director of the Schomburg Center for Research in Black Culture at the New York Public Library).

79 SERED, *supra* note 15, at 11.

80 Corey G Johnson, *Bryan Stevenson on Charleston and Our Real Problem with Race*, MARSHALL PROJECT (July 24, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/06/24/bryan-stevenson-on-charleston-and-our-real-problem-with-race> (transcribing interview with Bryan Stevenson, founder and executive director of the Equal Justice Initiative). As Stevenson notes, “we created a narrative of racial difference in this country to sustain slavery,” and “to make white Christian people feel comfortable with their ownership of other human beings.” *Id.*

81 See Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Aug. 13, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>.

82 See THE SENT'G PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 2--3, 11--15 (2d ed. 2008).

83 J. Clark Kelso, *Corrections and Sentencing Reform: The Obstacle Posed by Dehumanization*, 46 MCGEORGE L. REV. 897, 901 (2014).

84 HANEY, *supra* note 33, at 37.

85 *Id.* at 6-7.

86 Kevin L. James, Jr., *The Impacts of Trauma* (Oct. 14, 2019) (unpublished essay) (on file with authors).

87 JAMES GILLIGAN, VIOLENCE: REFLECTIONS ON A NATIONAL EPIDEMIC 5 (1997).

88 *Id.*



- 89 HANEY, *supra* note 33, at 38.
- 90 Ms. Nelson has been practicing law since 2004. Ms. Segil has been practicing law since 2014.
- 91 *See* PFAFF, *supra* note 6, at 190-92.
- 92 *See* discussion *infra* Section I.E.2.c.
- 93 *See* Letter from Nehemiah Filipe Chavez to authors (Aug. 6, 2020) (on file with authors).
- 94 *Id.*
- 95 *Id.*
- 96 *Id.*
- 97 *Id.*
- 98 PFAFF, *supra* note 6, at 231.
- 99 As Sered notes, “[p]risons make the work of rehabilitation strikingly difficult--though to the great credit of so many people who are incarcerated, never totally impossible.” SERED, *supra* note 15, at 65.
- 100 *See* Sawyer & Wagner, *supra* note 20.
- 101 *Id.*
- 102 *Id.*
- 103 Letter from Darcy Matlock to authors (July 18, 2020) (on file with authors).
- 104 *See* Letter from Damian Arguello to authors (Sept. 17, 2020) (on file with authors).
- 105 Johann Wolfgang von Goethe, Wilhelm Meisters Lehrjahre: Ein Roman, [Wilhelm Meister's Apprenticeship: A Novel] Vierter Band [Volume 4], Book 8, Chapter 4, 194, Frankfurt und Leipzig (1801) (quoted translation available at: <https://www.quotes.net/quote/37012>).
- 106 Letter from Damian Arguello to authors, *supra* note 104.
- 107 BARKOW, *supra* note 59, at 1.



108 *Id.* at 3.

109 *Id.*

110 The highly-publicized trial of James Holmes, who killed twelve people and injured seventy in the Aurora theater shooting on July 20, 2012 (and in which Ms. Nelson served as part of the defense team), provides one such example. Kristen Nelson et al., *The “Evil” Defendant and the “Holdout” Juror: Unpacking the Myths of the Aurora Theater Shooting Case as We Ponder the Future of Capital Punishment in Colorado*, 93 DENV. L. REV. 595, 595 (2016). Although all of the experts who evaluated Mr. Holmes agreed that he suffered from a serious mental illness that caused him to commit these horrific crimes, the narrative that Mr. Holmes was “evil” was readily embraced by the public and the media. *See id.* at 600, 607.

111 Marie Gottschalk, *Sentenced to Life: Penal Reform and the Most Severe Sanctions*, 9 ANN. REV. L. & SOC. SCI. 353, 361 (2013).

112 As John Pfaff notes: “When it comes to crime, Americans are, to use academic jargon, ‘low-information, high-salience’ (LIHS) voters: they do not pay much attention to the routine, day-to-day facts, but instead vote based on one or two particularly shocking--and thus salient, but not likely representative--cases.” PFAFF, *supra* note 6, at 169.

113 HANEY, *supra* note 33, at 11.

114 *Id.*

115 *See* PFAFF, *supra* note 6, at 186-87 (“The harsh sentences we impose on people convicted of violent crimes are not buying us the security we think they are: they incapacitate people longer than necessary and provide little deterrence in exchange.”).

116 SERED, *supra* note 15, at 55.

117 *See* Sawyer & Wagner, *supra* note 20.

118 Arthur Rizer & Lars Trautman, *The Conservative Case for Criminal Justice Reform*, GUARDIAN (Aug. 5, 2018, 6:00 AM), <https://www.theguardian.com/us-news/2018/aug/05/the-conservative-case-for-criminal-justice-reform>.

119 For example, Newt Gingrich, who in the 1980s and 1990s was a primary proponent of the “War on Drugs” as well as increased spending on prison construction in his famous “Contract with America,” declared in 2011: “There is an urgent need to address the astronomical growth in the prison population, with its huge costs in dollars and lost human potential .... The criminal-justice system is broken, and conservatives must lead the way in fixing it.” DAVID DAGAN & STEVEN M. TELES, PRISON BREAK: WHY CONSERVATIVES TURNED AGAINST MASS INCARCERATION x-xi (2016).

120 *See id.* at 168-69, 176.





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- 121 PFAFF, *supra* note 6, at 23-24 (citing Michael Dresser, *Hogan Signs Bill to Overhaul Maryland Criminal Justice System*, BALT. SUN (May 19, 2016, 7:09 PM), <https://www.baltimoresun.com/politics/bs-md-justice-reinvestment-20160518-story.html>).
- 122 Alexi Jones, *Reforms Without Results: Why States Should Stop Excluding Violent Offenses From Criminal Justice Reforms*, PRISON POL'Y INITIATIVE (Apr. 2020), <https://www.prisonpolicy.org/reports/violence.html>.
- 123 *Id.*
- 124 *Id.*
- 125 Gottschalk, *supra* note 111, at 360-61.
- 126 *Id.* at 361.
- 127 *See* S.B. 13-123, 69th Gen. Assemb., Reg. Sess. (Colo. 2013); S.B. 13-250, 69th Gen. Assemb., Reg. Sess. (Colo. 2013).
- 128 *See* Colo. S.B. 13-250. Notably, this bill was part of the Uniform Controlled Substances Act, which was passed in 2013 to commit to systemic reform of the failed “war on drugs.” The legislature’s express intention was to reduce incarceration related to drug offenses. *See, e.g.*, COLO. REV. STAT. § 18-1.3-103.4 (2020). Yet, the legislature included a provision that only allowed the new sentencing ranges to apply prospectively. *See* *People v. Hamm*, 461 P.3d 559, 564-66 (Colo. App. 2019). As a result, many individuals continue to serve lengthy sentences for drug offenses. For example, Charles Hamm, a forty-three-year-old Black man, is serving thirty years in prison for the sale of \$50 worth of crack cocaine (3.4 grams). *Id.* at 561-62. On September 30, 2013, Mr. Hamm accepted a plea agreement to serve this thirty-year prison sentence in order to avoid facing a mandatory sentence of sixty-four years under the habitual statute. *Id.* at 562-63. One day later, on October 1, 2013, the Uniform Controlled Substances Act came into effect. Under the Act, Mr. Hamm would have faced a maximum of only sixteen years. *Id.* at 562. However, because the Act was not made retroactive, Mr. Hamm continues to serve a sentence of thirty years for conduct that the legislature has now deemed only worthy of sixteen years of his freedom. Thus, the legislature’s prioritization of “finality” has hampered the impact of the reforms.
- 129 *See* Colo. S.B. 13-123.
- 130 *See id.*; Colo. S.B. 13-250.
- 131 KERRY WHITE, LEGIS. COUNCIL STAFF, HB 18-1109 REVISED FISCAL NOTE 2 (2018); *see* H.B. 18-1109, 71st Gen. Assemb., Reg. Sess. (Colo. 2018) (amending COLO. REV. STAT. § 17-1-102). The bill:  
  
Lower[ed] the age from 60 to 55 years of age the threshold for qualifying as a special needs offender under one category, and add[ed] a third category of special needs offenders to include those determined to be incompetent to complete any sentence and not likely to pose a risk to public safety.  
  
Memorandum from Juliann Jenson, Rsch. Analyst, Legis. Council Staff, to Interested Persons 6 (Feb. 21, 2020) (on file with authors).
- 132 *See* S.B. 19-143, 72nd Gen. Assemb., Reg. Sess. (Colo. 2019) (amending COLO. REV. STAT. §§ 17-1-119.7, 17-2-103). This law removes the option of reincarceration for a technical parole violation if “[a] person is on parole for DF2,



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DF3, DF4, nonviolent F3, F4, F5, F6” and “[t]he parole violation did not involve possession of a weapon, unauthorized contact with a victim, refusing or failing to comply with requirements of sex offender treatment, absconding,” and a few other violations. TERRI HURST, COLO. CRIM. JUST. REFORM COAL., COLORADO JUSTICE REPORT: 2019 LEGISLATIVE SESSION WRAP-UP 2 (2019).

133 See PFAFF, *supra* note 6, at 23.

134 *Id.*

135 *Id.* at 186. Pfaff also notes:

Prison reformers have been pushing hard to change state laws since 2008 or 2009, and seven or eight years later I have yet to see almost any politician take on how we might deal more effectively with violent offenses, perhaps with the high-profile exception of Senator Cory Booker of New Jersey. Political capital and attention are limited, and at some point people's focus will drift away from criminal justice reform to other topics. The window to act is not indefinite.

*Id.* at 23.

136 See SERED, *supra* note 15, at 11.

137 Oliver, *supra* note 78, at 1078 (citing PFAFF, *supra* note 6, at 185-86). As Bruce Western notes:

We also know from reentry interviews and a considerable body of research that the “nonviolent drug offender” is largely a mythic figure. The street trade in drugs is a dangerous business that must be protected from robberies and rival dealers. Guns and a willingness to use them are a part of the business .... The fiction of the “nonviolent drug offender” denies the violence of the drug trade for people entangled in the criminal justice system. Because violence is so prevalent in the social world of incarceration, the good and the bad, the wicked and the innocent, cannot be neatly differentiated. Instead, victims and perpetrators are often one and the same.

WESTERN, *supra* note 48, at 180.

138 HANEY, *supra* note 33, at 36.

139 See *Abolitionist and Retentionist Countries as of July 2018*, AMNESTY INT'L, <https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf> (last visited Jan. 3, 2021).

140 See, e.g., *Policy Issues: Arbitrariness*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/arbitrariness> (last visited Jan. 3, 2021).

141 MAUER & NELLIS, *supra* note 18, at 65.

142 *The Truth About Life Without Parole: Condemned to Die in Prison*, ACLU OF N. CAL., (Sept. 25, 2013), <https://www.aclunc.org/article/truth-about-life-without-parole-condemned-die-prison>.

143 See *id.*



144 *Id.*

145 Edmund H. Mahony, *A Federal Judge is Challenging How Connecticut Treats Its Former Death Row Inmates, Saying They are Held Under Cruel and Unusual Conditions*, HARTFORD COURANT (Oct. 21, 2019, 6:01 AM), <https://www.courant.com/news/connecticut/hc-news-prison-cruel-unusual-punishment-20191018-20191021-5iogiz3cgvhqne7fp2z6p7ihoi-story.html>.

146 *Id.*

147 Neil Vigdor, *Colorado Abolishes Death Penalty and Commutes Sentences of Death Row Inmates*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/us/colorado-death-penalty-repeal.html>.

148 *Repeal the Death Penalty: Hearing on S.B. 19-182 Before the S. Comm. on the Judiciary*, 2019 Leg., 72 Sess. (Colo. 2019) (statement of David Lane).

149 *See State by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last visited Jan. 4, 2021).

150 *See Death Sentences in the United States Since 1977*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year> (last visited Jan. 4, 2021). At the time of this writing, Virginia is poised to become the eleventh state to abolish the death penalty and the first Southern state to do so. In February 2021, the Virginia General Assembly voted to abolish the death penalty. Democratic Governor Ralph Northam was expected to sign them. Laura Vozzella & Gregory S. Schneider, *Lawmakers Vote to Make Virginia First Southern State to Abolish Death Penalty*, WASH. POST (Feb. 22, 2021, 12:50 PM), [https://www.washingtonpost.com/local/virginia-politics/virginia-death-penalty-ban/2021/02/22/742eed3e-7146-11eb-93be-c10813e358a2\\_story.html](https://www.washingtonpost.com/local/virginia-politics/virginia-death-penalty-ban/2021/02/22/742eed3e-7146-11eb-93be-c10813e358a2_story.html).

151 *See* Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENT'G PROJECT (Feb. 25, 2020), <https://www.sentencingproject.org/publications/juvenile-life-without-parole/> (noting that “[t]he United States stands alone as the only nation that sentences people to life without parole for crimes committed before turning 18”).

152 Gottschalk, *supra* note 111, at 364.

153 *Id.*

154 560 U.S. 48 (2010).

155 *Id.* at 82.

156 567 U.S. 460 (2012).

157 *Id.* at 465.



158 136 S. Ct. 718 (2016).

159 *See id.* at 732-37.

160 Sara Mayeux, *Youth and Punishment at the Roberts Court*, 21 U. PA. J. CONST. L. 543, 549 (2018).

161 *Id.* at 549; *id.* at 587 (internal quotations omitted) (quoting *Miller*, 567 U.S. at 473-74).

162 *Id.* at 549-50.

163 As Pfaff notes:

[R]eforms ... need to be implemented in a way that does not undermine more challenging reforms in the future. If the “easy” reforms are poorly framed, or if they cost too much political capital, they may hurt the overall reform effort in the end. And right now, it's quite possible that current reforms are doing just that.

PAFF, *supra* note 6, at 205.

164 SERED, *supra* note 15, at 6.

165 Michael Roberts, *Colorado Prisoners by the Disturbing Numbers*, WESTWORD (Dec. 21, 2018, 7:01 AM), <https://www.westword.com/news/colorado-prisoners-by-the-disturbing-numbers-11050425>.

166 Letter from M.C. to authors (July 2020) (on file with authors).

167 NAZGOL GHANDNOOSH, THE SENT'G PROJECT, U.S. PRISON POPULATION TRENDS: MASSIVE BUILDUP AND MODEST DECLINE 1 (2019) [hereinafter MASSIVE BUILDUP AND MODEST DECLINE] (measuring decline “since the prison population reached its peak level in 2009”).

168 *Id.* at 1-2.

169 NAZGOL GHANDNOOSH, THE SENT'G PROJECT, CAN WE WAIT 75 YEARS TO CUT THE PRISON POPULATION IN HALF? 5 tb1.1 (2018).

170 MASSIVE BUILDUP AND MODEST DECLINE, *supra* note 167, at 1.

171 *Id.* at 3.

172 PAFF, *supra* note 6, at 188-89.

173 *Id.* at 189.



174 See Gottschalk, *supra* note 111, at 360.

175 See *id.*

176 *Id.*

177 *Id.*

178 SERED, *supra* note 15, at 52.

179 See Gottschalk, *supra* note 111, at 373.

180 See *id.* at 354.

181 *Id.* at 373.

182 SERED, *supra* note 15, at 11.

183 *Id.*

184 See, e.g., ASHLEY NELLIS, THE SENT'G PROJECT, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 19 (2017).

185 Gottschalk, *supra* note 111, at 354-55.

186 MAUER & NELLIS, *supra* note 18, at 9.

187 As Steiker and Steiker note:

In order to prevent death sentences and executions, abolitionists have championed [life without parole] as a workable and humane alternative to the death penalty. Over the past decade, the number of inmates sentenced to [life without parole] has climbed astronomically, and it may well be that the widespread adoption of [life without parole], achieved in part because of the alliance of the abolitionist left and tough-on-crime right, has significantly increased the sentences of the many in order to make less likely the already unlikely execution of the few.

Carol S. Steiker & Jordan M. Steiker, *Opening A Window or Building A Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 UNIV. PA. J. CONST. L. 155, 158 (2008).

188 MAUER & NELLIS, *supra* note 18, at 8.

189 *Id.*



- 190 *Id.* at 9.
- 191 Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 788 (2010).
- 192 MAUER & NELLIS, *supra* note 18, at 8-9 (citing Catherine Appleton & Dirk van Zyl Smit, *Challenging Life Imprisonment*, COMPAR. PENOLOGY, <https://www.compen.crim.cam.ac.uk/Blog/blog-pages-full-versions/guest-blog-on-challenging-life-imprisonment> (last visited Jan. 4, 2021)).
- 193 *Id.* at 7, 10.
- 194 THE SENT'G PROJECT, PEOPLE SERVING LIFE EXCEEDS ENTIRE PRISON POPULATION OF 1970 at 2 (2020).
- 195 *See* Colorado Department of Corrections' response to Kristen Nelson's Colo. Open Records Act request concerning Life Without Parole (June 18, 2020) [hereinafter CDOC Life Without Parole Response] (on file with authors).
- 196 *Id.* As previously stated, only 4.6% of Colorado's residents are Black, and 21.8% are Hispanic. *QuickFacts: Colorado*, *supra* note 56.
- 197 *See* Colorado Department of Corrections' response to Kristen Nelson's Colo. Open Records Act request concerning Life With Parole (June 18, 2020) [hereinafter CDOC Life With Parole Response] (on file with authors).
- 198 *Id.*
- 199 COLO. REV. STAT. § 17-22.5-104(2)(a)-(b) (2020); *see also* Philip A. Cherner, *Colorado Felony Sentencing - An Update*, 14 COLO. LAW. 2163, 2163 (1985).
- 200 H.B. 79-1589, 52d Gen. Assemb., Reg. Sess. (Colo. 1979); COLO. REV. STAT. § 17-22.5-104(2)(a)-(b); *see also* Cherner, *supra* note 199, at 2163.
- 201 H.B. 85-1320, 55th Gen. Assemb., Reg. Sess. (Colo. 1985); COLO. REV. STAT. § 17-22.5-104(2)(c).
- 202 COLO. REV. STAT. § 17-22.5-104(2)(d)(I); *see also* NAZGOL GHANDNOOSH, THE SENT'G PROJECT, DELAYING A SECOND CHANCE: THE DECLINING PROSPECTS FOR PAROLE ON LIFE SENTENCES 10 (2017).
- 203 Letter from Darcy Matlock to authors, *supra* note 103.
- 204 Letter from Lori McLuckie, Denver Women's Corr. Facility, to authors (July 2020) (on file with authors).
- 205 *Id.*



206 *Id.*

207 Colorado is one of only a few states to classify depraved-heart murder as first-degree murder. WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* §14.7(d), at 486 (2d ed. 2003) (explaining that categorizing depraved heart murder as first-degree murder is “less defensible” than categorizing intentional murders as first-degree murder). And Colorado is the only jurisdiction in the United States that recognizes the crime of attempted extreme-indifference murder. *E.g.*, *People v. Rubio*, 222 P.3d 355, 358 (Colo. App. 2009); *see also* Beth Tomerlin, *Stretching Liability Too Far: Colorado's Felony Murder Statute in Light of Auman*, 83 DENV. UNIV. L. REV. 639, 654 (2005) (“Currently, Colorado has one of the most stringent felony murder statutes in the United States.”).

208 *See* COLO. REV. STAT. § 18-3-102(1)(a)-(d) (2020). Felony murder does not require that the person caused the death of another person with any particular mental state. Rather, a person is guilty of felony murder if, “[a]cting either alone or with one or more persons, he or she commits or attempts to commit arson, robbery, burglary, kidnapping, sexual assault,” or escape, and “in the course of or in furtherance of the crime that he or she is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by anyone.” *Id.* § 18-3-102(1)(b). The definition of extreme indifference murder, which has evolved following a long history of legal challenges to its constitutionality, *see, e.g.*, *Candelaria v. People*, 148 P.3d 178, 181 (Colo. 2006) (en banc) (describing legislative history of extreme-indifference-murder statute following successful equal protection challenge to previous version of the statute), provides that a person is guilty of first-degree murder if, “under circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally, he knowingly engages in conduct which creates a grave risk of death to a person, or persons, other than himself, and thereby causes the death of another.” *Id.* (emphasis omitted) (internal quotations omitted) (quoting COLO. REV. STAT. § 18-3-102(1)(d)).

209 COLO. REV. STAT. § 18-3-102(1)(e)-(f).

210 *Id.* § 18-3-102(3) (providing that “[m]urder in the first degree is a class 1 felony”); *id.* § 18-1.3-401(1)(a)(V.5)(A) (providing that the sentence for a class 1 felony is life imprisonment). Prior to July 1, 2020, the death penalty was also an available penalty for first-degree murder. *See* COLO. REV. STAT. § 16-11-901 (2020). However, it was rarely sought. For example, during a twelve-year period from January 1, 1999, to December 31, 2010, the Colorado Narrowing Study, conducted by University of Denver Law Professors Justin Marceau and Sam Kamin, among others,

[I]dentified 524 cases which, based on their specific facts, could have been prosecuted as death penalty cases under the Colorado Death Penalty Statute based on a first-degree murder finding and the factual existence of one or more statutory aggravating factors but in which the death penalty was not actually sought.

Meg Beardsley et al., *Disquieting Discretion: Race, Geography & the Colorado Death Penalty in the First Decade of the Twenty-First Century*, 92 DENV. UNIV. L. REV. 431, 438, 442 (2015) (footnote omitted). However, “[i]n addition to the 524 statutorily death-eligible cases in which the prosecution exercised its discretion and did not seek the death penalty, there were 22 cases in which the death penalty was actually sought by the prosecution during the [same] twelve-year period.” *Id.* at 442.

211 *See* Letter from Lori McLuckie to authors, *supra* note 204.

212 *See* Colorado Department of Corrections' response to Kristen Nelson's Colo. Open Records Act request concerning Sentences of Forty Years or Greater (June 18, 2020) [hereinafter CDOC Forty Years or Greater Response] (on file with authors); CDOC Life Without Parole Response, *supra* note 195; CDOC Life With Parole Response, *supra* note 197. This figure does not include the 1,718 people who are serving an indeterminate life sentence in the Department of Corrections for a sex offense. *See* Colorado Department of Corrections' response to Kristen Nelson's Colo. Open



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Records Act request concerning Indeterminate Lifers (Aug. 6, 2020) [hereinafter CDOC Intermediate Lifers Response] (on file with authors); *see also* COLO. REV. STAT. § 18-1.3-1004.

213 COLO. REV. STAT. § 18-1.3-401(1)(a)(V.5)(A) (providing presumptive penalty ranges for “person[s] sentenced for a felony for an offense committed on or after July 1, 2020”).

214 *Id.*

215 *See id.*

216 *See id.* § 18-1.3-401(8)(a). “[E]xtraordinary aggravating circumstances” include:

(I) The defendant is convicted of a crime of violence under section 18-1.3-406;

(II) The defendant was on parole for another felony at the time of commission of the felony;

(III) The defendant was on probation or was on bond while awaiting sentencing following revocation of probation for another felony at the time of the commission of the felony;

(IV) The defendant was under confinement, in prison, or in any correctional institution as a convicted felon, or an escapee from any correctional institution for another felony at the time of the commission of a felony;

(V) At the time of the commission of the felony, the defendant was on appeal bond following his or her conviction for a previous felony;

(VI) At the time of the commission of a felony, the defendant was on probation for or on bond while awaiting sentencing following revocation of probation for a delinquent act that would have constituted a felony if committed by an adult.

*Id.* Subsection (c) further provides a “catch-all” provision authorizing courts to consider “other” aggravating circumstances not listed in the statute as the basis for imposing a sentence that is greater than the presumptive range. *Id.* § 18-1.3-401(8)(c).

217 *Id.* § 18-1.3-401(8)(a). Additionally, the Colorado Supreme Court has explicitly upheld the ability of trial courts, rather than juries, to make most factual findings pertaining to aggravating circumstances. In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the U.S. Supreme Court held that the prosecution must prove to the jury “any fact that increases the penalty [of] a crime beyond the ... statutory maximum.” The increase is measured from “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (emphasis in original) (citing *Ring v. Arizona*, 536 U.S. 584, 602 (2002)). In *Lopez v. People*, 113 P.3d 713 (Colo. 2005) (en banc), the Colorado Supreme Court upheld the constitutionality of section 18-1.3-401(6) as long as the aggravated sentence is based on four types of facts beyond the elements of the crime: “(1) facts found by a jury beyond a reasonable doubt; (2) facts admitted by the defendant; (3) facts found by a judge after the defendant stipulates to judicial fact-finding for sentencing purposes; [or] (4) facts regarding prior convictions.” *Id.* at 719.

218 *See* COLO. REV. STAT. § 18-1.3-401(10)(a). If a class 3 felony falls into the category of an extraordinary risk crime, the maximum sentence is increased by four years, two years for class 4 felonies, one year for class 5 felonies, and six months for class 6 felonies. *Id.*

Crimes that present an extraordinary risk of harm to society ... include the following:





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(IX) Aggravated robbery, as defined in section 18-4-302;

(X) Child abuse, as defined in section 18-6-401;

(XI) Unlawful distribution, manufacturing, dispensing, sale, or possession of a controlled substance with the intent to sell, distribute, manufacture, or dispense, as defined in section 18-18-405;

(XII) Any crime of violence, as defined in section 18-1.3-406;

(XIII) Stalking, as described in section 18-9-111(4), as it existed prior to August 11, 2010, or section 18-3-602;

(XIV) Sale or distribution of materials to manufacture controlled substances, as described in section 18-18-412.7;

(XV) Felony invasion of privacy for sexual gratification, as described in section 18-3-405.6;

(XVI) A class 3 felony offense of human trafficking for involuntary servitude, as described in section 18-3-503;

(XVII) A class 3 felony offense of human trafficking for sexual servitude, as described in section 18-3-504; and

(XVIII) Assault in the second degree, as described in section 18-3-203(1)(i).

*Id.* § 18-1.3-401(10)(b).

219 *Id.* § 18-1.3-406(2)(a)(I). Section 18-1.3-406(2)(a)(II) lists specific offenses that are categorized as per se crimes of violence. Beyond that list, a crime of violence can occur if a person “[u]sed, or possessed and threatened the use of, a deadly weapon” or “[c]aused serious bodily injury or death to any other person except another participant.” *Id.* § 18-1.3-406(2)(a)(I)(A)-(B).

220 *See id.* § 18-1.3-406(1)(a).

221 *See, e.g.*, Ahmed A. White, *The Juridical Structure of Habitual Offender Laws and the Jurisprudence of Authoritarian Social Control*, 37 UNIV. TOL. L. REV. 705, 705 n.1 (2006) (citing V.F. Nourse, *Rethinking Crime Legislation: History and Harshness*, 39 TULSA L. REV. 925, app. A at 938-39 (2004); Michael G. Turner et al., “Three Strikes and You’re Out” Legislation: A National Assessment, FED. PROBATION, Sept. 1995, at 16, 17; and Daniel Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFF. L. REV. 99, 99-104 (1971), as sources discussing the lengthy history of habitual offender laws in the U.S.).

222 The statute applies to “class 1, 2, 3, 4, or 5 felon[ies] [and] level 1, 2, or 3 drug felon[ies].” COLO. REV. STAT. § 18-1.3-801(1.5).

223 *Id.*

224 *Id.*; *see also* Peter Roper, *Habitual-Offender Laws Under Scrutiny*, PUEBLO CHIEFTAIN (May 31, 2019, 12:32 PM), <https://www.chieftain.com/news/20190531/habitual-offender-laws-under-scrutiny>.

225 COLO. REV. STAT. § 18-1.3-801(2)(a)(I); *see also* Roper, *supra* note 224.



226 COLO. REV. STAT. § 18-1.3-801(2.5).

227 *Id.* § 18-1.3-801(1)(a).

228 *See id.*

229 Alan Prendergast, *The Big Bitch*, WESTWORD (Nov. 22, 2011, 4:00 AM), <https://www.westword.com/news/the-big-bitch-5114789>.

230 *See id.*

231 *Id.*

232 *Id.*

233 *Id.*

234 *Id.*

235 *Id.*

236 *Id.*

237 *Id.*

238 *Id.*

239 *Id.* (quoting Jim O'Connor, the chief public defender in Colorado's 18th Judicial District).

240 *Id.*

241 *See* U.S. CONST. amend. VIII; COLO. CONST. art. II, § 20.

242 *See* *Wells-Yates v. People*, 454 P.3d 191, 201 (Colo. 2019) (noting that “in most instances the General Assembly's determinations regarding the sentencing of habitual criminals will result in constitutionally proportionate sentences”). In that case, the Colorado Supreme Court did remand Ms. Wells-Yates's case for a proportionality review. However, Ms. Wells-Yates's case was exceptional in that she received a seventy-two-year sentence for a triggering offense of possession with intent to sell or distribute seven grams or less of methamphetamine, second-degree burglary and other nonviolent offenses, and her underlying habitual counts stemmed from drug possession convictions. *Id.* at 210-11. There are many other individuals serving extremely lengthy sentences in Colorado as a result of either the habitual offender



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law or a complex interplay between sentencing statutes who will not get that chance for relief because their sentences are more “usual.” And that is by design.

243 See ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL JUSTICE SYSTEM 7 (2019); Samuel Weiss, *Into the Breach: The Case for Robust Noncapital Proportionality Review Under State Constitutions*, 49 HARV. CIV. RTS-CIV. LIBERTIES L. REV. 569, 575, 589-591 (2014).

244 See *Cowen v. People*, 431 P.3d 215, 218 (Colo. 2018) (“[I]f the language in a statute is clear and unambiguous, we give effect to its plain meaning and look no further.” (citing *Lewis v. Taylor*, 375 P.3d 1205, 1209 (Colo. 2016))).

245 *Juhl v. People*, 172 P.3d 896, 899 (Colo. 2007) (en banc) (citing *Qureshi v. Dist. Ct.*, 727 P.2d 45, 46-47 (Colo. 1986) (en banc)).

246 COLO. REV. STAT. § 18-1-408(3) (2020).

247 *Id.* § 18-1.3-406(1)(a).

248 *People v. Chavez*, 2020 COA 80, ¶ 4.

249 *Id.* ¶ 2.

250 *Id.* ¶ 3.

251 *Id.* ¶ 4.

252 *Id.*

253 *Id.* ¶ 16.

254 *Id.*

255 See *Offender Search: Chavez, Nehemiah F.*, COLO. DEPT OF CORR., <https://www.doc.state.co.us/oss/index.php?ref=home> (last visited Jan. 5, 2021).

256 Letter from Nehemiah Filipe Chavez to authors, *supra* note 93. Mr. Chavez is eligible for parole in December of 2072, but is scheduled to see the parole board in November 2072. See *Offender Search: Chavez, Nehemiah F.*, *supra* note 255.

257 See BARKOW, *supra* note 59, at 39.

While it may not be possible to identify the one correct punishment for a particular crime if the theory is retribution, it is possible to identify disproportionate punishments based on how they stack up against other punishments for crimes where there is a consensus view that they are more or less serious.



*Id.*

258 *See Sawyer & Wagner, supra* note 20.

259 SERED, *supra* note 15, at 66 (quoting Cullen et al., *supra* note 43, at 53S).

260 Letter from Nehemiah Filipe Chavez to authors, *supra* note 93.

261 *Id.*

262 *Id.*

263 *Id.*

264 *See* discussion *infra* Sections III.B.2-3.

265 *See* Letter from Dr. Carlos Franco-Paredes, Assoc. Professor of Med., Univ. of Colo., to Policymakers, Judicial Officers, Sheriffs, Wardens, and Parole Boards (Mar. 22, 2020) (on file with authors).

266 Elise Schmelzer, *238 Inmates Test Positive for Coronavirus at Sterling Prison, the Largest Known Outbreak in Colorado*, DENV. POST (Apr. 28, 2020, 5:24 PM), <https://www.denverpost.com/2020/04/28/coronavirus-colorado-sterling-prison-outbreak/>.

267 *See Listings of WHO's Response to COVID-19*, WORLD HEALTH ORG., <https://www.who.int/news-room/detail/29-06-2020-covidtimeline> (last updated Dec. 28, 2020).

268 *See WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 - 11 March 2020*, WORLD HEALTH ORG. (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19—11-march-2020>.

269 Ariel Bleicher & Katherine Conrad, *We Thought It Was Just a Respiratory Virus*, UCSF MAG. (Summer 2020), [https://www.ucsf.edu/magazine/covid-body?fbclid=IwAR2ji2KJSp9mG3Tuq9h\\_yzB1-pkJUVmskxLx19CbjR61UW97IW0NAI-8pXI](https://www.ucsf.edu/magazine/covid-body?fbclid=IwAR2ji2KJSp9mG3Tuq9h_yzB1-pkJUVmskxLx19CbjR61UW97IW0NAI-8pXI). At the time of publication, COVID-19 had infected at least 84,474,195 million people worldwide and caused 1,848,704 deaths. *Coronavirus Disease (COVID-19) Pandemic*, WORLD HEALTH ORG., <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> (last visited Jan. 5, 2021). The United States remains the world epicenter for the disease, with more than 20,732,404 million confirmed cases and the death rate rapidly approaching 352,464 deaths. *United States COVID-19 Cases and Deaths by State*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://covid.cdc.gov/covid-data-tracker/#cases\\_casesper100klast7days](https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days) (last visited Jan. 5, 2021).

270 *See COVID-19: How Does the Virus Spread?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Spread> (last updated Dec. 31, 2020).



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271 *Id.*

272 Holly Yan, *Fauci Says the WHO's Comment on Asymptomatic Spread is Wrong. Here's the Difference Between Asymptomatic and Pre-symptomatic Spread*, CNN (June 10, 2020, 11:44 AM), <https://www.cnn.com/2020/06/09/health/asymptomatic-presymptomatic-coronavirus-spread-explained-wellness/index.html>.

273 *Id.*

274 *Id.*

275 *See, e.g.*, Dave Burdick, *Colorado's Stay-At-Home Order Will End, Gov. Polis Says, Outlining A New Phase of Coronavirus 'Marathon'*, CPR NEWS (Apr. 20, 2020), <https://www.cpr.org/2020/04/20/as-colorado-stay-at-home-order-nears-end-gov-polis-outlines-new-phase-of-coronavirus-marathon/>.

276 *See* Aleks Kajstura & Jenny Landon, *Since you Asked: is Social Distancing Possible Behind Bars?*, PRISON POL'Y INITIATIVE (Apr. 3, 2020), <https://www.prisonpolicy.org/blog/2020/04/03/density/>.

277 *Id.*

278 *Id.*

279 *See* Cary Aspinwall et al., *Coronavirus Transforming Jails Across the Country*, MARSHALL PROJECT (Mar. 21, 2020, 7:00 AM), <https://www.themarshallproject.org/2020/03/21/coronavirus-transforming-jails-across-the-country>.

280 C.J. Ciaramella, *8 of the Top 10 Biggest U.S. Coronavirus Hotspots Are Prisons and Jails*, REASON (Apr. 29, 2020, 3:30 PM), <https://reason.com/2020/04/29/8-of-the-top-10-biggest-u-s-coronavirus-hotspots-are-prisons-and-jails/>.

281 Beth Schwartzapfel et al., *1 in 5 Prisoners in the U.S. has had COVID-19*, 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>.

282 *Criminal Justice Facts*, *supra* note 17.

283 Luke Savage, *America's Prison System is a Danger to Public Health. These Numbers are Proof*, JACOBIN, <https://www.jacobinmag.com/2020/05/prison-jail-incarceration-covid-coronavirus-public-health> (last visited Jan. 5, 2021).

284 *See id.*

285 *Id.*

286 Aspinwall et al., *supra* note 279.



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- 287 Maria Morris, *Are Our Prisons and Jails Ready for COVID-19?*, ACLU (Mar. 6, 2020), <https://www.aclu.org/news/prisoners-rights/are-our-prisons-and-jails-ready-for-covid-19/>.
- 288 *See id.*
- 289 *See, e.g.*, Elise Schmelzer, *Colorado Public Defenders, Advocates Call for Drastic Change to Prevent Coronavirus in Jails, Prisons*, DENV. POST (Mar. 17, 2020, 4:26 PM), <https://www.denverpost.com/2020/03/17/colorado-public-defenders-criminal-justice-coronavirus/>.
- 290 Damini Sharma et al., *Prison Populations Drop by 100,000 During Pandemic*, MARSHALL PROJECT (July 16, 2020), <https://www.themarshallproject.org/2020/07/16/prison-populations-drop-by-100-000-during-pandemic>.
- 291 *Id.*
- 292 Emily Widra & Dylan Hayre, *Failing Grades: States' Responses to COVID-19 in Jails and Prisons*, PRISON POL'Y INITIATIVE (June 25, 2020), [https://www.prisonpolicy.org/reports/failing\\_grades.html](https://www.prisonpolicy.org/reports/failing_grades.html). The study provided each state with a weighted score based on the following criteria: whether “[t]he state Department of Corrections provided testing and personal protective equipment (PPE) to correctional staff and the incarcerated population;” whether “[t]he state reduced county jail populations and state prison populations”; whether “[t]he governor issued an executive order--or the Department of Corrections issued a directive--accelerating the release from state prisons of medically vulnerable individuals and/or those near the end of their sentence”; and whether “[t]he state published regularly updated, publicly available data on COVID-19 in the state prison system.” *Id.* While Colorado's grade of D- was “better” than the majority of states that received a grade of F or F+, a D- is not a desirable grade in any event.
- 293 *Id.* For example, “New Jersey has lowered its prison population by at least 30% during the pandemic, an aggressive reduction that outpaces dozens of other states.” Tom Nobile, *NJ Supreme Court Denies Wide-ranging Release of County Inmates with COVID-stalled Trials*, NORTHJERSEY.COM (Feb. 11, 2021, 5:36 PM), <https://www.northjersey.com/story/news/2021/02/11/nj-supreme-court-denies-release-inmates-covid-stalled-trials/6725947002/>. In California, the Governor ordered the release of up to 8,000 people, but excluded people convicted of violent offenses. Tracey Tully, *About 20% of N.J. Prisoners Could be Freed to Avoid Virus*, NY. TIMES (July 31, 2020), <https://www.nytimes.com/2020/07/30/nyregion/New-jersey-inmate-release-Covid.html>.
- 294 The State's response to reducing jail populations is emblematic. Jails fall under the jurisdiction of local authorities. While the Colorado Supreme Court has supervisory power over lower courts and has the authority to set policy for Colorado's judicial system, *see, e.g., Off. of the State Ct. Adm'r v. Background Info. Servs., Inc.*, 994 P.2d 420, 430-31 (Colo. 1999) (en banc), it declined to take initiative to develop a uniform, statewide approach to reducing jail populations, rejecting an emergency petition filed early on in the pandemic by the Colorado State Public Defenders, Alternate Defense Counsel, and the Colorado Criminal Defense Bar imploring the Court to create a “swift, unified and comprehensive response” to reduce the number of individuals in jails. *See* Lance Benzel, *Colorado Supreme Court Rejects Bid for ‘Immediate’ Action to Reduce Jail Populations*, GAZETTE (Nov. 15, 2020), [https://gazette.com/news/colorado-supreme-court-rejects-bid-for-immediate-action-to-reduce-jail-populations/article\\_1ac5282c-7821-11ea-b3ee-0f9d4a05797d.html](https://gazette.com/news/colorado-supreme-court-rejects-bid-for-immediate-action-to-reduce-jail-populations/article_1ac5282c-7821-11ea-b3ee-0f9d4a05797d.html). In doing so, the Colorado Supreme Court effectively allowed each jurisdiction to create its own rules, rather than taking initiative to ensure a unified response as other state supreme courts have done. *See* Aya Gruber & Benjamin Levin, *Colorado Supreme Court Fails to Protect State Residents as Coronavirus Grows ‘Exponentially’ in Jails*, THE APPEAL (Apr. 17, 2020), <https://theappeal.org/colorado-supreme-court-fails-to-protect-state-residents-as-coronavirus-grows-exponentially-in-jails/> (noting that “[a] growing list of high courts--including those in California, Kentucky, Massachusetts, Montana, New Jersey, Ohio, and South Carolina--have taken proactive measures to address this humanitarian disaster”). Some jails, such as those in Jefferson and Denver counties, significantly decreased their



populations during the early days of the pandemic. See, e.g., Elise Schmelzer, *Colorado's Biggest Jails Drop Population by a Third as Sheriffs Combat Spread of Coronavirus*, DENV. POST (Apr. 1, 2020, 11:34 AM), <https://www.denverpost.com/2020/04/01/colorado-jails-inmate-release-coronavirus-covid/>. Other jurisdictions, such as Weld County, did not. *Id.* In early April 2020, civil rights organizations sued the Weld County Sheriff in federal court for failing to take sufficient precautions to prevent a fast-moving COVID-19 outbreak inside the jail. See *Weld County Jail, Following Federal Judge's Orders, Identifies 89 Inmates Vulnerable to Coronavirus*, COLO. SUN (May 20, 2020, 2:36 PM), <https://coloradosun.com/2020/05/20/weld-county-jail-coronavirus-outbreak-colorado/>; see also *Carranza v. Reams*, No. 20-cv-00977-PAB, 2020 WL 2320174, at \*1-2 (D. Colo. May 11, 2020). The suit resulted in a federal court ruling ordering the Weld County Sheriff to provide special protections for its medically vulnerable incarcerated population. *Id.* at \*15.

295 Colorado's total jail population during the fourth quarter of 2020 was approximately 20% lower than it was during the first quarter of 2020. See *H.B. 19-1297 Jail Data Dashboard: Measures by Time*, COLO. DEP'T PUB. SAFETY, [https://cdpsdocs.state.co.us/ors/Data/Data\\_Instruments/HB1297/Dashboard/HB19-1297v3.html](https://cdpsdocs.state.co.us/ors/Data/Data_Instruments/HB1297/Dashboard/HB19-1297v3.html) (last visited Feb. 8, 2021) (reflecting that the reported statewide jail population was 11,698 during Q1 (Jan. 2020), and 9,131 during Q4 (Oct. 2020)). Colorado's prison population has declined by approximately 16% between February 2020 and January 2021. Alex Burness, *Colorado's Prison Population has Declined During Pandemic, but is Projected to Tick Upward Soon*, DENV. POST (Jan. 2, 2021, 6:00 AM), <https://www.denverpost.com/2021/01/02/colorados-prison-population-declined-pandemic/>.

296 In addition to the CDOC releasing an unspecified number of people “deemed to be low-risk,” a 2019 bill to reduce penalties on drug possession charges became law “and its early effects roughly coincided with the arrival of coronavirus in Colorado. Burness, *supra* note 295. Moreover, the pandemic has significantly curtailed court operations, including trials and sentencings, and there is a significant backlog of cases that have not yet been processed through the legal system. *Id.*

297 *Id.*

298 See, e.g., Christopher Osher & Evan Wyloge, *Colorado Corrections Facilities see High Rates of COVID Infections; Hundreds of Prisoner Deaths Predicted*, GAZETTE (Nov. 15, 2020), [https://gazette.com/news/homicides/colorado-corrections-facilities-see-high-rates-of-covid-infections-hundreds-of-prisoner-deaths-predicted/article\\_6eb6b288-9c8a-11ea-9527-8fff37da8c85.html](https://gazette.com/news/homicides/colorado-corrections-facilities-see-high-rates-of-covid-infections-hundreds-of-prisoner-deaths-predicted/article_6eb6b288-9c8a-11ea-9527-8fff37da8c85.html); Conor McCue, *Jails & Prisons Among Many Active COVID-19 Outbreak Sites in Colorado*, CBS DENV. (Nov. 5, 2020, 11:03 PM), <https://denver.cbslocal.com/2020/11/05/colorado-jails-prisons-active-coronavirus-outbreaks/>.

299 Allison Sherry, *Mask Rules in Jails Vary From County to County as Pandemic Worsens in Colorado*, COLO. SUN (Nov. 24, 2020, 5:45 AM), <https://coloradosun.com/2020/11/24/masks-covid-jails-colorado-outbreaks/>.

300 *CDOC COVID-19 Offender Case Dashboard*, COLO. DEPT. OF CORR., <https://www.colorado.gov/pacific/cdoc/covid-19-faq-and-updates> (last visited Jan. 21, 2021).

301 *Id.*

302 *Id.*

303 *Id.*



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- 304 See COLO. CONST. art. IV, § 2; COLO. REV. STAT. §§ 24-33.5-701 to -717 (2020).
- 305 Colo. Exec. Order No. D 2020 016 (Mar. 25, 2020).
- 306 *Id.*
- 307 Colo. Exec. Order No. D 2020 043 (Apr. 23, 2020).
- 308 Memorandum from Dean Williams, Exec. Dir., Colo. Dept. of Corr., Colorado Executive Order D 2020 043 Extending 016 at 2 (May 6, 2020) (on file with authors).
- 309 Elise Schmelzer, *Colorado Released 290 Inmates Under Governor's Executive Order-Less Than 2% of Prison Population*, DENV. POST (May 28, 2020, 9:12 AM), <https://www.denverpost.com/2020/05/28/colorado-prison-release-coronavirus/>.
- 310 Colorado Department of Corrections' response to Christie Dormer's Colo. Open Records Act request concerning Prisoners Over Age 60 (Apr. 29, 2020) (on file with authors).
- 311 See Sawyer & Wagner, *supra* note 20.
- 312 Letter from C.G. to authors (July 5, 2020) (on file with authors).
- 313 *Advocates to Governor Polis: Failure to Renew Prison Executive Order Will Cause Needless Suffering and Death*, ACLU OF COLO. (May 27, 2020), <https://aclu-co.org/advocates-to-governor-polis-failure-to-renew-prison-executive-order-will-cause-needless-suffering-and-death/>.
- 314 *Colorado Becomes 22nd State to Abolish Death Penalty*, DEATH PENALTY INFO. CTR. (March 24, 2020), <https://deathpenaltyinfo.org/news/colorado-becomes-22nd-state-to-abolish-death-penalty>.
- 315 See Colo. Exec. Ord. D 2020 078 (May 22, 2020) (allowing certain portions of Colo. Exec. Ord. 2020 016 to expire).
- 316 Jesse Paul, *Colorado Inmate Released on Parole Because of Coronavirus Arrested in Fatal Denver Shooting*, COLO. SUN (May 15, 2020, 2:47 PM), <https://coloradosun.com/2020/05/15/cornelius-haney-colorado-prison-release-coronavirus-shooting/>.
- 317 See LINDA HARRISON, OFF. OF RSCH. & STAT., ADULT AND JUVENILE CORRECTIONAL POPULATIONS FORECASTS 10-11 (2018) (showing that 930 parolees returned to Colorado prisons in 2017 while 7,350 were released); see also PFAFF, *supra* note 6, at 170 (noting that in the court of public opinion, “[t]he more mundane cases are ignored, even though they matter so much more in the aggregate”).
- 318 Chris Vanderveen, *Parolee Accused of Murder Left Prison Early Due to Ongoing COVID Response by State*, 9NEWS DENV. (May 15, 2020, 10:17 PM), <https://www.9news.com/article/news/investigations/colorado-parolee-accused-of-denver-murder-left-prison->





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early-due-to-ongoing-covid19-response-by-state/73-8f52ade4-8586-4f86-8c5d-f52ae8093d0f (quote available within the embedded video).

319 See Elise Schmelzer, *Suspect in Denver Murder was Paroled Due to Coronavirus Concerns at Colorado Prisons 3 Weeks Before Killing*, DENV. POST (May 15, 2020, 4:40 PM), <https://www.denverpost.com/2020/05/15/colorado-coronavirus-prison-release-murder/>.

320 See Class Action Complaint for Declaratory and Injunctive Relief, *Winston et al v. Polis*, 2020CV31823 (Denv. Dist. May 28, 2020), <https://acluco-wpengine.netdna-ssl.com/wp-content/uploads/2020/05/FINAL-DOC-Complaint-.pdf>

321 *Id.* at 27-28 (discussing prayer for relief).

322 See Jesse Paul, *Colorado Governor Defends Prison System, Accuses ACLU of Using Coronavirus to Push its Agenda*, COLO. SUN (May 28, 2020, 3:04 PM), <https://coloradosun.com/2020/05/28/jared-polis-coronavirus-briefing-may26-prisons-inmates> (discussing Governor Polis's response to the ACLU's lawsuit).

323 *Id.* Ultimately, the CDOC agreed to settle the lawsuit in November 2020, but the Governor did not. The ACLU and the CDOC asked the court to accept a proposed consent decree that, among other things, requires the CDOC to improve access to masks and hygiene supplies, provides for an independent expert to advise the CDOC on how to develop policies and protocols for medically vulnerable incarcerated people, requires the CDOC to prioritize safe housing for those vulnerable people, and requires increased testing and continuous information sharing regarding statistics related to COVID-19. See *ACLU and DOC Resolve Class Action COVID-19 Lawsuit, While Case Against Governor Continues*, ACLU COLO. (Nov. 13, 2020), <https://acluco.org/aclu-and-doc-resolve-class-action-covid-19-lawsuit-while-case-against-governor-continues/>; Michael Karlik, *ACLU, Department of Corrections Reach Settlement Over Prison Coronavirus Protocols*, COLO. POLITICS (Dec. 18, 2020), [https://www.coloradopolitics.com/news/aclu-department-of-corrections-reach-settlement-over-prison-coronavirus-protocols/article\\_95751454-25e8-11eb-b76d-57a49c492be2.html](https://www.coloradopolitics.com/news/aclu-department-of-corrections-reach-settlement-over-prison-coronavirus-protocols/article_95751454-25e8-11eb-b76d-57a49c492be2.html). After that portion of the lawsuit settled, ACLU attorneys then filed an amended complaint alleging that the Governor was violating the Colorado Constitution by failing to use his executive authority to reduce the prison population in light of the dangers to those held in prison during the COVID-19 pandemic. See *Amended Class Action Complaint for Declaratory and Injunctive Relief, or in the Alternative, Mandamus Relief, Winston v. Polis*, No. 20CV31823 (Colo. Dist. Ct. Nov. 13, 2020). However, in late December 2020, the court dismissed the portion of the lawsuit against the Governor, concluding it did not have the power to require the Governor to take actions within his discretion as the head of the executive branch. Lucy Haggard, *Judge Dismisses ACLU Lawsuit Against Gov. Polis Seeking to Reduce Prison Population During COVID-19*, COLO. SUN (Dec. 30, 2020, 10:44 AM), <https://coloradosun.com/2020/12/30/judge-dismisses-aclu-lawsuit-polis-prisons-covid-19/>. Thus, while the lawsuit resulted in some improvements to the CDOC's efforts to mitigate the spread of COVID-19, it did not result in the release of significant numbers of medically vulnerable incarcerated individuals.

324 Peter Baker, *Bush Made Willie Horton an Issue in 1988, and the Racial Scars are Still Fresh*, N.Y. TIMES (Dec. 3, 2018), <https://nyti.ms/2zEVsHQ>; Doug Criss, *This is the 30-year-old Willie Horton Ad Everybody is Talking About Today*, CNN (Nov. 1, 2018, 6:17 PM), <https://www.cnn.com/2018/11/01/politics/willie-horton-ad-1988-explainer-trnd/index.html>.

325 See Baker, *supra* note 324.

326 PFAFF, *supra* note 6, at 170.



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327 Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited*, MARSHALL PROJECT (May 13, 2015, 6:37 PM), <https://www.themarshallproject.org/2015/05/13/willie-horton-revisited>.

328 *Id.*

329 *See Baker, supra* note 324.

330 *See Schwartzapfel & Keller, supra* note 327 (discussing a letter in which prisoners requested lawmakers treat Horton as an isolated incident).

331 *Id.*

332 Mr. Horton's mug shot hung on the wall of the George H. W. Bush's campaign headquarters. *Id.* Once he became president, in 1989, Bush said, “[w]e need more jails, more prisons, more courts and more prosecutors.” *See id.* Then-Senator Joe Biden stated that one of his objectives “is to lock Willie Horton up in jail.” *Id.* President Clinton then fueled mass incarceration with his 1994 crime bill. *See id.*

333 Isaac Stanley-Becker, *Early Vaccination in Prisons, a Public Health Priority, Proves Politically Charged*, WASH. POST (Jan. 2, 2021), <https://www.washingtonpost.com/health/2021/01/02/covid-vaccine-prisons/>.

334 *Id.*; John Ingold, *Colorado's Governor Says Prisoners Won't be Prioritized for a Corona-virus Vaccine. A State Plan Outlines Otherwise*, COLO. SUN (Dec. 2, 2020), <https://coloradosun.com/2020/12/02/colorad-coronavirus-vaccine-polis-prisoners/>.

335 Stanley-Becker, *supra* note 333.

336 *Id.*

337 George Brauchler, *Brauchler: Prioritizing Prisoners Over the Elderly for a COVID Vaccine is Wrong in Every Way*, DENV. POST (Nov. 29, 2020), <https://www.denverpost.com/2020/11/29/covid-vaccine-colorado-prisoners-elderly-polis/>.

338 *Id.*

339 *Id.*

340 *Id.*

341 Stanley-Becker, *supra* note 333.

342 *Id.*



343 *Id.*

344 *Id.*

345 *Id.*

346 *Id.*; see also Kajstura & Landon, *supra* note 276.

347 David Montgomery, *Prioritizing Prisoners for Vaccines Stirs Controversy*, PEW TRUSTS (Jan. 5, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/01/05/prioritizing-prisoners-for-vaccines-stirs-controversy>.

348 *Id.*

349 See Vanderveen, *supra* note 318.

350 As Pfaff states, politicians are quick to absorb “the broader point: that ‘in a [low-information, high-salience] world, no amount of success can top one spectacular failure.’” PFAFF, *supra* note 6, at 171.

351 See Brauchler, *supra* note 337.

352 See Stanley-Becker, *supra* note 333.

353 See discussion *supra* Section I.B.2.

354 See discussion *supra* Section II.A.

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

356 Sadly, while some incarcerated people dream of being reunited with their families before it is too late, many people who have been incarcerated for decades no longer have family support (mass incarceration results in family separation), or any other community support upon release. Not only does this reality speak to the devastating consequences of lengthy sentences, but it also speaks to the lack of funding for reentry service. See Sarah Figgatt, *Reentry Reforms are More Critical Than Ever Amid the Coronavirus Pandemic*, CTR. FOR AM. PROGRESS (Apr. 30, 2020, 9:03 AM), <https://www.americanprogress.org/issues/poverty/news/2020/04/30/484168/reentry-reforms-critical-ever-amid-coronavirus-pandemic/> (“Policymakers must couple early release provisions with reentry reforms; failure to do so merely transitions formerly incarcerated people from one harmful environment to another, jeopardizing both their and their communities’ health, safety, and security during a global pandemic and economic crisis.”).



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- 357 Arundhati Roy, *The Pandemic is a Portal*, FIN. TIMES (April 3, 2020), <https://www.ft.com/content/10d8f5e8-74eb-11ea-95fe-fcd274e920ca>.
- 358 Letter from Samuel Mullikin, Resident, Denver Diagnostic & Reception Ctr., to authors (July 5, 2020) (on file with authors).
- 359 Jack Murray, *Morgan Park Academy Students Share Impact of Lessons Learned on Civil Rights Tour of the South*, CHI. TRIB. (July 28, 2020, 8:00 AM), <https://www.chicagotribune.com/suburbs/daily-southtown/ct-sta-bevery-civil-rights-tour-st-0729-20200728-cn5xqu3axvdbpl6mjw36z32c2m-story.html>.
- 360 Maureen Corrigan, *'Let the People See': It Took Courage to Keep Emmett Till's Memory Alive*, NPR (Oct. 30, 2018, 1:24 PM), <https://www.npr.org/2018/10/30/660980178/-let-the-people-see-shows-how-emmett-till-s-murder-was-nearly-forgotten>.
- 361 *Id.*
- 362 *Id.*
- 363 *Id.*
- 364 *Id.*
- 365 *Id.*
- 366 *Id.*
- 367 Jennifer Lackey, *The Measure of a Country is how it Treats its Prisoners. The U.S. is Failing.*, WASH. POST (Feb. 9, 2019), [https://www.washingtonpost.com/opinions/the-measure-of-a-country-is-how-it-treats-its-prisoners-the-us-is-failing/2019/02/06/8df29acc-2a1c-11e9-984d-9b8fba003e81\\_story.html](https://www.washingtonpost.com/opinions/the-measure-of-a-country-is-how-it-treats-its-prisoners-the-us-is-failing/2019/02/06/8df29acc-2a1c-11e9-984d-9b8fba003e81_story.html).
- 368 *Id.*
- 369 *See Savage, supra* note 283.
- 370 *See, e.g.,* Meera Santhanam, *COVID-19 and the Case for Prison Abolition*, CHI. MAROON (July 29, 2020), <https://www.chicagomaroon.com/article/2020/7/29/covid-19-case-prison-abolition>.
- 371 *Id.*
- 372 *A State-by-State Look at Coronavirus in Prisons*, MARSHALL PROJECT, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> (last updated Dec. 18, 2020).



- 373 See, e.g., Joseph Neff & Dan Kane, *Freed From Prison, Dead from COVID-19, not Even Counted*, MARSHALL PROJECT (July 10, 2020), <https://www.themarshallproject.org/2020/07/10/freed-from-prison-dead-from-covid-19-not-even-counted> (“Across the country, guards have been linked to outbreaks in their communities; releasing incarcerated people without testing them also exposed people on the outside.”).
- 374 See HANEY, *supra* note 33, at 11.
- 375 See discussion *supra* Section I.B.2; GILLIGAN, *supra* note 87, at 24. As Senator Chris Murphy argues in his new book, we can trace the origins of American violence directly to racism and slavery. See Anand Giridharadas, *America's Real Law-and-Order Problem is Racism*, THE.INK (Sept. 15, 2020), <https://the.ink/p/americas-real-law-and-order-problem>. “[F]rom its earliest days America committed itself to an economic model dependent on chattel slavery.” *Id.* As a result, “it took just massive, mind-numbing amounts of violence to keep America's economy running. It stands to reason that we became anesthetized to that violence during that period. I don't think that we've ever got our sense of feeling back.” *Id.* Today, the United States “is the most violent country in the advanced world.” *Id.* Turning the “law-and-order issue on its head,” Murphy argues that “America's real law-and-order problem is, and always has been, racism.” *Id.*
- 376 GILLIGAN, *supra* note 87, at 24.
- 377 Gilligan brilliantly explains why understanding violence is important as a public health issue, and does not equate to condoning it:
- “Condemning” violence is as irrelevant as it would be to “condemn” cancer or heart disease. And yet no one supposes that because doctors do not “condemn” or “punish” cancer and heart disease (or the people who suffer from those life-threatening illnesses) that they are somehow “soft on cancer” or “permissive” toward heart disease.
- Id.* at 25.
- 378 See HANEY, *supra* note 33, at 3; SERED, *supra* note 15, at 11.
- 379 See discussion *supra* Section II.B.
- 380 SERED, *supra* note 15, at 11.
- 381 DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 30--31 (1999).
- 382 *Id.* at 31. Desmond Tutu explains *ubuntu* as meaning, “[m]y humanity is caught up, is inextricably bound up, in yours.” *Id.*
- 383 CHARLES VILLA-VICENCIO, WALK WITH US AND LISTEN: POLITICAL RECONCILIATION IN AFRICA 124 (2009) (emphasis added).
- 384 Letter from Samuel Mullikin to authors, *supra* note 358.
- 385 *Id.*



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- 386 PFAFF, *supra* note 6, at 186.
- 387 *See id.* at 190-96.
- 388 Letter from Sean Marshall to authors (Sept. 12, 2020) (on file with authors).
- 389 *See* PFAFF, *supra* note 6, at 190-96.
- 390 Letter from Samuel Mullikin to authors, *supra* note 358.
- 391 Letter from M.C. to authors, *supra* note 166.
- 392 *See* WESTERN, *supra* note 48, at 2-3.
- 393 *See, e.g.*, HANEY, *supra* note 33, at 6-7, 37-38. As Western observes: “Where threats of violence and bodily harm are related less to the individual dispositions of [those who commit acts of violence] than to social environment, justice is more readily found in the abatement of violent environments than in the punishment of violent people. Here, criminal justice becomes social justice.” WESTERN, *supra* note 48, at 183.
- 394 Ruth Wilson Gilmore & James Kilgore, *The Case for Abolition*, MARSHALL PROJECT (June 19, 2019), <https://www.themarshallproject.org/2019/06/19/the-case-for-abolition>.
- 395 Angel Parker, *What About the Rapists and Murderers?*, MEDIUM (June 24, 2020), <https://medium.com/@amparker/what-about-the-rapists-and-murderers-7a81955b772c>.
- 396 ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 107 (2003).
- 397 *See* Brian Eason, *What You Need to Know About TABOR, Gallagher, Amendment 23 and the Hidden Forces that Constrain Spending in Colorado*, COLO. SUN (Feb. 1, 2019, 5:00 AM), <https://coloradosun.com/2019/02/01/colorado-tabor-gallagher-amendment-23-explained/>.
- 398 *Id.*
- 399 *Id.*
- 400 *Id.*
- 401 John Frank, *Colorado's Prison Budget Nears \$1 Billion as Inmate Population Grows. Frustrated Leaders Wanted Action Yesterday.*, COLO. SUN (Feb. 15, 2019, 4:55 AM), <https://coloradosun.com/2019/02/15/colorados-prison-budget-nears-1-billion-as-inmate-population-grows-frustrated-leaders-want-action-yesterday/>.



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- 402 Michael Booth & John Frank, *With Colorado's Budget in Tatters, Advocates Worry the Public Safety Net Will Further Fray*, COLO. SUN (May 6, 2020, 3:00 AM), <https://coloradosun.com/2020/05/06/colorado-budget-cuts-human-services-coronavirus/>.
- 403 Letter from R.F. to authors (Sept. 17, 2020) (on file with authors).
- 404 Howard Zehr, *Restorative or Transformative Justice?*, ZEHR INST. FOR RESTORATIVE JUST. (Mar. 10, 2011), <https://emu.edu/now/restorative-justice/2011/03/10/restorative-or-transformative-justice/>. S.B. poses similar questions in her letter to us, asking, “who is responsible? Is it the offender? Is it the justice system? Is it society? Is it a combination of some or all?” Letter from S.B. to authors (July 4, 2020) (on file with authors). Transformative justice then situates offenses within a political framework, understanding that offenses often occur due to broader societal failings. Thus, true repair and true accountability require political actions to address underlying causes of violence such as social inequities as racism.
- 405 Mia Mingus, *Transformative Justice: A Brief Description*, TRANSFORMHARM.ORG, <https://transformharm.org/transformative-justice-a-brief-description/> (last visited Jan. 7, 2021).
- 406 Words inspired by Elisabeth Epps's *Challenging Discrimination Award* acceptance speech. See Elisabeth Epps, *Challenging Discrimination Award Acceptance Speech at the Civil Rights Education and Enforcement Center's Virtual Benefit* (Sept. 17, 2020) (on file with Civil Rights Education and Enforcement Center).
- 407 SERED, *supra* note 15, at 12.
- 408 See Zehr, *supra* note 404.
- 409 Emily Yoffe, *Innocence is Irrelevant*, ATLANTIC (Sept. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/>.
- 410 See Zehr, *supra* note 404.
- 411 HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 18--19 (2002).
- 412 Paul Tullis, *Can Forgiveness Play a Role in Criminal Justice?*, N.Y. TIMES MAG. (Jan. 4, 2013), [https://www.nytimes.com/2013/01/06/magazine/can-forgiveness-play-a-role-in-criminal-justice.html?pagewanted=all&\\_r=0](https://www.nytimes.com/2013/01/06/magazine/can-forgiveness-play-a-role-in-criminal-justice.html?pagewanted=all&_r=0).
- 413 See Ashlee George, *Circle by Design*, in *SPACE FOR RESTORATIVE JUSTICE* 15, 16-19 (Emily Abruzzo et al. eds., 2019).
- 414 *Id.* at 18.
- 415 ZEHR, *supra* note 411, at 59.



416 *Id.*

417 Anjana Nagarajan-Butaney, *MacArthur Genius, sujatha baliga, and Restorative Justice*, INDIA CURRENTS (Feb. 10, 2020), <https://indiacurrents.com/macarthur-genius-sujatha-baliga-and-restorative-justice/>.

418 Shannon Sliva et al., *Fulfilling the Aspirations of Restorative Justice in the Criminal System? The Case of Colorado*, 28 KAN. J.L. & PUB. POL'Y 456, 461 (2019).

419 *Id.* These meetings are “variously called victim offender reconciliation programs (VORP), victim offender mediation (VOM), victim offender dialogue (VOD), and victim offender mediated dialogue (VOMD).” *Id.*

420 *Id.* at 462. Restorative justice models can also be national in scope, such as South Africa's Truth and Reconciliation Commission. *See, e.g.*, Laura McLeod, *Reconciliation Through Restorative Justice: Analyzing South Africa's Truth and Reconciliation Process*, BEYOND INTRACTABILITY, <https://www.beyondintractability.org/library/reconciliation-through-restorative-justice-analyzing-south-africas-truth-and-reconciliation> (last visited Jan. 7, 2021).

421 Sliva et al., *supra* note 418, at 463-64.

422 *Id.* at 501.

423 SERED, *supra* note 15, at 13.

424 *Id.* at 12.

425 *Id.* at 13.

426 *See* discussion *infra* Section III.B.3.c.

427 TEDx Talks, *How Restorative Justice Could End Mass Incarceration / Shannon Sliva / TEDxMileHigh*, YOUTUBE (July 18, 2019), <https://www.youtube.com/watch?v=wPA-p6UUD14>.

428 *See* HANEY, *supra* note 33, at 4; Sliva et al., *supra* note 418, at 470-77.

429 “[T]he greatest challenge is to stop sorting who receives relief based on a divide between violent and nonviolent offenses.” Kushner, *supra* note 68. As Udi Ofer, director of the Justice Division of the ACLU's National Political and Advocacy Department, explained to the New York Times, “To genuinely end mass incarceration in America, we have to transform how the justice system responds to *all* offenses .... Politically, this is a hard conversation. But morally, it's clear what the direction must be: dismantling the system.” *Id.* (internal quotations omitted).

430 *See* Sarah Stillman, *Will the Coronavirus Make us Rethink Mass Incarceration?*, NEW YORKER (May 18, 2020), <https://www.newyorker.com/magazine/2020/05/25/will-the-coronavirus-make-us-rethink-mass-incarceration>.





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- 431 Letter from Samuel Mullikin to authors, *supra* note 358.
- 432 *See* Stillman, *supra* note 430.
- 433 *See id.* Raj Jayadev, the founder of Silicon Valley De-Bug, a grassroots organization that helps incarcerated people fight their cases, explains, “[b]y far, the most effective driver of change right now has come directly from those locked up, on the inside .... Their voices, their demands for survival.” *Id.*
- 434 Letter from Tatianna Manon-Davis to authors, *supra* note 34.
- 435 Letter from Sondia Roberts to authors (Sept. 17, 2020) (on file with authors).
- 436 *See* PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 45-46,49-50,60 (1968).
- 437 *Id.* at 60.
- 438 *Id.*
- 439 *See* Lackey, *supra* note 367.
- 440 *See id.*
- 441 Letter from S.B. to authors, *supra* note 404.
- 442 BRYAN STEVENSON, JUST MERCY 17-18 (2014).
- 443 Brandi Santala, a former volunteer with Redemption Road CrossFit program at Limon Correctional Facility discussed below in Section III.B.2.b, writes about her own powerful experience with proximity:

I consider myself to have been one of the least likely people to experience the transformation that occurred from my experience [with] proximity .... I grew up with a father that was an FBI agent and is now a small county Republican judge. At home, we were basically told there are good guys and bad guys, and I just accepted it as truth, readily adopting the notion that it wasn't my concern and the system is just. However, [as an adult], when the opportunity presented itself through my favorite activity, CrossFit, to go into the prison, I was intrigued and ready to challenge my beliefs .... It didn't take long to realize I was wrong. As I got to know some of the men through the program, they would tell me a bit about themselves. I heard about their wives, their kids, their hobbies, their jobs, their family visits and what they couldn't wait to do when they got out. We suffered together through the CrossFit workouts, as we grumbled, supported and cheered each other on .... I [saw] how loved they are by people who know them as sons, brothers, husbands, and boyfriends and who are navigating this system the best they can .... I do whole-heartedly believe that if these experiences can change me like they did, anything is possible.

E-mail from Brandi Santala to Kristen Nelson (Sept. 23, 2020, 11:12 PM MST) (on file with authors).



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- 444 See, e.g., *What You can Expect From Your Law School Experience*, LAW SCH. ADMISSION COUNCIL, <https://www.lsac.org/discover-law/what-you-can-expect-your-law-school-experience> (last visited Jan. 7, 2021).
- 445 Temple University teaches a training program on conducting “Inside-Out” classes in prisons. The program teaches professors to create classes combining university students and people who are incarcerated. The results have been profound. See, e.g., Cay Leytham-Powell, *Learning About Social Justice from the Inside Out*, COLO. ARTS & SCIS. MAG. (May 6, 2019), <https://www.colorado.edu/asmagazine/2019/05/06/prison-education-social-justice-inside-out>; *Studying Criminal Justice From the Inside Out*, YALE L. SCH. (June 27, 2019), <https://law.yale.edu/yls-today/news/studying-criminal-justice-inside-out>.
- 446 The Harvard Blackletter Law Journal is one such publication. The Journal “is a forum for activists, lawyers, those who are or who have been incarcerated, scholars, and others to confront cutting-edge issues facing Black communities.” *About Blackletter*, HARV. BLACKLETTER L.J., <https://harvardblackletter.org/about/> (last visited Feb. 12, 2021). The journal features work in a variety of different mediums, including “poetry, essays, visual art, songs, and other forms of expression.” *Id.*
- 447 Formerly incarcerated people, or “leaders with conviction” have created important policy recommendations to reduce incarceration. See SUSAN STURM & HARAN TAE, CTR. FOR INSTITUTIONAL & SOC. CHANGE, *LEADING WITH CONVICTION: THE TRANSFORMATIVE ROLE OF FORMERLY INCARCERATED LEADERS IN REDUCING MASS INCARCERATION 1--3* (2017). However, there are virtually no opportunities for people who are currently incarcerated, who are most directly impacted by criminal justice legislation, to have a voice in criminal justice policy.
- 448 See NICOLE D. PORTER, THE SENT’G PROJECT, *VOTING IN JAILS* 5, 8 (2020).
- 449 See *TED<sup>x</sup> San Quentin: Life Revealed*, TED, <https://www.ted.com/tedx/events/13459> (last visited Jan. 7, 2021) (providing details on the event that occurred on January 22, 2016).
- 450 Rahsaan Thomas, *TEDx is Coming to San Quentin*, SAN QUENTIN NEWS (Dec. 1, 2015), <https://sanquentinnews.com/tedx-san-quentin/> (quoting Delia Cohen, former Clinton Administration White House staffer and event sponsor).
- 451 The Civil Rights Summit is an event organized by University of Denver law students that brings together students, activists, attorneys, and organizers to discuss issues related to environmental justice, immigration justice, criminal justice, and economic justice. See *The 21 Best Events in Denver, January 20 to January 26*, WESTWORD (Jan. 20, 2020, 5:00 AM), <https://www.westword.com/arts/best-things-to-do-in-denver-this-week-january-20-to-26-2020-11609460?fbclid=IwAR0y95NFoquMF7roadWQLRZdjqlmZb0Zke9qZ>. Individuals who are incarcerated have lived experience with these issues and could offer a valuable and unique perspective to other participants. Holding the Summit in a prison would provide an opportunity for incarcerated people to connect with community members and learn about ongoing scholarship and advocacy efforts aimed at addressing these issues.
- 452 Neil Barsky, *How to Fix Our Prisons? Let the Public Inside*, MARSHAL PROJECT (Dec. 17, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/12/17/how-to-fix-our-prisons-let-the-public-inside>.
- 453 Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650, 1652 (2019).



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- 454 Letter from Sondia Roberts to authors, *supra* note 435.
- 455 *See, e.g.*, Sliva et al., *supra* note 418, at 458-59.
- 456 *See id.* at 490-93.
- 457 *See id.*
- 458 *See* discussion *supra* Section I.A (explaining that prison is characterized by the same “four key drivers” as violence: “shame, isolation, exposure to violence, and a diminished ability to meet one’s economic needs.” (quoting SERED, *supra* note 15, at 67)). This is no accident--the rise of mass incarceration in the United States beginning in the 1970s occurred simultaneously with a widely-recognized shift in the perceived purpose of imprisonment from rehabilitation to punishment. *See, e.g.*, Sanford H. Kadish, *Rehabilitation Revisited*, 35 STAN. L. REV. 363, 363 (1983) (discussing the decline of the “rehabilitative ideal” during the 1970s and noting, “[a] wide segment of critics--academics, correctional people, prosecutors, defense lawyers, and legislators--has come to regard reform ... as an illusory and dangerous ideal”).
- 459 Letter from Samuel Mullikin to authors, *supra* note 358.
- 460 “Seven Habits on the Inside” is a program that was started over ten years ago in the Colorado Department of Corrections by the Chaplaincy program and is based on the book, *7 Habits of Highly Effective People* by Dr. Stephen R. Covey. The program, which is offered in many DOC facilities, is typically facilitated by incarcerated persons who serve as “Core Group Members” who not only help teach the course but serve as role models for 7Habits behavior and attitudes within the facility. *See* Gene Atherton, “*Seven Habits on the Inside*”: Provides Hope to Inmates, CORRECTIONS.COM (Oct. 3, 2011), <http://www.corrections.com/news/article/29272-seven-habits-on-the-inside-provides-hope-to-inmates>.
- 461 Letter from Samuel Mullikin to authors, *supra* note 358.
- 462 *Id.*
- 463 William S. Graham, I See Prison (Summer 2020) (unpublished poem) (on file with authors).
- 464 *See, e.g.*, WESTERN, *supra* note 48, at 183 (arguing that in the aftermath of violence, courts and correctional agencies should “recogniz[e] the histories of victimization and trauma of those who have most recently [caused harm] as well as attend[] directly to the harms suffered by victims, rather than through the convoluted conceit of punishing” the party who caused the harm).
- 465 One example is Norway, whose correctional system underwent a series of reforms in the early 1990s to focus on rehabilitation and saw declines in recidivism rates from 60%-70% to 20% as a result. *How Norway Turns Criminals into Good Neighbours*, BBC NEWS (July 6, 2019), <https://www.bbc.com/news/stories-48885846>.
- 466 Brandon Moss, *Dean Williams Pushes for a Culture Change*, INSIDE REP., July 2020, at 1, 1.
- 467 *See id.* at 1-2.



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- 468 Jack Healy, *How a Prison Play Goes on Tour*, N.Y. TIMES (Oct. 11, 2019), <https://www.nytimes.com/2019/10/11/theater/prison-arts-colorado.html>.
- 469 See Madi Skahill, *Incarcerated Women Star in the Newman Center's Most Anticipated Holiday Performance, A Christmas Carol*, 5280 MAG. (Dec. 12, 2019), <https://www.5280.com/2019/12/incarcerated-women-star-in-the-newman-centers-most-anticipated-holiday-performance-a-christmas-carol/>.
- 470 See *id.*
- 471 See *Our Work*, UNIV. OF DENV. PRISON ARTS INITIATIVE, <https://liberalarts.du.edu/prison-arts/our-work> (last visited Jan. 7, 2021).
- 472 Letter from T.M. to authors (July 10, 2020) (on file with authors). T.M.'s description of the impact the program has had for him is supported by empirical research. A recently published study in the *Justice Evaluation Journal* evaluating a set of semester-long DU PAI workshops found that participation in the program was associated with “social emotional outcomes such as community connection, skill attainment, and self-efficacy.” Danielle Maude Littman & Shannon Sliva, “*The walls came down: A Mixed-Methods Multi-Site Prison Arts Program Evaluation*,” *JUST. EVALUATION J.*, Jan. 7, 2021, at 1.
- 473 Letter from Damian Arguello to authors, *supra* note 104.
- 474 *Id.*
- 475 See Brian Maass, *CrossFit In Prison: Inmates Finding Strength, Redemption*, CBS4 DENV. (Mar. 18, 2019, 11:59 PM), <https://denver.cbslocal.com/2019/03/18/crossfit-prison-inmates-finding-strength-redemption/>.
- 476 Jessica Danger, *Barbells Behind Bars: First Ever Prison CrossFit Competition*, MORNING CHALK UP (Jan. 1, 2020), <https://morningchalkup.com/2020/01/01/barbells-behind-bars-first-ever-prison-crossfit-competition/>.
- 477 *Id.*
- 478 *Id.*
- 479 Letter from Damian Arguello to authors, *supra* note 104; see also Maass, *supra* note 475. Importantly, programs like DU PAI and Redemption Road have also created opportunities for authentic moments of interpersonal connection between incarcerated people and the outside world. As discussed in Section III.B.1.b, this is one of the most powerful methods of changing hearts and minds and pushing back against our human tendency to define people we do not know exclusively by their actions, known as “fundamental attribution error.” PFAFF, *supra* note 6, at 145-46. The hope, then, is that these programs can connect with broader efforts towards liberation.
- 480 Letter from M.C. to authors (Dec. 15, 2020) (on file with authors) (providing “Pathway to Freedom” program information).



481 *Id.*

482 *Id.*

483 Letter from M.C. to authors, *supra* note 480.

484 Letter from R.A. to authors (Dec. 11, 2020) (on file with authors).

485 *Id.*

486 *Denver Reception & Diagnostic Center*, PRISONPRO, <https://www.prisonpro.com/content/denver-reception-diagnostic-center> (last visited Feb. 12, 2021).

487 Letter from R.A. to authors, *supra* note 484.

488 Joel Warner, *Colorado's New Prison-Gang Program Draws from Inmate Efforts*, WESTWORD (Aug. 9, 2017, 8:43 AM), <https://www.westword.com/news/colorado-department-of-corrections-new-prison-gang-program-draws-from-inmates-9342457>.

489 *Id.*

490 Letter from Rhidale Dotson to authors (Nov. 1, 2020) (on file with authors).

491 Information on the “Women of Influence” program was provided to Kristen Nelson through verbal conversations and meetings with incarcerated residents at Denver Women’s Correctional Facility in the summer and fall of 2020.

492 Letter from Rhidale Dotson to authors (Jan. 17, 2021) (emphasis added) (on file with authors).

493 Letter from Tatianna Manon-Davis to authors (Dec. 17, 2020) (on file with authors).

494 Responses to the anonymous survey included statements such as, “more loss and grief[f] programs”; “therapy [to] heal from the experiences I have undergone”; “I need to learn how to love myself, what self[-]worth is, what healthy relationships are, setting boundaries”; “classes that deal with P.T.S.D.”; “[b]etter mental health treatment. Especially for trauma”; and “mental health help.” *Id.*

495 As Ms. Manon-Davis noted:

There is a need for college courses ... or grants for prisoners to receive a degree before they leave here. At least if you had a long[-]term sentence you would be allowed to create better job opportunities to be successful upon release. This would also create a sense of purpose for people who have lost confidence in themselves. I personally would have jumped at the opportunity to be in a college course.

*Id.*



496 Survey responses included “classes that teach life skills”; “a class that will give us the tools to become successful”; “For inmates like me, who have been lock[ed] up for more than 20 years, classes that teach me how to use a cell phone, and lap top, and internet”; “a class to help you be able to deal with the real[-]world stress. Like how to handle not being able to get a job right away because of your past, or to deal with the stress of building a relationship with your kids and family”; “How to reintegrate back into society after spending an extended amount [of time] in prison”; and “How to get started on your new life [and] relearn all the responsibility of a working adult.” *Id.*

497 Letter from D.R. to authors (July 5, 2020) (on file with authors). R.F. further explains, “[m]any classes and groups were never offered to me due to the length of my sentence. Several academic and vocational classes are curtailed around those with less than five years to their meeting the parole board.” Letter from R.F. to authors, *supra* note 403.

498 *See* Letter from C.G. to authors, *supra* note 312.

499 *Id.*

500 Letter from Darcy Matlock to authors, *supra* note 103.

501 *Id.*

502 Letter from C.N. to authors (July 2020) (on file with authors).

503 Pfaff, *supra* note 6, at 228.

504 *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

*Id.*

505 *See* HANEY, *supra* note 33, at 324.

506 Mauer & Nellis, *supra* note 18, at 164.

507 Letter from D.R. to authors, *supra* note 497.

508 Pfaff, *supra* note 6, at 186-87.

509 Letter from Darcy Matlock to authors, *supra* note 103.



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- 510 Matt Watkins, *Justice and the Virus: Rachel Barkow*, CTR. FOR CT. INNOVATION (May 2020), <https://www.courtinnovation.org/publications/post-COVID-Barkow>.
- 511 *See, e.g., How Norway Turns Criminals into Good Neighbours*, *supra* note 465.
- 512 *Id.*
- 513 *See* Ville Hinkkanen & Tapio Lappi-Seppälä, *Sentencing Theory, Policy, and Research in the Nordic Countries*, 40 *CRIME & JUST.* 349, 357 (2011); *Fact or Fiction: Not All “Life Sentences” Around the World are Actually for Life*, THE REEVES L. GRP. [hereinafter “*Life Sentences*” *Around the World*], <https://www.robertreeveslaw.com/blog/life-sentences/> (last visited Jan. 7, 2021). This is common in other European countries as well. “European courts rarely hand down what they call ‘life sentences’; when they do, maximum-imprisonment policies often prevent a person from spending his natural life in prison. A life sentence in Germany, for example, is closer to 15 years in jail.” Michelle Tsai, *40,000 Years in Spanish Prison? The Madrid Bomber Sentences, Explained*, SLATE (Nov. 1, 2007, 7:02 PM), <https://slate.com/news-and-politics/2007/11/why-did-the-madrid-bombers-get-40000-year-sentences.html>.
- 514 “*Life Sentences*” *Around the World*, *supra* note 513.
- 515 Kushner, *supra* note 68.
- 516 *Id.* Gilmore continues by explaining that “what this demonstrates is that for people trying to solve their everyday problems, behaving in a violent and life-annihilating way is not a solution.” *Id.* These insights are echoed by Gilligan, who opines: “The more harshly we punish criminals, or children, the more violent they become; the punishment increases their feelings of shame and simultaneously decreases their capacities for feelings of love for others, and of guilt toward others.” GILLIGAN, *supra* note 87, at 113.
- 517 Mauer and Nellis of The Sentencing Project propose a cap of a maximum of twenty years. They note that:  
Substantial evidence exists that a twenty-year maximum sentencing cap will produce better public safety outcomes than our current, record-breaking use of life imprisonment. This would lead to a better allocation of resources and would position the United States more in line with other industrialized nations in limiting the use of extreme sentences.  
*See* MAUER & NELLIS, *supra* note 18, at 145. We think that the specific minimum term of years a person should be required to serve is up for debate. What is most important is that the possibility for release be meaningful in the context of an individual's life.
- 518 Letter from C.N. to authors, *supra* note 502.
- 519 *Id.* R.F., who has been incarcerated for thirty years, writes, “I count the years in prison according to my daughter who was six years old when I arrived. She is now a mother with two children of which makes me a grandparent. My grandkids love me but do not know me.” Letter from R.F. to authors, *supra* note 403.
- 520 *See* MAUER & NELLIS, *supra* note 18, at 166.
- 521 *See* COLO. REV. STAT. § 17-1-102(7.5)(b)(I)-(II) (2020). In addition to expanding the criteria for special needs parole, the process is in desperate need of several other reforms. Presently, the CDOC is “largely responsible for



identifying which people in prisons might be eligible for [special needs parole] and compiling the information necessary to send a request to the parole board.” Elise Schmelzer, *Release of 84-Year-Old Colorado Prisoner Highlights Push to Fix “Fundamentally Broken” Parole Option*, DENV. POST (Jan. 20, 2021, 6:00 AM), <https://www.denverpost.com/2021/01/20/anthony-martinez-colorado-special-needs-prison-parole/>. There are also no deadlines by which the process must be completed. The combination of these factors has created a situation where very few people are released on special needs parole despite serious medical needs. In 2017 and 2016, “the Department received 72 applications for special needs parole” and referred only nine of them to the parole board, which granted six. *Id.* “Two people died while their applications were pending ....” *Id.* According to Christie Donner, executive director of the Colorado Criminal Justice Reform Coalition, COVID-19 “has only highlighted the depth of the problem with the system,” as few people have been released under the statute despite the risks created by the pandemic. *Id.* Advocates are presently working on proposed legislation to fix these issues and expand special needs parole criteria during the 2021 legislative session. *Id.*

522 The current version of the statute provides that a person cannot be defined as a “special needs offender,” regardless of the severity of their medical needs, if they were convicted of a class 1 felony. [COLO. REV. STAT. § 17-1-102\(7.5\)\(b\)\(I\)–\(II\)](#) Nonsensically, however, the statute provides an exception to this rule if “the offense was committed before July 1, 1990, and the offender has served at least twenty years in a department of corrections facility for the offense.” *Id.* The determination of whether a person should be released on special needs parole should connect to the person’s health needs and risk level, not the date or nature of the offense of conviction.

523 Often, when legislators do enact sentencing reforms, they add explicit language to the statute providing that the change only applies to offenses committed on or after the date the statute takes effect. *See, e.g., id.* § 18-3-203(2)(c) (II) (amended in 2016 to remove mandatory prison sentences for individuals convicted of second-degree assault, but explicitly providing, “[t]his act takes effect July 1, 2016, and applies to offenses committed on or after said date.”). Such language precludes individuals whose convictions were not final on the date the reform took effect from benefiting from the change. If, on the other hand, a statute is silent on whether it applies prospectively, a defendant whose conviction is not final at the time the amendment is enacted receives the benefit of retroactive application to his or her sentence. *See People v. Stellabotte*, 421 P.3d 174, 181-82 (Colo. 2018). Another potential limitation to retroactive sentencing relief in Colorado is *People v. Herrera*, 516 P.2d 626 (Colo. 1973) (en banc), which held that a statute providing a mechanism for postconviction review and resentencing “in the interest of justice” in cases where “there has been a significant change in the law” violated the separation of powers doctrine. *Id.* at 627. The Court concluded that [Article IV, section 7 of the Colorado Constitution](#) vests the governor with the exclusive power “to reduce a sentence after a final conviction[.]” *Id.* at 628. Advocates should devote future time and resources to consider strategies for obtaining retroactive relief for individuals who have been excessively punished. In the meantime, given *Herrera*, it is all-the-more important for the Governor to increase his use of his executive clemency powers, as discussed in Section III.B.3.b.

524 Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final can Further the “Interests of Finality,”* 2013 UTAH L. REV. 561, 564 (2013) (defining “wrongful incarceration” to include those who are “factually guilty but are serving improperly lengthy sentences”).

525 *Id.* at 580.

526 As Justice Thurgood Marshall noted in his dissent from denial of certiorari in *Evans v. Muncy*, 498 U.S. 927, 930-31 (1990), a case in which a defendant was ultimately executed despite the existence of evidence, developed post-trial, that cast doubt upon the basis for Evans’s death sentence:

The only ground asserted by the State for permitting Evans’ execution to go forward is its interest in procedural finality .... It may indeed be the case that a State cannot realistically accommodate post sentencing evidence casting doubt on a jury’s finding of future dangerousness; but it hardly follows from this that it is Wilbert Evans who should bear the burden of this procedural limitation. In other words, if it is impossible to construct a system capable of accommodating all





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evidence relevant to a man's entitlement to be spared death--no matter when that evidence is disclosed--then it is the system, not the life of the man sentenced to death, that should be dispatched.

*Id.* (Marshall, J., dissenting) (emphasis omitted). Wilbert Evans wrote on his copy of the dissent, “[p]lease bury this with me,” tucked the copy into his pocket, and walked into the execution chamber. *See* JEFFREY L. KIRCHMEIER, IMPRISONED BY THE PAST: WARREN MCCLESKEY AND THE AMERICAN DEATH PENALTY 176 (2015).

- 527 *See supra* Section I.E.2.c, for discussion of 128-year sentence imposed on Nehemiah Chavez for inchoate offenses in which no one was harmed.
- 528 *See* NICOLE L. WATERS ET AL., BUREAU OF JUST. STAT., NCJ 248874, CRIMINAL APPEALS IN STATE COURTS 1 (2015) (providing that in 2010, only 12% of the 69,348 criminal appeals heard resulted in the appellate courts reversing, remanding, or modifying a component of the trial court decision); *see also Just the Facts: U.S. Courts of Appeals*, U.S. CTS. (Dec. 20, 2016), <https://www.uscourts.gov/news/2016/12/20/just-facts-us-courts-appeals> (“Fewer than 9 percent of total appeals resulted in reversals of lower court decisions in 2015.”).
- 529 Letter from T.M. to authors (July 29, 2020) (on file with authors).
- 530 *Id.*
- 531 Letter from R.F. to authors, *supra* note 403.
- 532 BARKOW, *supra* note 59, at 81.
- 533 *See* COLO. CONST. art. IV, § 7.
- 534 Gottschalk, *supra* note 111, at 370.
- 535 *Id.*
- 536 BARKOW, *supra* note 59, at 83.
- 537 Letter from D.R. to authors, *supra* note 497.
- 538 Letter from Juvencia Townsend to authors, *supra* note 5.
- 539 Letter from Darcy Matlock to authors, *supra* note 103.
- 540 Letter from D.R. to authors, *supra* note 497.
- 541 *See* Letter from Samuel Mullikin to authors, *supra* note 358; Letter from T.M. to authors, *supra* note 529.



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- 542 Letter from Damian Arguello to authors, *supra* note 104.
- 543 Gottschalk, *supra* note 111, at 372.
- 544 Sliva et al., *supra* note 418, at 459-60.
- 545 *Id.* at 456, 501-02 (“Despite strong evidence that restorative justice is beneficial for achieving justice aims, restorative justice is most frequently used in the United States among low-risk populations in school-based or juvenile diversion contexts.”).
- 546 *See* SERED, *supra* note 15, at 132-33.
- 547 *Id.* at 133.
- 548 Sliva et al., *supra* note 418, at 456, 502.
- 549 As Brooklyn District Attorney Eric Gonzalez explains:
- The job of a District Attorney--a prosecutor--is to promote community safety. This means more than simply punishing people who commit crimes. It requires engaging with communities to determine what safety and justice mean for them, identifying the most effective ways to hold accountable those who do harm, giving victims a sense of justice and healing, and promoting strong, healthy communities.
- Miriam Krinsky & Taylor Phares, *Accountability and Repair: The Prosecutor's Case for Restorative Justice*, 64 N.Y. L. SCH. L. REV. 31, 32 (2020).
- 550 SERED, *supra* note 15, at 133-34. The organization does not accept homicides or cases involving intimate partner or sexual violence but works primarily on cases involving gunpoint robberies, serious assaults, shootings, and other acts of street violence. *Id.*
- 551 *Id.* at 134. Prior to that program undergoing substantial refinement in 2012, Sered notes that its termination rate for a new criminal conviction was still less than six percent. *Id.*
- 552 Letter from D.R. to authors, *supra* note 497.
- 553 *See* Letter from Darcy Matlock to authors, *supra* note 103; Letter from Damian Arguello to authors, *supra* note 104.
- 554 In Colorado, “[a]ll [Victim Offender Dialogues] must be victim-initiated; the offender cannot initiate a dialogue.” *Victim Offender Dialogue (VOD)*, COLO. ORG. FOR VICTIM ASSISTANCE, <https://www.coloradocrimevictims.org/vod.html> (last visited Jan. 7, 2021).
- 555 Letter from S.B. to authors, *supra* note 404.



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556 See discussion *supra* Section III.B.1.

557 HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 228 (1990). Similarly, Thich Naht Hanh once said:

The problem is whether we are determined to go in the direction of compassion or not .... If I lose my direction, I have to look for the North Star, and I go to the north.

That does not mean I expect to arrive at the North Star. I just want to go in that direction. THICH NAHT HANH, BEING PEACE 100 (Arnold Kotler ed., 1987).

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