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# THE SILVER TSUNAMI: AGING PRISONERS, EARLY RELEASE, GUARDIANSHIP AND PRISONER ADVOCATE INITIATIVES FOR LONG TERM CARE BEYOND THE PRISON WALLS

MARTINA E. CARTWRIGHT\*

## INTRODUCTION

With more than two million individuals behind bars, the United States has the dubious distinction of being the largest incarcerator in the world.<sup>1</sup> A significant percentage of that population is elderly, and the figures are increasing, rather than decreasing. A number of factors contribute to the aging of America's prison population, among them are: (1) an increase in older inmates in the general population; (2) an increase in arrests of senior citizens for serious crime; (3) a national shift away from rehabilitative responses to crime towards retributive and punitive measures; and (4) a curtailment of discretionary early release from prison.<sup>2</sup>

In 2012, prisoners over the age of 50 comprised approximately 16% of the total population in state and federal prisons.<sup>3</sup> In 1992, inmates over the age of 50 comprised 5.7% of the total population of

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<sup>1</sup> INT'L. CTR. FOR PRISON STUDIES, WORLD PRISON BRIEF: U.S., <http://www.prisonstudies.org/country/united-states-america> (last visited June 25, 2015). In 2013, the United States prison population was approximately 2,217,000, including pre-trial detainees and remand prisoners. *Id.* Of that number, approximately 731,200 were held in local jails and 1,485,800 incarcerated in state or federal prisons. *Id.*

<sup>2</sup> It is well accepted that the growth in the older prison population is likely due to "three strikes" and truth-in-sentencing laws and not a sudden elderly crime wave. *See*, Section II, *infra*, providing a brief history of corrections policies in the United States, from the 1960s to the present day.

<sup>3</sup> AMERICAN CIVIL LIBERTIES UNION ("ACLU"), AT AMERICA'S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY 2 (2012).

incarcerated prisoners.<sup>4</sup> A decade later, the number of prisoners over age 50 doubled.<sup>5</sup>

In the United States, correction budgets are one of the fastest growing expenditures, expanding at a rate second only to Medicaid.<sup>6</sup> In 2008, it was estimated that states spent more than \$40 billion each year on corrections – an increase of 300% since 1988.<sup>7</sup> These expenditures are subsidized by fewer funds from the federal government. As corrections budgets continue to grow, state legislatures are seeking new ways to cut costs. Some states have responded to this crisis by reducing available medical services or purchasing inmate pharmaceuticals at lower costs.<sup>8</sup> An increasing number of states have expanded early release programs, such as medical furloughs or compassionate release programs to reduce prison populations. However, there has been scant discussion or research on the issue of elderly releasees or their medical care post-release from prison. This is a salient issue in light of recent proposals by state and federal governments to release elderly or infirmed prisoners and the potential problems presented by their return to society, particularly incapacitated elderly prisoners.

This article proposes a number of initiatives to address the issue of elder care beyond prison, providing pre-release assistance to ensure post-release continuity of care.

Part I of this article considers the ethical and moral arguments which support early release, such as compassionate release, for elderly and infirmed prisoners.

Part II of this article provides a brief historical overview of the last four decades of criminal justice in the United States and how

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<sup>4</sup> Patrick McMahon, *Aging Inmates Present Prison Crisis*, USA TODAY, (Aug. 10, 2003, 8:40 PM), <http://www.globalaging.org/elderrights/us/inmates.htm>.

<sup>5</sup> *Id.*

<sup>6</sup> PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 1 (2009), <http://www.convictcriminology.org/pdf/pew/onein31.pdf>. In 2008, state and federal governments spent approximately 68 billion dollars annually to run the penal system. *Id.* at 11. In the last 25 years, the number of prison and jail inmates has grown by 274%. *Id.* at 4. Correction costs are mainly spent on incarceration, with older prisoners incurring higher costs than younger inmates. Cyrus Ahalt et al., *Paying the Price: The Pressing Need for Quality, Cost, and Outcomes Data to Improve Correctional Health Care for Older Prisoners*, 61 J. AM. GERIATRICS SOC'Y 2013, 2013 (2013). For instance, it costs approximately \$34,135 per year to house an average prisoner. ACLU, *supra* note 3, at vii, 27. However, it costs approximately \$68,270 to house a prisoner age 50 and older. *Id.* at vii, 27-28.

<sup>7</sup> PEW CENTER ON THE STATES, *supra* note 6, at 11.

<sup>8</sup> CHRISTINE S. SCOTT-HAYWARD, THE FISCAL CRISIS IN CORRECTIONS: RETHINKING POLICIES AND PRACTICES. NY: VERA INSTITUTE OF JUSTICE 2 (2009), [http://www.vera.org/files/The-fiscal-crisis-in-corrections\\_July-2009.pdf](http://www.vera.org/files/The-fiscal-crisis-in-corrections_July-2009.pdf).

various tough on crime measures—at both the state and federal levels—have contributed to this crisis.

Part III of this article will consider the cost, both in human capital and fiscal expenditures.

Part IV of this article will address release programs and the recent push for compassionate release legislation at both the state and federal levels as a means of addressing this crisis. Part IV will also briefly consider the conundrum posed by unconditional release for elderly inmates, as it relates to lack of post-release supervision and assistance for incapacitated releasees.

Part V will discuss issues associated with release, reintegration, and reentry of elderly offenders, particularly those requiring guardians or “advocates.” Part V will make recommendations on policy changes—at the state and federal levels—to ensure that elderly inmates are afforded opportunities to seek early release and that, beyond the prison walls, each is assured quality of life post-incarceration. Part V will briefly discuss the role of pre-release advocates and post-release guardians within this system and steps that can be undertaken to ensure humane and ethical handling of elderly inmates.

## I.

### ETHICAL AND MORAL CONSIDERATIONS FOR EARLY RELEASE OF ELDERLY AND INFIRMED INMATES

The majority of scholars and criminologists accept that punishment serves the following dual purposes: censure and the prevention of crime.<sup>9</sup> The primary purpose of censure is to convey blame to those who commit a wrongful act against society.<sup>10</sup> Indeed, censure is the manner by which offenders are held responsible for their actions, giving them an opportunity to acknowledge their wrongdoing in some form or fashion.<sup>11</sup> Moreover, censure is society’s way of demonstrating disapproval by stigmatizing certain types of conduct and discouraging others from engaging in such future criminal acts.<sup>12</sup> Deterrence, while not a sufficient reason for punishment, is, however, a necessary one.<sup>13</sup> In fact, as noted by one prominent criminologist, “if punishment has no usefulness in preventing crime, there should not be criminal sanction.”<sup>14</sup>

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<sup>9</sup> MIRKO BAGARIC, *PUNISHMENT AND SENTENCING: A RATIONAL APPROACH* 67 (2001).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 68.

<sup>13</sup> *Id.* at 67.

<sup>14</sup> *Id.*

The utilitarian and retributive models are two primary rationales for the imposition of punishment.<sup>15</sup> While the two philosophies are inconsistent with each other, as it relates to approaches and aims, both have been used by jurists, policymakers, and scholars to justify punishment.<sup>16</sup>

The utilitarian theory, promulgated by such philosophers as Jeremy Bentham, posits that punishment should only be used if it benefits society by incapacitating offenders, deterring others from crime, or rehabilitating criminals for the betterment of society.<sup>17</sup> Utilitarianism emphasizes the prospective aspects of punishment, rather than the retrospective.<sup>18</sup>

Until the latter part of the 20th century, rehabilitation was the primary goal of the criminal justice system in the United States.<sup>19</sup> The aim of rehabilitation is to focus on the offender, providing treatment—not punishment—to ensure that when the individuals are returned to society, they are cured.

In recent times, however, rehabilitation has become one of the least professed goals, while other justifications of the utilitarian model—deterrence and incapacitation—have become more dominant.<sup>20</sup> Imprisonment is the usual form of incapacitation. Based on the type and severity of the crime, offenders are confined to secure institutions and prevented from committing any additional crimes during the period of their incapacitation.<sup>21</sup> Incapacitation considers the offender's potential and future acts.<sup>22</sup>

In contrast, the retributive model, as advanced by philosophers such as Immanuel Kant, justifies punishment as “deserved.”<sup>23</sup> Essentially, if an individual freely decides to violate the rules of society, the punishment imposed is deserved.<sup>24</sup> Moreover, the retributive model conceives deserved punishment as an intrinsic good.<sup>25</sup> At its core, the

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<sup>15</sup> JEFFREY L. KIRCHMEIER, *IMPRISONED BY THE PAST: WARREN McCLESKEY AND THE AMERICAN DEATH PENALTY* 172 (2015).

<sup>16</sup> *Id.*

<sup>17</sup> See generally JEREMY BENTHAM, *THE RATIONALE OF PUNISHMENT* (1830); see also KIRCHMEIER, *supra* note 15, at 172.

<sup>18</sup> BAGARIC, *supra* note 9, at 184.

<sup>19</sup> KIRCHMEIER, *supra* note 15, at 172.

<sup>20</sup> *Id.*

<sup>21</sup> GEORGE F. COLE, CHRISTOPHER E. SMITH, CHRISTINA DEJONG, *CRIMINAL JUSTICE IN AMERICA* 279 (2014) (hereinafter *CRIMINAL JUSTICE*).

<sup>22</sup> *Id.*

<sup>23</sup> See generally IMMANUEL KANT, *SCIENCE OF RIGHT* (1790) reprinted in 42 *GREAT BOOKS OF THE WESTERN WORLD: KANT* 395 (Robert Maynard Hutchins ed., 1952); see also KIRCHMEIER, *supra* note 15, at 172.

<sup>24</sup> KIRCHMEIER, *supra* note 15, at 172.

<sup>25</sup> *Id.*

retributive model differs from the concept of vengeance as it focuses primarily on assessing “deserved punishment” on the individual, rather than satisfying the victim’s need for revenge.<sup>26</sup> As noted by Kant, “punishment ought to be pronounced over all criminals proportionate to their internal wickedness” and thus, there is a proportionality component to the retribution model.<sup>27</sup>

By and large, societal justification for punishment—under either model—may be significantly undermined if the offender is elderly or infirmed. For instance, if the primary purposes are deterrence and incapacitation, specifically incarceration, an individual who is physically or mentally incapable of recommitting an offense poses no threat to society and the justification for continued incarceration is not met.<sup>28</sup> Utilitarianism presupposes an elevated risk of reoffending and the existence of problems that can be readily identified and remedied through a criminal sentence.<sup>29</sup> Clearly, the state’s penological goals of deterrence and incapacitation are thwarted by the continued incarceration of elderly or infirmed inmates, particularly if the financial costs to society exceed the benefits of continued incarceration.<sup>30</sup> The same argument can be posited at the state’s penological goal of retribution, as sentence proportionality hardly exists with physically or mentally impaired offenders.<sup>31</sup> Indeed, if the state’s interest is in demanding sentences proportional to the crime, that interest is far outweighed by the “fiscal responsibility of caring” for inmates with diminished quality of life.<sup>32</sup> A poorly designed and conceived sentencing system that doggedly pursues flawed objectives will only perpetuate “pre-existing injustices.”<sup>33</sup>

In the last decade, increasing numbers of older prisoners, prison overcrowding, and spiraling medical costs associated with the aged and infirmed have resulted in correctional and public policy experts advocating a broader and sustained use of *compassionate release*. *Compassionate release* refers to the early release of prisoners through either executive commutation of sentences or commutation through state departments of correction, judicial reduction of sentence, fur-

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Brie A. Williams et al., *Balancing Punishment and Compassion for Seriously Ill Prisoners*, 155 ANNALS INTERNAL MED. 122, 122 (2011).

<sup>29</sup> William W. Berry III, *Extraordinary and Compelling: A Re-examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 877 (2009).

<sup>30</sup> *Id.* at 886.

<sup>31</sup> *Id.* at 885-86.

<sup>32</sup> *Id.* at 886. See, Section III, *infra*, regarding human and social costs of incarceration.

<sup>33</sup> BAGARIC, *supra* note 9, at 66.

lough, or parole.<sup>34</sup> As discussed, *infra* Section IV.A., in granting compassionate release, the state must weigh the needs of the offender against societal needs such as safety, retribution, and deterrence. Compassionate release is founded on the theory that substantial and substantive changes in health may impact so-called principles of justice and alter the reasons for incarceration and sentence completion.<sup>35</sup>

The majority of state compassionate release programs are based on considerations related to humanitarian, sentencing, and financial concerns, buttressed by assurances that releasees will not pose a risk to society.<sup>36</sup> At the heart of the humanitarian argument is the recognition that even those who have committed crimes deserve the chance to spend their last days with loved ones, rather than in prison.<sup>37</sup> However, this goal is hardly met if the process for securing compassionate release is inflexible and designed to dissuade inmates from filing petitions.<sup>38</sup>

Despite the laudable humanitarian goals that compassionate release programs offer and the cost savings to budgets, fewer and fewer states are releasing elderly or infirmed prisoners.<sup>39</sup> The primary justification remains politics as public opinion appears solidly against early release programs.<sup>40</sup> Unfortunately, as inmates continue to age and the elderly prison population continues to grow, states will be forced to consider developing geriatric facilities and training personnel to provide long-term medical care to aging, infirmed, or terminally ill prisoners—at exorbitant cost—or freeing prisoners who pose little to no harm to society.<sup>41</sup>

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<sup>34</sup> ENCYCLOPEDIA OF PRISONS AND CORRECTIONAL FACILITIES 447 (Mary Bosworth ed. 2005).

<sup>35</sup> Williams et al., *supra* note 28, at 122.

<sup>36</sup> John A. Beck, *Compassionate Release from New York State Prisons: Why Are So Few Getting Out?* 27 J.L. MED. & ETHICS 216, 233 (1999).

<sup>37</sup> Nicole M. Murphy, Comment, *Dying to be Free: An Analysis of Wisconsin's Restructured Compassionate Release Statute*, 95 MARQ. L. REV. 1679, 1691 (2012).

<sup>38</sup> See Section IV, *infra*, discussing the application process for compassionate release under 18 USC § 3562.

<sup>39</sup> Tina Maschi, *The State of Aging: Prisoners and Compassionate Release Programs*, HUFF POST CRIME, THE BLOG (last updated Oct. 23, 2012, 5:12 AM), [http://www.huffingtonpost.com/tina-maschi/the-state-of-aging-prisoners\\_b\\_1825811.html](http://www.huffingtonpost.com/tina-maschi/the-state-of-aging-prisoners_b_1825811.html). While more than 41 states have early release programs, these programs are infrequently—if ever—used. *Id.* For example, over a seven year period—between 2001 and 2008, Colorado released only three prisoners, Oregon never releases more than 2 prisoners a year, and until 2009, Maryland and Oklahoma had not released any prisoners under their early release programs. *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See Section IV, *infra*, discussing state compassionate release programs and/or medical furloughs.

## II. AMERICAN CORRECTIONAL CRISIS: FOUR DECADES OF FAILED CRIMINAL JUSTICE POLICIES

Unquestionably, the corrections system in America is in crisis. In recent times, prison populations have reached unprecedented levels—tripling since the 1980s.<sup>42</sup> In order to understand the current difficulties facing the modern correctional system, it is necessary to consider the last four decades of policies that have created this particular quagmire.

### A. *Gradual Shift From the Rehabilitation and Redemption Model to the Incarceration and Retribution Model*

As discussed, *supra* Section I., the levying of punishment serves the following primary goals: retribution, deterrence, incapacitation, and rehabilitation. Each of these goals, singular or in combination, serves the purpose of maintaining social order, but the use of any or all derives from shared values of justice and fairness.<sup>43</sup> However, the types of punishments imposed reflect the societal values at that moment in time in history.<sup>44</sup>

At the turn of the twentieth century, criminal justice in the United States adhered to a rehabilitation model, rather than the more contemporary retributive model.<sup>45</sup> For a 30 year period, following the end of World War II, the goal of rehabilitation was universally embraced; treatment of the offender was the dominant—sometimes, sole—issue to be considered by the courts, with an increased use of community-based correctional programs.<sup>46</sup> Crime was believed caused by societal problems or ills impacting individuals. Further, the methods and means existed to resolve or ameliorate these issues.<sup>47</sup> Accordingly, following a medical model—where the offender was considered in need of treatment—the bulk of the rehabilitation programs focused specifically on the individual-level causes of crime, such as addiction or behavioral issues.<sup>48</sup> Additionally, rehabilitation

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<sup>42</sup> Sarah Glazer, *Sentencing Reform*, 24 CQ RESEARCHER 27 (2014).

<sup>43</sup> CRIMINAL JUSTICE, *supra* note 21, at 278.

<sup>44</sup> *Id.*

<sup>45</sup> DAVID B. WOLCOTT & TOM HEAD, AMERICAN EXPERIENCE: CRIME AND PUNISHMENT IN AMERICA 130 (2010).

<sup>46</sup> CRIMINAL JUSTICE, *supra* note 21, at 280-81; *see also* THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA 781 (Wilbur M. Miller ed. 2012) (hereinafter SOCIAL HISTORY).

<sup>47</sup> CRIMINAL JUSTICE, *supra* note 21, at 280-81.

<sup>48</sup> SOCIAL HISTORY, *supra* note 46, at 787. Therapy programs like Alcoholics Anonymous and Narcotics Anonymous were instituted in prisons throughout the country in the 1960s and 1970s. *Id.* Additionally, other group and individual counseling programs



schemes were often tied to indeterminate sentencing—which was the norm during the mid-1950s to the early 1970s.<sup>49</sup> Judges were afforded broad discretion, sentencing an offender between a minimum and maximum range.<sup>50</sup>

### B. *Tough on Crime Initiatives; Increased Incarceration Rates Nationally*

During the early 1950s, crime rates increased in the Northeast, Midwest, and the West; the same trend was followed in the South during the early to mid-1960s.<sup>51</sup> Nationally, the homicide rate doubled while, in some large cities, it tripled or quadrupled.<sup>52</sup> Between 1960 and 1970, the rates of violent and non-violent crimes doubled, with violent crimes rising from 160.9 per 100,000 in 1960 to 363.5 per 100,000 a decade later.<sup>53</sup> For a 50 year period, between the 1920s and the 1970s, the number of incarcerated people in the United States remained stable, with an incarceration rate of about 110 per 100,000 population.<sup>54</sup>

However, as the overall rate of crime started to fall, incarceration rates exponentially increased.<sup>55</sup> A primary reason behind the dramatic uptick in incarceration rates was increased skepticism about rehabilitation, particularly after publication of a handful of influential scholarly articles.<sup>56</sup> In fact, the studies suggested that penal policies

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were implemented to assist in the treatment of psychological and behavioral problems. *Id.* The primary purpose was to ensure that prisoners had the tools to return as productive members of society. *Id.*

<sup>49</sup> *Id.* at 788.

<sup>50</sup> *Id.* at 787-88.

<sup>51</sup> WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 245 (2011).

<sup>52</sup> *Id.*

<sup>53</sup> SOCIAL HISTORY, *supra* note 46, at 781.

<sup>54</sup> Adam Liptak, *U.S. Prison Population Dwarfs that of Other Nations*, N.Y. TIMES, Apr. 23, 2008, [http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html?pagewanted=all&_r=0).

<sup>55</sup> JOHN E. CONKLIN, *WHY CRIME RATES FELL* 80-81 (2003). In 1972, there were approximately 300,000 individuals incarcerated in prisons in the United States. SABRINA JONES & MARC MAUER, *RACE TO INCARCERATE: A GRAPHIC RE-TELLING* 15 (2013) [hereinafter *RACE TO INCARCERATE*]. Today, there are more than 2 million individuals imprisoned in the United States. *Id.*

<sup>56</sup> See generally Robert Martinson, *What Works? - Questions and Answers about Prison Reform*, 35 PUB. INT. 22 (1974) (Martinson's essay concluded that rehabilitation . . . had no appreciable effect on recidivism); See also DOUGLAS S. LIPTON ET AL., *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* (1975); Walter C. Bailey, *Correctional Outcome: An Evaluation of 100 Reports*, 57 J. CRIM. L. & CRIMINOLOGY 153 (1966); William C. Berleman & Thomas W. Steinburn, *The Value and Validity of Delinquency Prevention Experiments*, 15 CRIME & DELINQUENCY 471 (1969); David F. Greenberg, *The Correctional Effects of Corrections: A Survey of Evaluations in CORRECTIONS AND PUNISHMENT*, edited by David F. Greenberg;

stressing rehabilitation were not working and that the emphasis should be directed towards deterrence and incapacitation.<sup>57</sup> That sentiment was borne out in public perceptions of the criminal justice system, where a significant percentage of Americans felt the courts did not do enough to punish criminals.<sup>58</sup>

Crime increase, social unrest and civil disorder produced “law and order” politicians, both at the state and national level. In fact, politicians such as Ronald Reagan—in California and Richard Nixon—campaigning for president in 1968—used “fear of crime” and campaigned to “‘get tough on crime’ by building more prisons, limiting prisoners’ due process and appellate rights . . . and by giving law enforcement officials more latitude and ability to investigate, apprehend, and arrest[. . .] accused individuals.”<sup>59</sup>

In 1973, the New York legislature, at the behest of then Gov. Nelson Rockefeller, enacted the harshest drug laws in the nation.<sup>60</sup> Known as the “Rockefeller Drug Laws,” individuals convicted of selling or possessing a certain quantity of narcotics would be sentenced to a minimum term of 15 years.<sup>61</sup> This particular law established the benchmark for new sentencing laws throughout the United States and for decades to follow.<sup>62</sup> With the subsequent political

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James Robison & Gerald Smith, *The Effectiveness of Correctional Programs*, 17 CRIME & DELINQUENCY 67 (1971).

<sup>57</sup> CONKLIN, *supra* note 55, at 81. It had been argued that the rehabilitation model failed to achieve its goals, with many pointing to the high recidivism rates as evidence of its ineffectiveness. See, CRIMINAL JUSTICE, *supra* note 21, at 317. In 1974, Robert Martinson undertook a longitudinal study of rehabilitation programs in United States. *Id.* Following his survey of more than 200 rehabilitation programs, Martinson surmised that rehabilitative efforts had no appreciable effect on recidivism. *Id.* Martinson’s study is credited with turning legislators and policymakers from the rehabilitation model and embracing more punitive measures. *Id.*

<sup>58</sup> CONKLIN, *supra* note 55, at 81.

<sup>59</sup> David Schultz, *No Joy in Mudville Tonight: The Impact of Three Strike Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 CORNELL J.L. & PUB. POL’Y 557, 557 (2000).

<sup>60</sup> RACE TO INCARCERATE, *supra* note 55, at 33.

<sup>61</sup> *Id.* See also Madison Gray, *A Brief History of New York’s Rockefeller Drug Laws*, TIME (Apr. 2, 2009), <http://content.time.com/time/nation/article/0,8599,1888864,00.html>. The driving force in the growth of incarceration rates in the 1980s and early 1990s was the “war on drugs,” began under President Ronald Reagan, continued through President George H W Bush, and escalated during the Clinton presidency. HENRY RUTH & KEVIN R. REITZ, THE CHALLENGE OF CRIME: RETHINKING OUR RESPONSE 96 (2006)[hereinafter RUTH & REITZ]. However, from the mid-1990s to the present-day, the driving force behind increased incarceration rates were longer sentences, rather than increased admissions. *Id.* at 96-97.

<sup>62</sup> RACE TO INCARCERATE, *supra* note 55, at 34. In 1975, Massachusetts passed a law mandating a minimum one-year prison sentence for carrying an unlicensed gun. *Id.* In 1977, Michigan enacted a law requiring a minimum of two years for the use of a gun in a felony. *Id.*

changes—both at the state and federal level—legislators and policy-makers began embracing a crime control model of corrections, with emphasis on incarceration and risk containment.<sup>63</sup> Starting in the mid-1970s, a handful of states moved from indeterminate sentencing structures, which provided a broad range of sentence and allowing for discretionary parole release, to determinate sentencing structures having far more narrow sentence ranges and release dates determined by the sentence, minus any good time earned.<sup>64</sup>

The first states to shift from indeterminate to determinate sentencing were California and Maine in 1976.<sup>65</sup> Almost 30 years later, the number grew exponentially, with a significant number of states and the federal government adopting determinate sentencing models.<sup>66</sup> Even states that utilized an indeterminate sentencing model adopted determinate (mandatory) sentences for certain offenses. Under determinate (or mandatory) sentencing provisions, offenders sentenced for an offense—for which there is a mandatory term—must be sentenced to that particular term.<sup>67</sup>

Notably, states employing mandatory sentencing models also adopted mandatory parole release.<sup>68</sup> Under the indeterminate model, parole boards determined readiness for release—considering a number of factors such as successful completion of treatment and educational programs.<sup>69</sup> Conversely, in most states that enacted mandatory sentencing schemes, parole boards were abolished (or significantly curtailed) and release dates automatically calculated.<sup>70</sup> While discretionary release was the primary form of parole release up

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<sup>63</sup> CRIMINAL JUSTICE, *supra* note 21, at 317.

<sup>64</sup> U.S. CRIMINAL JUSTICE POLICY: A CONTEMPORARY READER 164 (Karim Ismaili, ed. 2011) (hereinafter U.S. CRIMINAL JUSTICE POLICY). Mandatory sentencing laws are based on the assumption that longer prison terms reduce crimes—a direct reaction to the “more flexible indeterminate sentences” of past decades. WOLCOTT & HEAD, *supra* note 45, at 269. Mandatory minimum sentences are generally associated with nonviolent drug offenses and are often connected to the amount of drugs involved in the case. *Id.* By the mid to late 1990s, the federal penal system had over 100 specific mandatory minimum laws. *Id.*

<sup>65</sup> U.S. CRIMINAL JUSTICE POLICY, *supra* note 64, at 164.

<sup>66</sup> Rodney L. Engen, *Assessing Determinate and Presumptive Sentencing – Making Research Relevant*, 8 CRIMINOLOGY & PUB. POL’Y 323, 323 (2009). By 2002, 17 states had adopted mandatory sentencing systems, eliminating parole and requiring minimum sentences for certain offenses; 18 states and the federal courts implemented “presumptive sentencing”, severely restricting judicial discretion, and approximately eight states had “voluntary” guidelines. *Id.*

<sup>67</sup> U.S. CRIMINAL JUSTICE POLICY, *supra* note 64, at 165.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

to the mid-1970s, by the end of the 1990s mandatory release became the principle mechanism of prison release.<sup>71</sup>

The 1980s and 1990s continued a more conservative trend in correctional policies.<sup>72</sup> Media sensationalism and the politicizing of crime as election year fodder led a number of states to enact “three strikes” law, under which an individual could receive life without parole for a third violent felony.<sup>73</sup> Additionally, the election of more conservative governors and mayors to political office continued “get tough on crime” trends.<sup>74</sup> As a result of newly enacted laws and initiatives, corrections spending increased more than 500%.<sup>75</sup> Between 1972 and 1980, increases in incarceration rates roughly paralleled increases in property crimes and burglary rates.<sup>76</sup> However, after 1980, while the rates of imprisonment continue to rise sharply, crime indicators did not increase.<sup>77</sup> Further, the same indicators dropped in the years even when incarceration continued to grow.<sup>78</sup> Thus, the growth in prison populations was not the result of a sudden crime wave or an increasing number of arrests per crime.<sup>79</sup> Instead, changes in punishment, particularly after the 1980s, were the reason for the significant growth in the prison population.<sup>80</sup>

For instance, the Comprehensive Crime Control Act of 1984 embodied the federal response to “widespread crime” and inconsistent federal sentencing.<sup>81</sup> Title II of the Act—the Sentencing Reform Act—established the United States Sentencing Commission and provided for the creation of guidelines to further the general aims of pun-

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<sup>71</sup> *Id.*

<sup>72</sup> Schultz, *supra* note 59, at 568.

<sup>73</sup> RACE TO INCARCERATE, *supra* note 55, at 58. For instance, under California’s three strikes law if an offender had two prior serious or violent felony convictions the mandatory sentence for third conviction even if it is a nonviolent felony is 25 years to life. CONKLIN, *supra* note 55, at 85. The California law was enacted to deal with violent crimes and dangerous criminals. *Id.* However, two years after the law’s passage, non-violent offenders were twice as likely to be imprisoned as violent offenders. *Id.* In fact, more than 80 % of individuals receiving enhanced sentences were for non-violent offenses. *Id.*

<sup>74</sup> RACE TO INCARCERATE, *supra* note 55, at 58. The 1990s also saw a surge in media coverage of random violent crimes. *Id.* at 59. For instance, while TV crime coverage doubled and murder coverage tripled, the crime rate either stabilized or decreased. *Id.*

<sup>75</sup> *Id.* at 47.

<sup>76</sup> CONKLIN, *supra* note 55, at 80.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* As the evidence clearly demonstrates, there was no linkage between the rate of crime or incarceration rates. *See*, RACE TO INCARCERATE, *supra* note 55, at 16. The rate of crime either stabilized or declined in the 1990s while conversely, the rate of incarceration increased exponentially. *Id.*

<sup>81</sup> Comprehensive Crime Control Act of 1984, Pub. L. No. 98- 473, 98 Stat. 1976 (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C., and 42 U.S.C.).

ishment—deterrence, rehabilitation, and incarceration.<sup>82</sup> The Act’s mandate and the work of the Commission resulted in harsh mandatory sentencing, an explosive increase in the number of incarcerated persons, and fewer and limited release opportunities.<sup>83</sup> Moreover, the Violent Crime Control Act of 1994, required life imprisonment without possibility of release for any offender convicted of a federal offense if the individual had two prior state or federal qualifying offenses.<sup>84</sup> This law also required that any states receiving incentive grants under the Act adopt “truth-in-sentencing” laws, with the stipulation that offenders serve at least 85% of their sentences before being released.<sup>85</sup>

As a result of “law and order” mandates at the state and federal levels, between 1978 and 2009, the number of individuals incarcerated in the United States increased from 294,400 to 1,555,600—approximately 430%.<sup>86</sup> Conversely, in the same period, the population of the United States increased by only 36.41%.<sup>87</sup>

At the beginning of the 21st century, the United States is acknowledged as the foremost world leader in the use of incarceration.<sup>88</sup> Still there are some positive trends to celebrate. After almost

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<sup>82</sup> Don. M. Gottfredson, *Measuring Justice: Unpopular Views on Sentencing Reform* in THE CRIMINOLOGY OF CRIMINAL LAW 247 (William S. Laufer & Freda Adler eds., 2013); Sentencing Reform Act of 1984, Pub. L. No. 98–473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

<sup>83</sup> Jalila Jefferson-Bullock, *The Time Is Ripe to Include Considerations of the Effects on Families and Communities of Excessively Long Sentences*, 83 UMKC L. REV. 73, 82-83 (2014). Under the Comprehensive Crime Control Act, between 1991 and 2011, the number of mandatory minimum penalties increased from 98 to 195. *Id.* at 82. Moreover, federal offenders convicted of crimes which carry mandatory minimums are generally given longer sentences and parole has been eliminated, requiring inmates to complete their entire sentence. *Id.* at 82-83.

<sup>84</sup> HR 3355 §§ 70001-70002 (amending 18 U.S.C. § 3559, 3582(c)(1)(A)); *see also* Jalila Jefferson-Bullock, *supra* note 83, at 83.

<sup>85</sup> HR 3355 § 20102 (codified at 42 U.S.C. § 13704) *see also* Tish Smyer & Patricia M. Burbank, *The U.S. Correctional System and the Older Prisoner*, 35 J. GERONTOLOGICAL NURSING 33, 33 (2009).

<sup>86</sup> E. ANN CARSON & DANIELA GOLINELLI, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991-2012, BUREAU OF JUSTICE STATISTICS 1 (2013), <http://www.bjs.gov/content/pub/pdf/p13.pdf>. The population of the United States grew less slowly for the same period, increasing from 225,055,487 to 307,006,550—approximately 36.41% <http://www.census.gov/popest/data/national/totals/pre-1980/tables/popclockest.txt> and [http://www.census.gov/popest/data/historical/2000s/vintage\\_2009/index.html](http://www.census.gov/popest/data/historical/2000s/vintage_2009/index.html) (last visited Dec. 5, 2015).

<sup>87</sup> In 1978, the population of the United States was approximately 225,055,487. <http://www.census.gov/popest/data/national/totals/pre-1980/tables/popclockest.txt> (last visited Dec. 5, 2015). In 2009, it had risen to 307,006,550. [http://www.census.gov/popest/data/historical/2000s/vintage\\_2009/index.html](http://www.census.gov/popest/data/historical/2000s/vintage_2009/index.html) (last visited on Dec. 5, 2015).

<sup>88</sup> RUTH & REITZ, *supra* note 61, at 20. The United States incarcerates more individuals than any other nation. Smyer & Burbank, *supra* note 85, at 33. The

four decades of continual growth, the imprisonment rate appears to be leveling off or declining.<sup>89</sup>

### III.

#### HUMAN AND FISCAL COSTS OF A FLAWED PENAL SYSTEM OF MASS INCARCERATION

Currently, more than two million individuals are incarcerated in prisons and jails in the United States, approximately one in every 200 adults.<sup>90</sup> If post-incarceration supervision—such as probation and parole—are included, approximately one in every 31 adults, or 3.2% of the population, is under some form of criminal justice supervision.<sup>91</sup>

Unfortunately, minorities comprise a disproportionate number of inmates currently in the US correctional system.<sup>92</sup> In 2010, there were 4,347 African-American male inmates per 100,000 African-American population; 1,775 Hispanic male inmates per 100,000 Hispanic population; and 678 white male inmates per 100,000 white population.<sup>93</sup> That means that African-American males are six times more likely than white males and three times more likely than Hispanic males to be incarcerated. In fact, the “odds of an African-American man going to prison today are higher than the odds he will go to college [or] get married.”<sup>94</sup>

Mass incarceration negatively impacts prisoners’ families and communities.<sup>95</sup> It removes from the family and the community potential breadwinners—placing their families at risk economically.<sup>96</sup> In fact, the large number of incarcerated young African-American males disproportionately impacts the “social fabric of inner city communities,” possibly creating more crime than it prevents.<sup>97</sup> Imprisonment removes spouses and parents from the community, placing minor chil-

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incarceration rate for the US is 738 per 100,000, 4-7% higher than other Western Countries. *Id.* Russia has the world’s second highest rate of 607 per 100,000. *Id.*

<sup>89</sup> RACE TO INCARCERATE, *supra* note 55, at ix; *see also* CARSON & GOLINELLI, *supra* note 86, at 1.

<sup>90</sup> RACE TO INCARCERATE, *supra* note 55, at 2.

<sup>91</sup> PEW CENTER ON THE STATES, *supra* note 6, at 1.

<sup>92</sup> PEW RESEARCH CENTER, KING’S DREAM REMAINS AN ELUSIVE GOAL; MANY AMERICANS SEE RACIAL DISPARITIES 31 (2013), [http://www.pewsocialtrends.org/files/2013/08/final\\_full\\_report\\_racial\\_disparities.pdf](http://www.pewsocialtrends.org/files/2013/08/final_full_report_racial_disparities.pdf).

<sup>93</sup> *Id.*

<sup>94</sup> Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 593 (2012) (quoting JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 141 (2007)).

<sup>95</sup> U.S. CRIMINAL JUSTICE POLICY, *supra* note 64, at 149.

<sup>96</sup> *Id.*

<sup>97</sup> CONKLIN, *supra* note 55, at 83.

dren at risk for emotional and psychosocial problems.<sup>98</sup> Approximately 2.7 million children or one in every 28 children in the U.S. have an incarcerated parent.<sup>99</sup> However, a more detailed analysis of the impact to minority families demonstrates long-term repercussions to those communities. For instance, while 1.8% of Anglo children have one parent incarcerated, the number triples if the child is Hispanic—3.5% and jumps exponentially if the child is African-American—11.4%.<sup>100</sup>

Forced parent–child separation, associated with death of a parent or divorce, generally leads children to develop “poor adaptive strategies, low self-esteem, or delinquent behavior.”<sup>101</sup> These effects also exist in the children of incarcerated parents and may be further exacerbated by instability in childcare arrangements or stigma associated with incarceration.<sup>102</sup>

Financial difficulties and the physical separation associated with incarceration also contribute to instability in marital or dating relationships.<sup>103</sup> In fact, a substantial body of research exists suggesting that incarceration increases the risk of divorce or separation.<sup>104</sup>

Separation between loved ones, particularly children and incarcerated parents, are further compounded by problems associated with maintaining contact during the period of incarceration.<sup>105</sup> Visits are less likely when prisons are located far from the family and community, rendering trips too expensive or logistically impossible.<sup>106</sup> Additionally, contact by phone is cost prohibitive as collect calls from

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<sup>98</sup> *Id.* at 84. There is research, demonstrating that children of incarcerated parents tend to suffer from a variety of behavioral problems, leading to “significant adjustment problems.” Erin Kathleen Midgley & Celia C. Lo, *The Role of a Parent’s Incarceration in the Emotional Health and Problem Behaviors of At-Risk Adolescents*, 22 J. CHILD & ADOLESCENT SUBSTANCE ABUSE 85, 86 (2013) (referencing the findings of a number of studies on the effect of incarceration on children, e.g. adjustment problems, emotional disturbance, etc.).

<sup>99</sup> PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 4 (2010), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2010/CollateralCosts1pdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/CollateralCosts1pdf.pdf).

<sup>100</sup> Jefferson-Bullock, *supra* note 83, at 91.

<sup>101</sup> Amanda Geller et al., *Parental Incarceration and Child Well-Being: Implications for Urban Families*, 90 SOC. SCI. Q. 1186, 1188 (2009).

<sup>102</sup> *Id.*

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

<sup>104</sup> *Id.*

<sup>105</sup> Sarah Abramowicz, *A Family Law Perspective on Parental Incarceration*, 50 FAM. CT. REV. 228, 231 (2012).

<sup>106</sup> *Id.* The bulk of prisons are frequently located in rural areas with poor or non-existent transportation systems. See CREASIE FINNEY HAIRSTON, FOCUS ON CHILDREN WITH INCARCERATED PARENTS: AN OVERVIEW OF THE RESEARCH LITERATURE (2007), <http://www.f2f.ca.gov/res/pdf/FocusOnChildrenWith.pdf>. They are often located far from urban communities where prisoner families live and the distance from the prison and

prison usually include exorbitant surcharges.<sup>107</sup> Moreover, harsh prison rules and poor treatment by staff generally discourages family members from visiting incarcerated loved ones.<sup>108</sup> Unfortunately, maintaining security and safety of prisoners remains the primary concern of corrections facilities, not encouraging positive post-release results, particularly as it pertains to family structures.<sup>109</sup>

Correction costs in the United States are exorbitant and run to the tens of billions of dollars annually.<sup>110</sup> Large, unwieldy prison budgets divert public funds from other critical social programs, such as education, health care, and Social Security for the elderly. The more spent on corrections, the less spent on programs that may have a higher crime reduction impact.<sup>111</sup> In fact, if the U.S. reduced its incarceration rate to that of other industrialized nations, there would be far more to spend on programs to improve health, educate youth, and protect the environment.<sup>112</sup> Today, lawmakers, both Republican and Democrat, question the efficacy of correctional policies that financially burden states and the federal government.<sup>113</sup> As most legislatures discover, “lengthy prison sentences unnecessarily burden the nation’s fiscal management.”<sup>114</sup>

In a rush to adopt “tough on crime” measures, very little attention was paid to the long-term fiscal impact of lengthy prison sentences.<sup>115</sup> Future correctional policies will likely employ cost-benefit analysis, particularly as it pertains to long-term incarceration.<sup>116</sup> At an average of \$25,000 per inmate or about \$75 billion per year,

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related problems of transportation create a major factor prohibiting frequent visitation. *Id.* at 10.

<sup>107</sup> CREASIE FINNEY HAIRSTON, *supra* note 106, at 8. Companies that provide phone services to incarcerated individuals enjoy immense profits, sufficient enough to pay commission to governmental entities with whom they contract. *Id.* The rates for phone calls far exceed the cost of providing service, generating substantial profits to phone companies in correctional entities. *Id.* Recognizing the impact to families, some states have eliminated commissions, reducing rates by half. *Id.* Others have instituted alternative phone plans, such as prepaid calling systems. *Id.*

<sup>108</sup> *Id.* at 9-10.

<sup>109</sup> Jefferson-Bullock, *supra* note 83, at 95.

<sup>110</sup> U.S. CRIMINAL JUSTICE POLICY, *supra* note 64, at 150.

<sup>111</sup> Jefferson-Bullock, *supra* note 83, at 90.

<sup>112</sup> *Id.*

<sup>113</sup> Neil King, *As Prisons Squeeze Budgets, GOP Rethinks Crime Focus*, WALL ST. J. (June 21, 2013, 5:23 PM), <http://www.wsj.com/articles/SB10001424127887323836504578551902602217018>. Republican states such as Georgia, Texas, Ohio, and Kentucky, have adopted more “nuanced” laws, employing rehabilitation over incarceration or reduced sentences for non-violent crimes. *Id.*

<sup>114</sup> Jefferson-Bullock, *supra* note 83, at 90.

<sup>115</sup> King, *supra* note 113.

<sup>116</sup> TINA CHIU, IT’S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE, NY: VERA INSTITUTE OF JUSTICE 3 (2010).



incarceration accounts for nearly 90% of the costs paid by states for correction.<sup>117</sup> Unfortunately, as prison populations age, it is *estimated* that the cost per inmate will increase substantially due to the increased level of care required for “elderly” inmates.

However, there are substantial gaps in data related to costs, quality of care, and health outcomes of inmates considered “elderly.”<sup>118</sup> For instance, national health datasets do not include prisoner data.<sup>119</sup> Additionally, quality measures, detailing health outcomes, vary from state to state.<sup>120</sup> Finally, approximately 26% of states do not publically report any annual health care expenditures and only 14% of all states detail health care spending per age group.<sup>121</sup> Going forward, any policies—whether state or federal—regarding older inmates—will first require a standard definition of “elderly” and then a collection of data from all states as it relates to the level of care and the annual costs, as well as outcomes.

Unfortunately, the information that currently exists suggests a widespread problem necessitating a collective response.<sup>122</sup>

#### A. *Defining the “Elderly;” Longer Sentences Ensures Aging in Prison*

The definition of “elderly,” as used to determine retirement and eligibility for various government programs is generally 65.<sup>123</sup> However, sixty-five is not the best indication of senior status, as individuals of differing ages vary in general health and mental acuity.<sup>124</sup> The majority of studies and reports on elderly inmates use 50 as the age at which one is identified as an “older offender.”<sup>125</sup> Likewise, while state correctional policies on the elderly vary,<sup>126</sup> there appears to be consensus that—due to accelerated aging—a person is considered “eld-

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<sup>117</sup> JOHN SCHMIDT, KRIS WARNER, & SARIKA GUPTA, CTR. FOR ECON. & POLICY RESEARCH, *THE HIGH BUDGETARY COST OF INCARCERATION*, 10-11 (2010).

<sup>118</sup> Ahalt et al., *supra* note 6, at 2013.

<sup>119</sup> *Id.* at 2014-15.

<sup>120</sup> *Id.* at 2015.

<sup>121</sup> *Id.* at 2015-16.

<sup>122</sup> Timothy Curtin, *The Continuing Problem of America’s Aging Prison Population and the Search For A Cost-Effective And Socially Acceptable Means of Addressing It*, 15 *ELDER L.J.* 473 (2008).

<sup>123</sup> RONALD H. ADAY, *AGING PRISONERS: CRISIS IN AMERICAN CORRECTIONS* 16 (2003).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> CHIU, *supra* note 116, at 4. The National Commission on Correctional Health Care employs 55 as the threshold for “elderly inmates.” *Id.*

erly” when reaching the age of 50 or 55.<sup>127</sup> Unfortunately, any information collected on the health of “elderly” inmates fails to group aging inmates (e.g. 50-55, 56-60, etc.).<sup>128</sup> Accordingly, there is very little data on costs and outcome data per sentence, chronic condition, and delivery site.<sup>129</sup>

Between 1999 and 2012, the number of state and federal prisoners aged fifty-five or older increased 204%, from 43,300 to 131,500.<sup>130</sup> However, during the same time, the number of inmates younger than 55 years of age increased much more slowly, from 1.26 to 1.38 million—an uptick of only 9%.<sup>131</sup>

As discussed, *supra* Section II.B., “tough on crime” initiatives and policies resulted in longer prison sentences and increased the number of older inmates serving longer sentences. The numbers are staggering. In 2009, 13.5% of state prisoners were serving sentences between 10 and 20 years long, 11.2% were serving sentences for more than 20 years, and 9.6% were serving life sentences.<sup>132</sup> Among prisoners 51 years of age or older incarcerated in state facilities, 40.6% are serving sentences of more than 20 years or life sentences.<sup>133</sup> Additionally, 20% of prisoners between the ages of 61 and 70 years are serving sentences of 20 years or more.<sup>134</sup>

Moreover, in this decade, older individuals entering prison are doing so with longer sentences.<sup>135</sup> For instance, among state prisoners

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<sup>127</sup> U.S. DEP’T JUSTICE NATIONAL INST. CORR., CORRECTIONAL HEALTH CARE: ADDRESSING THE NEEDS OF ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES, 8-9 (2004), <http://static.nicic.gov/Library/018735.pdf>. Most experts agree that inmates typically experience the effects of aging sooner than individuals not incarcerated, primarily because of former substance abuse, inadequate healthcare prior to incarceration, separation from family, and stress related to incarceration. CHIU, *supra* note 116, at 5.

<sup>128</sup> Ahalt et al., *supra* note 6, at 2016.

<sup>129</sup> *Id.*

<sup>130</sup> PEW CHARITABLE TRUST & JOHN D. & CATHERINE T. MACARTHUR FOUND., STATE PRISON HEALTHCARE SPENDING: AN EXAMINATION 9 (2014) [hereinafter STATE PRISON HEALTHCARE SPENDING], <http://www.pewtrusts.org/~media/Assets/2014/07/StatePrisonHealthCareSpendingReport.pdf>. In the state prisons, the number of older inmates increased exponentially. *Id.* at 11. *See also* CHIU, *supra* note 116, at 4. For instance, between 2001 and 2005, the number of elderly inmates (aged 50 and older) in North Carolina grew by more than 50%, while the general prison population increased only 16%. *Id.* In Virginia, the number of inmates over 50 increased six fold, between 1990 and 2008. *Id.* In Oklahoma, inmates over 50 increased from 6.4% of the general population in 1994 to almost 15% in 2008. *Id.*

<sup>131</sup> STATE PRISON HEALTHCARE SPENDING, *supra* note 130, at 9.

<sup>132</sup> HUMAN RIGHTS WATCH, OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES, 26 (2012) [hereinafter OLD BEHIND BARS], [http://www.hrw.org/sites/default/files/reports/usprisons0112webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0.pdf).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 36-41.

in 2009, 17% entered prison at age 51 or older, with sentences ranging from 20 years to life.<sup>136</sup> Among state prisoners between the ages of 41 and 50 years, approximately 18.1% had sentences ranging from 20 years to life.<sup>137</sup> Accordingly, many of these prisoners will be in their 70s or 80s before they are released.

This poses a serious problem for state and federal prison systems and a budgetary crisis for the next few decades.

### B. Health Infirmities and the Elderly

Chronic illnesses and mental disorders are far more prevalent among prisoners than non-prisoners.<sup>138</sup> Additionally, long term debilitating ailments are more common among older prisoners, than younger prisoners.<sup>139</sup> Elderly inmates suffer from an average of three chronic illnesses while incarcerated.<sup>140</sup> Further, approximately 20% of elderly inmates suffer from a mental illness.<sup>141</sup>

In prison, elderly inmates are more likely to develop disabilities requiring the use of assistive devices such as glasses, hearing aids, wheelchairs, walkers, and canes.<sup>142</sup> Decreased vision and hearing problems and decreased independence, places elderly inmates at “risk for adverse events while in prison.”<sup>143</sup> Additionally, older inmates require frequent dental and periodontal services.<sup>144</sup>

Prisons are not designed for elderly inmates.<sup>145</sup> Elderly inmates, as is frequently common with non-incarcerated elderly, are prone to falls, leading to hip fractures and associated high costs related to

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<sup>136</sup> *Id.* at 27.

<sup>137</sup> *Id.* at 27-28.

<sup>138</sup> Ahalt et al., *supra* note 6, at 2016.

<sup>139</sup> *Id.*

<sup>140</sup> Aging Inmate Committee, *Aging Inmates: Correctional Issues and Initiatives*, CORRECTIONS TODAY 85 (Aug./Sept. 2012). Illnesses such as hypertension, arthritis, ulcer, prostate issues, and myocardial infarction are the more common chronic illnesses among elderly inmates. KEVIN E. MCCARTHY & CARRIE ROSE, STATE INITIATIVES TO ADDRESS AGING PRISONERS, OLR RESEARCH REPORT 2013-R-0166 (Mar. 4, 2013), <http://www.cga.ct.gov/2013/rpt/2013-R-0166.htm>.

<sup>141</sup> CHIU, *supra* note 116, at 5. Unfortunately, prisons do not screen for “age-related” cognitive illnesses. OLD BEHIND BARS, *supra* note 132, at 52. Dementia and other cognitive illnesses are first observed by staff or other prisoners “when a prisoner exhibits bizarre or erratic conduct.” *Id.*

<sup>142</sup> CHIU, *supra* note 116, at 5.

<sup>143</sup> Brie Williams & Rita Abraldes, *Growing Older: Challenges of Prison and Reentry for the Aging Population in PUBLIC HEALTH BEHIND BARS: FROM PRISONS TO COMMUNITIES* 56, 61 (Robert B. Greifinger, ed., 2007).

<sup>144</sup> CHIU, *supra* note 116, at 5.

<sup>145</sup> Curtin, *supra* note 122, at 476. Prison healthcare is designed on the military sick-call system and does not lend itself to chronic illnesses typically common with the elderly. *Id.*

care.<sup>146</sup> In addition to uneven sidewalks or walking areas, lack of handrails, or poor lighting, elderly prisoners have to deal with other hazards—such as top bunk assignments, fast moving lines in bathrooms, and other prison activities.<sup>147</sup> Moreover, diminished capacity may make it more difficult for elderly or infirmed prisoners to readily obey disciplinary guidelines.<sup>148</sup> Older inmates take longer to eat, longer to dress, and are more likely to be incontinent.<sup>149</sup>

Additional efforts on the part of correction officials are needed for the growing problems created by old and infirmed inmates.<sup>150</sup> Within the prison system, it is clear that limited resources, long-standing rules and policies, a lack of external support from elected officials, and lack of training for staff as it relates to the needs of older prisoners generally leads to inadequate care and protection for elderly inmates.<sup>151</sup>

### C. Healthcare Expenditures and Provisions for the Elderly

The case of *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) established a constitutional right to healthcare for prisoners. In *Estelle*, the U.S. Supreme Court held that inmates must be provided care that is not “deliberately indifferent” to serious medical needs.<sup>152</sup> While this particular standard has generated significant litigation by inmates challenging whether the adequacy of the care they received in prison met the constitutional standard, there have been few, if any, cases which address whether the quality of care provided elderly inmates meets this constitutional standard.<sup>153</sup>

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<sup>146</sup> OLD BEHIND BARS, *supra* note 132, at 46. One particular study of female inmates over 55, found that more than half reported falls within a one-year period. *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 46-47. Incontinence creates other problems for geriatric inmates. *Id.* at 47. Prison bathrooms generally lack any measure of privacy and persons needing to change soiled clothes or undergarments do so in public—a fairly humiliating and diminishing act. *Id.* This places elder inmates at risk of social isolation, harassment, and possible retaliation from younger inmates who are likely offended by an elderly prisoner soiling his or her clothes. *Id.*

<sup>150</sup> *Id.* at 43.

<sup>151</sup> *Id.* at 44.

<sup>152</sup> *Gamble*, a Texas inmate, was injured while performing a work assignment. *Id.* at 98. He brought an action, under 42 U.S.C. § 1983, against the department of corrections, the warden of the prison, and the prison doctor, complaining of the treatment (or lack thereof) he received for his injury. *Id.* The court held that deliberate indifference to serious medical needs of prisoners constitutes “unnecessary and wanton infliction of pain” and therefore violates the Eighth Amendment. *Id.* at 104.

<sup>153</sup> THE ENCYCLOPEDIA OF ELDER CARE: THE COMPREHENSIVE RESOURCE ON GERIATRIC HEALTH AND SOCIAL CARE 530 (Mathy D. Mezey et al. eds., 3d ed. 2001).

For instance, state and federal correction agencies do not make housing assignments for an inmate solely based on age.<sup>154</sup> Most prison systems support mainstreaming, placing older inmates in the general population for as long as possible.<sup>155</sup> However, some state correctional programs take into consideration frailty, disability, and illness when housing inmates.<sup>156</sup> Unfortunately, while special housing units providing high levels of care for the infirmed exist, they still fall short of the type of care one would receive in an assisted living or skilled nursing facility.<sup>157</sup>

Further, the type of personnel and the level of care provided fail to meet community standards of care.<sup>158</sup> For example, the compensation offered medical personnel makes it difficult to find qualified physicians willing to work in prisons.<sup>159</sup> The majority of physicians hired to provide care in prison systems generally have restrictions on their medical licenses and practice medicine only in prisons, due in part, to prior findings of medical negligence or malpractice in non-prison settings.<sup>160</sup> Even if qualified physicians are found, they have large caseloads and rely heavily on non-physician health care workers.<sup>161</sup> Finally, unlike medical personnel outside the prison system, doctors and nurses must balance medical needs against security issues, severely restricting prisoners' access to medication if there is a belief the purported illness is not real.<sup>162</sup> Medical personnel in prisons are different from staff in regular medical settings.<sup>163</sup> As they have contact with prisoners on full-time basis, their training includes training similar to correctional officers, as they are considered to be correctional officers.<sup>164</sup>

Prison medical care accounts for a large portion of correctional budgets. In 2011 alone, states spent \$7.7 billion on correctional health care – approximately a fifth of overall prison budgets.<sup>165</sup> However, older prisoners are responsible for a disproportionate share of prison

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<sup>154</sup> OLD BEHIND BARS, *supra* note 132, at 48.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 49.

<sup>158</sup> John J. Kerbs & Jennifer M. Jolley, *A Commentary on Age Segregation for Older Prisoners: Philosophical and Pragmatic Considerations for Correctional Systems*, 34 CRIM. JUST. REV. 119, 121 (2009).

<sup>159</sup> MARY BOSWORTH, THE U.S. FEDERAL PRISON SYSTEM 79 (2002).

<sup>160</sup> Kerbs & Jolley, *supra* note 158, at 122.

<sup>161</sup> BOSWORTH, *supra* note 159, at 81.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> STATE PRISON HEALTHCARE SPENDING, *supra* note 130, at 3.

medical expenses.<sup>166</sup> For instance, in 2011, the health care costs for the average prisoner was \$5,482 but for prisoners aged 55 to 59, it doubled to \$11,000 and steadily increased—reaching \$40,000 for prisoners age 80 or over.<sup>167</sup> Thus, annual medical expenditures for older state prisoners are three to eight times greater than those for offenders in the general population.<sup>168</sup>

Most notable, however, is the failure of states to track per capita medical costs by age.<sup>169</sup> Nonetheless, the data that is available suggests higher medical costs associated with elderly prisoners.<sup>170</sup> For instance, in California, medical service costs for older inmates are twice that for younger inmates.<sup>171</sup> However, while older inmates comprise 7% of the general population, they account for more than 35% of the medical bed resources.<sup>172</sup> In Georgia, elderly inmates over 65 incur an average annual medical cost of \$8,565, compared to younger inmates who incur costs less than \$1,000.00 annually.<sup>173</sup> In Texas, while elderly inmates comprise approximately 5.4% of the inmate population, their hospitalization costs account for more than 25% of healthcare costs.<sup>174</sup>

Prior to 2014, federal health insurance programs such as Medicaid and Medicare could not provide medical care for inmates.<sup>175</sup> States were expected to shoulder the entire burden for health, dental, and medical care for prisoners.<sup>176</sup> However, recent changes in Medicaid permit any person, with an income below 133% of the federal poverty line, to become eligible for Medicaid coverage.<sup>177</sup> These potential new enrollees will likely include a significant number of inmates as they have little or no income.<sup>178</sup> The savings to states is significant as state correction agencies will be eligible for federal reimbursement for off-site hospitalization costs for inmates.<sup>179</sup> States will

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<sup>166</sup> OLD BEHIND BARS, *supra* note 132, at 75.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 6. In 1998, the estimated cost of incarcerating an elderly offender was approximately \$69,000 a year, at least three times the cost of incarcerating the average inmate. *Id.* at 73 n.156.

<sup>169</sup> *Id.* at 76.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 77.

<sup>175</sup> *Id.* at 78.

<sup>176</sup> *Id.*

<sup>177</sup> 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII); *See also* OLD BEHIND BARS, *supra* note 132, at 79.

<sup>178</sup> OLD BEHIND BARS, *supra* note 132, at 79.

<sup>179</sup> *Id.*

also benefit from lower fees for hospital charges.<sup>180</sup> This new policy will assist states in defraying cost associated with hospital care provided to inmates outside the prison system.<sup>181</sup> However, state correctional facilities are still responsible for the cost of transporting incarcerated persons to and from outside service providers and providing officers to guard offenders while they are receiving community-based treatment.<sup>182</sup> Indeed, states incur a substantial cost ensuring 24-hour a day monitoring of inmates being treated in community hospitals.<sup>183</sup>

#### IV.

##### ELDERLY AND INFIRMED INMATES AND RELEASE FROM INCARCERATION: EARLY RELEASE AND UNCONDITIONAL RELEASE

Prisoners are generally released in one of two ways: (a) conditional release; or (b) unconditional release.<sup>184</sup> When conditional releases are granted prisoners are released under some form of supervision and are required to comply with certain specific conditions.<sup>185</sup> If violated, the individual is returned to prison.<sup>186</sup> Currently, there are two forms of conditional release: (1) discretionary release; and (2) mandatory release.<sup>187</sup> Compassionate release or medical furloughs are forms of conditional release and are generally granted by a parole board or other similar reviewing agency.<sup>188</sup>

On the other hand, an unconditional release is granted when an inmate has served the entire sentence.<sup>189</sup> Further, inmates are released only at the end of the sentence.<sup>190</sup> Thus, an inmate released unconditionally is not required to conform to any conditions—parole, post-release supervision—and the release cannot be revoked.<sup>191</sup>

As discussed, *infra* Section IV.A., conditional sentences for the elderly are humane, financially sound, and still serve the state's interest of safety.<sup>192</sup> Without question, severe punishment should not

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> George T. Patterson, *Prisoner Reentry: A Public Health and Public Safety Issue for Social Work Practice*, 28 SOC. WORK IN PUB. HEALTH 129, 131 (2013).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Aday, *supra* note 123, at 207.

be implemented if it serves no real societal purpose.<sup>193</sup> Further, sentencing older offenders to long prison sentences is financially costly and poses special problems for the prison system as it relates to special diets, medications, and long-term treatment.<sup>194</sup> Thus, if an elderly offender is not a threat to society, it is often better to release these relatively harmless individuals into society than to keep them in prison and have taxpayers incur medical expense costs.<sup>195</sup> However, regardless of whether an elderly inmate is paroled, unconditionally released, or allowed compassionate or early release from prison, measures should be in place to ensure orderly and humane re-entry efforts for aging inmates.

This section will discuss the challenges posed by early release procedures at both the state and federal level, considering the hurdles and difficulties faced by inmates, as well as initiatives adopted by correctional departments to improve outcomes for release opportunities. This section will also briefly discuss the issues associated with elderly inmates and unconditional release.

### A. Early Release—Compassionate Release

#### 1. Federal Compassionate Release

In 1984, Congress passed the Sentencing Reform Act as part of the Comprehensive Crime Control Act of 1984.<sup>196</sup> This particular Act created the Sentencing Commission, the independent agency responsible for the drafting of mandatory sentencing guidelines.<sup>197</sup> Moreover, the Act abolished parole for all federal prisoners committing crimes after November 1, 1987, resulting in most sentences received being fully served.<sup>198</sup> However, Congress clearly recognized the harshness of the Act and implemented certain safety valve provisions to allow courts some discretion in remedying unjust results in certain circumstances.<sup>199</sup>

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* The ACLU in its report entitled, *At America's Expense*, estimated that releasing aging prisoners would save states an average of \$66,294 per year per prisoner. ACLU, *supra* note 3, at ii.

<sup>196</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

<sup>197</sup> 28 U.S.C. § 991(a); *See generally* Berry III, *supra* note 29, at 858.

<sup>198</sup> Pub.L. 98-473, §§ 218(a)(5), 235, 98 Stat. at 2027, 2031. §218(a)(5) repealed most of the statutory provisions governing parole of federal prisoners. However, the "Savings Provision" of the Act allowed the parole law and the pre-existing parole framework to remain in effect for 5 years after the passage of the Act. Pub.L. 98-473 §§ 211 to 239; *See generally* Berry III, *supra* note 29, at 858.

<sup>199</sup> *Id.* at 858-59.



Pursuant to 18 U.S.C. § 3582(c), a district court, upon a motion from the Director of the Bureau of Prisons (hereinafter “BOP”), may reduce the term of imprisonment, if it finds that “extraordinary and compelling” reasons warrant such a reduction or if the defendant, 70 years or older, has served at least 30 years and the defendant is no longer a danger to the safety of any other person or the community.<sup>200</sup> Further, any reductions must be consistent with the applicable policy statements issued by the sentencing commission.<sup>201</sup>

Unfortunately, prisoners cannot seek a sentence reduction for extraordinary compelling circumstances from the courts.<sup>202</sup> Only the BOP has the statutory authority to request that courts consider early release.<sup>203</sup>

Prior to the Director submitting a motion to the court, the inmate must follow certain delineated procedures and meet specific criteria.<sup>204</sup> To be eligible for compassionate release, an inmate must demonstrate “particularly extraordinary or compelling circumstances.”<sup>205</sup> A request must be submitted by the inmate to the Warden of the institution.<sup>206</sup> If the Warden approves the application, the Warden refers the matter to the Office of General Counsel.<sup>207</sup> If the General Counsel accepts the application, it is then forwarded to the Director of Prisons for a final decision.<sup>208</sup> If the application is approved by the Director of Prisons, it is then forwarded to the U.S. Attorneys’ office with a request to file a motion with the sentencing court to “reduce the inmate’s term of imprisonment to time served.”<sup>209</sup> Extensive documentation and details are generally required for successful applications.<sup>210</sup> If an application is not

<sup>200</sup> 18 U.S.C. § 3582(c)(1)(A)(i) and (ii) (2012).

<sup>201</sup> *Id.* § 3582(c)(1)(A)(ii).

<sup>202</sup> *Id.* See generally *U.S. v. Early*, 27 F.3d 140 (5th Cir. 1994), *cert. denied*, 513 U.S. 1027 (1994) (court held that 18 U.S.C. § 3742 does not provide a jurisdictional basis for the motion to reduce. The provisions for modification of a sentence under § 3742 are available to a defendant only upon direct appeal of a sentence or conviction); See also HUMAN RIGHTS WATCH, *THE ANSWER IS NO: TOO LITTLE COMPASSIONATE RELEASE IN US FEDERAL PRISONS 2* (2012) [hereinafter *THE ANSWER IS NO*].

<sup>203</sup> *Id.*

<sup>204</sup> Berry III, *supra* note 29, at 863.

<sup>205</sup> 28 C.F.R. § 571.61 (a) (2014); See also Federal Bureau of Prisons Program Statement 5050.46; Compassionate Release Procedures for Implementation, 18 U.S.C. § 3582 (c)(1)(A) (2012) & § 4205(g).

<sup>206</sup> 28 C.F.R. § 571.61(a) (2014).

<sup>207</sup> *Id.* § 571.62(a)(1).

<sup>208</sup> *Id.* § 571.62(a)(2).

<sup>209</sup> *Id.* § 571.62(a)(3).

<sup>210</sup> Federal Bureau of Prisons Program Statement 5050.49; Compassionate Release/Reduction in Sentence: Procedures for Implementation, 18 U.S.C. § 3582 (c)(1)(A) & § 4205(g) (August 12, 2013), p. 5.

approved by the Warden, appeals are available to inmates whose applications have been denied, though few have proved successful.<sup>211</sup> While data on the number of applications filed by inmates is scarce, since the early 1990s, less than two dozen or so prisoners received compassionate release annually.<sup>212</sup>

In 2013, the Inspector General of the Department of Justice (“OIG”) undertook an extensive review of BOP’s comprehensive release program, to determine “whether it provides costs savings or other benefits to the BOP.”<sup>213</sup> OIG found that the BOP did not have: (a) clear standards regarding whether compassionate release was warranted; (b) formal timelines for reviewing requests; (c) effective procedures for informing inmates of the program; or (d) a system to track requests.<sup>214</sup> Pursuant to OIG’s findings, in late 2013, BOP undertook comprehensive reforms to improve its compassionate release program in three major areas.<sup>215</sup> The first change focused on early release for medical reasons.<sup>216</sup> Under the new policy, dying prisoners are allowed to seek compassionate release within 18 months of their expected death rather than the previous term of 12 months.<sup>217</sup> Further, under this new policy, prisoners are not required to be completely disabled to be eligible.<sup>218</sup> As long as an inmate can demonstrate a diagnosis with a seriously debilitating medical condition from which recovery is not expected, compassionate release is possible.<sup>219</sup>

Additionally, the BOP’s new policies will allow elderly prisoners—not dying or severely incapacitated—to seek early release. Prisoners 65 and older are allowed to apply for early release if they have served 50% or more of their sentence, have chronic medical issues connected to aging, and are experiencing deteriorating mental or physical capabilities that impact their ability to function in a correctional facility.<sup>220</sup> However, the new policies also allow prisoners 65 or

<sup>211</sup> 28 C.F.R. § 571.63(a) (2014); *see also* THE ANSWER IS NO, *supra* note 202, at 4.

<sup>212</sup> THE ANSWER IS NO, *supra* note 202, at 2.

<sup>213</sup> U.S. DEP’T JUSTICE, OFFICE INSPECTOR GEN. I-2013-006, THE FEDERAL BUREAU OF PRISONS’ COMPASSIONATE RELEASE PROGRAM, i (Apr. 2013).

<sup>214</sup> *Id.* at i-iii.

<sup>215</sup> Jamie Fellner, *Dispatches: Good News for US Prisoners Seeking ‘Compassionate Release’*, HUMAN RIGHTS WATCH (Aug. 13, 2013), <http://www.hrw.org/news/2013/08/13/dispatches-good-news-us-prisoners-seeking-compassionate-release>; *see also* U.S. DEP’T JUSTICE, BUREAU PRISONS, OGC/LCI 5050.49, PROGRAM STATEMENT: COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582(c)(1)(A) AND 4205(G), (Aug. 12, 2013).

<sup>216</sup> Fellner, *supra* note 215.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

older without such medical conditions to apply for early release if they have served at least ten years or 75% of their sentence, whichever is greater.<sup>221</sup>

Finally, the new policy ensures better tracking of applications, because Wardens are required to identify staff members responsible for receipt of all requests and all information pertaining to such requests must be entered in an electronic tracking database.<sup>222</sup> Time will tell, however, if the new guidelines instituted by BOP ensure more successful applications and significant cost reductions to the federal prison system.

## 2. *State Compassionate Release Programs*

For inmates with diminished ability to provide self-care, the financial cost to states for the care of such individuals can be quite high and significantly exceed the costs of ordinary imprisonment.<sup>223</sup> With more than 200,000 elderly inmates in prisons throughout the United States straining state budgets, greater consideration should be given to early release of these individuals.

Numerous states have laws allowing early release or parole for medical reasons establishing procedures and criteria for eligibility.<sup>224</sup> Further, since 2009, approximately 12 states have expanded early release programs for terminally ill or incapacitated prisoners.<sup>225</sup> The application process for early release differs from state to state. While some states are age specific (i.e. 65 or older), other states require a debilitating medical condition.<sup>226</sup> For instance, eligibility for geriatric release (age related) generally includes age,<sup>227</sup> medical condition,<sup>228</sup>

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> Berry III, *supra* note 29, at 885.

<sup>224</sup> THE ANSWER IS NO, *supra* note 202, at 5. Most state statutes require the following: (1) terminal or debilitating medical condition that cannot be cared for within the prison and (2) a prisoner who poses no harm or threat to society. *See* Williams et al., *supra* note 28, at 122.

<sup>225</sup> Williams et al., *supra* note 28, at 122. In 2008 and 2009, states such as Alabama, North Carolina and Washington enacted legislation allowing elderly inmates to complete the remainder of their sentences in the community. *See*, CHIU, *supra* note 116, at 3. Unfortunately, these programs have not been utilized and some states have not released even one elderly prisoner using these laws. *Id.*

<sup>226</sup> CHIU, *supra* note 116, at 6. Colorado, DC, North Carolina, New Mexico are age specific states. *Id.* at 7 Figure 3. Eligible applicants are required to be at least 65. *Id.* Other states such as Oklahoma, Virginia, and Wisconsin requires the applicant to be either 60 or older and complete a significant portion of their sentence. *Id.*

<sup>227</sup> *Id.* Most states require an age of eligibility of 60 or 65. *Id.* However, Louisiana and Alabama have the lowest age of eligibility—45 and 55, respectively. *Id.*

and demonstration that release poses no risk to public safety.<sup>229</sup> Furthermore, some States require that an inmate serve a minimum amount of time before being eligible to apply for release.<sup>230</sup> Some inmates convicted of certain types of offenses may be precluded from consideration.<sup>231</sup>

Unfortunately, few states have released elderly prisoners under these policies: for instance, between 2001 and 2008, Colorado released three prisoners under its release policy.<sup>232</sup> Likewise, Oregon released only two prisoners annually.<sup>233</sup> On the other hand, other states have been more aggressive in their use of early release.<sup>234</sup> Over a ten year period, Missouri released more than two hundred prisoners.<sup>235</sup> However, a large portion of those released were inmates close to death, rather than merely elderly or incapacitated.<sup>236</sup>

While releasing prisoners who are terminally ill and close to death may result in shifting health care costs from the states to the federal government (i.e. Medicare and Medicaid), it may be far wiser and financially beneficial to release aged and infirmed prisoners early.<sup>237</sup> This significantly reduces costs related to their care in the form of expenditures for hospital security, medical transport for outpatient treatment, and specialized units or housing. For instance, the average annual costs for health care, secured transportation and guards for 21 infirmed prisoners in California was approximately \$1.97

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<sup>228</sup> *Id.* at 6. Eligibility requirements for geriatric or medical furloughs often require that the inmate be diagnosed with a certain debilitating physical condition or disease related to aging or that the inmate requires long-term care. *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* Maryland, Virginia, and Wisconsin established thresholds for age and minimum length of sentence served for early release eligibility. *Id.* For instance, Maryland requires eligible candidates to be 65 and serve at least 15 years of their sentence. Md. Code Ann., Crim. Law § 14-101(g). In Virginia and Wisconsin, eligible candidates must be at least 65 and older and serve five years or 60 to 64 and served 10 years. Va. Code Ann. § 53.1-40.01 and Wis. Stat. § 302.1135.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 6, 8.

<sup>236</sup> *Id.* at 8.

<sup>237</sup> Williams et al., *supra* note 28, at 122. In 2009, Washington state expanded its “extraordinary medical placement” statute to include inmates not yet infirmed but expected to be physically incapacitated at time of release. CHIU, *supra* note 116, at 9. Prior to the modification, Washington only released 22 prisoners over a five year period. *Id.* Under the modified statute, it is expected that twice the number of prisoners will be released over a two year period, for a savings of 1.5 million dollars to the state. *Id.*

million per prisoner.<sup>238</sup> This far exceeds the average cost of \$73,000 per person for nursing home care in California in the same year.<sup>239</sup>

Despite the cost savings to states, hurdles remain. Public opinion is a powerful deterrent to the use of early release programs. Despite evidence that the rates of recidivism are relatively low among older offenders, it is still considered politically risky to release inmates early.<sup>240</sup>

Additionally, the application process is both lengthy and cumbersome. Considerable time is needed to identify eligible candidates, compile medical records and other relevant documentary evidence, develop release plans, as it relates to housing, medical treatment, and access to social services.<sup>241</sup> Unfortunately, by the time eligible candidates have filed applications for release, some have died before their applications were reviewed.<sup>242</sup>

### B. Unconditional Release

As discussed, *infra* Section IV., unconditional releasees have no set conditions or supervision upon discharge from prison. Prisoners released into the community—under some form of probation or parole—are required to meet certain standards or are returned to prison to complete the remainder of their sentence. Such is not the case with inmates released when their sentences expire. While there are studies on post-release challenges and prospects facing unconditional releases,<sup>243</sup> the author was able to find only a handful of studies on post-release challenges facing elderly releasees, particularly those with chronic ailments and mental illnesses.<sup>244</sup> This suggests gaps in research as well as gaps in post-release services provided to elderly releasees discharged unconditionally.

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<sup>238</sup> Williams et al., *supra* note 28, at 123.

<sup>239</sup> *Id.*

<sup>240</sup> CHIU, *supra* note 116, at 8.

<sup>241</sup> *Id.* at 10.

<sup>242</sup> *Id.*

<sup>243</sup> Bonita M. Veysey et al., *The Effectiveness of Enhanced Parole Supervision and Community Services: New Jersey's Serious and Violent Offender Reentry Initiative*, 94 PRISON J. 435 (2014); AMY L. SOLOMON ET AL., DOES PAROLE WORK? ANALYZING THE IMPACT OF POSTPRISON SUPERVISION ON REARREST OUTCOMES (2005), [http://www.urban.org/UploadedPDF/311156\\_Does\\_Parole\\_Work.pdf](http://www.urban.org/UploadedPDF/311156_Does_Parole_Work.pdf).

<sup>244</sup> Tina Maschi et al., *The Case for Human Agency, Well-being, and Community Reintegration for People Aging in Prison: A Statewide Case Analysis*, J. CORRECTIONAL HEALTH CARE 1 (2013); see also Matthew Davies, *The Reintegration of Elderly Prisoners: An Exploration of Services Provided in England and Wales*, 1 INT'L J. CRIMINOLOGY 1 (2011).

## V.

ENSURING RE-ENTRY AND RE-INTEGRATION AND CARE  
FOR ELDERLY OFFENDERSA. *Goals of Re-Entry and Re-Integration; Hurdles to Re-Entry*

Re-entry has been defined as the “process associated with transitioning individuals from prison to community supervision.”<sup>245</sup> It has been described as “all activities and programming conducted to prepare ex-convicts to return safely to the community and live as law abiding citizens.”<sup>246</sup> It is based on the assumption that if certain needs are met—employment, housing, mental health, medical services—successful re-entry is possible for former prisoners.<sup>247</sup>

A significant majority of incarcerated prisoners will re-enter, eventually returning to their communities.<sup>248</sup> However, while some will re-enter, very few are able to successfully reintegrate.<sup>249</sup> Successful reintegration requires that formerly incarcerated persons become functioning members of society, eventually enjoying the same rights and responsibilities they would have received had they not been incarcerated.<sup>250</sup> To do so, an integrated ex-offender must be able to secure gainful employment and housing, reestablish positive ties to his or her community, and successfully reconnect with family and friends after long periods of separation.<sup>251</sup> Unfortunately, a significant percentage will return to their communities with no health insurance, limited funds, and few employment prospects.<sup>252</sup>

Unquestionably then, prisoner re-entry and re-integration presents a significant challenge for all prisoners and communities, as ex-offenders are “among the most stigmatized and least sympathetic of all marginalized groups.”<sup>253</sup> Former prisoners are considered less honest, less trustworthy, and least deserving.<sup>254</sup> This “stigma” can negatively impact post-release opportunities indefinitely into the future.<sup>255</sup> For the typical ex-offender, employment, housing, and edu-

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<sup>245</sup> Patterson, *supra* note 184, at 130.

<sup>246</sup> JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 3 (2003).

<sup>247</sup> Patterson, *supra* note 184, at 130.

<sup>248</sup> U.S. CRIMINAL JUSTICE POLICY, *supra* note 64, at 168.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> Brie A. Williams et al., *Coming Home: Health Status and Homelessness Risk of Older Pre-release Prisoners*, 25 J. GEN. INTERNAL MED. 1038, 1038 (2010) [hereinafter *Coming Home*].

<sup>253</sup> U.S. CRIMINAL JUSTICE POLICY *supra* note 64, at 163.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

cational opportunities are difficult to secure.<sup>256</sup> Relationships with family members, such as spouses or children, are difficult to mend.”<sup>257</sup> In the case of elderly inmates, this is fairly true as many have spent decades incarcerated in state or federal facilities.<sup>258</sup> Some older inmates may have family assistance and support upon release, however, a significant number are just as likely to be without a family support network because they have “lost contact with their families.”<sup>259</sup> Older inmates who are released have difficulties securing housing, employment, and healthcare.<sup>260</sup> Consequently, the lack of institutional support and assistance “create a significant barrier to successful reintegration . . . for many returning prisoners,” particularly elderly inmates.<sup>261</sup>

As outlined by the National Institute of Corrections, the re-entry process involves a number of fundamental steps, agencies, and parties.<sup>262</sup> Three agencies are generally involved in prisoners’ release: (a) corrections—prisons or jails; (b) the agency responsible for the release or managing release and parole revocation decisions—parole board; and (c) the agency which supervises the releasee in the community—parole department.<sup>263</sup> The transition process from prison to community includes the following steps: assessment and classification; transition accountability plan; release; supervision and services; responses to adjustments while on supervision; discharge from supervision; and aftercare and community services.<sup>264</sup>

Increases in the prisoner population over the last four decades has led to increases in the number of parolees and former prisoners re-entering society. Unfortunately, these releasees are less prepared for re-entry than those released almost two or three decades prior.<sup>265</sup> For example, existing data demonstrates a significant decrease in prisoners participating in vocational and educational programs to assist with reentry.<sup>266</sup> However, the reason behind this decrease has very

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<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> OLD BEHIND BARS, *supra* note 132, at 80.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> James B. Luther et al., *An Exploration of Community Reentry Needs and Services for Prisoners: A Focus on Care to Limit Return to High-Risk Behavior*, 25 AIDS PATIENT CARE & STDS 475, 476 (2011).

<sup>262</sup> NAT’L INST. CORR., TRANSITION FROM PRISON TO COMMUNITY INITIATIVE (2002), <http://static.nicic.gov/Library/017520.pdf>.

<sup>263</sup> *Id.* at 9.

<sup>264</sup> *Id.* at 11-26.

<sup>265</sup> Damian J. Martinez, *Informal Helping Mechanisms: Conceptual Issues in Family Support of Reentry of Former Prisoners*, 44 J. OFFENDER REHABILITATION 23, 26 (2006).

<sup>266</sup> *Id.*

little to do with the declining number of participants.<sup>267</sup> Instead, the prison population has increased significantly enough to impact the number of individuals who can engage in vocational programs.<sup>268</sup> In response to recognized deficiencies in re-entry programs and initiatives, eight federal agencies combined staff and resources to address re-entry and transitional services for juvenile and adult offenders.<sup>269</sup> The program, Serious and Violent Offender Reentry Initiative (hereinafter “SVORI”), focuses its efforts on “improving criminal justice, employment, education, health, and housing outcomes of adult and juvenile offenders on their release from incarceration.”<sup>270</sup> Approximately, sixty-nine state and community agencies receive SVORI funds to facilitate the reentry and reintegration of offenders.<sup>271</sup> Unfortunately, the program’s target audience is younger offenders, aged 14-35.<sup>272</sup>

The Second Chance Act of 2007 recognized the issues associated with the vast number of prisoners returning to society and allocated more than three hundred million dollars to developing strategies—at the federal, state, and local level—to combat “recidivism and increase public safety.”<sup>273</sup> One funded initiative targeting elderly inmates was a two-year pilot program, conducted by the Bureau of Prisons (“BOP”), to determine the effectiveness of placing eligible elderly prisoners on home detention, including detention in a nursing home or other residential long-term care facility until the end of their prison terms.<sup>274</sup>

Effectuating successful re-entry transfer of elderly offenders back into the community requires state and federal correctional agencies to assess prisoners and determine post-release needs. Successful re-entry also requires that correctional agencies educate and prepare elderly inmates and provide access to programs and resources to assist them upon re-entry. Without adequate preparation, education, and referrals to appropriate social agencies, elder inmates will likely struggle with healthcare continuity, homelessness, and other obstacles upon re-entry into the community.<sup>275</sup>

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<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> Joey R. Weedon, *The Foundation of Re-entry*, CORRECTIONS TODAY Apr. 2004 at 6.

<sup>270</sup> Office of Justice Programs, *Program Profile: Serious and Violent Offender Reentry Initiative (SVORI)*, NAT’L INST. JUSTICE, <http://www.crimesolutions.gov/ProgramDetails.aspx?ID=167> (last visited June 25, 2015).

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> 42 U.S.C. § 3797w (2012); see also Cecelia Klingele, *The Early Demise of Early Release*, 114 W. VA. L. REV. 415, 424 (2012).

<sup>274</sup> 42 U.S.C. § 17541(g) (2012).

<sup>275</sup> ACLU, *supra* note 3, at 39.



### B. Re-Entry and Pre-Release Planning

Post-release planning falls into two categories: (a) re-entry planning; and (b) release planning. Planning for reentry should begin at intake or admissions and extend beyond the time of release to prepare prisoners for “long-term post-release success.”<sup>276</sup> Release planning, usually in the months leading up to release from incarceration, focuses on the weeks and days following release from incarceration.<sup>277</sup> While re-entry planning addresses long-term needs, such as employment, housing, and healthcare, the release plans focus on “short-term needs.”<sup>278</sup>

Successful reentry is only possible when there is a collaborative effort among community partners, family members, the courts and correctional agencies, and crime victims.<sup>279</sup> Reentry programs must include assessment, reentry planning, offender programming, involvement of family members, skills training, discharge planning,<sup>280</sup> supervision, and community justice partnerships.<sup>281</sup>

Unfortunately, a number of studies suggest there is inadequate information or resources to provide proper reentry planning and that is problematic.<sup>282</sup> For instance, poor information regarding the physical and mental health needs of older inmates hinders appropriate identification of community-based services for inmates, post-release.<sup>283</sup> Thus, as one survey found, a significant number of ex-offenders, suffering from physical and mental health maladies, often resorted to seeking treatment at emergency rooms, with a small percentage hospitalized within a year following release.<sup>284</sup>

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<sup>276</sup> NANCY LA VIGNE ET AL., *RELEASE PLANNING FOR SUCCESSFUL REENTRY: A GUIDE FOR CORRECTIONS, SERVICE PROVIDERS AND COMMUNITY GROUPS* 5 (2008).

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> Joan Petersilia, *What Works in Prison Reentry? Reviewing and Questioning the Evidence*, 68 *FED. PROBATION* 4, 5 (2004).

<sup>280</sup> Discharge planning is defined as the “process of helping inmates prepare to make the transition from prison or jail to society.” Cheryl Roberts et al., *Linkages between In-Prison and Community-Based Health Services*, 10 *J. CORR. HEALTH CARE* 333, 336 (2004). There are two phases to discharge planning: (1) linking prisoners with medical care social services and case management within the community before release; and (2) follow-up with prisoners to ensure access to services and support to successfully transition into their respective community post-release. *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> See generally Susan J. Loeb & Azza AbuDagga, *Health-Related Research on Older Inmates: An Integrative Review*, 29 *RES. NURSING & HEALTH* 556 (2006); Susan J. Loeb et al., *In Their Own Words: Older Male Prisoners' Health Beliefs and Concerns for the Future*, 28 *GERIATRIC NURSING* 319 (2007).

<sup>283</sup> *Coming Home*, *supra* note 252, at 1041.

<sup>284</sup> *Id.* at 1041-42.

Proper health care—physical and mental—for elderly inmates requires initial assessment, early detection, and annual evaluation while incarcerated.<sup>285</sup> As discussed, *supra* Section III.B., older prisoners are likely to have between one and three chronic medical conditions. It requires a coordination of medical and mental health services among prison officials and staff.<sup>286</sup> Finally, it requires continuity of care to reduce any risks to public health.<sup>287</sup> This process entails coordinated discharge planning efforts between correctional, parole, health care providers, non-profits, and other local agencies.<sup>288</sup>

In the case of physically or mentally incapacitated elderly inmates, seeking early release, or those facing unconditional release from prison, this process should also include public guardianship programs or nonprofit advocacy organizations that can assist in securing housing, enrollment for federal benefits and Medicaid, and easing former prisoners back into society.

### C. *The Role of “Advocates” or “Guardians”*

Elderly inmates generally fall into one of two categories: (a) persons needing long-term care services and support, including access to institutional care, assisted living, or home-based services; and (b) individuals needing only basic services such as employment, training, housing, and transportation as well as long-term support, including health care services to manage chronic illnesses.<sup>289</sup> This section will focus primarily on the needs of the former, rather than the latter category of elderly inmates, though some discussion will be provided on programs that can give assistance to both types of elderly or soon-to-be-released inmates. Without question, the issue of mentally and physically incapacitated elderly ex-offenders post-release presents another potential concern: the role of public guardians.

#### 1. *Case Studies*

The author serves as supervising attorney for a law clinic at an historical black college/university law school in the southern United States. The clinic provides services to the indigent and unrepresented

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<sup>285</sup> Judith F. Cox & James E. Lawrence, *Planning Services for Elderly Inmates with Mental illness*, CORR. TODAY, 52, 55-56 (2010).

<sup>286</sup> *Id.* at 54.

<sup>287</sup> *Id.* at 55.

<sup>288</sup> *Id.*

<sup>289</sup> OHIO DEPARTMENT OF AGING, COALITION QUARTERLY MEETING PRESENTATION: RE-ENTRY FOR THE OLDER EX-OFFENDER, May 15, 2013, <http://www.reentrycoalition.ohio.gov/docs/Reentry%20for%20the%20Older%20Ex-Offender%20-%202005-15-13.pptx>.

in the following areas: estate planning, probate, and guardianship. The following case studies involve prospective wards, the subject of guardianship applications filed by family members and represented by the Clinic, and the concerns presented by seeking guardianship for individuals, in and out of prisons/jails.

#### *Case #1*

African-American male, aged 63, physical diagnosis includes diabetes, hypertension, obesity. Proposed ward has also being diagnosed with paranoid schizophrenic affective disorder and bipolar disorder. Proposed ward has been arrested multiple times for vagrancy, criminal trespass, and burglary. Proposed ward has a number of misdemeanor convictions and a felony. Proposed ward has been incarcerated in county jails, as well as in state prison. While incarcerated, subject is placed on a management plan, which includes regular health assessments, counseling, and pharmacological treatment. Each time subject completes sentence, he is unconditionally released. Within weeks, subject is either arrested for vagrancy or seeks medical attention at the county hospital. Proposed ward has no fixed place of residence. Proposed ward has no spouse or children. Proposed ward's extended family believes that a guardianship is necessary but cannot agree on which family member will serve as guardian.

#### *Case #2*

African-American female, aged 54, physical diagnosis includes heart disease and arthritis. Subject has a long history of substance abuse. Proposed ward has been diagnosed with schizophrenia, with underlying diagnosis of psychotic disorder. Proposed ward has low level of baseline functioning and poor decision making. Proposed ward has no spouse or children. Proposed ward has no fixed place of residence. Proposed ward's extended family believes that guardianship is necessary but are unable or willing to serve. Subject has a number of convictions. Proposed ward has completed all sentences and was unconditionally released from custody at the end of sentence. Proposed ward admittedly unable to make decisions as it relates to living quarters or treatment. Proposed ward is unable to administer her own medication.

## 2. *Guardianship*

Guardianship derives from the doctrine of *parens patriae*, or the obligation of the sovereign to care for citizens unable to care for

themselves.<sup>290</sup> It is defined by state law, with rules differing from state to state.<sup>291</sup> Generally, matters related to guardianship are handled by the probate courts, though in some states, courts of general jurisdiction, other than the probate courts, have jurisdiction over guardianship matters.<sup>292</sup> A guardian of the person is an individual or entity appointed by the court to handle the personal affairs of the individual.<sup>293</sup> The party over whom the guardianship orders are created is often referred to as the “ward.”

Guardianships are considered options of last resort, resulting in a declaration of incapacity and the loss of rights.<sup>294</sup> A court can order either full or limited guardianship for a person declared incapacitated.<sup>295</sup> With a full guardianship, the ward loses all fundamental rights such as the right to manage her own finances, the right to handle her own personal affairs, the right to make medical decisions, the right to marry, the right to vote, the right to drive, or the right to contract.<sup>296</sup> Partial guardianships—limiting the powers and duties of the guardian—allow the ward to retain some rights, depending on the level of capacity.<sup>297</sup>

In most circumstances, guardians are members of the ward’s family. However, if it is not possible for the court to appoint a family member or close friend to serve as guardian, courts often appoint independent third parties—non-profit organizations, individuals, or for-profit organizations—to serve as guardians.<sup>298</sup>

Furthermore, most states have public guardianship programs,<sup>299</sup> funded by governmental entities,<sup>300</sup> to provide for indigent incapacitated adults, who have no family or friends to serve in any guardianship capacity.<sup>301</sup> Public guardians generally provide for a significant

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<sup>290</sup> Pamela B. Teaster, *When the State Takes Over a Life: The Public Guardian as Public Administrator*, 63 PUB. ADMIN. REV. 396, 397 (2003).

<sup>291</sup> Brenda K. Uekert & Thomas Dibble, *Guardianship of the Elderly: Past Performance and Future Promises*, 23 CT. MANAGER 9, 9 (2008).

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 9-10.

<sup>297</sup> *Id.* at 10.

<sup>298</sup> *Id.*

<sup>299</sup> Public guardianship programs exist in approximately 42 states. See Teaster, *supra* note 286, at 397.

<sup>300</sup> Public guardianship programs can be funded through state appropriations, Medicaid, court fees, funds from the ward “or some combination of these sources.” Pamela B. Teaster et al., *Wards of the State: A National Study of Guardianship*, 37 STETSON L. REV. 193, 201 (2007).

<sup>301</sup> *Id.*

number of wards and shoulder relatively high caseloads.<sup>302</sup> Clients are often: (1) older incapacitated persons with little to no decision-making capabilities; or (2) individuals with developmental or mental retardation, who “may never have had decisional capacity.”<sup>303</sup> A statewide program may be located in one single office, or comprised of numerous local, and/or regional offices.<sup>304</sup> Public guardianship offices are often staffed with salaried employees or a combination of salaried employees and volunteers.<sup>305</sup> Courts can appoint public guardians to serve as guardian of the person, guardian of the estate, representative payee, or surrogate decision maker.<sup>306</sup>

Public guardians serve many roles; the most important is as surrogate decision maker.<sup>307</sup> Surrogate decisions include long term treatment, exigent medical decisions, habilitation decisions, financial decisions, applying for and maintaining public benefits, and care or quality of life decisions.<sup>308</sup> Additional roles include service monitor, client advocate, and relationship architect.<sup>309</sup> For instance, the process of finding appropriate housing, particularly for recently released elderly inmates, necessitates assistance.<sup>310</sup> Public guardians can help in finding appropriate housing for elderly wards.<sup>311</sup>

Individuals suffering from mental illness, homeless persons, and persons with end stages of HIV/AIDS are prime candidates for public guardianship.<sup>312</sup> Assisted living facilities, nursing homes, and hospitals seek protection from lawsuits regarding medical treatment decisions.<sup>313</sup> Thus, there is a considerable demand for public guardians, individuals who can make medical treatment decisions for persons considered incapacitated.<sup>314</sup>

Upon release, elderly prisoners may be entitled to receive certain federal benefits, including Supplemental Security Income (“SSI”), SSI

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<sup>302</sup> Teaster, *supra* note 290, at 397.

<sup>303</sup> Teaster et al., *supra* note 300, at 201.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> Teaster, *supra* note 290, at 399.

<sup>308</sup> *Id.* See also PAMELA B. TEASTER, ET AL., NATIONAL STUDY OF PUBLIC GUARDIANSHIP, PHASE II, PUBLIC GUARDIANSHIP AFTER 25 YEARS: IN THE BEST INTEREST OF INCAPACITATED PEOPLE? 15 (2007), [http://www.americanbar.org/content/dam/aba/administrative/law\\_aging/PublicGuardianshipAfter25YearsInTheBestInterestofIncapacitatedPeople.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/law_aging/PublicGuardianshipAfter25YearsInTheBestInterestofIncapacitatedPeople.authcheckdam.pdf).

<sup>309</sup> Teaster, *supra* note 290, at 399.

<sup>310</sup> Naomi Karp et al., *Choosing Home for Someone Else: Guardian Residential Decision-Making*, 2012 UTAH L. REV. 1445, 1459.

<sup>311</sup> *Id.*

<sup>312</sup> Teaster, *supra* note 290, at 396.

<sup>313</sup> *Id.* at 397.

<sup>314</sup> *Id.*

disability, Veterans benefits, and Medicare.<sup>315</sup> Public guardians can assist in securing federal benefits, such as SSI or SSI disability, serving as payee and ensuring that funds are directed to daily necessities, such as food, clothing, and shelter.<sup>316</sup>

In case studies 1 and 2, both individuals were unconditionally released without any supervision, assistance, or follow-up. Within weeks of release, both subjects were homeless, without medication, and likely to be arrested for vagrancy, disorderly conduct, or some other violation, resulting in jail time.<sup>317</sup> The primary goal for any program related to release (early or medical furlough) or re-entry is reduction in recidivism, ensuring that formerly incarcerated persons have a chance at successfully re-integrating into society.<sup>318</sup> Unfortunately, if sufficient and adequate resources are not devoted to ensuring that releasees are provided the basic necessities—continuity of health care, housing, food—the likelihood of recidivism is increased.<sup>319</sup>

### 3. *Advocates—Project Older Prisoners (“POPS”)*

As discussed, *supra* Section IV.A. 1, the BOP and a number of states have revised their guidelines or expanded programs for compassionate or early release. However, the process for applying for early release or medical furlough is cumbersome and often difficult for the average prisoner to understand. Without question, there are likely a significant number of elderly inmates that are eligible for early release or medical furlough under many state programs. Yet prisoners are expected to secure application forms, gather relevant information, which includes medical records, and submit voluminous documentation to the appropriate offices. This is daunting for anyone, but certainly more so for persons with limited education.

One particular program that assists elderly prisoners in securing early release is the Project for Older Prisoners or POPS. Founded in 1989, by Professor Jonathan Turley at George Washington University, POPS is one of a handful of non-profit organizations intended to assist aging and disadvantaged prisoners.<sup>320</sup> POPS, a clinical program, pro-

<sup>315</sup> Caroline M. Upton, *A Cell for a Home: Addressing the Crisis of Booming Elder Inmate Populations in State Prisons*, 22 ELDER L.J. 289, 305 (2014).

<sup>316</sup> Teaster, *supra* note 290, at 399.

<sup>317</sup> Elder inmates, without resources, are likely to impact local communities through vagrancy, if they are unable to provide for themselves. *Id.* at 307.

<sup>318</sup> Adequate funding and proper post-release planning is literally the “difference between zero recidivism and greater recidivism.” *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> Carrie Abner, *Graying Prisons: States Face Challenges of an Aging Inmate Population*, ST. NEWS 8, 11 (2006).

vides assistance to low-risk elderly inmates to obtain parole.<sup>321</sup> Candidates are selected based on variety of factors, most critically age, health condition, and prison sentence.<sup>322</sup> Students are assigned to an inmate to discuss parole and other options, conduct extensive background investigations to determine the likelihood of recidivism.<sup>323</sup> Students also assist inmates in securing housing and employment upon release.<sup>324</sup>

POPS provides assistance to elderly inmates on both national and local levels, collecting data on “costs and necessities of this population.”<sup>325</sup> According to Professor Turley:

All that is required is for a state to request such a program, give POPS researchers access to the prison population, and enlist the participation of one or more law schools. POPS/DC will help any law school establish an academic program and regional office for work in a given state.<sup>326</sup>

The program currently exists in five states and has resulted in the early parole of nearly 400 older prisoners with no recidivism.<sup>327</sup>

#### D. Recommendations

Successful prisoner reentry is a collaborative endeavor. It requires involvement from all strata of society to ensure that releasees are effectively re-integrated into society. However, in the case of elderly and/or infirmed releasees, it requires recognition of their unique needs. First and foremost, many elderly prisoners have been incarcerated for a significant period of time. Second, many entered prison with very little education or poor literacy skills.<sup>328</sup> A significant percentage

<sup>321</sup> Heather Habes, *Paying for the Graying: How California Can More Effectively Manage Its Growing Elderly Inmate Population*, 20 S. CAL. INTERDISC. L.J. 395, 407 (2011).

<sup>322</sup> Keith Martin, *The POPS Program: Providing A Voice For Older Inmates*, CORRECTIONS.COM (Feb. 19, 2001), <http://www.corrections.com/articles/7449-the-pops-program-providing-a-voice-for-older-inmates>.

<sup>323</sup> Helen Rippier Wheeler, *Senior Power: “Graying prisons,” early release, and ‘assisted living’*, THE BERKELEY DAILY PLANET (Jan. 30, 2011, 5:01 PM), <http://www.berkeleydailyplanet.com/issue/2011-01-05/article/37048>.

<sup>324</sup> *Id.*

<sup>325</sup> POPS The Project for Older Prisoners, *POPS Project For Older Prisoners, PATH TO FREEDOM FOR THE ELDERLY PRISONER*, <https://elderlyrelease.wordpress.com/pops-project-for-older-prisoners/> (last visited Sep. 16, 2015).

<sup>326</sup> *Id.*

<sup>327</sup> LEGAL SERV. FOR PRISONERS WITH CHILDREN, CALIFORNIA’S OLDER PRISONER CRISIS: FACTS AND FIGURES, (2010), <http://www.cas.miamioh.edu/AOAroaa/WrittenTestimony/Testimony%20-%20San%20Francisco%20-%20PDF%20ONLINE/Heidi%20Strupp%20-%20San%20Francisco.pdf>.

<sup>328</sup> Smyer & Burbank, *supra* note 85, at 36.

have no employment skills and lack strong support networks.<sup>329</sup> Moreover, a large number of elderly prisoners have long histories of poor or no healthcare prior to entering prison, substance abuse, and poor diets.<sup>330</sup> Many are at risk or will develop chronic conditions while incarcerated.<sup>331</sup> Chronic illnesses impact daily living activities such as bathing, eating, and dressing.<sup>332</sup> Finally, the risk of certain communicable diseases exists such as HIV, hepatitis B or C, and tuberculosis.<sup>333</sup> Finally, for inmates with debilitating diseases, nursing homes or care facilities need to be identified to provide long-term care. One of the most significant obstacles faced by elderly and/or infirmed prisoners is securing housing, in some instances, nursing home care for former prisoners who require skilled nursing or assisted living facilities. Many nursing homes are unwilling to accept ex-felons.<sup>334</sup>

### 1. *Interagency Collaborative Initiatives; Specialized Caseloads*

In strengthening planning and pre-release processes for elderly or infirmed releasees, correctional facilities should develop collaborative relationships with public guardianship programs agencies or non-profit organizations which provide guardianship services. For example, if particular inmates, scheduled for unconditional release, are identified as “incapacitated persons” by prison medical staff or personnel, efforts should be undertaken to refer those individuals to public guardian programs. If proactive steps are undertaken by correctional staff and public guardian staff, it may be possible to identify nursing homes, treatment facilities, or care homes and secure placement before the time of release. This is particularly important for individuals with serious mental illnesses and others who require uninterrupted access to medication.

One example of statewide intra-agency initiative can be found in Texas.<sup>335</sup> Under section 508.146 Texas Government Code, an individual identified by the Texas Department of Criminal Justice as elderly (65 or over), mentally ill, in need of long-term care, and no threat to public safety can qualify for early release from prison.<sup>336</sup> The Texas Correctional Office for Offenders with Mental or Medical Impairments (“TCOOMMI”) is the primary agency charged with handling

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<sup>329</sup> *Id.*

<sup>330</sup> *Id.* at 34.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 34-35.

<sup>333</sup> *Id.* at 34.

<sup>334</sup> MELVIN DELGADO ET AL., HEALTH AND HEALTH CARE IN THE NATION’S PRISONS: ISSUES, CHALLENGES, AND POLICIES 8 (2009).

<sup>335</sup> CHIU, *supra* note 116, at 10.

<sup>336</sup> TEX. GOV’T. CODE ANN. § 508.146. (West 2007).



referrals and applications for early release.<sup>337</sup> Once a referral is submitted to TCOOMMI, the agency conducts a screening of the inmate, unit medical staff prepares a medical summary, and all information is provided to the Parole Board for a decision.<sup>338</sup> Unfortunately, in the years following the creation of the program, the number of inmates granted release continued to decline.<sup>339</sup> An audit of the program showed delays in the program, primarily due to understaffing.<sup>340</sup> To address the problem, TCOOMMI contracted with the state's Department of Aging and Disability Services ("DADS") for case management services.<sup>341</sup> To date, DADS' staff is now responsible for the following: pre-release interviews; federal entitlement applications; coordination of all post release services including placement in nursing homes or long term care facilities.<sup>342</sup> DADS involvement has helped to streamline the referral process for early release of eligible candidates and ensure pre and post-release continuity of care.<sup>343</sup> Thus, a mechanism is in place to ensure continuity of care for individuals scheduled for unconditional release. Unit staff referrals can be made to appropriate agencies and pre-release services secured for inmates scheduled for unconditional release.

It may also be necessary to create particular divisions within correctional agencies or public guardianship programs, which deal exclusively with elderly releasees. Specially trained case managers, with smaller caseloads, should be located in public guardianship programs or correctional agencies, with the opportunity to work across agencies to ensure adequate pre-release planning and continuity of care. This requires familiarity with inmate health histories, as well as benefits for which prisoners may be eligible and existing timelines for submission for applications.<sup>344</sup> This requires familiarity with nursing homes and long-term care facilities likely to accept parolees or ex-felons.<sup>345</sup>

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<sup>337</sup> GOV'T § 508.146(a)(3).

<sup>338</sup> TEXAS CIVIL RIGHTS PROJECT, MEDICALLY RECOMMENDED INTENSIVE SUPERVISION Q&A FOR TEXAS INMATES, 3-7 (2012), [http://www.texascivilrightsproject.org/docs/vets/mris\\_prose.pdf](http://www.texascivilrightsproject.org/docs/vets/mris_prose.pdf).

<sup>339</sup> CHIU, *supra* note 116, at 10.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> Williams & Abraldes, *supra* note 143, at 68. Older inmates reentering the community may have to deal with health providers with little to no knowledge of the releasee's incarceration history. *Id.* This may be problematic particularly for prisoners that are considered high risk for diseases such as STDs, hepatitis, and HIV. *Id.*

<sup>345</sup> *Id.*

## 2. Increased Funding

Additional staff and tasks will require substantial funding. Currently, states receive funds for re-entry programs through SVORI or the Second Chance Act, but as discussed, *infra* Section V.A., these programs either exclusively or primarily focus on younger offenders. New or additional funding sources should be identified or created, with the sole focus on reentry programs for elderly inmates. As the population of elderly inmates continues to grow, more and more programs will have to be designed to cater to their unique needs and requirements. Funding efforts should be devoted to hiring and training case managers in correctional agencies and parole agencies to deal exclusively with reentry and reintegration efforts for elderly inmates. Moreover, funding should also be provided to public guardianship programs for the hiring and training of staff devoted primarily or exclusively to inmates unconditionally released and identified as incapacitated.

## CONCLUSION

The explosive increase in the aging inmate population has long-term, far-reaching implications for this country. States grapple with exponentially growing budgets as a greater percentage of resources are devoted to caring for elderly inmates. A rush to create “tough on crime” initiatives with little thought or consideration of the social, economic, and political consequences has resulted in a massive fault line in the corrections system. The iron law of imprisonment is simply thus: “They all come home.”<sup>346</sup> As noted by author, Jeremy Travis in his seminal book, *But They All Come Back: Facing the Challenges of Prisoner Reentry*, every person sent to prison returns to live with us.<sup>347</sup>

American penal policy has effectively moved from the age of mass incarceration, with its emphasis on retributive justice, to the dawning silver tsunami of elderly and infirmed parolees and releasees. Unlike previous initiatives, where federal and state governments effectively legislated and spent their way into the present quagmire, it will be necessary to carefully and cautiously plan and effectively execute strategies to address the myriad of issues posed by elderly inmates re-entering society.<sup>348</sup> It will require innovation, collaboration, and the commitment of resources necessary to ensure the humane care of elderly citizens who have paid their debt to society.

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<sup>346</sup> JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* xvii (2005).

<sup>347</sup> *Id.*

<sup>348</sup> *See*, Section II.B., discussing “Tough on Crime” state and federal legislation.

Some hope is on the horizon, as evidenced by initiatives such as the federal Second Chance Act, 2007 that is in the process of being reauthorized;<sup>349</sup> the explosion of scholarly articles on reentry and reintegration initiatives, and the creation of intra-agency government structures at both the state and federal levels. The task of confronting long-term care of parolees or releasees is one that will require a multi-layered, collaborative approach employing the ideas and resources of government, community service providers, faith-based organizations, and academia. No less is required to battle this mighty challenge.

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<sup>349</sup> Second Chance Reauthorization Act, S. 1690, S. 1513, 114th Cong. (1st Sess. 2015), <https://www.govtrack.us/congress/bill/114s1513>.