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SENTENCED TO PRISON, NOT TO DEATH: HOME CONFINEMENT DURING THE PANDEMIC AND MOVING BEYOND COVID-19

Sydney McConnell*

INTRODUCTION

A prison sentence should “not include incurring a great and unforeseen risk of severe illness or death.”¹ But for the 2.3 million people² housed in our nation’s prisons and jails during the COVID-19 (“COVID”) pandemic, their sentences have included just that. The United States boasts the world’s highest incarceration rate,³ and as difficult and deadly as the pandemic has been for people globally, incarcerated populations have been hit especially hard. Within mere weeks of the first cases reaching the United States, 70% of inmates tested were positive for the virus.⁴ By May 2020, seven of the ten largest COVID clusters were prisons or jails.⁵ Despite a lack of widespread testing in correctional facilities, by the end of 2020, an estimated “one in

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1. *United States v. Rodriguez*, 451 F. Supp. 3d 392, 407 (E.D. Pa. 2020).

2. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), [<https://perma.cc/E5QQ-6T7F>].

3. *Id.*

4. Lee Kovarksy, *Pandemics, Risks, and Remedies*, 106 VA. L. REV. ONLINE 71, 73 (2020) (this number only included those that were tested, but with testing in jails and prisons reported as sporadic at best, it can be assumed the actual rate of infection was much higher).

5. *Id.*

every five prisoners had COVID-19, compared to one in twenty in the general population.”⁶

On March 13, 2020, President Donald Trump declared the pandemic a national emergency.⁷ To rapidly reduce the incarcerated population and keep inmates and correctional facility staff safe, then-Attorney General William Barr issued a memorandum encouraging the Bureau of Prisons (“BOP”) to “utilize home confinement, where appropriate, to protect the health and safety of BOP personnel and the people in [its] custody.”⁸ The day after Barr’s memo was released, the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) granted the Director of the BOP the authority to expand the use of home confinement to alleviate the strain on BOP functioning.⁹ On April 3, 2020, Barr exercised that authority, stating:

[T]he CARES Act now authorizes me to expand the cohort of inmates who can be considered for home release upon my finding that emergency conditions are materially affecting the functioning of the Bureau of Prisons. I hereby make that finding and direct that . . . you give priority in implementing these new standards to the most vulnerable inmates at the most affected facilities¹⁰

Since the beginning of the pandemic, the BOP has transferred approximately 49,068 inmates to home confinement.¹¹ The decision to expand home confinement is an important one. It is a step in the right direction to address another

6. Eda Katharine Tinto & Jenny Roberts, *Expanding Compassion Beyond the COVID-19 Pandemic*, 18 OHIO STATE J. CRIM. L. 575, 577 (2021).

7. Discretion to Continue the Home-Confinement Placements of Federal Prisons After the COVID-19 Emergency, 45 Op. O.L.C. 1, 3 (Dec. 21, 2021) [hereinafter *Discretion to Continue Home Confinement*].

8. Memorandum from William Barr, Att’y Gen., to Michael Carvajal, Dir., Bureau of Prisons (Mar. 26, 2020) [hereinafter *Att’y Gen. Memorandum*], [<https://perma.cc/93W7-5EPK>].

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

10. Memorandum from William Barr, Att’y Gen., to Michael Carvajal, Dir., Bureau of Prisons (Apr. 3, 2020), [<https://perma.cc/9A8X-9DHT>].

11. *Frequently Asked Questions Regarding Potential Inmate Home Confinement in Response to the COVID-19 Pandemic*, FED. BUREAU OF PRISONS, [<https://perma.cc/2HB4-PR4H>] (last visited Oct. 30, 2022); *Discretion to Continue Home Confinement*, *supra* note 7, at 2, 4.

broader, and distinctly American, issue: mass incarceration. Lawmakers on both sides of the political aisle have reached the consensus “that the uniquely American policy of mass incarceration is both fiscally and morally unsustainable.”¹² If anything, the pandemic has shown we are capable of exacting meaningful change in a short period of time. The extension of home confinement demonstrates that America’s position as the world’s largest incarcerator does not have to remain the status quo. There are realistic, workable solutions for change in the criminal justice system, and home confinement presents one such opportunity.

This Comment argues that we have a perfect opportunity to stretch the utility of home confinement in a way that extends beyond the pandemic and addresses our overincarceration problem. Even though this Comment, and the current expansion of home confinement, deals only with federal prisons, state prisons could also benefit from increased utilization of this alternative to incarceration. Because of the CARES Act, there are already inmates that do not conform to the traditional eligibility requirements serving their sentences at home.¹³ As a result, there is a national experiment already underway to see if expanded home confinement can achieve the goals of imprisonment while limiting the cost to the public and allowing inmates to remain close to their families and communities. Home confinement, as it currently operates, admittedly is not a perfect solution. However, even considering some of the potential drawbacks, home confinement has benefits prison cannot hope to deliver. In addition to substantial cost savings,¹⁴ home confinement allows inmates to maintain proximity to the communities they are expected to reenter upon the completion of their sentence.¹⁵ The value of extended home confinement does not have to end at merely a temporary solution to address the lasting effects of a global pandemic—not when it has the potential to be so much more.

12. Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 113 (2018).

13. See Discretion to Continue Home Confinement, *supra* note 7, at 1, 4 & n.1.

14. See *infra* note 106 and accompanying text.

15. See *infra* note 108 and accompanying text.

In the sections that follow, Part I provides information related to the historical factors leading to America's unenviable position as the world's largest incarcerator, including current racial disparities in inmate populations and the devastating impact COVID has had in American correctional facilities. Part II outlines home confinement as an alternative sanction and highlights the potential benefits and limitations of it as a long-term alternative to incarceration. Part III briefly describes the reasons we punish, the limits of incarceration in achieving those goals, and why home confinement is ultimately a winning alternative. Finally, this Comment offers recommendations for expanded home confinement beyond the pandemic and concludes home confinement is a better option than prison and can serve as one option to address mass incarceration.

I. HOW WE GOT HERE

To fully appreciate the impact expanded home confinement could have on individual inmates and the broader criminal justice system, we first need to understand why COVID had such devastating results in American prisons. The reason the pandemic had such a detrimental impact on American incarcerated populations can be summarized by three predominating factors: (1) the United States puts people in prison more often and for longer periods of time than other countries, (2) the people we incarcerate experience health problems at higher rates than the general population, and (3) American carceral facilities are overcrowded, poorly ventilated, and unsanitary. These three facets combined had deadly consequences for America's inmates when COVID crossed our borders.

A. Mass Incarceration

The first reason the pandemic was so harmful to U.S. incarcerated populations is what is commonly known as mass incarceration. Despite housing only 5% of the world's population, the United States is home to 25% of the world's

prisoners.¹⁶ The U.S. incarceration rate, when considering both prisons and jails, “is roughly 12 times the rate in Sweden, eight times the rate in Italy, seven times the rate in Canada, five times the rate in Australia, and four times the rate in Poland.”¹⁷ “American jails and prisons hold half a million more people” than China, a nation with around four times the number of people.¹⁸ While the origins of mass incarceration are many and complex, the drastic increase in U.S. prison populations in the mid to late twentieth century can be summarized as (1) the merging of social War on Poverty initiatives with more targeted War on Crime programs in the 1960s, (2) the 1980s War on Drugs and sentencing policies such as mandatory minimums, and (3) racially biased and discriminatory practices at other key touchpoints in the criminal justice system. It is because of these three factors that today:

The American criminal justice system holds almost 2.3 million people in 1,833 state prisons, 110 federal prisons, 1,772 juvenile correctional facilities, 3,134 local jails, 218 immigration detention facilities, and 80 Indian Country jails as well as in military prisons, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories.¹⁹

1. Merging the War on Poverty with the War on Crime

While Lyndon Johnson’s presidency is often associated with landmark civil rights legislation and the social programs that made up his vision for a Great Society, it also marks the point at which Johnson vowed “the ‘Federal Government [would] henceforth take a more meaningful role in meeting the whole spectrum of problems posed by crime.”²⁰ The 1960s saw the migration of many Black Americans from the rural south to

16. JUST. POL’Y INST., FINDING DIRECTION: EXPANDING CRIMINAL JUSTICE OPTIONS BY CONSIDERING POLICIES OF OTHER NATIONS 3 (2011).

17. Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), [<https://perma.cc/Y35B-3PNB>].

18. *Id.*

19. Sawyer & Wagner, *supra* note 2.

20. ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 27 (2016).

northern cities.²¹ This, combined with numerous incidences of civil unrest, many of which were tied to the Civil Rights Movement, led to public outcry for “law and order” and the need for lawmakers to be “tough on crime.”²² While many of these uprisings occurred in response to the continued presence of deeply entrenched racial inequality despite substantive federal action, like the passing of the Civil Rights Act of 1964, the heavily publicized images of urban unrest helped to solidify the connection between Black people and criminality in the minds of many white Americans.²³

Rather than taking steps to address the systems and institutions presenting barriers to full equality, the Johnson Administration instead chose to increase spending on the surveillance of Black communities and law enforcement to combat crime. In 1965, Johnson sent the Law Enforcement Assistance Act to Congress, allocating the modern-day equivalent of \$223 million for police departments to purchase “bulletproof vests, helicopters, tanks, rifles, gas masks and other military-grade hardware for police departments.”²⁴ This legislation helped to merge Johnson’s social agenda, dubbed the “War on Poverty,” with a newly declared “War on Crime” and “established a direct role for the federal government in local police operations, court systems, and state prisons” for the first time in American history.²⁵ The War on Crime fostered the idea that street crime, illegal drug use, and delinquency were not themselves byproducts

21. *Id.* at 29 (“By the early 1960s, 31 percent of African Americans lived in twelve northern cities, their living conditions characterized by the isolation, marginalization, and exclusion that stemmed from segregation.”).

22. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 40-41, 54 (2012); Elizabeth Hinton, “*A War Within Our Own Boundaries*”: Lyndon Johnson’s Great Society and the Rise of the Carceral State, 102 *J. AM. HIST.* 100, 100 (2015) (noting there were over 250 incidences of civil disorder during the summers of Johnson’s presidency alone).

23. HINTON, *supra* note 20, at 56; Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 *J. AM. HIST.* 703, 707 (2010); Hinton, *supra* note 22, at 100.

24. Elizabeth Hinton, *Why We Should Reconsider the War on Crime*, *TIME* (Mar. 20, 2015, 7:00 AM), [<https://perma.cc/7G4R-L9DD>].

25. *Id.*

of poverty, but were instead merely the cultural character failings of those who were poor.²⁶

2. *The War on Drugs*

The War on Drugs is perhaps the most formidable cause of mass incarceration. Even though President Nixon declared drugs to be “public enemy number one”²⁷ in 1971, it was during Ronald Reagan’s presidency that the War on Drugs as it is known today took shape.²⁸ Funding for federal law enforcement to combat drug-related crimes increased from \$8 million to \$95 million between 1980 and 1984 alone.²⁹ In 1986, the House of Representatives allocated another \$2 billion to fight the drug war.³⁰ Additionally, the War on Drugs was not waged indiscriminately. Black communities were especially negatively impacted, as the focus was directed towards policing inner-city areas more than it was drug prevention and treatment programs.³¹ Penalties for drug offenses also differed depending on the typical user, most famously exemplified with the discrepancy between crack and powder cocaine.

The Anti-Drug Abuse Act of 1986 established mandatory minimum penalties for various drug trafficking offenses depending on the quantity.³² Despite the chemical structures of crack and powder cocaine being nearly identical,³³ the punishment for the possession and sale of crack cocaine was far more severe. For a first-time offense involving as little as five grams of crack cocaine, the form associated with Black users, the federal minimum imposed a five-year mandatory sentence.³⁴ For powder cocaine, however, the version of the drug associated with

26. ALEXANDER, *supra* note 22, at 45.

27. *Thirty Years of America’s Drug War: A Chronology*, PBS: FRONTLINE, [https://perma.cc/NGB9-V8VH] (last visited Oct. 30, 2022).

28. ALEXANDER, *supra* note 22, at 49.

29. *Id.*

30. *Id.* at 53.

31. MARC MAUER & RYAN S. KING, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 1, 19 (2007).

32. U.S. SENT’G COMM’N., COCAINE AND FEDERAL SENTENCING POLICY 2-3 (2007).

33. *What Is the Difference Between Cocaine and Crack?*, DRUG POL’Y ALL., [https://perma.cc/9N5N-LS8Z] (last visited Oct. 30, 2022).

34. U.S. SENT’G COMM’N. *supra* note 32, at 2-3.

white and Hispanic users, it would have taken a trafficking offense involving 500 grams or more of powder cocaine to impose the same penalty.³⁵ This “100-to-1 drug quantity ratio,” resulted in crack cocaine offenders serving sentences “three to [] six times longer . . . than [] powder cocaine offenders with equivalent drug quantities.”³⁶

The harsh policy approach to drugs and crime did not waiver in the 1990s. President Bill Clinton’s “tough on crime” policies “resulted in the largest increases in federal and state prison [populations] of any president in American history.”³⁷ Clinton’s Violent Crime Control and Law Enforcement Act of 1994 provided state governments with “\$30 billion to add 100,000 new police officers, [] more prisons, [] more prison guards, [and more] funding for crime prevention programs.”³⁸ Clinton also endorsed the idea of a federal “three strikes and you’re out” law, mandating life sentences for three-time offenders.³⁹

As a result of these policies, prison populations soared in the 1980s and 1990s, with minimal impact on the illegal drug trade.⁴⁰ While less than 25,000 people were in federal prisons in 1980, that number had risen to almost 220,000 by 2013, an increase of almost 800%.⁴¹ The length of time spent in prison has increased as well. In 1986, inmates spent an average of twenty-two months in prison for federal drug offenses.⁴² In 2017, the average length of a sentence for offenders convicted of a drug crime with a mandatory minimum was ninety-four months.⁴³ Today, nearly

35. *Id.*

36. *Id.* at 3.

37. JUST. POL’Y INST., TOO LITTLE TOO LATE: PRESIDENT CLINTON’S PRISON LEGACY 2-3 (2001).

38. *Id.* at 4.

39. ALEXANDER, *supra* note 22, at 56.

40. Mauer, *supra* note 12, at 115, 120.

41. U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-275T, CONTINUED ACTION NEEDED TO ADDRESS INCARCERATION CHALLENGES AND OFFENDERS’ REENTRY 7 (2017), [<https://perma.cc/7DG2-S4LW>] (much of this increase can likely be attributed to mandatory minimums and punitive drug policies; however, these numbers encompass total federal prison growth and not merely those attributable to drug crimes).

42. *Criminal Justice Facts*, THE SENT’G PROJECT, [<https://perma.cc/84VS-CCYQ>] (last visited Oct. 30, 2022).

43. U.S. SENT’G COMM’N., MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 4 (2017).

half of the inmates in federal prisons are in for drug offenses.⁴⁴ What is especially troubling is that while Black Americans are “consistently documented by the U.S. government [as using] drugs at similar rates to people of other races,”⁴⁵ Black inmates account for nearly 40% of the incarcerated population despite making up only 13% of total people in the U.S.⁴⁶

3. Other Touchpoints in the Criminal Justice System

This is not to say that there have not been important steps taken to remedy the harm caused by punitive drug and crime policies. The Fair Sentencing Act of 2010 reduced the disparity between powder and crack cocaine from 100-to-1 to 18-to-1, and “eliminated the mandatory minimum sentence for simple possession of crack cocaine”⁴⁷ The First Step Act of 2018 “ma[de] the Fair Sentencing Act retroactive” so people serving outdated sentences for crack cocaine could be “resentenced to shorter prison terms,”⁴⁸ and included reforms like eliminating the use of restraints on pregnant inmates and placing inmates in facilities closer to their families.⁴⁹ Despite this progress, the United States still has a long way to go to address mass incarceration and conditions in prisons. A critical facet of this story, one inextricably intertwined with our nation’s history, is the extent to which incarceration, and by extension COVID, disproportionately impacts minority populations and people of color.

Black Americans today are five times more likely to be incarcerated as their white counterparts, despite their making up

44. See *Offenses*, FED. BUREAU OF PRISONS (Oct. 1, 2022), [<https://perma.cc/5TMU-C97R>].

45. DRUG POL’Y ALL., *THE DRUG WAR, MASS INCARCERATION, AND RACE 1* (2015), [<https://perma.cc/Z3VE-RAJT>].

46. See *Inmate Race*, FED. BUREAU OF PRISONS (Oct. 22, 2022), [<https://perma.cc/Z3P4-L2Q4>]; *QuickFacts United States*, U.S. CENSUS BUREAU, [<https://perma.cc/H4H5-3VB6>] (last visited Oct. 30, 2022).

47. U.S. SENT’G COMM’N, *REPORT TO THE CONGRESS: IMPACT OF THE FAIR SENTENCING ACT OF 2010*, at 3 (2015), [<https://perma.cc/3L2L-EDPH>].

48. Ames Grawert, *What Is the First Step Act—And What’s Happening with It?*, BRENNAN CTR. FOR JUST. (June 23, 2020), [<https://perma.cc/57VM-FP2F>].

49. *Id.*

only 13% of the U.S. population.⁵⁰ Young Black men in particular are far more likely to be incarcerated than any other demographic group.⁵¹ Marc Mauer, former Executive Director of The Sentencing Project, a non-profit organization dedicated to promoting a more fair and effective justice system, estimated in 2016 that if the incarceration rate were to continue at the current trajectory, “one of every three [B]lack males born today can expect to go to prison in his lifetime, one in every six Latino males, [and] one of every seventeen white males.”⁵²

An important reason for this disparity is that Black individuals are moved through the various touchpoints of the criminal justice system at higher rates than people of other races and ethnicities.⁵³ A variety of factors, “including disproportionate offending rates, the concentration of policing in inner-city communities, and (sometimes blatant) disparities in criminal justice outcomes across races all have contributed to” stark racial disparities in U.S. prison populations.⁵⁴ Inner-city areas are more likely to be policed, regardless of actual local crime rates,⁵⁵ leading to the increased likelihood of interactions with law enforcement and arrests.⁵⁶ Once arrested, “people of color are more likely to be assessed as safety or flight risks and detained pretrial because they lack resources to pay fines, fees, and bail and because they are more likely than white people to have a criminal record.”⁵⁷ Being held in pretrial detention “increase[s] odds of conviction, sentences to prison, and longer

50. Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POL’Y INITIATIVE (May 28, 2014), [<https://perma.cc/4G7T-538K>].

51. TODD R. CLEAR & NATASHA A. FROST, *THE PUNISHMENT IMPERATIVE: THE RISE AND FAILURE OF MASS INCARCERATION IN AMERICA* 26 (2014).

52. Marc Mauer, *Race to Incarcerate: The Causes and Consequences of Mass Incarceration*, 21 ROGER WILLIAMS U. L. REV. 447, 449 (2016).

53. CLEAR & FROST, *supra* note 51, at 26-27.

54. *Id.*

55. SUSAN NEMBHARD & LILY ROBIN, URBAN INST., *RACIAL AND ETHNIC DISPARITIES THROUGHOUT THE CRIMINAL LEGAL SYSTEM* 3 (2021), [<https://perma.cc/ZYG5-QUH5>].

56. THE SENT’G PROJECT, *RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1* (2018), [<https://perma.cc/Y3A7-727Y>].

57. NEMBHARD & ROBIN, *supra* note 55, at 5.

sentences.”⁵⁸ Black Americans are also more likely to serve longer prison sentences than their white counterparts.⁵⁹

B. The Premature Aging and Sickness of Prison Populations

Because of the practices described above, and the resulting prison population boom over the last forty years, it is no surprise the virus swept through American carceral facilities so swiftly. However, the number of people in prison is only part of the problem. Another reason COVID took such a stronghold in prisons has to do with the characteristics of those who make up incarcerated populations. While those aged sixty-five and older are considered to be “geriatric” by health care professionals outside of the prison system, incarcerated individuals are considered to be “older prisoners” by their early fifties.⁶⁰ Those who are incarcerated experience “accelerated aging,” not only because prison can be very hard on the body, but also because those individuals are “more likely to have experienced profound stress and/or trauma over their lifetime, to have a history of substance use disorder and/or homelessness, and to have had limited access to quality health-care and education.”⁶¹

The population of prisoners aged fifty-five and older tripled between 1990 and 2009, the result of a variety of factors, including “mandatory minimum sentencing laws, more older adult arrests, [the] reintroduction of indeterminate and life sentences, and third-strike legislation.”⁶² More than that, older prisoners experience several chronic medical conditions, such as “hypertension, diabetes mellitus, and pulmonary disease,” at higher rates than younger inmates and non-prisoners.⁶³ In addition to physical ailments, older inmates are also more likely to have undiagnosed and untreated mental illnesses and

58. *Id.*

59. THE SENT’G PROJECT, *supra* note 56, at 1.

60. Rachael Bedard et al., *Ageing Prisoners: An Introduction to Geriatric Health-Care Challenges in Correctional Facilities*, 98 INT’L REV. RED CROSS 917, 919 (2016).

61. *Id.*

62. Brie A. Williams et al., *Addressing the Aging Crisis in U.S. Criminal Justice Health Care*, 60 J. AM. GERIATRICS SOC’Y 1150, 1151 (2012).

63. *Id.*

psychiatric conditions.⁶⁴ Ultimately, “prisoners tend to be less healthy with more preexisting medical issues than the general population, making them more susceptible to the virus.”⁶⁵

C. Prisons, Meet COVID-19

When considering the demographics of the prison population, as well as overcrowding, unsanitary conditions, poor ventilation, and general unpreparedness, it is no wonder COVID absolutely ravaged U.S. prisons and jails.⁶⁶ The Centers for Disease Control and Prevention (“CDC”) published guidelines at the start of the pandemic about how to protect yourself and others from the virus.⁶⁷ Suggested measures included wearing a mask, staying six feet away from other people, avoiding poorly ventilated and crowded common spaces, washing your hands frequently, and cleaning and disinfecting surfaces daily.⁶⁸ All of these guidelines are virtually impossible to execute properly in a prison.

Social distancing proved to be incredibly difficult, if not impossible, despite instating preventative measures such as quarantining and discontinuing social visits.⁶⁹ Even though prisoner movement was heavily restricted, inmates often came into contact with correctional officers and staff who moved throughout the building as well as outside of the facility in the surrounding community.⁷⁰ In dormitory-style prisons, where beds are stacked two, sometimes three high, inmates are so close together that they can often reach out and touch the bunk next to

64. *Id.*

65. Carrie Leonetti, *What Coronavirus Has Taught Us About Unnecessary Incarceration*, 58 AM. CRIM. L. REV. ONLINE 36, 39 (2020).

66. Katie Park et al., *A Half-Million People Got COVID-19 in Prison. Are Officials Ready for the Next Pandemic?*, THE MARSHALL PROJECT (June 30, 2021), [<https://perma.cc/YU4R-FBCQ>].

67. *See How to Protect Yourself and Others*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 19, 2022), [<https://perma.cc/ET7V-VJ84>].

68. *Id.*

69. *COVID-19 Action Plan: Phase Five*, FED. BUREAU OF PRISONS (Mar. 31, 2020), [<https://perma.cc/6W75-T5S6>]; *BOP Modified Operations*, FED. BUREAU OF PRISONS (Nov. 25, 2020), [<https://perma.cc/2U9M-W7F5>].

70. Ahlman v. Barnes, 445 F. Supp. 3d 671, 679 (C.D. Cal. 2020).

theirs.⁷¹ Population density like this means that not only is it hard to distance during the day, while people are constantly moving around, but at night, inmates may sleep within six feet of “as many as five or eight other people.”⁷² Social distancing was even more unlikely in the absence of procedures to prevent bottlenecks in walkways, causing inmates and staff to stand close to each other while waiting in line for food or to be seen at the medical clinic.⁷³

Additionally, there was widespread, undisputed testimony from some facilities that cleaning protocols did not change at all as a result of the pandemic. A janitor at one facility testified that “just as before the pandemic, the cleaning solution provided to the cleaning crews was frequently depleted by midafternoon,” and that he “received only one pair of gloves to share with his co-janitor, an arrangement medical experts described as tantamount to no gloves at all.”⁷⁴ Other inmates reported that the cloth masks they were provided were “not replaced for weeks or [were] made from blood- and feces-stained sheets.”⁷⁵ Inmates sometimes requested soap and did not receive any for days, and were not allowed to disinfect their hands with hand sanitizer as it has long been considered a contraband item in prisons due to the alcohol content.⁷⁶ In one Ohio prison, inmates “resort[ed] to ‘hanging bedsheets from the top rack of their bunks to protect themselves from others’ coughing, sneezing, and breathing.’”⁷⁷ To make matters worse, even when they were not feeling well, some inmates “reported being hesitant to admit to being COVID-symptomatic out of fear of being placed in” medical isolation, a term equated with “solitary confinement.”⁷⁸ It was under these dire circumstances that former Attorney General Barr declared

71. Sharon Dolovich, *Mass Incarceration, Meet COVID-19*, U. CHI. L. REV. ONLINE, Nov. 2020, at pt. I.

72. *Id.*

73. *Id.* at pt. II.

74. *Valentine v. Collier*, 140 S. Ct. 1598, 1599 (2020).

75. *Barnes*, 445 F. Supp. 3d at 682.

76. Dolovich, *supra* note 71, at pt. I; NATHAN JAMES & MICHAEL A. FOSTER, CONG. RSCH. SERV., R46297, FEDERAL PRISONERS AND COVID-19: BACKGROUND AND AUTHORITIES TO GRANT RELEASE 3 (2020), [<https://perma.cc/95RG-3WA6>].

77. Dolovich, *supra* note 71, at pt. II.

78. *Id.*

the virus to be materially impacting the functioning of the Bureau of Prisons and expanded home confinement began.⁷⁹

II. HOME CONFINEMENT

As incarceration rates soared in the 1980s and 1990s, so did the use of alternative, community-based sanctions.⁸⁰ While home confinement has been in practice all over the world for centuries, its use in the United States emerged in the 1970s and 1980s as states sought a way to “divert nonviolent offenders from costly jail and prison beds, to reduce jail and prison overcrowding, and to strengthen existing community-based sanctions such as probation or parole.”⁸¹ The focus of many state home confinement programs is the reduction of prison populations; in the federal system, however, home confinement has largely been used as a way to still punish offenders without incarceration and facilitate their reentry to society near the end of their sentences.⁸²

A. Home Confinement as an Alternative Sanction

Historically, home confinement has been used as a transitional period at the end of an inmate’s sentence to help them acclimate back to society prior to their release.⁸³ Under current law, home confinement is only granted for the shorter of 10% of an inmate’s sentence or six months.⁸⁴ At its core, home confinement is “[a]ny circumstance in which the inmate is required to remain in the home during specified hours.”⁸⁵ Participants are required to remain at home unless authorized to leave for “employment, education, treatment, or other specified

79. See Att’y Gen. Memorandum, *supra* note 8, at 1.

80. ENCYCLOPEDIA OF COMMUNITY CORRECTIONS 62 (Shannon M. Barton-Bellessa ed. 2012).

81. *Id.* at 204.

82. Robert N. Altman & Robert E. Murray, *Home Confinement: A ‘90s Approach to Community Supervision*, 61 FED. PROB. 30, 30-31 (1997).

83. Alan Ellis & J. Michael Henderson, *The U.S. Bureau of Prisons’ Pre-Release Program: Getting Out Early*, 31 CRIM. JUST., Winter 2017, at 20, 20.

84. 18 U.S.C. § 3624(c)(2).

85. FED. BUREAU OF PRISONS, HOME CONFINEMENT 2 (1995) [hereinafter HOME CONFINEMENT PROGRAM STATEMENT], [<https://perma.cc/5Y3G-XT8X>].

reasons.”⁸⁶ One of the purposes of home confinement is to allow the inmate to “assume increasing levels of personal responsibility while providing sufficient restriction to promote community safety and continue the sanction of the sentence” prior to their release.⁸⁷ Electronic monitoring is often coupled with home confinement to monitor offender whereabouts and ensure they are either in their homes or at one of their approved locations.⁸⁸

The present road to get to home confinement is not a straight one; there are strict procedural hurdles and eligibility requirements. According to the Second Chance Act of 2007, all federal inmates are eligible for home confinement, though the “BOP’s placement decisions are supposed to be driven by an individual assessment weighing an inmates need for reentry services against the risk to the community.”⁸⁹ Importantly, the BOP currently does not have statutory authority to place an inmate in home confinement at the beginning of their sentence.⁹⁰ The BOP must place an inmate in “any available penal or correctional *facility* that meets minimum standards of health and habitability established by the Bureau.”⁹¹ As a result, because inmates are only eligible for home confinement for the shorter of the last 10% or the last six months of their sentence, most inmates placed on home confinement will have served a period of incarceration and been placed under the supervision of a Community Corrections Center (“CCC”) or a Residential Re-Entry Center (“RRC”) before they are even considered eligible to serve the rest of their sentence at home.⁹²

Inmates must undergo a series of evaluations before home confinement, or any community-based sanction, can be granted.

86. Darren Gowen, *Overview of the Federal Home Confinement Program 1988-1996*, 64 FED. PROB. 11, 12 (2000).

87. HOME CONFINEMENT PROGRAM STATEMENT, *supra* note 85, at 1.

88. Gowen, *supra* note 86, at 12-13.

89. OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., AUDIT OF THE FEDERAL BUREAU OF PRISONS’ MANAGEMENT OF INMATE PLACEMENTS IN RESIDENTIAL REENTRY CENTERS AND HOME CONFINEMENT, at i (2016) [hereinafter BOP AUDIT], [<https://perma.cc/QY6G-BLF9>].

90. HOME CONFINEMENT PROGRAM STATEMENT, *supra* note 85, at 1.

91. 18 U.S.C. § 3621(b) (emphasis added).

92. OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., AUDIT OF THE HOME CONFINEMENT PROGRAM IN THE BUREAU OF PRISONS 2 (1996), [<https://perma.cc/57EE-D2CW>].

As the eligibility period for pre-release community-based sanctions approaches towards the end of an inmate's sentence, correctional facility staff will refer inmates for pre-release placement to a Community Corrections Manager ("CCM").⁹³ The CCM evaluates the inmate's referral material to determine the most appropriate program, among some of the options being placement in a CCC, a Comprehensive Sanctions Center ("CSC"), home confinement, or another community program.⁹⁴ Once the inmate is approved for a particular program, they must agree to all imposed conditions of the placement; inmates do not have a choice in their pre-release programming or the ability to apply for alternatives.⁹⁵

Only on occasion, and only pending the determination that a candidate bears "no obvious risk" to the public and that an electronic monitoring program is available, will an inmate be placed directly on home confinement from their incarceration facility.⁹⁶ An inmate may only be considered for direct placement on home confinement if he or she (1) "has no public safety [concerns]," (2) "had excellent institutional adjustment," (3) "has a stable residence with a supporting family," (4) "has confirmed employment (if employable)," and (5) "has little or no need for the services of a CCC."⁹⁷ For inmates released from BOP custody from October 2013 through April 2016, approximately 94,000 inmates, only 4%, went directly into home confinement from a BOP facility, while another 21% were "released directly from a BOP institution" without any transition period.⁹⁸

B. The Benefits of Home Confinement

As those numbers illustrate, home confinement has historically been underutilized despite being called the "preferred

93. HOME CONFINEMENT PROGRAM STATEMENT, *supra* note 85, at 4.

94. *Id.*

95. *Id.*

96. *Id.* at 5, 7.

97. *Id.* at 7.

98. BOP AUDIT, *supra* note 89, at i.

pre-release option” for “low need/low risk inmates.”⁹⁹ So underutilized, in fact, that recent “data on placement of minimum and low security inmates” revealed the “BOP placed only 6 percent of even those lower risk inmates directly into home confinement”¹⁰⁰ Not employing home confinement to the extent permitted “may [] further strain high security BOP institutions that are already well above capacity.”¹⁰¹

As of October 2022, 79,745 inmates, which makes up just over 50% of the total number of people in federal prisons, were classified as either “minimum” or “low” security risks.¹⁰² Increased utilization of home confinement, “[i]n addition to reintegrating inmates more quickly into their communities, . . . will help mitigate our critical population/capacity issues” in carceral facilities.¹⁰³ Aside from being able to address overcrowding and reducing prison populations, permanent expansion of home confinement would allow for increased realization of a myriad of other benefits that come from prison alternatives, some of which include material cost savings and the ability of the inmate to maintain close ties to their families and contribute to their communities.

1. Cost Savings

Home confinement, and community supervision in general, is far more cost effective than incarceration. Prisons, as they currently operate, have severe costs to American taxpayers. It is estimated the United States pays more than \$80 billion each year to keep roughly 2.3 million people in prison and jail.¹⁰⁴ That figure does not include the multitude of other costs imposed on families of incarcerated individuals in commissary account

99. Memorandum from Blake R. Davis, Assistant Dir., Corr. Programs Div., to Reg’l Dirs., Wardens, and Residential Reentry Managers 2 (May 24, 2013) [hereinafter Corr. Programs Memorandum], [<https://perma.cc/4EA4-8CQN>].

100. BOP AUDIT, *supra* note 89, at ii.

101. *Id.* at ii-iii.

102. *Prison Security Levels*, FED. BUREAU OF PRISONS, [<https://perma.cc/A363-84AN>] (last visited Oct. 30, 2022).

103. Corr. Programs Memorandum, *supra* note 99, at 3.

104. Beatrix Lockwood & Nicole Lewis, *The Hidden Cost of Incarceration*, THE MARSHALL PROJECT (Dec. 17, 2019), [<https://perma.cc/26AK-RAWA>].

deposits, phone calls, emails, care packages, and court fees.¹⁰⁵ It costs an average of \$37,500 per year, which amounts to roughly \$102.74 per day, to house an inmate in a federal prison.¹⁰⁶

Home confinement, on the other hand, costs a comparatively minimal \$13,000 a year, or around \$35.62 per day per inmate.¹⁰⁷ This is a material savings of \$67.12 per inmate per day, or what amounts to approximately 65%. This money, that could go towards other, more productive and societally beneficial means, is instead being sunk to keep people locked up. If home confinement was utilized on a larger scale, the BOP would have increased funds that could be reallocated to further develop education, substance abuse treatment, therapy, and employment programs to enable offenders to be less likely to recidivate and better able to contribute to society upon the completion of their sentence.

2. *Community Proximity and Relationship Maintainence*

The biggest benefit of home confinement compared to other punitive measures like incarceration is that it allows the offender to remain in a “reasonably regular social environment and maintain social relationships with family, friends, and the community, while potentially avoiding offender networks.”¹⁰⁸ Home confinement allows inmates to be “productive, tax-paying members of society,” with the potential for them to earn money to pay restitution, support dependents, provide childcare, and ultimately reduce the “drain on welfare and foster child systems.”¹⁰⁹ Additionally, the beauty of home confinement is that it can be tailored to meet the unique needs of individual inmates. With the variety of conditions and resources that can be utilized

105. *Id.*

106. Zolan Kanno-Youngs & Maura Turcotte, *Thousands of Prisoners Were Sent Home Because of Covid. They Don't Want to Go Back*, N.Y. TIMES (Aug. 30, 2021), [<https://perma.cc/G6LN-D3NN>].

107. *Id.*

108. Jessica Bouchard & Jennifer S. Wong, *The New Panopticon? Examining the Effect of Home Confinement on Criminal Recidivism*, 13 VICTIMS & OFFENDERS 589, 591 (2018).

109. PAUL J. HOFER & BARBARA S. MEIERHOEFER, FED. JUD. CTR., HOME CONFINEMENT: AN EVOLVING SANCTION IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1987).

as part of a home confinement placement, like “community service, drug testing and treatment, [and] education and job training—judges can dispense both justice and rehabilitative treatment while significantly incapacitating the offender.”¹¹⁰

There is concrete evidence suggesting this expanded home confinement experiment is working. One of the principal arguments against the expansion of home confinement is that allowing previously non-eligible inmates to serve their sentences at home exposes the surrounding communities to those who might commit additional crimes.¹¹¹ A *New York Times* article written in June 2021, when there were around 24,000 people that had benefitted from the Director of the BOP’s expanded authority, reported most inmates “had only weeks or months left on their sentences and completed them without incident.”¹¹² “Three people committed new crimes,” only one of which was violent, and around 150 were returned to prison for violations of their home confinement placement.¹¹³ If home confinement is given increased attention and is continually improved upon, the criminal justice system would be vastly improved for both the agencies that operate federal prisons and the people they serve without exposing the public to an elevated risk of criminal activity.

C. The Addressable Limitations of Life at Home

Despite the potential benefits, this Comment does not purport that home confinement, as it currently operates, is a perfect solution to mass incarceration. Home confinement is anything but a get out of jail free card. Upon their admittance to a home confinement placement, inmates must sign a “Conditions of Home Detention” form, where they pledge to adhere to a number of rules, among them being: (1) always answering calls from Residential Re-Entry Center staff and wearing their electronic monitoring devices, (2) continuing any mental health, psychiatric, or substance abuse treatment, (3) not owning any

110. *Id.*

111. See HOFER & MEIERHOEFER, *supra* note 109, at 7-8.

112. Kanno-Youngs & Turcotte, *supra* note 106.

113. *Id.*

deadly weapon or being in the company of someone with a weapon, (4) not drinking alcoholic beverages of any kind or using or possessing any narcotics, (5) remaining steadily employed and not changing employment without approval, (6) not driving a vehicle without authorization, and (7) understanding the inmate themselves are personally responsible for “all costs of [] housing, meals, and general subsistence.”¹¹⁴

As difficult as adhering to the guidelines of a home confinement placement might be, there are also significant labor requirements for being a home confinement case manager. Home confinement “officers are ‘on call’ 24 hours a day, 7 days a week because they must respond anytime there is a potential violation.”¹¹⁵ This kind of work can be very demanding when “alerts average 10 per officer per day in the federal program, many after normal working hours.”¹¹⁶ This hurdle, though, might be overcome if a portion of the savings from reduced prison populations could go towards training and employing more case managers. Furthermore, with increased funds to allocate to case managers, we might be able to be more selective as to who we employ to take on those roles. Case managers could be social workers, healthcare professionals specializing in substance abuse or mental illness, or other people with expertise valuable to help the inmates they serve. Home confinement offers the potential for unique, individualized rehabilitation and reentry to community life that is difficult to achieve from a prison cell.

Another potential drawback of home confinement is that between the constant invasion of privacy that comes with electronic monitoring and random urinalysis, home confinement can be stressful. Inmates on an electronic monitoring program have to wear a transmitter and stay within 200 feet of a receiver installed at the inmate’s home containing the inmate’s schedule.¹¹⁷ When the receiver is “notified of a change in the inmate’s status, [the computer] compares the time with the schedule to determine if a break in contact is authorized. If not

114. FED. BUREAU OF PRISONS, FORM BP-A0460 (2010), [<https://perma.cc/9BW4-6MQT>] (last visited Oct. 31, 2022).

115. Altman & Murray, *supra* note 82, at 31.

116. *Id.*

117. HOME CONFINEMENT PROGRAM STATEMENT, *supra* note 85, at 2.

authorized, the computer sends an alert” and, unless the inmate is able to resolve the discrepancy with their case manager, they might be sent back to a correctional facility for violating the rules of their placement.¹¹⁸ Alerts can be triggered for any number of reasons, including “unauthorized absences from the residence,” “failure to return to the residence from a scheduled absence,” “late arrivals,” “early departures from the residence,” “equipment malfunctions,” “tampering with the monitoring equipment,” or “loss of electrical power or telephone service.”¹¹⁹ Inmates are also subject to random calls and visits from their case manager throughout the day to make sure they are where they are supposed to be and are adhering to program guidelines.¹²⁰

Because of the ever-present fear that even the slightest violation of protocol will result in the revocation of home confinement and a prolonged prison sentence, some studies have shown inmates with prison experience would prefer prison time rather than taking a chance on an alternative sanction.¹²¹ Some offenders who have had experienced community-based sanctions have reported “working every day, submitting to random urinalysis, and having their privacy invaded was *more* punitive than a brief prison term.”¹²² Prison, though a far cry from being rehabilitative and with its obvious restriction of freedom, offers a more predictable routine with fewer unknowns.¹²³ Alternative sanctions are a gamble, and “[r]esearch indicates that many offenders would prefer to complete their prison terms and be released with no strings attached rather than invest significant time in an alternative with a strong perceived likelihood of revocation.”¹²⁴ These kinds of inmate preferences are revealing, as they indicate prison is not as effective as some would like to believe.

118. *Id.*

119. Altman & Murray, *supra* note 82, at 31.

120. See HOME CONFINEMENT PROGRAM STATEMENT, *supra* note 85.

121. Alisha Williams et al., *The Lesser of Two Evils? A Qualitative Study of Offenders' Preferences for Prison Compared to Alternatives*, J. OFFENDER REHAB., no. 3-4, 2007-2008, at 71, 86.

122. David C. May & Peter B. Wood, *What Influences Offenders' Willingness to Serve Alternative Sanctions?*, 85 PRISON J. 145, 147 (2005).

123. Williams et al., *supra* note 121, at 73-76.

124. May & Wood, *supra* note 122, at 147.

Electronic monitoring presents its own set of unique issues. There is no disputing that home confinement with electronic monitoring is more cost effective per inmate than incarceration.¹²⁵ However, one reason for this savings is that the costs of incarceration shift from the taxpayer to the inmate and the inmate's family once placed in home confinement. The offenders themselves are often the ones required to pay for electronic monitoring,¹²⁶ in addition to other costs like urinalysis, "meals, medical treatment, clothing or incidentals, laundry services or other subsistence items," all of which would be provided to them if they were serving their sentence in prison.¹²⁷ Electronic monitoring has also been argued to be stigmatizing, making it hard for monitored offenders to find employment, housing, and maintain healthy relationships with their significant others and children.¹²⁸

Cost shifting may not only result in financial hardship for the individual offender and their family, but it also significantly limits the number of people who can participate in home confinement, "potentially creating an unjust gap between the correctional options available to offenders of low socioeconomic status."¹²⁹ While of course putting the inmate in the best position possible to be successful upon the completion of their sentence should be the ultimate goal of any punitive sanction, the reality is that only those inmates who have supportive families and gainful employment can utilize home confinement. There are also studies that show offender preferences differ starkly along racial lines. When considering whether a community-based sanction would best serve inmate needs, "[s]omeone who sees their neighborhood as ridden with crime, poverty, unemployment, [and] poor recreational opportunities . . . might be less inclined toward a

125. See Kanno-Youngs & Turcotte, *supra* note 106.

126. Bouchard & Wong, *supra* note 108, at 591.

127. HOME CONFINEMENT PROGRAM STATEMENT, *supra* note 85, at attach. B.

128. OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., ELECTRONIC MONITORING REDUCES RECIDIVISM 2 (2011), [<https://perma.cc/D6WK-AQTU>].

129. Bouchard & Wong, *supra* note 108, at 591.

sentence that would keep them in that community,” even when the alternative is incarceration.¹³⁰

Black Americans in particular have shown a preference to incarceration over alternative sanctions because the alternatives are viewed as a “hassle, involving intrusive restrictions and harassment from supervising officers.”¹³¹ Some Black offenders were less likely to want to serve their sentence under an alternative sanction if they were from neighborhoods where many others had done prison time because they are “less inclined to see imprisonment as something to be avoided.”¹³² The heartbreaking reality that this research brings to light is that minority populations, and Black Americans in particular, are less likely to see prison as punitive because incarceration is seen as an expected eventuality, an unavoidable rite of passage.¹³³ For many, it is not “if,” but “when” they will experience incarceration.

These drawbacks could be avoided as well if even a portion of the cost savings from reduced prison populations could be diverted to families who opt to support and sponsor their family member inmate in a home confinement placement. Offering financial subsidies to offset the costs of electronic monitoring, urinalysis, and other subsistence the inmate might require would reach families who might not otherwise be able to utilize home confinement and would allow their family member to reenter their community while serving the duration of their sentence.

III. WHY HOME CONFINEMENT WINS

When searching for alternatives to incarceration, it is important to first ask “does prison work?” and if not, “where does it fall short, and how can we make it better?” According to the U.S. Sentencing Commission, an imposed sentence would ideally accomplish four goals: (1) retribution, (2) deterrence, (3)

130. Brandon K. Applegate, *Of Race, Prison, Perception: Seeking to Account for Racially Divergent Views on the Relative Severity of Sanctions*, 39 AM. J. CRIM. JUST. 59, 63 (2014).

131. *Id.* at 72.

132. *Id.* at 73.

133. *Id.* at 72-73.

incapacitation, and (4) rehabilitation.¹³⁴ Incapacitation is one area in which prison certainly excels. It is difficult to commit crimes if you are cut off from the rest of society. When it comes to the other goals, however, in particular deterrence, evidence suggests that prison often falls short of its intended purpose. Pertaining to drugs in particular, an important facet of this conversation as nearly half of federal prisoners are locked up for drug crimes, some argue incarceration “does not deter unlawful drug activity . . . [and] incapacitating a low-level drug seller for a long time prevents little, if any, drug selling; the crime is simply committed by someone else.”¹³⁵

Arguments can also be made that prison fails to rehabilitate offenders and only stifles and hides problems from public view. “As massive numbers of homeless, hungry, unemployed, drug-addicted, illiterate, and mentally ill people vanish behind [prison] walls, the social problems of extreme poverty, homelessness, hunger, unemployment, drug addiction, illiteracy, and mental illness become more ignorable too.”¹³⁶ Even once inmates are released, incarceration has been linked to multiple negative side effects, from “increased criminal activity,” the “enduring stigma that affects future employment opportunities,” and “poor physical and mental health outcomes.”¹³⁷ Regarding recidivism rates, “[a]bout one-third of those who go to prison once come back again; of those who go to prison a second time, four-fifths will return repeatedly.”¹³⁸

Incarceration has severe costs, not merely in terms of dollars, but also in terms of the long-lasting, multi-generational impacts felt by inmates and their families. One study reported,

“More than half of fathers in state prison report being the primary breadwinner in their family” Should the family attempt to stay together through incarceration, the loss of

134. U.S. SENT’G COMM’N, FEDERAL SENTENCING: THE BASICS 4 (2020), [<https://perma.cc/N4KB-YXCU>].

135. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 FED. SENT’G REP. 2, 3 (2021).

136. MAYA SCHENWAR, LOCKED DOWN, LOCKED OUT: WHY PRISON DOESN’T WORK—AND HOW WE CAN DO BETTER 12 (2014).

137. Bouchard & Wong, *supra* note 108, at 589.

138. Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97, 98 (2008).

income only increases, as the mother must pay for phone time, travel costs for visits, and legal fees. The burden continues after the father returns home, because a criminal record tends to injure employment prospects. Through it all, the children suffer.¹³⁹

As of 2015, “2.7 million children are growing up in U.S. households in which one or more parents is incarcerated,” with “[t]wo-thirds of these parents [being] incarcerated for nonviolent offenses, including a substantial proportion who are incarcerated for drug law violations.”¹⁴⁰ The data also suggests impacts are felt disparately among communities of color. A staggering “[o]ne in nine Black children has an incarcerated parent, compared to . . . one in 57 white children.”¹⁴¹ Some studies suggest parental incarceration “makes [a] child three to four times more likely to develop a record for juvenile delinquency” and is linked to “school failure, underemployment, and illegal drug use.”¹⁴²

Not only is incarceration damaging to family ties, but it also hurts community and economic development when residents are put in prison. The unemployment rate for formerly incarcerated individuals is “nearly *five times higher* than the unemployment rate for the general United States population.”¹⁴³ When going to prison reduces your ability to get a job, “then neighborhoods where many people have been to prison are also neighborhoods where those people have trouble in the job market.”¹⁴⁴ Not only are previously incarcerated individuals less likely to find employment and earn as much as people who have not been incarcerated, they are also less likely to engage and be able to participate in the political process. Studies show “[m]ore than 5.3 million people . . . are estimated to have been prohibited from voting as a consequence of their criminal records.”¹⁴⁵ Additionally, “[p]eople with felony arrests who may legally vote

139. Coates, *supra* note 17, at 20.

140. DRUG POL’Y ALL., *supra* note 45.

141. *Id.*

142. Clear, *supra* note 138, at 110.

143. Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL’Y INITIATIVE (July 2018), [<https://perma.cc/LGD3-MLBE>].

144. Clear, *supra* note 138, at 107-08.

145. *Id.* at 116.

are 18 percent less likely to vote than those who have not been arrested; people in prison who are allowed to vote are 27 percent less likely to do so than their nonincarcerated counterparts.”¹⁴⁶ As these numbers demonstrate, incarceration does not just impact our families and our communities; incarceration also impacts our democracy. “[G]rowth in the penal system, especially prisons, has resulted in a series of collateral problems that produce inequality and reproduce injustice in ways that are inconsistent with sound democratic policy.”¹⁴⁷

Ultimately, the overall effectiveness of prison is a mixed bag, and studies show that it can be a factor that both increases and decreases crime. Being in prison “tends to reduce crime through incapacitation and deterrence but . . . also tends to increase crime through destabilization of families and by undermining other sources of informal social control.”¹⁴⁸ The current mass incarceration crisis is not only a reflection of the huge numbers of people being admitted to prisons, but also has much to do with the length of their stays.¹⁴⁹ While time served is a “significant component of the rising prison population,” it is not believed to reduce recidivism, or contribute to general deterrence but it does have significant costs, both monetary and in terms of the erosion of community ties.¹⁵⁰ Home confinement on the other hand, even though constant surveillance through electronic monitoring has its downsides, appears to be “an effective deterrent for offenders who are arrested or convicted of an offense,” because it is a “tool to encourage [] self-regulatory behavior.”¹⁵¹

There is much we have yet to explore regarding the full utility of home confinement. The BOP itself does not currently have a full picture of how successful RRC and home confinement programs can be. A recent audit of the programs revealed the BOP focuses on hitting target goals for utilization, sometimes at

146. *Id.* at 116-17.

147. CLEAR & FROST, *supra* note 51, at 16.

148. Clear, *supra* note 138, at 108.

149. Marc Mauer, *The Hidden Problem of Time Served in Prison*, 74 SOC. RSCH. 701, 701 (2007).

150. *Id.*

151. Bouchard & Wong, *supra* note 108, at 601.

the expense of transitioning inmates too early, but it “lacks adequate performance measures to evaluate the success of [] home confinement programming.”¹⁵² Additionally, viewpoints of the overall impact home confinement has on recidivism is split. Some studies conclude “home confinement does little to impact recidivism,” but instead merely suppresses “criminal behavior during the period of time the offender is being monitored or serving a period of home confinement.”¹⁵³ Others, contrastingly, have found a strong positive correlation between reduced recidivism and home confinement, claiming “offenders who are sentenced to home confinement are significantly less likely to commit a subsequent offense in comparison with offenders who are released from a custodial facility.”¹⁵⁴

One insight that these studies have not yielded, however, is that home confinement makes recidivism worse. As one author put it, “[I]f alternative sanctions are equally effective (or ineffective) as incarceration [] in reducing recidivism, perceived by offenders as equally punitive, and significantly less expensive than imprisonment, there seems good reason to expand their use.”¹⁵⁵ We will not know the full spectrum of the benefits to be wrought by increased utilization of home confinement until we try. The expanded eligibility made available under the CARES Act during the COVID pandemic has shown us that there is still much that can be done to improve the criminal justice system and to serve the people it imprisons.

CONCLUSION

As a nation, addressing mass incarceration must be a priority. While the ultimate goal should be to address the systemic inequalities and policies that put so many people in prisons and jails in the first place, home confinement is one way to address the negative impacts prison has on inmates, their families, and our communities while those policy changes take shape. We need to ask ourselves what we hope to accomplish

152. BOP AUDIT, *supra* note 89, at iii.

153. ENCYCLOPEDIA OF COMMUNITY CORRECTIONS, *supra* note 80, at 205.

154. Bouchard & Wong, *supra* note 108, at 601.

155. Williams et al., *supra* note 121, at 87.

through punishment in a prison setting. If the ultimate goal of prison is for inmates to learn from their mistakes and reenter and contribute to society after their sentence has elapsed and not recidivate, how is it helpful for people to sit in cells, sometimes for years, without the adequate training and preparation they need to be successful on the outside? Home confinement offers the potential for us to save and reallocate funds for education, substance abuse treatment, and employment programs which in turn can contribute to breaking vicious cycles related to multi-generational substance abuse and poverty. Not only that, but the shift to remote work over the course of the pandemic has created more opportunities than ever for people to work from home and support their families.

If there is even the slightest chance that home confinement can be better than prison at allowing inmates to “maintain employment, get off drugs, or stay in school,”¹⁵⁶ why would we not at least try? We have a perfect subset of inmates through which we can see the impact of extended home confinement. The inmates currently serving their sentences at home, who are not traditional candidates for home confinement but that have been released under the CARES Act during the pandemic, offer a perfect ongoing national experiment to see if home confinement can accomplish the goals of imprisonment while limiting the costs to the public and allowing inmates to remain close to those they love.

Not only should we permit those already serving their sentences in home confinement to remain there, even after the pandemic is declared to no longer be an emergency, we should also continue to expand home confinement to include other classes of non-violent offenders to identify the full spectrum of benefits to be realized by the alternative sanction. The cost savings from reduced prison populations can be diverted to incentivize participation in home confinement for families who would otherwise be excluded by lack of financial ability or to hire case managers with the qualifications to meet inmates’ unique needs.

156. HOFER & MEIERHOEFER, *supra* note 109, at 50.

Our current criminal justice system is one of unequal outcomes, and one in which an offender's age, education, race, and socioeconomic background will have a substantial impact on the effectiveness of their punishment. Addressing mass incarceration will require an examination of what we hope to achieve through imprisonment as well as exploration into viable alternatives. Home confinement is one such alternative. It is more than merely pre-trial detention or a pre-release adjustment period. It is more than an emergency pandemic protocol. It is an underutilized alternative sanction with huge potential to be part of a bigger solution. At the end of the day, a prison sentence should not be a death sentence, pandemic or not. Our people, our families, and our communities are worth it.