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Rotten Social Background and Mass Incarceration: Who Is a Victim?

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WHO IS A VICTIM?

Steven Zeidman†

INTRODUCTION

Several years ago, the annual Parole Summit organized by the Lifers and Longtermers Organization (LLO) at Otisville Correctional Facility in New York included a skit the organizers created about sentencing in criminal cases. The skit began with the accused having been found guilty of murder, and attention then turned to sentencing, with LLO members playing the role of judge, prosecutor, victim's mother, defense counsel, and defendant.

The judge started the proceeding by asking if all sides were ready for sentencing, and the prosecutor and defense attorney nodded their assent. The judge then asked if the prosecutor had any sentencing recommendation. The prosecutor detailed the facts of the case, referred to the defendant as an unrepentant danger to society, and implored the judge to impose the maximum sentence of fifty years to life.

Thereafter, the victim's mother addressed the court. She spoke of the excruciating pain she felt every second of every day and the irreparable harm the defendant caused. She concluded by urging the judge to send the defendant away for the rest of his life.

Defense counsel began by acknowledging the heinous nature of the crime, and then talked about his belief in his client's good qualities, the legal issues in the case, and the plans to appeal. He concluded by asking the judge to impose a reasonable sentence.

Then the judge addressed the defendant: "Is there anything you wish to say before I pronounce sentence?" At that moment, the room got very quiet as everyone watching leaned in to hear what the script called for the defendant to say. The defendant looked down at the floor, shook his head, and whispered "No." There were

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audible murmurs of recognition from the many lifers in the room. The skit ended with the judge sentencing the defendant to fifty years to life.

The skit generated heated discussion. On its surface, the point seemed to be the defendant's failure to seize the opportunity to acknowledge and accept responsibility for the harm he caused and to express remorse. Yet LLO members quickly raised myriad explanations for remaining silent—feeling concern about compromising an appeal (and their lawyer's admonition that they remain silent); being too consumed with anger, frustration, sadness, and anxiety to be able or willing to speak; and believing in the futility of saying anything that would lead to a lesser sentence. A final reason, of course, is the impossibility of expressing remorse for something if the person being sentenced is in fact innocent. As a result, many people are sent to prison for lengthy terms, like fifty years to life as in the example above, without the judge having ever heard them utter a single word.[1]

Working for several years with people serving life and long term sentences has made me increasingly aware of the many ways their voices are stifled—they seldom testified at their trial (if indeed there was a trial as opposed to a guilty plea); they rarely spoke at their sentencing; and decades later when they finally appeared before a parole board, they were interrogated about their crime of conviction and prohibited from fully explaining the confluence of factors that led to their arrest.[2]

And so, what remains buried along with the prisoners behind the walls is the reality that hundreds of thousands of them are themselves victims[3]—victims of both willful societal neglect and victims of massive prison terms unknown to any other western industrialized nation.[4] Given the current calls for overhauling, if not

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[1] Based on the author's experience observing and engaging with participants and other attendees of the LLO's 5th Annual Parole Summit, held at Otisville Correctional Facility in Otisville, New York, on September 29, 2017.

[2] Most states and the federal government do not provide the accused with the right to testify in the Grand Jury. However, it is also exceedingly rare for the accused to testify on their own behalf in the few states that explicitly allow it. Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 37 (2002).

[3] By "victim," I am referring to the Black's Law Dictionary definition: "a person harmed by a crime, tort, or other wrong." *Victim*, BLACK'S LAW DICTIONARY (11th ed. 2019). I do, however, recognize the many concerns with the very use of the word "victim" as trenchantly discussed by Anna Roberts. *See generally* Anna Roberts, *Victims, Right?*, 42 CARDOZO L. REV. 1449 (2021) (discussing problems with the word "victim").

[4] Matthew B. Kugler et al., *Differences in Punitiveness Across Three Cultures: A Test of American Exceptionalism in Justice Attitudes*, 103 J. CRIM. L. & CRIMINOLOGY 1071, 1074 (2013) ("The United States now has the highest incarceration rate in the world, assigns more long-duration prison sentences than do other countries, and makes considerable use of the death penalty when almost all other Western democracies have

abolishing, the criminal legal system, it is time to center the voice of the accused and bring to the fore the reality of societal blame for most serious crime and for the crisis of mass incarceration.

Part I of this essay provides an overview of what has come to be referred to as "rotten social background" or "severe environmental deprivation," a confluence of circumstances meant to describe the harsh conditions found in many underresourced and overpoliced communities, particularly communities of color, and the impact of those factors on people's opportunities, choices, and behavior. Part II examines the impediments to actualizing defendants' supposedly sacred constitutional right to meaningfully testify on their own behalf in the few cases that do proceed to trial. Part III focuses on the defendants' right to be heard at sentencing and the ways, particularly if the conviction was the result of a guilty plea, that any statements made are circumscribed and discounted. Part IV scrutinizes the back end of the criminal legal system and the limitations on incarcerated individuals' rights to be heard at parole interviews beyond the facts of their crime of conviction and statements of contrition. The overall analysis reveals the many ways that the accused is denied the opportunity to be heard, fully, about their life circumstances and the myriad societal factors that paved the way for their current situation.

I. "ROTTEN SOCIAL BACKGROUND"

While the link between crime and poverty is complex, it is undeniable that poor people, especially poor people of color, are overrepresented in the criminal courts.[5] "Rotten social background" (RSB) has been offered as an explanation. The first reference to RSB, or "severe environmental deprivation,"[6] as it relates to the culpability of a person accused of crime appeared in the 1973 case *United States v. Alexander*.[7]

In *Alexander*, a Black man named Murdock shot and killed a white marine after the marine "called him a 'black bastard.'"[8] The defense theory was that Murdock suffered from a mental disease or

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banned that punishment."); *see also* German Lopez, *The Case for Capping All Prison Sentences at 20 Years*, VOX (Feb. 12, 2019), https://www.vox.com/future-perfect/2019/2/12/18184070/maximum-prison-sentence-cap-mass-incarceration [https://perma.cc/SZY4-X74T].

[5] *See* THE SENT'G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 1 (2018).

[6] *See infra* note 39 and accompanying text.

[7] *See* United States v. Alexander, 471 F.2d 923 (D.C. Cir. 1973).

[8] *Id.* at 957. There was also testimony from prosecution witnesses about several more, increasingly vile, racial epithets.

defect due to his RSB such that he could not control his conduct.[9] A defense psychiatrist did not label Murdock as legally insane, but instead testified that Murdock suffered from an inability to control his behavior due to the societally imposed hardships he faced while growing up.[10] The defense produced evidence that Murdock grew up amid great socioeconomic and environmental adversity, and that because of racist treatment that he had endured he had learned to fear white people.[11] Although the trial judge permitted testimony about Murdock's life experiences, he instructed the jury to ignore testimony about Murdock's background and to decide only the narrow question of whether he met the legal definition of insanity.[12] Murdock was found to be sane, was convicted, and was sentenced to "twenty years to life" in prison.[13]

While the appellate court affirmed, Judge David Bazelon wrote in his dissent that the jury should have been allowed to consider social background evidence to assess whether Murdock's behavior was impaired to such a degree that he should be acquitted.[14] In other words, while Murdock may not have been legally insane, he might still have been acquitted if the jury considered all the evidence of his background.[15] Bazelon felt that the trial judge's refusal to consider the role that RSB played on Murdock's behavior rendered Murdock unable to show that he lacked moral responsibility for his actions.[16] For Bazelon, it was a matter of fundamental morality that evidence of a person's RSB should be factored into the determination of culpability. By directly inserting the accused's background into the guilt equation, Bazelon raised the question of societal fault and the role of systemic inequality as it relates to culpability.[17]

In 1985, Richard Delgado was the first academic to pick up on Bazelon's suggestion and argue for a defense rooted in RSB.[18]

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[9] *Id.* at 959.

[10] *Id.* at 958–59.

[11] *See id.* at 959 n.100.

[12] *See id.* at 959.

[13] *Id.* at 927.

[14] *Id.* at 960 (Bazelon, C.J., dissenting) ("I think that the quoted [jury] instruction was reversible error. It had the effect of telling the jury to disregard the testimony relating to [defendant's] social and economic background and to consider only the testimony framed in terms of 'illness.'").

[15] *Id.* at 958–59.

[16] *See id.* at 960.

[17] *See id.* at 926 (explaining that the grounds for error upon appeal raise broad concerns about the societal impacts of racism on the entire criminal justice system); *see also* David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 401–02 (1976) (arguing there is no moral justification for punishing poor criminal defendants when society refuses to remedy conditions of inequality).

[18] Richard Delgado, *Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation*, 3 MINN. J.L. & INEQ. 9, 11

Delgado observed that while the vast majority of poor people do not commit crime, most offenders are from poor backgrounds.[19] He catalogued some of the many ways that society turns a willful blind eye to issues faced predominantly by communities of color, including substandard housing, chronic lack of employment opportunities, inadequate schools, lack of access to healthcare, and pervasive racism.[20] Delgado agreed with Bazelon that the legal system lacks the moral authority to impose punishment unless the accused is blameworthy and bears responsibility for their intentional actions.[21] In Delgado's framework, evidence of RSB could rise to the level of an excuse to absolve the accused of criminal liability.[22] Recognizing RSB as a defense to crime ascribes blame to societal fault as opposed to some kind of personal deficiency; it compels the question of whether society can sit in judgment when it is in large part to blame for the environmental deprivation and desperate circumstances that set the accused's actions in motion.

II. TESTIMONY AT TRIAL

The Fifth Amendment provides that "No person . . . shall be compelled in any criminal case to be a witness against himself."[23] While the affirmative right to testify on one's behalf at trial is not explicitly mentioned in the Constitution or its Amendments, in *Rock v. Arkansas*, the Supreme Court held that it is a corollary of the right to remain silent.[24]

However, rarely does the accused avail themselves of this cherished right.[25] For starters, the overwhelming number of convictions are the result of guilty pleas—trials are few and far between.[26] But even in those relatively few cases where the

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n.11 (using the phrase "rotten social background" to describe conditions of "socioeconomic and environmental adversity").

[19] *Id.* at 10.

[20] *Id. passim*. In contrast, the United States "spends $81 billion a year on mass incarceration, according to the Bureau of Justice Statistics." *See* Casey Kuhn, *The U.S. Spends Billions to Lock People Up, but Very Little to Help Them Once They're Released*, PBS NEWS HOUR (Apr. 7, 2021), https://www.pbs.org/newshour/economy/the-u-s-spends-billions-to-lock-people-up-but-very-little-to-help-them-once-theyre-released [https://perma.cc/BHS8-8CNU].

[21] Delgado, *supra* note 18, at 54–55 (asserting that "blame is inappropriate when a defendant's criminal behavior is caused by extrinsic factors beyond his or her control").

[22] *Id.* at 63–68.

[23] U.S. CONST. amend. V.

[24] Rock v. Arkansas, 483 U.S. 44, 52 (1987).

[25] Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1449–50 (2005) ("The United States's criminal justice system is shaped by a fundamental absence: Criminal defendants rarely speak."); *see also* Barbara Babcock, *Taking the Stand*, 35 WM. & MARY L. REV. 1, 2 (1993).

[26] Missouri v. Frye, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.");

accused rejects a guilty plea and opts for trial, they rarely testify.[27] In some cases, that is because of the prosecution's threat of perjury charges if the accused is convicted after having testified to their innocence.[28] In other cases, the accused declines to testify because they fear not being able to tell their narrative story well under pressure or being tripped up or confused by cross-examination.[29] In many cases, people do not testify because the prosecutor intends to cross-examine them about prior unrelated convictions or bad acts.[30]

Given the undeniable history of hyperaggressive policing in Black and Brown communities,[31] concerns regarding cross-examination about prior convictions disproportionately affect people of color.[32] Also, people charged with crime are aware that they will be seen, as a standard jury charge instructs, as an "interested witness" whose credibility merits heightened scrutiny and whose testimony may therefore be discounted or outright rejected.[33] Furthermore, not only does current practice

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Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Gone: Trials Continue to Decline in Federal and State Courts. Does It Matter?*, 101 JUDICATURE 26, 28 (2017).

[27] Hon. Robert L. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: Former Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 134 (2019) (noting that defendants "frequently exercise[their] right to not testify"); Vida Johnson, *Silenced by Instruction*, 70 EMORY L.J. 309, 311 (2020) ("Of those individuals who choose to go to trial, only a small number decide to testify."); *see also* Toni Messina, *Why Defendants Rarely Testify*, ABOVE THE L. (Sept. 30, 2019, 12:44 PM), https://abovethelaw.com/2019/09/why-defendants-rarely-testify/ [https://perma.cc/GJ5E-SLDZ]; Matthew T. Mangino, *Mangino Column: Few Criminal Trials Feature the Defendant's Testimony*, CHEBOYGAN DAILY TRIB. (Dec. 11, 2020, 9:33 AM), https://www.cheboygannews.com/story/opinion/columns/2020/12/11/mangino-column-few-criminal-trials-feature-defendants-testimony/43266443/ [https://perma.cc/VY5B-L6NP].

[28] *See, e.g.*, United States v. Dunnigan, 507 U.S. 87, 89, 99 (1993) (upholding a sentence enhancement based on the trial judge's determination that the defendant's trial testimony was perjury).

[29] Babcock, *supra* note 25, at 12; Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 426 (2018).

[30] *See* Bellin, *supra* note 29, at 863–71, 880. *See generally* Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 565 (2014) [hereinafter Roberts, *Unreliable Conviction*] (calling for an examination of the reliability of convictions offered or impeachment of the accused's testimony); Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1977 (2016) [hereinafter Roberts, *Prior Impeachment*] (urging abolition of the practice of impeaching the defendant with prior convictions).

[31] *See, e.g.*, Steven Zeidman, Opinion, *Shatter 'Broken Windows' Policing*, N.Y. DAILY NEWS (June 10, 2020, 5:00 AM), https://www.nydailynews.com/opinion/ny-oped-shatter-broken-windows-policing-20200610-iozn54pfwnhzbps3oqnx7dvhum-story.html (last visited May 19, 2022) (explaining that broken windows, or quality-of-life, policing disproportionately regulated communities of color).

[32] Julia Simon-Kerr, *Credibility by P*roxy, 85 GEO. WASH. L. REV. 152, 190 (2017); Montre D. Carodine, *The Mis-Characterization of the Negro: A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 527 (2009).

[33] *See, e.g.*, Reagan v. United States, 157 U.S. 301, 310 (1895) (holding that the trial court "may, and sometimes ought, to remind the jury . . . that the interest of the defendant in the result of the trial is of a character possessed by no other witness, and

mean that too few people exercise their fundamental right to testify on their own behalf, juries undoubtedly, and despite judicial admonitions to the contrary,[34] hold the accused's silence against them.[35]

Surely, even when the accused declines to testify, they have things they want to say; things the jury, judge, and prosecutor should hear.[36] Given the value placed on the heralded right to testify on one's own behalf, trials should provide opportunities for the accused to exercise their fundamental and treasured right to be heard. Accordingly, actors in the legal system should take affirmative steps to limit or remove the extant disincentives facing someone who is considering whether to testify.

For starters, self-described progressive prosecutors could refrain from cross-examining the accused if they testify at trial. If that is a bridge too far, they could limit their questioning to the classic "Q&A" style, utilizing open-ended questions like "What happened?" and "What happened next?" in the nature of an investigative interview rather than an interrogation. If a prosecutor still feels compelled to cross-examine the accused, their questioning should be limited to the facts of the instant charges, and they should refrain from asking any questions about any alleged prior arrests, convictions, or bad acts.[37]

Further, the accused's own testimony should not be limited to the facts of the instant charges. As one scholar observed, "it is almost impossible to see the defendant as a deserving person unless he testifies, partly because the natural order of the trial dehumanizes him."[38] Courts should allow the accused to testify in-depth about their background, especially,

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is therefore a matter which may seriously affect the credence that shall be given to his testimony"); Portuondo v. Agard, 529 U.S. 61, 72–73 (2000) (reaffirming *Reagan* in a case where the trial court instructed the jury that "[a] defendant is of course an interested witness since he is interested in the outcome of the trial. You may as jurors wish to keep such interest in mind in determining the credibility and weight to be given to the defendant's testimony."); Roberts, *Prior Impeachment*, *supra* note 30, at 2000 (noting that "judge[s] may instruct jurors that a testifying defendant has a deep interest in the case that creates a motive for false testimony").

[34] Carter v. Kentucky, 450 U.S. 288, 300 (1981) (concluding that at the defendant's request the trial judge must instruct the jury to draw no negative inferences from the accused's decision not to testify).

[35] Roberts, *Unreliable Conviction*, *supra* note 30, at 575; Bellin, *supra* note 29, at 407–08 (finding that "empirical evidence also demonstrates that remaining silent comes at a price. . . . [J]urors punish defendants for refusing to testify"); Babcock, *supra* note 25, at 13 (explaining that jurors expect an innocent person to testify).

[36] *See* Bellin, *supra* note 29, at 397 ("[D]efendants with important stories to tell frequently sit silently . . . .").

[37] *See, e.g.*, Roberts, *Prior Impeachment*, *supra* note 30 (calling for abolition of evidentiary rules that allow for impeachment of the accused by prior conviction).

[38] Babcock, *supra* note 25, at 5–6.

where applicable, about RSB or "severe environmental deprivation"—namely, poverty and substandard education, housing, nutrition, and healthcare.[39] While the Supreme Court has held that the defendant must be permitted to introduce evidence of their social background when seeking to mitigate a sentence,[40] the door has remained closed to the admission of such evidence on the question of culpability, despite arguments to the contrary made almost fifty years ago by Judge Bazelon in his dissent in *Alexander*.

There are innumerable reasons why the accused's testimony should be encouraged beyond just giving the jury more evidence to consider on the vital question of guilt or innocence. If jury service is one of the pillars of civic engagement, it is imperative that jurors hear the accused's full story.[41] Prosecutors and judges should also hear directly from the accused about the combination of factors that led them to their current predicament.[42] In keeping with the abolitionists' call to redirect funds currently funneled into the criminal legal system, so, too, might more people seek ways to rectify the conditions of RSB if they heard more about it.[43]

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[39] Richard Delgado, *Should the Law Recognize a Defense of Severe Environmental Deprivation*, 3 LAW & INEQ. 9, n.82 (1985) ("a person deserves his or her day in court and with it the right to tell his or her story as he or she sees fit"). *Contra* Stephen J. Morse, *Severe Environmental Deprivation (AKA RSB): A Tragedy Not a Defense*, 2 ALA. C.R. & C.L. L. REV. 147, 156 (2011).

[40] Williams v. Taylor, 529 U.S. 362, 397 (2000).

[41] *See, e.g.*, Roberts, *Prior Impeachment*, *supra* note 30, at 2002 (testifying "permits a criminal defendant to remind—or show—the jury that he is a human being"); Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 861 (2016); Natapoff, *supra* note 25, at 1503 ("recognizing defendants as speakers and valuing their speech is a form of empathy, inclusion, and empowerment"); M. Eve Hanan, *Talking Back in Court*, 96 WASH. L. REV. 493, 500–01 (2021) (hearing from the accused would increase understanding about the injustices perpetuated by criminal legal practices); *see also* Angela P. Harris, *RSB and the Temper of the Times*, 2 ALA. C.R. & C.L. L. REV. 131, 134 (2011) ("Bazelon hoped that a broad inquiry into criminal responsibility would confront jurors and by extension other members of the public with their own often failed responsibility to their fellow citizens.").

[42] Natapoff, *supra* note 25, at 1498–99; Roberts, *supra* note 30, at 2018 ("[D]efendant testimony can reveal the vulnerabilities and suffering—victimization, even—that a defendant has endured. . . . For judges and prosecutors . . . how could it not be uncomfortable to hear defendant narratives of vulnerability, victimhood, injustice, and legal and constitutional violations, some perpetuated in the name of the state, and some unremedied by the state?"); Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 894 (208) ("Courts and practitioners have grown increasingly callous to the value of hearing from defendants . . . .").

[43] United States v. Alexander, 471 F.2d 923, 965 (D.C. Cir. 1973) (Bazelon, C.J., dissenting) (permitting RSB defense would force society to confront the causes of crime and "whether income redistribution and social reconstruction are indispensable first steps toward solving the problem of violent crime"); Delgado, *supra* note 18, at 21 ("[E]xposure to the testimony would benefit society. As a result of learning about the

And while no state has adopted a defense of extreme economic deprivation[44] or RSB and "judges are [loathe] to permit evidence" about the accused's social background at the guilt phase of the trial,[45] there is growing receptivity to the impact of social background and circumstances in the context of resentencing. One transformational line of Supreme Court cases, including *Roper v. Simmons*,[46] *Graham v. Florida*,[47] *Miller v. Alabama*,[48] and *Montgomery v. Louisiana,*[49] changed the way children are treated at sentencing[50] and spawned resentencing motions[51] that focus on neuroscience regarding brain development—more specifically, the prefrontal cortex—and the diminished culpability of young people.[52] The Court also recognized that young people can and do change and should rarely be subject to life or de facto life sentences.[53]

Lawyers and academics increasingly argue that brain development evidence should be admitted at trial to show that a

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wretched conditions in which some of its members live, society would presumably decide to do something about them.").

[44] Richard Delgado, *The Wretched of the Earth*, 2 ALA. C.R. & C.L. L. REV. 1, 5 (2011).

[45] Mythri Jayaraman, *Rotten Social Background Revisited*, 14 CAP. DEF. J. 327, 331 (2002); *see* Andrew E. Taslitz, *The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado's Rotten Social Background*, 2 ALA. C.R. & C.L. L. REV. 79, 80 (2011) (noting that Delgado's formulation of rotten social background has been important with respect to scholarship regarding criminal responsibility but has had no impact on case and statutory law).

[46] Roper v. Simmons, 543 U.S. 551 (2005) (holding that the death penalty is unconstitutional for juveniles).

[47] Graham v. Florida, 560 U.S. 48 (2010) (holding that juvenile offenders cannot be sentenced to life imprisonment without parole for convictions that are not homicide).

[48] Miller v. Alabama, 567 U.S. 460 (2012) (holding that life imprisonment without parole for juvenile offenders violated Eighth Amendment prohibition on cruel and unusual punishment).

[49] Montgomery v. Louisiana, 577 U.S. 190 (2016) (holding that the Court's ruling in *Miller v. Alabama* should be applied retroactively).

[50] John F. Stinneford, *Youth Matters:* Miller v. Alabama *and the Future of Juvenile Sentencing*, 11 OHIO ST. J. CRIM. L. 1, 3 (2013) (discussing how children now get individualized sentencing determination); *see Miller*, 567 U.S. at 471.

[51] *See* Robert S. Chang et al, *Evading* Miller, 39 Seattle U. L. Rev. 85, 91–103 (2015); *The Aftermath of* Miller v. Alabama, NAT'L CTR. FOR YOUTH L. (Apr. 1, 2014), https://youthlaw.org/news/aftermath-miller-v-alabama [https://perma.cc/L92V-WQL4].

[52] *See, e.g.*, Judith G. Edersheim et al., *Neuroimaging, Diminished Capacity and Mitigation*, *in* NEUROIMAGING IN FORENSIC PSYCHIATRY: FROM THE CLINIC TO THE COURTROOM 163 (Joseph R. Simpson ed., 2012) (discussing the impact of neuroimaging findings on medicolegal questions such as criminal responsibility); Elizabeth Scott et al., *Brain Development, Social Context, and Justice Policy*, 57 WASH. U. J.L. & POL'Y 13 (2018) (confirming and explicating the Supreme Court's conclusion that juvenile offenders differ in important ways from adult counterparts; juveniles deserve less punishment because their offenses are driven by biological and psychological immaturity).

[53] *See Miller*, 567 U.S. at 479 (acknowledging children's "heightened capacity for change" and indicating that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon").

young defendant lacked the intent required to establish guilt.[54] After all, the Court in *Miller* stated that the "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences."[55] The same "distinctive attributes" of one's background and upbringing should similarly matter when it comes to determinations of culpability.[56]

Some states have begun enacting legislation recognizing the lesser culpability of certain offenders due to background characteristics. In 2019, New York State passed the Domestic Violence Survivors Justice Act (DVSJA) which authorizes, subject to specified criteria, motions for resentencing by a domestic violence survivor who suffered abuse that contributed to their conviction if the abuse was a "significant contributing factor" to the alleged criminal behavior.[57] Notably, the abuser does not have to be the alleged victim of the crime for which the resentencing applicant was convicted. This statute raises the question whether evidence of domestic violence was adequately admitted and considered at the sentencing phase of the trial.

Since the passage of DVSJA, I have received countless letters from lifers that describe in excruciating detail the abuse and trauma they suffered while growing up. "Hurt people hurt people," as one letter writer put it. In most cases, the alleged victim of their crime was not their abuser, and the crime for which they were convicted happened many years after their childhood abuse. Most of the people who wrote these letters did not testify at trial, or, if they did, their testimony was limited to the facts of the charges against them. Juries should hear and

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[54] *See, e.g.*, Jenny E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. REV. 539 (2016) (arguing that the mens rea standard should be recalibrated to account for the distinct thought and decision-making processes of adolescents relative to adults); Williams v. Ryan, 05CV0737-WQH WMC, 2010 WL 3768151, at *14 (S.D. Cal. Sept. 21, 2010) (noting that petitioner contended that he would call multiple experts to testify "regarding juveniles and their brain development, MRI evidence, and their maturity and restricted ability to make judgments all as it relates to culpability and appropriate punishment"). For examples of scholars calling for a reevaluation of the meaning of criminal intent in general, see Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179 (2010); and David Crump, *What Does Intent Mean*, 38 HOFSTRA L. REV. 1059 (2010).

[55] *Miller*, 567 U.S. at 472.

[56] *Id.* The Supreme Court has to date limited its holdings regarding youth sentencing to those who were seventeen or younger at the time of their crime. *See, e.g.*, *id.* at 465 (limiting holding to persons under eighteen years old). However, the science the Court relied on now suggests that brain development continues into the mid-20s. Cara H. Drinan, *Conversations on the Warren Court's Impact on Criminal Justice*: In re Gault *at 50*, 49 STETSON L. REV. 433, 452–53 (2020). In New York State, 631 people in state prison are serving life sentences for crimes committed when they were seventeen or younger. Data from the New York State Department of Corrections & Community Supervision (on file with author).

[57] N.Y. PENAL LAW § 60.12 (McKinney 2019); N.Y. CRIM. PROC. LAW § 440.47 (McKinney 2019).

consider on the question of culpability the accused's testimony about their childhood abuse and trauma. As with RSB, maybe if more judges and juries heard these stories, there would be a growing societal commitment to finally take meaningful steps to address the circumstances that created and allowed for childhood abuse and trauma.

III. STATEMENTS AT SENTENCING

Whether by virtue of a guilty plea or conviction after a trial, sentencing theoretically affords the defendant an opportunity to speak.[58] Federal Rule of Criminal Procedure 32 provides the defendant with the right "to speak or present any information to mitigate the sentence."[59] The states also provide for the right to be heard at sentencing, whether in the state constitution, case law, statutes, or court rules.[60] The Supreme Court has made clear that the trial judge should "leave no room for doubt that the defendant has been issued a personal instruction to speak prior to sentencing."[61] For appellate purposes, prejudice will be presumed if the district court failed to ask the defendant if they wished to speak at sentencing.[62]

However, many, if not most, people choose not to exercise that right.[63] If they do, it is a scripted routine with the institutional expectation that it will be limited to expressions of remorse and pleas for leniency.[64] And that is wise—after all, it is generally understood that judges only want to hear contrition and apology.[65] It is usually

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[58] Joshua I. Burger-Caplan, Note, *Time of Desperation: An Examination of Criminal Defendants' Experiences of Allocuting at Sentencing*, 51 COLUM. J.L. & SOC. PROBS. 39, 41 (2017) ("In a system where so few people go to trial, let alone testify, sentencing is often the only opportunity for defendants to speak during the legal process in a way that is even nominally unconstrained."). *But see* People v. Brown, 170 N.E.3d 439 (N.Y. 2021) (holding that defendant's waiver of the right to appeal waived his right to speak at sentencing). Judge Rowan Wilson's lengthy dissent in *People v. Brown* highlighted the importance of hearing from the defendant at sentencing: "I dissent because Mr. Brown had the right to speak his mind at sentencing, did not waive that right, and I, for one, would have liked him to enter prison thinking the courts treated him fairly." *Id.* at 446 (Wilson, J., dissenting).

[59] FED. R. CRIM. P. 32(i)(4)(A)(ii). The right to speak at sentencing before sentence is handed down has been codified in some version of the Federal Rules of Criminal Procedure since 1944. Burger-Caplan, *supra* note 58, at 40.

[60] *See* Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 FORDHAM L. REV. 2641, 2649–51 (2007).

[61] Green v. United States, 365 U.S. 301, 304 (1961) (plurality opinion).

[62] United States v. Greenspan, 923 F.3d 138, 156 (3d Cir. 2019).

[63] Hanan, *supra* note 41, at 518 (noting that defendants in lower court "may seem speechless at sentencing").

[64] *See* M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301, 323–28 (2018); Robin L. Rosenberg, *Conversations of a Lifetime: The Power of the Sentencing Colloquy and How to Make it Matter*, JUDICATURE, Summer 2019, at 19, 19–20.

[65] Mark W. Bennett & Ira P. Robbins, *Last Words: A Survey and Analysis of Federal Judges' Views on Allocution at Sentencing*, 65 ALA L. REV. 735, 752 (2014).

the case that a defendant who voices remorse and accepts responsibility is likely to receive a better sentence than someone seen as "unrepentant."[66]

Going beyond the confines of what is generally understood as acceptable remarks at sentencing—contrition, remorse, accepting responsibility—is risky.[67] Judges do not want to hear anything that to them sounds like an excuse.[68] It is especially dangerous for the defendant to voice anything like anger or raise any grievance.[69]

In fact, many judges frown upon statements by the defendant at sentencing, especially in the context of a guilty plea with an already negotiated sentence, and dismiss what is said as self-serving and scripted.[70] Not surprisingly then, defense lawyers may counsel their clients that any attempt at excusing, justifying, or even explaining their conduct will often prompt judges, who view a guilty plea or a jury's verdict as truth and sacrosanct, to increase the punishment they are soon to hand down. Defense lawyers may also advise clients to remain silent at sentencing out of concerns that anything said, especially admissions of guilt, could jeopardize a likely appeal.[71] As a result, the entire trial process effectively silences the accused—jurors do not regularly hear from the defendant at trial and judges do not often hear from the defendant at sentencing.

While defense counsel will certainly speak and might submit a sentencing memorandum, it is not the same as giving the defendant the floor to speak their own narrative. If, as with the right to testify at trial, defendants have the right to speak and yet choose to say nothing at sentencing, it behooves all to discern why, remove those barriers, and pave the way for the court to hear the defendant's voice.

By contrast, the victims' rights movement has established statutory mandates for victims or their family

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[66] *See* Jennifer M. Collins, *Crime and Parenthood: The Uneasy Case for Prosecuting Negligent Parents*, 100 NW. U. L. REV. 807, 850 (2006).

[67] Burger-Caplan, *supra* note 58, at 52 ("Interview subjects did not seem eager to gamble with their allocution by expressing themselves beyond the unspoken prescribed range of mitigation, and seemed to feel that humanization was, in some important ways, unavailable to them.").

[68] Bennett & Robbins, *supra* note 65, at 754.

[69] *Id.*

[70] "In some jurisdictions, trial judges discourage defendants from speaking at all at their sentencing hearing. To these courts, carefully scripted expressions of regret that 'slow down the case' seem like a 'misuse of time.'" Deborah L. Rhode, *Character in Criminal Justice Proceedings: Rethinking its Role in Rules Governing Evidence, Punishment, Prosecutors, and Parole*, 45 AM. J. CRIM. L. 353, 379 (quoting NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT 81 (2016)).

[71] *See* Burger-Caplan, *supra* note 58, at 57.

members to be fully heard at sentencing.[72] The victims' rights movement in the late 1960s and 1970s paved the way for the use of victim impact statements in the 1980s.[73] Today, all fifty states have some version of victim participation laws or constitutional amendments providing for victims' rights.[74]

Originally, victim impact statements were conceived to help victims "regain autonomy and restore a 'sense of self.'"[75] They were believed to have healing power,[76] helping people achieve some kind of closure.[77] Over time, these statements have also come to have an impact on the actual sentence imposed.[78] "Through submission of a victim impact statement or victim impact testimony, a victim can generally communicate to the sentencing judge the direct physical, psychological, and economic impact of the crime and often the victim's opinion as to the crime, the offender, and the desired sentence."[79]

On the other hand, the accused's family members are all but absent from the sentencing process and ultimate determination.[80] Even in capital proceedings, the families of

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[72] *See, e.g.*, Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 763–74 (2007) (describing the history of the victims' rights movement).

[73] For discussion of the history of the victims' rights movement at the state and federal levels, see Paul G. Cassell & Margaret Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Marsy's Law For Florida*, 110 J. CRIM. L. & CRIMINOLOGY 99, 103–04, 114–18 (2020); Jill Lepore, *The Rise of the Victims'-Rights Movement*, NEW YORKER (May 14, 2018), https://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement [https://perma.cc/PDM2-T9TH]; and *Justice for Whom?: The Dangers of the Growing Victims' Rights Movement*, HARV. C.R.-C.L. L. REV. (Nov. 27, 2018), https://harvardcrcl.org/justice-for-whom-the-dangers-of-the-growing-victims-rights-movement/ [https://perma.cc/R43E-6RKD].

[74] *See* Madison H. Kemph, *Reconsidering the Use of Victim Impact Evidence*, 31 GEO. J. LEGAL ETHICS 673, 673 (2018); Carol Brennan, *The Victim Personal Statement: Who Is the Victim?*, 4 WEB J. CURRENT LEGAL ISSUES (2001), https://www.bailii.org/uk/other/journals/WebJCLI/2001/issue4/brennan4.html [https://perma.cc/YE5K-JPMS]. For a critique of victim participation in the criminal process see Rachel King, *Why a Victim's Rights Constitutional Amendment Is a Bad Idea*, 68 U. CIN. L. REV. 357 (2000).

[75] Hugh M. Mundy, *Forgiven, Forgotten? Rethinking Victim Impact Statements for an Era of Decarceration*, 68 UCLA L. REV. DISC. 302, 331 (2020) (citing MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND MISUSE OF VICTIMS' RIGHTS 338 (2006)).

[76] Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 621–22 (2009).

[77] Mundy, *supra* note 75, at 330.

[78] Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L 293, 301 (2020) ("The victims' rights movement developed in the context of a call for more prosecutions and harsher criminal punishment."); *see also* Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 944–99 (1985) (noting the retaliatory motives of victims at sentencing).

[79] Andrew E. Taslitz, *Racial Threat Versus Racial Empathy in Sentencing—Capital and Otherwise*, 41 AM. J. CRIM. L. 1, 4 n.24 (2013) (citing Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 70 (1999)).

[80] As but one example, here is an excerpt from a sentencing transcript for a seventeen-year-old who was convicted of homicide in an upstate New York court.

those facing death are often rendered invisible.[81] And yet, the impact of incarceration on the families and communities of people sentenced to prison is devastating.[82] Family members are left to compensate as best they can for the emotional, physical, and financial loss of an incarcerated loved one.[83]

Scholars have argued that courts must consider the impact of any sentence on the defendant's family to counterbalance the outsized power of victim impact statements.[84] These pieces tend to focus on responsibilities to children,[85] but equally relevant is the impact on parents of the defendant, especially if elderly, infirm, or dependent on their child for emotional, physical, or economic support. These factors are also germane because many judges believe that defendants who provide economic support or care for others deserve more lenient treatment.[86]

> Defense counsel: "I had been contacted by Mr. [C's] mother and she is requesting an opportunity to speak to the court. . . . I explained to her that there's no specific provision that would allow that. However, she is asking for that opportunity if the court's willing to hear from her."
>
> The court: "No. That request is denied."

Transcript of Sentencing (on file with author). The judge thereafter imposed a sentence of twenty-five years to life and added that "the recommendation of the court [is] that this defendant not be released on parole ever." *Id.*

[81] Rachel King & Katherine Norgard, *What About Our Families? Using the Impact on Death Row Defendants' Family Members as a Mitigating Factor in Death Penalty Sentencing Hearings*, 26 FLA. ST. U. L. REV. 1119, 1124 (1999) (describing the families of defendants as invisible during sentencing procedures).

[82] Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 346 (2004) (stating that the impact on families is the most significant collateral effect of incarceration); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121, 123, 139–40 (1999) (describing the myriad negative effects of incarceration on an inmate's family members).

[83] Monika Taliaferro, *Defund to Refund the Vote: Dismantling the Criminal Justice System's Impact on Voting*, 13 ELON L. REV. 193, 195 (2020).

[84] Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. L. REV. 267, 311 (2021) (asserting that family impact assessments "would allow the court to recognize the effects on the defendant's children and other family members in the course of performing traditional sentencing analysis"); Tamar Lerer, *Sentencing the Family: Recognizing the Needs of Dependent Children in the Administration of the Criminal Justice System*, 9 NW. J.L. & SOC. POL'Y 24, 54–55 (2013) (arguing that courts should standardize how a defendant's family responsibilities are accounted for in parole and prison alternatives); Tali Yahalom Leinwand, Note, *Family Matters: The Role of "Family Ties and Responsibilities" in Sentencing*, 2 STAN. J. CRIM. L. & POL'Y 63, 77 (2015) (arguing that judges need a more workable approach to account for defendant's family needs in sentencing decisions); Susan E. Ellingstad, Note, *The Sentencing Guidelines: Downward Departures Based on a Defendant's Extraordinary Family Ties and Responsibilities*, 76 MINN. L. REV. 957, 984 (1992) (arguing that the courts should consider alternative sentences when a defendant's family circumstances are extraordinary).

[85] *See, e.g.*, Ellingstad, *supra* note 84, at 984 (noting that the court should consider factors that might indicate a lack of concern for the welfare of their child).

[86] Collins, *supra* note 66, at 850.

One author writes that sentencing procedures "must empower courts to view the people who stand before them not just as defendants, but as fathers, mothers, partners, and caregivers."[87] To effectuate this noble aspiration, the author argues for revisions to the US Sentencing Guidelines that would require the court to consider family ties, and for an amendment to Federal Rules of Criminal Procedure 32 that would require that presentence investigation reports include a family impact assessment.[88]

Such an approach seems only fair—the family, like the accused, has also been victimized by RSB. Family members, too, should have a right to speak at sentencing and their words should be among the enumerated factors that judges must consider when pronouncing sentence. Further, the sentencing judge should be required to address any RSB and any impact statements from the defendant or their family when pronouncing sentence.

Capital cases provide a lens through which to examine the relevance of family impact evidence. In *Payne v. Tennessee*,[89] the Court overruled *Booth v. Maryland*[90] and held that the Eighth Amendment poses "no *per se* bar prohibiting a capital sentencing jury from considering 'victim impact' evidence relating to the victim's personal characteristics and the emotional impact" on the victim's family. The Court reasoned that such evidence is designed to show "*each* victim's uniqueness as an individual human being."[91] In similar fashion, the defendant's family should be permitted to offer testimony relating to the impact of the conviction and sentence—to show the defendant's uniqueness as an individual human being as well as the societal role in creating the conditions of criminality in the first place, regardless of the crime of conviction.

IV. STATEMENTS AT PAROLE PROCEEDINGS

The limitations on defendants' full and legitimate opportunity to be heard continue past trial and sentencing to the moment they become eligible for parole.[92] Parole, meaning discretionary release decisions by a Parole Board or similar authority, affords people seeking parole only "anemic procedural

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[87] Emily W. Andersen, Note, *"Not Ordinarily Relevant": Bringing Family Responsibilities to the Federal Sentencing Table*, 56 B.C. L. REV. 1501, 1536 (2015).

[88] *See id.* at 1501.

[89] Payne v. Tennessee, 501 U.S. 808, 808 (1991).

[90] Booth v. Maryland, 482 U.S. 496 (1987).

[91] *Payne*, 501 U.S. at 809.

[92] It has long been the case that criminal law scholarship has ignored parole. Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1747 (2012).

due process protections" and the "most minimal opportunity to be heard."[93]

For one thing, parole boards will often hold against the person the very fact that they did not admit guilt and express remorse at the time of sentencing, despite the many reasons articulated above why that might be the case.[94] Furthermore, parole interviews are typically brief, hurried, and focused on the crime of conviction, often from decades earlier—there is scant attention paid to the person's upbringing and background.[95]

While a person seeking parole often has a right to be heard in some fashion, there is no concomitant right to talk about RSB or any trauma from the past. It is generally understood that it is a grave error for a parole applicant to talk about regret and lost opportunities as opposed to the impact of the crime on the victim.[96] To the extent that parole boards are at all willing to entertain talk of anything beyond the crime of conviction, it is usually limited to the person's institutional record while incarcerated and their plans for re-entry should they be released.[97] Evidence of RSB should be among the specifically enumerated factors that the board must hear and consider. There is already some movement in this direction—given the Supreme Court's jurisprudence regarding brain development and the diminished capacity of youth,[98] many parole boards are now mandated to weigh the person's youth at the time of their crime of conviction.[99]

While there are myriad parole systems in place across the nation, most parole boards can grant release if there is a reasonable probability the person would not reoffend and release is not "incompatible with public safety."[100] Most states now have

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[93] *Id.* at 1752; *see* Kimberly Thomas & Paul Reingold, *From Grace to Grids: Rethinking Due Process Protection for Parole*, 107 J. CRIM. & CRIMINOLOGY 213, 238–51 (2017); *see also* Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 442 U.S. 1, 7 (1979) (explaining that there is no fundamental liberty interest in parole).

[94] *See supra* text accompanying notes 62–72.

[95] *See, e.g.*, Michael Winerip et al., *For Blacks Facing Parole in New York State, Signs of a Broken System*, N.Y. Times (Dec. 4, 2016), https://www.nytimes.com/2016/12/04/nyregion/new-york-prisons-inmates-parole-race.html [https://perma.cc/3R34-DMP9] (reporting that "[i]nmates are often given mere minutes to make a case for their freedom"); Michelle Lewin & Nora Carroll, *Collaborating Across the Walls: A Community Approach to Parole Justice*, 20 CUNY L. REV. 249, 266 (1017) (discussing parole interviews as short as four minutes).

[96] Nicole Bronniman, *Remorse in Parole Hearings: An Elusive Concept with Concrete Consequences*, 85 MO. L. REV. 321, 349 (2020).

[97] Lewin & Carroll, *supra* note 95, at 266–67.

[98] *See supra* text accompanying notes 46–53.

[99] *See, e.g.*, *In re* Hawkins v. N.Y. State Dep't of Corr. & Cmty. Supervision, 30 N.Y.S.3d 397 (App. Div. 2016) (holding that the parole board must consider the significance of youth and its attendant circumstances at time of commission of crime).

[100] *See* R. Michael Cassidy, *Undue Influence: A Prosecutor's Role in Parole Proceedings*, 16 OHIO ST. J. CRIM. L. 293, 298 (2019).

in place "risk and needs assessment instruments" or evidence-based systems that guide their decision-making with a focus on the likelihood of recidivism.[101] In other words, parole determinations are supposed to be based on risk and rehabilitation, not retribution. And yet, victims and their families continue to play an outsized role even many years after the crime, even though they "seldom possess information relevant to the parole [release] decision."[102]

At the federal level,[103] victims have a statutory right to be heard at parole proceedings.[104] A thorough study of parole authorities conducted at the national level found that almost 94 percent of jurisdictions permitted some version of victim input.[105] In many jurisdictions, victims or their family members can attend parole hearings alongside Board members while the prisoner attends via video.[106] It is generally understood that if there is victim opposition, the chances of release are dramatically decreased.[107] In particular, evidence shows that parole rates drop when victims supply an impact statement.[108]

In fact, the victim's role at parole proceedings has increased to such a degree that it is similar to their role at sentencing.[109] Many scholars even believe that victim impact statements at parole proceedings have more sway than at

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[101] Thomas & Reingold, *supra* note 93, at 244.

[102] Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole*, 38 CRIME & JUST. 347, 347 (2009); *see also* Kathryn Morgan & Brent L. Smith, *Victims, Punishment, and Parole: The Effect of Victim Participation on Parole Hearings*, 4 CRIMINOLOGY & PUB POL'Y 333, 333, 339 (2005) (finding that victim input affects parole decisions).

[103] The Sentencing Reform Act of 1984 abolished federal parole beginning November 1, 1987. Federal parole proceedings continue for individuals incarcerated for offenses predating November 1, 1987, and for offenders under certain other narrow categories. *See* CHARLES DOYLE, CONG. RSCH. SERV. RL31653, SUPERVISED RELEASE (PAROLE): AN OVERVIEW OF FEDERAL LAW 1 & n.5 (2021).

[104] 18 U.S.C. § 3771(a)(4) (granting victims "[t]he right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding").

[105] Susan C. Kinnevy & Joel M. Caplan, *Findings from the APAI International Survey of Releasing Authorities*, CTR. FOR RSCH. ON YOUTH & POL'Y 16–18 (Apr. 2008), https://bit.ly/3zWIoMa [https://perma.cc/C89P-L5EQ].

[106] Brittany E. Williams, Comment, *The Underbelly of the Criminal Justice System: A Critique and Proposed Reform of Parole Hearings in Louisiana*, 81 LA. L. REV. 1569, 1577 (2021). In addition to Louisiana, victims are permitted to be present in the federal system, *see* 18 U.S.C. § 3771(a), and also in California and West Virginia. CAL. CONST. art. I, § 28; W. VA. CODE ANN. § 62-12-23 (West, Westlaw through legis. of the 2022 First Spec. Sess. & Reg. Sess. approved through March 24, 2022).

[107] *Id.* at 1593.

[108] Roberts, *supra* note 102, at 397.

[109] Noah Epstein, Note, *An Uncertain Participant: Victim Impact and the Black Box of Discretionary Parole Release*, 90 FORDHAM L. REV. 789, 793 n.20 (2021) (citing Roberts, *supra* note 102, at 382; Kathryne M. Young, *Parole Hearings and Victims' Rights: Implementation, Ambiguity, and Reform*, 49 CONN. L. REV. 431, 439 (2016)).

sentencing[110] as that victim impact is often the decisive factor.[111] As one scholar wrote, "[t]here is a clear threat to the integrity of the parole decision if the victim's expression of opinion regarding release is placed before parole board members."[112] And yet, that is the prevailing practice.

In contrast, the family of the person seeking parole has relatively little input into the parole decision. If victims or their family members are statutorily entitled to be heard regarding a person's parole, then the incarcerated person's family should have the same right. If the victim's family can speak about the ongoing harm caused by the person's crime, then the person's family members should be able to talk about the enduring impact of massive sentences—children growing up without a mother or father[113] or mothers and fathers growing old without a son or daughter to offer emotional and financial support.[114] In fact, a study of people who had been denied parole revealed that there was great frustration over the short shrift given to letters from their elderly parents, as well as their own statements about their families' economic, physical, and emotional needs.[115] Widening the lens even more about the impact of criminal legal policy would allow for community impact evidence, as certain neighborhoods have been devastated by decades of hyperaggressive policing and draconian sentencing.[116]

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[110] Roberts, *supra* note 102, at 397.

[111] Edward E. Rhine et al., *The Future of Parole Release*, 46 CRIME & JUST. 279, 317 (2016).

[112] Roberts, *supra* note 102, at 384.

[113] *See generally* ANNIE E. CASEY FOUND., CHILDREN OF INCARCERATED PARENTS, A SHARED SENTENCE: THE DEVASTATING TOLL OF PARENTAL INCARCERATION ON KIDS, FAMILIES, AND COMMUNITIES (2016) (describing the challenges that children of incarcerated persons face).

[114] For arguments in favor of execution impact evidence in capital cases, see Wayne A. Logan, *When Balance and Fairness Collide: An Argument for Execution Impact Evidence in Capital Trials*, 33 U. MICH. J.L. REFORM 1, 37–54 (Fall 1999/Winter 2000).

[115] Mary West-Smith et al., *Denial of Parole: An Inmate Perspective*, FED. PROB. J., Dec. 2000, at 3, 8.

[116] *See, e.g.*, Jennifer Gonnerman, *Million-Dollar Blocks*, VILLAGE VOICE (Nov. 9. 2004), https://www.villagevoice.com/2004/11/09/million-dollar-blocks/ https://perma.cc/L7QE-LXZW (discussing the "million-dollar blocks" phenomenon, whereby the cost of incarceration for the total *number* of residents on one city block sent to state prisons exceeds one million dollars); Connor Maxwell & Danyelle Solomon, *Mass Incarceration, Stress, and Black Infant Mortality*, CTR. FOR AM. PROGRESS 1, 2 (June 5, 2018) (noting African Americans in nine states were more than twice as likely as whites to have a family member imprisoned at some point during their childhood).

CONCLUSION

Few people testify at their trial. Few people speak at their sentencing. Few people are permitted to testify to any significant degree at their parole interview. It behooves all concerned with any semblance of fairness and decency to interrogate the reasons why the accused is effectively barred from speaking and to then remove those barriers. In the process, more people would be exposed to the realities of societal fault in prevalent and ongoing RSB, and to sentencing practices that have driven, and continue to drive, the crisis of mass incarceration.[117]

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[117] The time is certainly ripe for a renewed consideration of RSB. As Delgado wrote in 2011:

> Forty years have passed since publication of Judge David Bazelon's dissent in *United States v. Alexander* and twenty-five since the appearance of my [RSB] article. The country is groaning under the expanse of mass incarceration, while the gap between the rich and the poor now stands highest of any industrialized nation.

Delgado, *supra* note 44, at 4.