Abstract

Empirical research into the effects of mass incarceration reveals that the pains of contemporary imprisonment extend far beyond the prison walls. This paper surveys how mass incarceration disrupts individuals’ lives in wide-ranging ways, exacerbating existing social disadvantages, alienating individuals from their families and neighbors, and further segmenting the communities to which these individuals belong. While these effects are profound, court processes and social dynamics contribute to making these effects substantially invisible to most Americans. The toll of mass incarceration is almost as invisible as it is potent, building as it does on existing structures of disadvantage. By contrast, the visibility the law accords victim survivors in death penalty cases exacts its own cost. The American death penalty system combines with broader social dynamics to create a sociological ambivalence for victim survivors—an environment both offering and constraining opportunities to mourn. This paper suggests further empirical research is needed concerning the role the law plays in shaping an individual’s experience in reconciling the multiple demands of grief, mourning, and legal participation, as well as how the individual survivor’s social resources may influence his or her use of the law. In both cases, however, we see how the law shapes loss, both on its own and in conjunction with other social processes, such as stigma and disadvantage.

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I. Mass Incarceration

David Garland defines mass incarceration as a phenomenon involving both (1) the dramatic increase in the rate of incarceration and size of the incarcerated population, and (2) the “systematic imprisonment of whole groups of the population.”¹ The size of the American prison

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The black male incarceration rate remains more than six times greater than the white male incarceration rate. Nearly one in four young black male high school dropouts is in prison or jail, as compared to about one in fourteen young white, Asian, or Hispanic male dropouts. Other scholars have observed similar trends. Bruce Western found that “[t]he basic brute fact of incarceration in the new era of mass imprisonment is that African Americans [sic] are eight times more likely to be incarcerated than whites.”

David Cole pointed out, even as the incarceration rate has leveled off,

However, the good news is that the incarceration trend is flattening, extensive research on mass incarceration warns of far-reaching consequences for labor prospects, health, family, and communities. 6

Austin; J.D., Georgetown University Law Center; A.B., Yale College.


4. Id. at 4.


6. See id. at 27, 35 (noting “incarceration has deep and wide ripple effects on the employment opportunities and likely criminal conduct of not only the incarcerated themselves, but their children and other members of their community”); see also infra note 27.

7. Id. at 34.

8. Western refers here to the years from 1970 to 2003, as this period saw a sevenfold increase in the number of people serving more than a year in custody, as well as substantial increases in the number of people in jail or under supervision. All told, in 2003, about 6% of the adult male population was under some kind of criminal justice control. Western, supra note 3, at 3. See also Cole, supra note 2, at 34 (noting that although racial disparities in criminal law enforcement have fallen, “the black male incarceration rate remains more than six times greater than the white male incarceration rate”).

Western outlined the sobering statistics:

Incarceration rates climbed to extraordinary levels among young black men, particularly among those with little schooling. The Bureau of Justice Statistics reports that in 2004, over 12 percent of black men aged twenty-five to twenty-nine were behind bars, in prison or jail. Among black men born in the late 1960s who received no more than a high school education, 30 percent had served time in prison by their mid-thirties; 60 percent of high school dropouts had prison records.\textsuperscript{10}

This means that “[h]eart men born in the late 1960s are more likely to go to prison than to finish a four-year [college] degree or serve in the military,”\textsuperscript{11} and, tellingly, that as incarceration “became a modal life event for young black men with little education,” these men expect to be incarcerated over the course of their lifetimes.\textsuperscript{12} This experience of incarceration “divert[s] young men from the life stages that mark a man’s gradual inclusion in adult society,” profoundly degrading one’s ability to work, form a family, and participate in community life.\textsuperscript{13} Incarceration therefore exacerbates existing inequalities, as “the inequality is cumulative, deepening the disadvantage of the most marginal men in society[] and . . . transmitting the penalties of a prison record from one generation to the next.”\textsuperscript{14}

These men experience significant labor market disadvantages, and not simply because they have been out of the labor market during the period of their incarceration.\textsuperscript{15} Pettit and Lyons argue the fact that “[i]ncarceration had negative effects on wages for all inmates,” even among those who had participated in work-release and other prison programs, indicates that the impact of incarceration on wages is not solely attributable to a loss of skills and time out of the workforce.\textsuperscript{16} Instead, these data suggests an “enduring stigma.”\textsuperscript{17} This stigma combines with race to harm African-Americans with criminal records more than whites with criminal records. Devah Pager’s experiment involving employer responses to a white job applicant without a

\textsuperscript{10} WESTERN, supra note 3, at 3.
\textsuperscript{11} Id. at 189.
\textsuperscript{12} Id. at 24.
\textsuperscript{13} Id. at 5.
\textsuperscript{14} Bruce Western & Becky Pettit, Incarceration and Social Inequality, in DAEDALUS 8, 12 (2010).
\textsuperscript{15} See generally WESTERN, supra note 3, at 108–30 (discussing at length how “[t]he mass incarceration of less-educated minority men concealed declining employment and produced phantom reductions in wage inequality”); see also Becky Pettit & Christopher J. Lyons, Incarceration and the Legitimate Labor Market: Examining Age-Graded Effects on Employment and Wages, 43 LAW & SOC’Y REV. 725, 746 (2009) (recognizing the negative stigma attached to former prisoners attempting to enter the labor market).
\textsuperscript{16} Pettit & Lyons, supra note 15, at 740, 743 (emphasis in original).
\textsuperscript{17} Id. at 743 (noting multiple studies recognized that job applicants with criminal records face a persistent stigma that undermines their “labor market opportunities”).
criminal record, a white job applicant with a criminal record, a black job applicant without a criminal record, and a black job applicant with a criminal record found that “even whites with criminal records received more favorable treatment (17%) than blacks without criminal records (14%).” While race clearly played a role in the job applicants’ prospects, the existence of a criminal record mattered, and it affected the African-American applicants more severely than the white applicants. “While the ratio of callbacks for nonoffenders relative to ex-offenders for whites is 2:1, this same ratio for blacks is nearly 3:1. The effect of a criminal record is thus 40% larger for blacks than for whites.” Although these factors remain relevant, Pager concluded we cannot attribute poor employment prospects solely to “desolate opportunities or deeply ingrained dispositions, grown out of broken families, poor neighborhoods, and little social control.” Instead, “mere contact with the criminal justice system, in the absence of any transformative or selective effects, severely limits subsequent employment opportunities.”

The economic impact of incarceration on these men’s lives is so profound that African-American men who have been to prison are less economically mobile than those who score in the bottom quintile of the Armed Forces Qualifying Test, an indicator of very low cognitive capacity. Using different data, and recognizing that most of those in prison were likely poor and poorly equipped for the workforce before prison, researchers nonetheless recently concluded that “[m]ass incarceration has played a major role in increasing poverty rates.” A burgeoning area of research also suggests incarceration strongly increases the likelihood of future serious health limitations, and this may contribute to at least some racialized health disparities. Importantly, 

19. Pager’s study used white and black college students as “tester” job applicants. The testers were 23-year-old college students from Milwaukee who were matched on the basis of physical appearance and general style of self-presentation. Objective characteristics that were not already identical between pairs—such as educational attainment and work experience—were made similar for the purpose of the applications. Within each team, one auditor was randomly assigned a “criminal record” for the first week; the pair then rotated which member presented himself as the ex-offender for each successive week of employment searches, such that each tester served in the criminal record condition for an equal number of cases. By varying which member of the pair presented himself as having a criminal record, unobserved differences within the pairs of applicants were effectively controlled. No significant differences were found for the outcomes of individual testers or by month of testing.

Id. at 947.
20. Id. at 959 (footnotes omitted).
21. Id.
22. Id. at 938–39.
23. Id. at 960.
25. DeFina & Hannon, supra note 2, at 581; see also Wildeman & Muller, supra note 2, at 12–15 (discussing the complexity in teasing out impacts of incarceration).
26. See Wildeman & Muller, supra note 2, at 19–20 (citing contradictory findings regarding the strength of the effect of incarceration on racial disparities in severe health limitations, but noting studies
incarceration itself, rather than the length of time in prison, appears to be what matters. Incarceration also affects the family with attendant racial disparities. The health of the families of those incarcerated may deteriorate, and incarceration can compound family instability. “Over half of all prisoners have children under the age of eighteen, and about 45 percent of those parents were living with their children at the time they were sent to prison.” As of 2008, 1.75% of white children, 3.5% of Latino children, and 11% of black children—about 1.2 million—had a parent in prison. The children of the incarcerated experience stigma in school (leading teachers to have lower expectations of them), earn lower grade point averages, and have lower educational attainment. They may be more likely to go into foster care (when the mother is incarcerated), and become more physically aggressive.

Not only are individual lives diminished by encounters with the criminal justice system, but their communities are as well. As punishment is unequally distributed, it is “distinctly concentrated by place” with “a small number of communities bear[ing] the disproportionate brunt of U.S. crime policy’s experiment with mass incarceration.” This feeds a damaging “mutually reinforcing social process [as] disadvantage and crime work together to drive up the incarceration rate. This combined influence in turn deepens the spatial concentration of disadvantage, even if at the same time it reduces crime through incapacitation.” Sampson and Loeffler underscore that “the combination of poverty, unemployment, family disruption, and racial isolation is bound up with high levels of incarceration even when adjusting for the rate of crime that a community experiences. These factors suggest a self-reinforcing cycle that keeps some communities trapped in a

suggesting a connection between incarceration and race disparities with respect to HIV/AIDS, infant mortality, and life expectancy at birth).


28. See Wildeman & Muller, supra note 2, at 20 (noting studies regarding increased risk of cardiovascular disease and poor mental health).

29. Western & Pettit, supra note 14, at 14.

30. Id. at 16.

31. Wildeman & Muller, supra note 2, at 24; see also Western & Pettit, supra note 14, at 15 (noting that “children of incarcerated parents . . . are at [a] greater risk of developmental delays and behavioral problems”).

32. Wildeman & Muller, supra note 2, at 24–25.

33. Sampson & Loeffler, supra note 2, at 20, 22; see also James P. Lynch & William J. Sabol, Assessing the Effects of Mass Incarceration on Informal Social Control in Communities, 3 CRIMINOLOGY & PUB. POL’Y 267, 269–70 (2004) (recognizing that the “expansion of incarceration into society has not been randomly distributed in social and geographic space”).

34. Sampson & Loeffler, supra note 2, at 27; see also Lynch & Sabol, supra note 33 (critiquing research on incarceration and communities).
negative feedback loop.”

There are other, more explicitly legal impacts on the community. Felon disenfranchisement laws can curtail its political potency. Constant unpleasant (or futile) encounters with law enforcement can breed distrust of and cynicism toward law enforcement and legal institutions. These sentiments increases the likelihood, Kirk and Papachristos find, that disputants in those neighborhoods will resort to violence. Prosecuting drug cases in particular can feed a snitch culture that can be toxic. Criminal informants are generally given a pass on their illegal activities in exchange for what they tell police. In addition, their pervasive use “erode[s] social mechanisms for keeping the peace [in communities] by creating distrust and inviting retaliation.” Further, since informants generally have information about only those around them, reliance on informants intensifies the over-policing common to troubled inner-city neighborhoods. Because informants are not always reliable, “[f]alse accusations, mistaken warrants, erroneous raids, and wrongful convictions associated with snitches will be more frequent in communities in which the practice is prevalent,” feeding further hostility and feelings of disillusionment toward the police.

As pernicious as these effects are, it is also true that they are largely invisible to those unaffected, precisely because they are so concentrated.

35. Sampson & Loeffler, supra note 2, at 21.
36. See Christopher Uggen & Jeff Manza, Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States, 67 AM. SOC. REV. 777, 796 (2002) (noting that although “ballot restrictions for felons and ex-felons have had a demonstrable impact on national elections, . . . such impact is even more pronounced in local or district-level elections, such as House, state legislative, and mayoral races”).
38. Kirk & Papachristos, supra note 37, at 1204, 1228 (theorizing that “[l]egal cynicism constrains choices, making it more likely that individuals will undertake ‘extraordinary measures’ of self-help,” Kirk and Papachristos found that “neighborhood rates of homicide are positively associated with legal cynicism”).
39. NATAPOFF, supra note 37, at 105–07 (describing drug convictions as “high-snitch arenas” and noting that some criminal justice observers “conclude[d] that drug cases almost always involve snitches”).
40. Id. at 109.
41. Id. at 111; see also Alice Goffman, On the Run: Wanted Men in a Philadelphia Ghetto, 74 AM. SOC. REV. 339, 348–51 (2009) (describing how for men who are potentially wanted by the police, “more intimate relations—friends, family, and romantic partners—may pose a threat and thus have to be avoided or at least carefully navigated”).
42. NATAPOFF, supra note 37, at 113.
43. Id.
44. See, e.g., WESTERN, supra note 3, at 86 (“The underclass is thus defined by its social remoteness, its invisibility, as much as by its deprivation. This remoteness has a physical reality (the poor live separately from the middle class), and a social reality (the everyday routines and experiences of the poor are unlike those of the middle class).” “The poor are invisible not because they are in desperate straits, but because they are beyond the horizon of middle-class social experience.”); see also Colle, supra note 2, at 39 (“The fact that incarceration is concentrated on the most vulnerable segments of our increasingly divided society means that even with the highest incarceration rate in the world, most members of the majority do not know anyone in prison.”); Sampson & Loeffler, supra note 2, at 20
addition, because so much of the incarceration binge was fueled by the War on Drugs and an enthusiasm for parole revocations, these are fairly abstract offenses. While a community may suffer from the open air drug markets, one rarely sees “the community” in court to articulate the costs of drug prohibition and over-policing. This is in part because it is a diffuse injury inflicted on disorganized communities. However, mass incarceration requires mass-processing tools that intensify the invisibility and de-individuation of its objects. Judges approve plea agreements, approved in somewhat opaque, sometimes inaudible proceedings that allow the spectator only a technical sense of the crime. In some courtrooms, the defendant has only a disembodied presence, as video appearances become commonplace for certain types of hearings.

II. The Death Penalty

Death penalty cases could not be more different. Not only are murders (and murders that result in the death penalty) rare and sensational occurrences, but these are crimes overflowing with clear victims. Victims range from the person or persons killed, to any witnesses, to the loved ones of the murder victim; and, on the murderer’s side, victims include the murderer’s loved ones, his dependents, and, usually, him at some other point (proposing that “spatial inequality in punishment helps explain the widespread invisibility of mass incarceration to the average American”).

45. See, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 93 (2010); see also Cole, supra note 2, at 36 (noting that “the war on drugs [was] responsible for much of the rise in incarceration,” and this war “is increasingly acknowledged to be a failure”); Theodore Caplow & Jonathan Simon, Understanding Prison Policy and Populations Trends, Prisons, 26 CRIME AND JUST. A REVIEW OF RESEARCH 63 (1999).

46. See Adjudication Outcome for Felony Defendants in the 75 Largest Counties, Table 5.57.2006, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE (2006), available at http://www.albany.edu/sourcebook/pdf/t5572006.pdf (recognizing that of individuals charged with a felony and subsequently convicted of a crime, 95.6% resolved their cases through plea agreement to a felony or misdemeanor).


48. In 2010, there were 14,748 murders and non-negligent manslaughters, a rate of 4.8 per 100,000 people. Estimated Number and Rate (Per 100,000 Inhabitants) of Offenses Known to Police, by Offense and Extent of Urbanization, 2010, Table 3.107.2010, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE (2010), available at http://www.albany.edu/sourcebook/pdf/t31072010.pdf. In 2011, 76 new death sentences were handed down; and in 2012, 80 were handed down. Death Penalty Information Center, THE DEATH PENALTY IN 2012: YEAR END REPORT (2012), available at http://deathpenaltyinfo.org/documents/2012YEarEnd.pdf. Even in Texas, not every murder is punished with the death penalty. From July 31, 2007 to July 19, 2013, jurors considered capital murder charges in 254 cases, excluding two cases involving only re-sentencing. Texas Office of Court Administration, Jury Charges and Sentences in Capital Cases, available at http://www.courts.state.tx.us/oca/jurycharges.asp. Of those, seven defendants were acquitted, and five were convicted of less serious offenses. Id. A jury decided between the sentencing options of life or death in 63 cases, and 50 were sentenced to death. Id. Obviously, these cases exclude those resolved by plea agreement prior to trial). Id.
in his life. While the substantial media coverage typically associated with death penalty cases contributes to the visibility of the trial participants, the law of the death penalty also makes these participants highly visible, — and highly individualized.49 The law individualizes the defendant and victim through different mechanisms. Defense counsel must present a full picture of the defendant’s humanity, and the jury must be able to consider this evidence in deciding whether to impose the death penalty. The victim’s survivors are allowed to present “victim impact statements” during the sentencing phase of the trial that are “designed to show . . . each victim’s uniqueness as an individual human being.”50

The victim impact statement represents just one of the several ways the American criminal justice system has gradually formalized roles for crime victims. It first developed a right to certain financial remedies, and then created a greater role in the prosecution and management of the criminal offender.51 This legalistic response to criminal victimization represents a distinct policy choice.52

Victim survivors are now entitled to notification of court proceedings, attendance at court proceedings, and may contribute their views at different stages of the legal process.53 In capital cases, addition to providing “victim impact statements,” victim survivors may witness the offenders’ executions.54

49. See Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (“the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death”); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (“the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death”) (emphasis in original); Williams v. Taylor, 529 U.S. 362, 395–99 (2000) (counsel failed to “fulfill their obligation to conduct a thorough investigation of the defendant's background,” which would have enabled them to present evidence of defendant’s nightmarish childhood and intellectual impairment); Abdul-Kabir v. Quarterman, 550 U.S. 233, 263–64 (2007) (“before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense”).

50. Payne v. Tennessee, 501 U.S. 808, 823 (1991) (emphasis in original; internal punctuation omitted). See also id. at 825 (“death represents a unique loss to society and in particular to his family”); Souter, J., dissenting (Payne overturned previous “blanket prohibition on consideration of evidence of the victim’s individuality and consequent harm to survivors.”).


53. Acker & Mastrocinque, supra note 51, at 147–49.

54. See, e.g., Execution Procedures 710.04 – Designation of Witnesses by Director, ARIZONA DEPARTMENT OF CORRECTIONS, available at http://www.azcorrections.gov/Policies/700/0710.pdf (“The Director shall invite . . . any crime victims and survivors of the crime for which the sentence of death will be imposed . . . .”); State of Delaware, Delaware Correctional Center, Security Execution Procedure,
In addition to these formal mechanisms engaging victim survivors in the criminal case,\(^{55}\) informal techniques can also make them central figures. One longitudinal study of murder victim survivors found:

With one exception, in Texas participants felt either partnered with or protected by the prosecution who developed close, personal ties with them. Prosecutors visited them in their homes, took them to lunch, made sidebar comments to them during the trial, shared inside information about the criminal justice system, and gave guidance and direction to participants’ decisions.\(^{56}\)

This legal institutionalization of the victim’s role solidifies an already intertwining survivor’s experience. As one victim survivor stated, “One of the sad facts about losing a loved one to murder is that there is both a loss and a crime. It is very easy to get wrapped up in the crime element and not deal with the loss aspect of it[.]”\(^{57}\)

The legal framing of the crime victim experience offers opportunities some victim survivors are glad to have. In presenting victim impact evidence, some victim survivors report satisfaction that they “would be able to speak in [their] own voices, and attention would be paid.”\(^{58}\) Participating in the criminal trial can be an attempt “to reestablish a just world.”\(^{59}\)

But as one observer notes, victim-survivor participation in death penalty proceedings “both create[s] a new . . . duty . . . and provide[s] a venue in which that duty [can] be satisfied.”\(^{60}\) This identification of a new “duty” points to the multiple different roles—the sociological ambivalence—survivors must struggle to reconcile as they become increasingly enmeshed in the criminal justice system. The ambivalence is rooted in “[i]ncompatible normative expectations of attitudes, beliefs, and behaviors assigned to a

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55. See JODY LYNEÉ MADEIRA, KILLING McVEIGH: THE DEATH PENALTY AND THE MYTH OF CLOSURE 138 (2012) (quoting President Clinton as expressing support for victims’ rights legislation because victims “should be at the center of the criminal justice process, not on the outside looking in”).


58. Charisse Coleman, Matters of Life or Death, in WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY 17, 22 (James R. Acker & David R. Karp eds., 2006).

59. MADEIRA, supra note 55, at 123.

60. Id. at 124.
status (i.e., a social position) or to a set of statuses in a society.” 61 People are “pulled in cognitively and emotionally opposed directions as the consequence of conflicting normative expectations, attitudes and behavior incorporated in one or more social statuses assigned to the same person.” 62 In other words, victim survivors do not simply grieve, but are instead thrust into a social role that makes multiple and contradictory demands on them. Sociological ambivalence is an attribute of a social system, and is not simply a psychological state or the experience of conflicting emotions. 63 Instead, [s]ociological ambivalence arises when an actor is faced with a specific situation that simultaneously values opposing courses of action that are rooted within the social structure.” 64 It is “built into” the experience of the victim survivor, as it emerges from “the broader social and cultural contexts to which people belong.” 65 By merging the victim survivor with the role of legal actor so completely, the law constructs an ambivalent role that both offers and constrains survivors’ opportunities and duties to mourn, to heal, and to embody the community’s sense of justice.

Losing a loved one to murder inflicts unfathomable pain not only because of the personal loss, but also because that loss implicates the criminal justice apparatus (and usually the media) that constrains expressions of grief and some of the material aspects of mourning. One study that focused on families grieving a murder reported:

\[P\]arents found that opportunities for expressing personal pain and sharing intimate feelings were restricted. Grief was subordinate to justice. Murder must be one of the few causes of death in modern society where the private and diverse reactions of bereaved family members are the subject of such official scrutiny. Opportunities for grieving and negotiating meanings are also restricted by police


63. My focus on sociological ambivalence is not intended to deny the intrapsychic ambivalence of death. See Neil J. Smelser, The Rational and the Ambivalent in the Social Sciences: 1997 Presidential Address, 63 AM. SOC. REV. 1, 7 (1998). Instead I seek simply to highlight the less obvious social construction of the experience of death in capital murder cases.


65. Merton & Barber, supra note 61, at 5; Hillecoat-Nallétamby & Phillips, supra note 61, at 202-03.
investigation and the timetabling of coroners’ [sic] and criminal courts. . . . [T]he legal significance of murder totally overrides any personal significance which the child held for his or her parents.66

While grief is subordinated to the demands of the criminal justice system, the social performance of mourning,67 perhaps inevitably, enters that same system. Demanding the death penalty can become a way for the survivor to perform a relationship with the victim and to establish the survivor as the protector of the victim and uniquely responsible for ensuring the honor of the victim’s memory.68 Thus, one survivor “pushed on the district attorney saying, ‘Don’t disrespect my son. This [defendant] needs to die[.]’”69

Sarah Beth Kaufman’s ethnography of capital trials documents how death penalty court processes can become sites of mourning rituals and performances.70 One survivor explained:

The formality of court proceedings would take the act of speaking to the level of public ritual, participated in and acted out, not only by me, but by friends and witnesses, by people the community regarded as authorities, and by a representation of the community itself—those twelve people sitting in the jury box.71

Without an affiliation to a church or the military, this person felt court was the only ritual available, as “imperfect [as] the setup” was.72

While mourning is a social activity, embedding it within the legal process carries a cost. “By turning punishment into a site for the rituals of grieving, . . . not only is a private colonization of public processes encouraged, but also public scrutiny invades some of the most personal aspects of our lives—the way we suffer and grieve.”73

This ritual becomes fraught for some, however, precisely because their voices matter. Some express anguish that the chance to pay tribute came at a cost in a zero-sum game. They believe that by telling the jury what a good and important person the victim was, they contributed to a death

67. EMILE DURKHEIM, THE ELEMENTARY FORMS OF RELIGIOUS LIFE 400–01 (trans. Karen E. Fields, 1995) (“Mourning is not the natural response of a private sensibility hurt by a cruel loss. It is an obligation imposed by the group. One laments not simply because one is sad but become one is obligated to lament”).
69. Id.
71. Coleman, supra note 58, at 21.
72. Id.
sentence, an outcome not all wanted. One described her victim impact evidence as “a sort of devil’s compact.”\textsuperscript{74} The pull to testify was powerful even to someone who did not want a death sentence imposed: “The fact that my desire to bear witness overpowered some of my deepest beliefs about right and wrong only added to the confusion and suffering of being a murdered man’s sister.”\textsuperscript{75} Compounding the anguish was the death penalty opponent’s recognition that she obtained some relief from the death verdict: “I couldn’t help being gratified by what the jury seemed to say: that what was done to [the murder victim] appalled them—appalled them enough to warrant the strongest response legally available.”\textsuperscript{76}

Some survivors not only use the trial as a forum to mourn a terrible loss, but also to advance a meaning of the criminal trial beyond its function as an impartial tribunal.

These legal proceedings, and the preparation for them, are the critical justice juncture for survivors. Their attendance allows them to stand in for the victim and to bear witness to justice. Besides scrutinizing the defendant’s persona and conduct, survivors’ very presence, though silent, is the fulfillment of their duty to hold the defendant personally accountable for his monstrous act and their incalculable suffering. Though bystanders to the main event, their real or mental relationships with the prosecution and defense teams, as well as giving [victim impact statements], gives them preferential access to and membership in this publically historic event.\textsuperscript{77}

The trial, Jody Lyneé Madeira writes, can become a “site of ‘memory work’”—a place to “recogniz[e], respect[, and resolv[e] victims’ emotional needs . . . through physical presence and participation at legal proceedings.”\textsuperscript{78} For these survivors, integrating emotion into the proceedings was central to securing what they defined as justice. Without emotion, justice would become “an impoverished concept that was only ‘for’ the defendant and not bombing victims.”\textsuperscript{79} The survivors, therefore, are uniquely privileged participants in the proceedings. This privilege enables, but can also require them literally to embody justice. It makes them personally responsible for holding the defendant accountable for his crime.

The responsibility for embodying justice places demands beyond trial. Media stories of these executions generally ask only those personally or professionally invested—the police, the lawyers, and the survivors—and not the people in whose name the execution is carried out. Some victim
survivors report a pressure to “represent” their community, to give cues about how the community should respond, and to bear the burden of interpreting the event to their community. One survivor explained his family was “expected to keep [their] sense of injury and rage whipped into a constant call for retribution . . . as if the only decent way to honor loss is to take another life.”

This responsibility to represent the community’s interest in punishment could explain why some survivors feel protracted appeals revictimize them, they cannot “finally go on with [their] lives” until the condemned is executed. Two researchers expressed concern that “the extensiveness of the [death penalty] appeals may have stymied participants’ ability to remove the murderer from their thoughts, and impacted the potential for further anger against the murderer caused by feeling victimized by additional and, in some participants’ minds, ‘unnecessary’ legal processes.” As the State obtains the death penalty verdict and its need for the victim survivors subsides, the survivors’ ignorance of the legal procedures and their marginalization from an appellate process that does not use what the survivors provide exacerbates their sense of suspended animation. In addition, where funerals have traditionally marked the “limit on the period of immediate mourning,” extending death rituals into the legal system may also extend this period of public mourning without the socially integrative effect of a funeral.

Simultaneously, these survivors are caught within other powerful social forces, namely the stigma of death, particularly violent death, and belief in a just world.

80. Coleman, supra note 58, at 19.
81. White, supra note 57, at 65; Shane Wagner, The Death Sentence: For Criminals or Victims?, in WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY 69, 37 (James R. Acker and David R. Karp, eds., 2006) (reporting “some relief in knowing that… they did not have to think about the appeals process” because the defendant had been executed); id. at 77 (describing ‘emotional roller coaster’ of appeals and stays of execution); id. at 81 (“death penalty cases are more burdensome on victims’ loved ones than other criminal cases” because of “years of appeals and the constant possibility of a commutation”); see, e.g., Armour & Umbreit, supra note 56, at 54 (noting how the lengthy appeals process can imprison the victim’s family).
82. Id. at 67.
83. Id. at 55 (“Participants . . . tended to agonize over how long the process took and having limited to no communication about the legal proceedings. In some instances, they voiced fear and a reluctance to contact officials about the length of time or what was happening in the process. This ambivalence over knowing was accompanied by comments about not being sure what was believable or who[m] to believe.”).
85. The theory of a “belief in a just world” emerged from research finding that: [W]hen presented with a victim who suffered through little fault of her own (i.e., an innocent victim), people compensated the victim if they believed they could effectively do so. Thus, under these conditions, people appeared to react with a recognition of the unfairness of the situation and were motivated to respond with compassion. However, when presented with the same victim, along with the expectation that the victim may continue to suffer, people derogated the victim’s
Family members . . . felt marked. “I felt I had a big M on my forehead for Murder.” They also felt typed as bad luck families. A daughter explained, “There has to be a reason why somebody gets murdered. Either they are in a bad neighborhood, they are involved in a drug deal, they are a different color than me, or they are poor and lazy. There has to be a reason why it can’t . . . happen to . . . me.”

One survivor also complained that the American fixation on the bright side of things created a “pressure to eradicate any strong feelings as quickly as possible” and the survivor felt “leaned on . . . to hurry up and get better.” This leaves survivors shouldering the responsibility for expressing the community’s outrage at its loss at the very time the community isolates itself from the survivor.

Family members rationalized the disappearance of their families and friends. “They all disappeared because they couldn’t handle it.” “They may be afraid to bring up his name because of the tears.” While these explanations made sense of the abandonment, they

caracter, describing her in relatively more negative terms. The authors . . . proposed that people need to believe that the world is a just place in which individuals get what they deserve. . . . [W]hen the notion of a just world is threatened by contrary evidence, like the innocent victim in Lerner and Simmons’s experiment, people may engage in a variety of behaviors that help to maintain a sense of justice. These behaviors range from helping or compensating the victim to psychological rationalization of the victim’s fate—for example, perceiving the victim’s fate as deserved (and, therefore, less unfair) because of her unworthy character.

Carolyn L. Hafer & Laurent Bègue, Experimental Research on Just-World Theory: Problems, Developments, and Future Challenges, 131 PSYCHOLOGICAL BULL. 128, 128–29 (2005) (discussing just-world belief research); see also Marilyn Armour, Journey of Family Members of Homicide Victims: A Qualitative Study of Their Posthomicide Experience, 72 AM. J. ORTHOPSYCHIATRY 372, 372–73 (2002) (summarizing post-homicide studies that indicate “the stigma attached to murder” often causes victim survivors to blame themselves for the loved one’s death); Riches & Dawson, supra note 66, at 149 (noting that stigma of violent death can be exacerbated through involvement in the criminal justice system); Heidi M. Zinzow et al., Losing a Loved One to Homicide: Prevalence and Mental Health Correlates in a National Sample of Young Adults, 22 J. TRAUMATIC STRESS 20, 20 (2009) (same).

86. Armour, supra note 85, at 376.

87. Coleman, supra note 58, at 20 (emphasis in original).

88. Margaret Vandiver, The Impact of the Death Penalty on the Families of Homicide Victims and of Condemned Prisoners, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION (James R. Acker, Robert M. Bohm, and Charles S. Lanier, eds., 2003), at 617 (“The experience of isolation is very common – at the time they most need contact and support, families often feel the most isolated. The opposite situation of intrusion is often a problem as well, with unwelcome contacts from the criminal justice system, the media, and curiosity seekers.”); Armour, supra note 85, at 374–77 (describing victims’ experience of abandonment and isolation from family and social institutions, while also recognizing in some circumstances fostered solidarity); see also Marilyn Armour, Violent Death: Understanding the Context of Traumatic and Stigmatized Grief, 14 J. OF HUM. BEHAV. IN THE SOC. ENVIRON. 53, 70 (2007) (“The public response to the murder has emerged as the most troublesome issue for homicide survivors…. The lack of support from community institutions and friends and family erodes their efforts to cope. Without a legitimizing social context, they feel marginalized and marked as an object lesson about what can go wrong in a person’s life.”); Riches & Dawson, supra note 66, at 149 (recounting one survivor’s experience of the unwillingness of others to discuss her loss).
also reminded family members that they were alone and should not 
look to family and friends for what they needed.89

With victim survivors, not only do we see law responding to victims 
by providing mechanisms of compensation and participation, but the legal 
intervention is framed as a matter of “rights.”90 Critiques of this “rights 
discourse” raise the concern that articulating victim survivors’ needs through 
the language of rights may further isolate them. Talk of rights can 
“encourage[] a politics based on selfish individualism,” “discourage[] the 
communitarian and egalitarian values that the rights advocates often want to 
pursue,” and create solutions that rely on State action.91 While some have 
argued that rights talk itself can “help to develop community around shared 
interpretations” of what those rights mean, rights talk may be more effective 
in building particularistic communities.92 Furthermore, rights discourse does 
not necessarily create solidarity between the victim survivors and their own 
communities, although it may foster solidarity among crime victims 
themselves.93 Another critique is that rights discourse enmeshes victim 
 survivors in litigation over the conduct of the criminal trial, which can take 
its own toll.94

While the law contributes to the sociological ambivalence of the 
victim survivor, it also manages to decrease the pull of one of the competing 
norms by “convert[ing] ambivalent feelings into univalent preferences in a 
range of ways.”95 Sarah Beth Kaufman noted how victim impact testimony 
“organizes and exacerbates the antagonism” between victim survivors and 
courtroom actors such as defense counsel.96 Others have noted that the 
victim survivors’ rights movement positions the rights of the victim survivors 
as antithetical to those of the offenders,97 a framework some survivors 
struggle against.98 Craig Haney catalogued the capital processes that 
contribute to creating the capital defendant as profoundly “other” through a 
variety of mechanisms of moral disengagement and dehumanizing

89. Armour, supra note 85, at 375.
90. Crime victim oriented laws and legislation are commonly referred to as “Victim Bills of 
91. Neal Milner, The Denigration of Rights and the Persistence of Rights Talk: A Cultural Portrait, 
92. Id. at 635.
93. By contrast, the non-legal solidarity of a support group of similar survivors can offer significant 
relief, at least for some. Armour, supra note 85; see also MADEIRA, supra note 55, at 63–94 
(describing the benefits of joining a support group of similar survivors).
94. MADEIRA, supra note 55, at 122.
95. Smelser, supra note 63, at 11 (discussing the role of social structure and process in relation to 
intrapyschic ambivalence).
96. Kaufman, supra note 70.
97. Id.; see also Barker, supra note 52, at 643 (noting that “the Victims’ Bill of Rights [granting 
crime victims new rights . . . but these rights were interlinked with the retraction of the rights and liberties 
of criminal offenders”)
98. White, supra note 57, at 56.
techniques. These may help reduce ambivalence, but at a cost to the authenticity of the survivor’s testimony and experience.

It is also worth asking how legal, community, and personal resources shape survivors’ responses to the ambivalence created by the legal system. Megan Comfort’s ethnography of wives and girlfriends of prisoners noted that women with greater social and economic resources more easily maintained their free-world identity than those without those resources. Social location and resources, such as a strong affiliation with another institution, such as a church, or with a distinct cultural community, could affect the survivors’ experience of, need for, and use of the legal system. At the same time, as victims in death penalty cases are more likely to be white and of higher social status, their survivors’ superior social privilege may contribute to greater confidence in navigating and being present in the criminal justice system.

III. Conclusion

Mass incarceration, even if we are past its peak, threatens to become another engine of inequality as it diminishes the economic, social, and health possibilities of those most affected. The law can reinforce or alleviate the economic burden of a criminal record by restricting the kinds of work ex-prisoners can do, restricting potential employers from asking whether the job applicant has been imprisoned, and any of several other practices. The biggest contribution the law can make, however, is to be less present in the lives of the incarcerated, to decrease the incidence and length of incarceration for drug offenses and parole violations, and, better yet, to replace law with social resources that address underlying causes of marginalization.

In the context of the death penalty, law may perpetuate social privilege where it intensifies disadvantage in the context of mass incarceration. Law has increased its presence in the lives of survivors at their behest, as survivors have enlisted court processes and a discourse of rights to meet emotional needs and advance their vision of justice. Unlike the men


100. COMFORT, supra note 61, at 183.


102. JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 105–37 (2005) (identifying legal barriers to work, housing, voting, public assistance, and family formation); see also Darren Wheelock, Christopher Uggen, & Heather Hlavka, Employment Restrictions for Individuals with Felons Status and Racial Inequality in the Labor Market, in GLOBAL PERSPECTIVES ON RE-ENTRY 278, 299 (Ikponwosa Ekwunye & Richard S Jones eds., 2011), available at http://epublications.marquette.edu/cgi/viewcontent.cgi?article=1044&context=socs_fac (providing the example of a white male convicted of drug conspiracy and equipped with an MBA who cannot obtain a job after disclosing on job applications that he has a criminal history); Jessica S. Henry & James B. Jacobs, Ban the Box to Promote Ex-Offender Employment, 6 CRIMINOLOGY & PUB’L. 755, 758 (2007) (noting that cities such as Chicago have begun to reform “how city agencies consider a job applicant’s criminal record”).
swept up in America’s recent experiment with mass incarceration, less law is not necessarily what survivors want or need. However, recognizing that more law reflects a costly policy decision for victim survivors is essential. This highly visible, privileged relationship to the law increases rather than reduces the conflicts inherent in their sociologically ambivalent role.