

NOT FAR ENOUGH: THE RISING ELDERLY
PRISON POPULATION AND CRIMINAL
JUSTICE AND PRISON REFORM FOLLOWING
THE FIRST STEP ACT OF 2018

Johnny Thach[†]

TABLE OF CONTENTS

INTRODUCTION.....	632
I. ELDERLY PEOPLE IN THE CURRENT UNITED STATES PRISON SYSTEM	637
<i>A. The Rising Elderly Prison Population.....</i>	640
<i>B. Old Age and Physical and Mental Impairments.....</i>	641
<i>C. Non-Integration in a Correctional Setting</i>	643
<i>D. Health Care and Medical Services.....</i>	644
<i>E. Disproportionate Number of Deaths in Prison</i>	647
II. CRIMINAL JUSTICE, COMPASSIONATE AND EARLY RELEASE, COMMUNITY SUPERVISION AND CIVIL RIGHTS AND LEGAL PROTECTIONS.....	648
<i>A. Punishment and Criminal Justice.....</i>	649
<i>B. Compassionate and Early Release</i>	651
<i>C. Community Supervision.....</i>	655
<i>D. Section 504 of the Rehabilitation Act, Civil Rights, and Constitutional Protections.....</i>	655
III. ANALYZING THE FIRST STEP ACT OF 2018	660
<i>A. The Risk and Needs Assessment System</i>	662
<i>B. Good Time Credits.....</i>	666
<i>C. Compassionate Release and the Reauthorization of the Early Release Pilot Program from Second Chance Act of 2007.....</i>	668
<i>D. Sentencing Reform.....</i>	671

[†] Johnny Thach is a J.D. Candidate (June 2020), Benjamin N. Cardozo School of Law; M.A. Graduate Center, City University of New York; B.A. Binghamton University.

632	<i>EQUAL RIGHTS & SOCIAL JUSTICE</i>	[Vol. 26: 3
	<i>E. Community Supervision, Home Confinement, and Halfway Houses</i>	673
	<i>F. Re-Entry and Job Training Opportunities and the Expansion of Labor</i>	675
	<i>G. More Cosmetic Than Consequential</i>	676
	<i>H. Judicial Ability or Inability to Review: A Look at Present Litigation Efforts Under the First Step Act</i>	678
IV.A	PROPOSAL FOR A SECOND STEP	680
	<i>A. First Recommendation: Reform the Risk and Needs Assessment System</i>	680
	<i>B. Second Recommendation: Increase Compassionate and Early Release and Make All Sentencing Reforms Retroactive</i>	682
	<i>C. Third Recommendation: Support Deinstitutionalization While Addressing Concerns About Home Confinement and Halfway Houses</i>	685
	<i>D. Fourth Recommendation: Provide Early Release for Elderly People Behind Bars</i>	686
	<i>E. Fifth Recommendation: Review the Authority and Substantial Discretion Provided to the Attorney General and the BOP</i>	688
	<i>F. Sixth Recommendation: Increase Access to Counsel for Pro Se Individuals and Independent From the Attorney General</i> ..	689
	CONCLUSION	690

INTRODUCTION

By 2019, the passage and enactment of the First Step Act of 2018 (“First Step Act”)¹ emerged as one of the most major developments in the law that not only rekindled national conversations² about criminal justice and prison reform but also aspired to have an unprecedented impact on people behind bars.³ One significant, vulnerable, yet often marginalized, population that

¹ Signed into law on December 21, 2018, S. 756, the First Step Act of 2018 stands for the “Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act.” S. 756, 115th Cong. (2018), <https://www.congress.gov/115/bills/s756/BILLS-115s756enr.pdf> [<https://perma.cc/TMC9-HBG5>].

² See Gerard Robinson, *First Step Act’s Passage Represents a Starting Point to Address Issues in the Criminal Justice System*, THE HILL (Jan. 6, 2019), <https://thehill.com/blogs/congress-blog/judicial/424076-first-step-acts-passage-represents-a-starting-point-to-address>. “The administration’s focus on [mass incarceration] has brought it to the forefront of the national conversation. The attention and discussion have planted seeds that could help build support and spark a larger movement.”

³ See Zachery Petrizzo, *Matthew Charles and the Impact of the First Step Act*, TOWNHALL (Jan. 10, 2019), <https://townhall.com/tipsheet/zacharypetrizzo/2019/01/10/matthew-charles-and-the-impact-of-the-first-step-act-n2538769>. “Thousands of incarcerated individuals and their families are heading to

2020]

NOT FAR ENOUGH

633

the First Step Act will impact is the elderly population in prison through new provisions, such as the increased use and transparency of compassionate release and the reauthorization of the early release pilot program for elderly people behind bars, which will result in home confinement.⁴ However, despite these ambitious changes, the First Step Act does not go far enough.

While the First Step Act established and amended new provisions that impact people⁵ behind bars, it is only one modest step forward with significant flaws and deficiencies.⁶ First, the First Step Act mandated the Department of Justice (“DOJ”) to establish, and for the Bureau of Prisons (“BOP”) to implement, a “risk and needs assessment”⁷ in federal prisons that subjects people behind bars to individualized measurements of “minimum, low, medium, or high risk” of recidivism,⁸ based on their criminogenic needs, and then requires them to participate in evidence-based rehabilitative programs⁹ that are intended to reduce their risk of recidivism.¹⁰ People are incentivized to participate in these programs by the opportunity to earn “good conduct time credits” that could then be exchanged for benefits, but only “as determined appropriate” by the Director of the BOP.¹¹ However, this often reserves significant authority and discretion to the Attorney General and BOP

court to get their excessive sentences corrected. Families will be reunited, and our communities will be safer,” Kevin Ring, [president of Families Against Mandatory Minimums (FAMM)] responded to the impact of the First Step Act across the country.”

⁴ See *infra* Part III.

⁵ This Note uses people-first language and refers to prisoners and inmates as “people behind bars” or “incarcerated people.” See Michelle Lewin & Nora Carroll, *Collaborating Across the Walls: A Community Approach to Parole Justice*, 20 CUNY L. REV. 249 (2017), <https://academicworks.cuny.edu/clr/vol20/iss2/2>. “The purpose of using such terminology is to recognize and reaffirm the humanity of those who are incarcerated.”

⁶ See, e.g., Osita Nwanevu, *The Improbable Success of a Criminal-Justice-Reform Bill Under Trump*, THE NEW YORKER (Dec. 17, 2018), <https://www.newyorker.com/news/news-desk/the-improbable-success-of-a-criminal-justice-reform-bill-under-trump>. “[T]he First Step Act is ultimately a very modest step in the direction of addressing mass incarceration. Federal prisons, to which the act applies, hold just over [180,000] of America’s more than two million inmates.” While some supporters have called the bill “transformational change,” “bigger reforms and investment of resources” are needed.

⁷ 18 U.S.C. § 3632 (2018).

⁸ 18 U.S.C. § 3632(a)(1) (2018).

⁹ See Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299, 345 (2013), <https://www.jstor.org/stable/10.1086/670395>. An “evidence-based recidivism reduction program” is defined as an activity that “has been shown by empirical evidence . . . or is based on research indicating that it is likely to be effective in reducing recidivism,” and is “designed to help prisoners succeed in their communities upon release from prison.” Over the past two decades, there has been a growing movement to use evidence in criminal justice policy and practice in corrections. Yet, this can lead to further detachment from the human aspects of prisoners, such by treating them as “test subjects” in an effort to collect data on best practices towards rehabilitation.

¹⁰ 18 U.S.C. §§ 3632(a)(3), (b) (2018). Additionally, “criminogenic needs” are defined as factors that contribute to breaking the law.

¹¹ 18 U.S.C. § 3632(d)(3)(D) (2018).

634 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 3]

to determine how these credits are distributed, to whom, and whether they are appropriate to be used for early release.

The assessment is fundamentally riddled with alarming problems. The First Step Act specifically tasked the Attorney General to develop the assessment with specific guidance from an independent committee. Furthermore, such assessments are paternalistic and the subsequent classifications superimpose a conceptual prefiguration of rehabilitation that not only mischaracterizes people behind bars' unique needs and vulnerabilities but also segregates in a manufactured system of classifications based on abstract determinations of risk and needs.¹² The assessment also discriminates because not all people behind bars are even allowed to earn credits, as the standards for eligibility still take into account and restrict based on the crime(s) for which they were convicted.¹³ Consequently, for people who are excluded from earning credits, they are placed into a cycle of injustice, as they continue to be unequally and collaterally punished for their past crimes even when the crimes were committed in the past. This runs counterintuitive to the purpose of rehabilitation and the goals of real transformative change by the First Step Act.

Second, the First Step Act essentially changed the mechanics of early release but remains less than compassionate. The Act increased the use and transparency of compassionate release and early release for elderly people behind bars, introduced significant changes to drug sentencing laws and mandatory minimums, broadened the existing safety valve,¹⁴ and recomputed past credits to allow earlier release. Yet, compassionate and early release still remain *unnecessarily* restrictive, and replete with underlying structural issues in the overall process that delay and obstruct final decisions.¹⁵ Also, a

¹² See Adam Skolnick, *Stripped: The Search for Human Rights in US Women's Prisons*, LONGREADS (Sept. 2018), <https://longreads.com/2018/09/07/prison-reform/>. Rehabilitation commonly intersects with paternalism when in conjunction with an indeterminate sentence that provides an "absolute authority to keep a person locked up until . . . deemed them rehabilitated." These indeterminate sentences are often arbitrarily set and manufactured and used to justify further incarceration until a determination is made that the person has been rehabilitated enough to reintegrate into society. However, this standard is often ambiguous and based on what society how rehabilitation provides a sense of safety.

¹³ 18 U.S.C. § 3632(d)(4)(D) (2018) (specifically, detailing 68 criminal convictions that would make a prisoner ineligible to receive time credits).

¹⁴ 18 U.S.C. § 3553(f) (2018) is commonly referred to as the "safety valve" because it allows a court to avoid otherwise applicable mandatory minimums for certain non-violent drug offenders with no prior criminal history who meet other conditions. One issue with the safety valve has been it is only available to defendants with no more than one criminal history point under the sentencing guidelines. Therefore, it applies to very few people and only to a small set of criminal offenses.

¹⁵ *The Answer is No: Too Little Compassionate Release in U.S. Federal Prisons*, HUMAN RIGHTS WATCH (Nov. 30, 2012), <https://www.hrw.org/report/2012/11/30/answer-no/too-little-compassionate-release-us-federal-prisons>. "The paucity of BOP motions for sentence reduction for extraordinary and compelling reasons is not happenstance. The BOP insists that it has essentially unbounded discretion with

2020]

NOT FAR ENOUGH

635

majority of sentencing reform is inexplicably *not* retroactive, specifically in regards to reducing mandatory minimums, which continues to preclude *current* people behind bars from being released.¹⁶ This contradicts efforts in recent years of criminal justice reform to address and remedy decades-long of harsh sentencing laws and mandatory minimums that have disproportionately led to long sentences and punishment that are not commensurate to the crime.¹⁷

Third, the First Step Act promoted the use of home confinement¹⁸ and halfway houses or residential reentry centers for people who are released from prison. However, the Act does not, in any way, mandate that the BOP place people behind bars on home confinement when they meet the age and other attendant requirements for such placements.¹⁹ The BOP possesses the sole discretion in all release determinations, including where and how they are housed, and people do not have any entitlement or say regarding their placement.²⁰ For the BOP to arbitrarily make all release determinations, this has undermined the number of people who are granted such release and also insulates their determinations from judicial review. Furthermore, although touted as an alternative to incarceration,²¹ home confinement and halfway houses still represent a vexing form of institutionalization as a type of *continued* imprisonment that does not reduce incarceration but rather continues to restrict, surveil, and control people even outside the prison walls. Courts have also continued to clarify that people do not have a liberty interest, even if their sentence is served outside prison.²² Home confinement and halfway houses also predominantly serve the interests of contracted private prison corporations that unduly profit from the implementation and management of such options.²³

regard to compassionate release, and it has chosen to exercise that discretion to reject compassionate release in all but a few cases.”

¹⁶ Daniel Suleiman, *Case shows why federal ‘First Step Act’ sentencing changes must be made retroactive*, THE BALTIMORE SUN (Oct. 30, 2019), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-1031-retroactive-relief-20191030-2ccxow47vfbfpogkavkxrpe4xm-story.html>.

¹⁷ Charlotte Resing, *How the FIRST STEP Act Moves Criminal Justice Reform Forward*, ACLU (Dec. 3, 2018), <https://www.aclu.org/blog/smart-justice/mass-incarceration/how-first-step-act-moves-criminal-justice-reform-forward>.

¹⁸ Home confinement is also referred to as “community confinement” or “home detention.” For the purposes of this Note, I will use “home confinement” as the phrase representative of these terms.

¹⁹ *De Jesus v. Woods*, No. 2:19-CV-121-WHA, 2019 WL 3326199, at *4 (M.D. Ala. June 21, 2019).

²⁰ *Parsons v. Howard*, 2019 WL 469913, at *2 (M.D. Pa., Feb. 6, 2019).

²¹ See United States Sentencing Commission, *Alternative Sentencing in the Federal Criminal Justice System* (May 2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf.

²² *Parsons*, 2019 WL 469913, at *3.

²³ Liliana Segura, *The First Step Act Could Be a Big Gift to CoreCivic and the Private Prison Industry*, THE INTERCEPT (Dec. 22, 2018), <https://theintercept.com/2018/12/22/first-step-act-corecivic-private-prisons/>.

636 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 3]

Finally, federal courts have interpreted the First Step Act to grant exclusive and total authority and sole discretion to the Attorney General and BOP to decide all release determinations and have consistently and expressly held that they possess no power to grant people behind bars any form of compassionate and early release.²⁴ Accordingly, courts are insulated and foreclosed from the process since they have no authority to order home detention and order such release.²⁵ However, in contrast, courts have exercised their discretion mainly in cases regarding reductions of sentences and resentencing to effectuate the remedial purpose and intent of the First Step Act.

This Note presents two innovative and ambitious looks into the scarce legal scholarship on elderly people behind bars²⁶ as a rising population inside federal prisons²⁷ and the new First Step Act's impact on the criminal justice and prison system. Old age, as it relates to the criminal justice and prison system, represents a novel issue that is often neglected, overlooked, and not widely discussed. Particularly, for qualified elderly people behind bars with disabilities, the prison system is an inherently non-integrative environment in a correctional setting that does not and cannot accommodate their unique needs and vulnerabilities. For a second step, stakeholders in criminal justice must work to dismantle the BOP's exclusive and sole discretion over release determinations, embrace community integration with broader early release eligibility and policies, actual deinstitutionalization and self-independence, and empower each person to have an equal opportunity to live a full and unconstrained life²⁸ outside the prison walls, including increased access to counsel. This Note specifically argues that while the First Step Act is one step forward, it falls *very short*, only offering an inherently flawed pursuit of revolutionary criminal justice and prison reform and equal justice that is needed for people behind bars, including elderly people with disabilities under the Rehabilitation Act and constitutional protections. As people

²⁴ See *infra* Part III(H).

²⁵ See *infra* Part III(H).

²⁶ To maintain a narrow focus that is also a unique and non-preempted perspective in the conversations following the FSA's passage, this Note is particularly focused on addressing how elderly people behind bars are affected.

²⁷ HARSHA WALIA, UNDOING BORDER IMPERIALISM 38 (2013). The carceral state has been defined as "an inescapable and increasingly internalized network of discourses and architectures, coercive regulations and scientific propositions . . . [with the] belief that incarceration is a legitimate response to communities that are constructed and characterized *innately* as being illegals, deviants, criminals, terrorists, or threats."

²⁸ Slightly more specific—compassionate release and medical parole policies normally only allow prisoners to be released from prison if they are terminally ill or have significant health problems. This is not the appropriate way to address the elderly prison population. They should have the opportunity to be released earlier, so that they can live outside of prison and not only when they are terminally ill and dying.

2020]

NOT FAR ENOUGH

637

behind bars continue to age, there is an indispensable interest to find meaningful and just solutions *now*.

Part I details the rising elderly prison population, including their size, demographics, old age and infirmity, availability of medical services to address their unique needs and vulnerabilities, non-integrative nature of prisons to address those concerns, and the dire consequences of when the United States prison system fails elderly people behind bars. Part II describes many of the factors in the criminal justice system that the First Step Act attempted to address in its provisions, such as rehabilitation, institutionalization, and mass incarceration. This part also explains why methods of compassionate and early release and community supervision are not reasonable alternatives to incarceration. This part also lays out Section 504 of the Rehabilitation Act and constitutional protections that provide a precursor to arguments against the First Step Act. Part III analyzes the First Step Act, the changes and its impact, and provides criticism of the new provisions that the Act provides. Lastly, Part IV provides six recommendations to propose a second step by reforming the risk and needs assessment system, expanding compassionate and early release and sentencing reform, deinstitutionalization and other alternatives to incarceration such as supportive housing, arguing for early release for elderly people behind bars, reviews the authority and substantial discretion provided to the Attorney General and the BOP, and recommending an increase in access to counsel for pro se individuals and independent from the Attorney General.

I. ELDERLY PEOPLE IN THE CURRENT UNITED STATES PRISON SYSTEM

Elderly people represent the fastest-growing United States prison population.²⁹ Following the increase in crime rates between the early 1950s

²⁹ See Tina Chiu, *It's About Time: Aging Prisoners, Increasing Costs, and Geriatric Release*, VERA INST. OF J. 4 (2010), <https://www.prisonpolicy.org/scans/vera/Its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf>. Although there is no national consensus about the "age" at which a person qualifies as "old" or "elderly," the United States Census Bureau has defined "elderly" as 65 years of age and older. Alternatively, the National Commission on Correctional Health Care used 55 years of age as their threshold. See also Valeriya Metia, *Aging Prisoners: A Prison Crisis*, L. ST. MEDIA (Feb. 15, 2015), <https://lawstreetmedia.com/issues/law-and-politics/aging-prisoners>. Nonetheless, regardless of their actual and chronological age, researchers have found that the prison environment commonly accelerates the aging process for people behind bars, which results in a physiological age that is up to ten years older. As such, a prisoner's age progressively increases as a consequence of poor physical and mental health from limited access to adequate medical care, profound anxiety, stress, and violence associated with prison life, social isolation from family and loved ones, and the particularly grim reality that some will spend most or all of their life behind prison walls.

638 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 3

and 1970,³⁰ “law and order” federal and state legislators and governmental agencies enacted laws in a major shift in criminal justice for “get tough on crime” policies which, in addition to mandatory minimums,³¹ added indeterminate sentencing guidelines that incarcerated people for an *indefinite* duration of time³² and eliminated the eligibility for federal parole that supported a culture of intolerance and mass incarceration.³³ Since the 1970s, the rising national median age in the United States and this decades-long aggressive legislation to address and combat crime³⁴ led to the elderly prison population not only increasing in numbers but also the proliferation of more people being given longer sentences and limited early release.³⁵ The consequential fascination towards criminal justice resulted in a brutal social control model of corrections and the development of a privatized system of contracted prison corporations that profited from human incarceration and labor.³⁶ Even as overall crime rates fell, the criminal justice system continued to arrest and incarcerate in unprecedented numbers.³⁷ Simultaneously,

³⁰ Martina E. Cartwright, *The Silver Tsunami: Aging Prisoners, Early Release, Guardianship and Prisoner Advocate Initiatives for Long Term Care Beyond the Prison Walls*, 1 *TOURO J. OF L. & AGING* 30 (2016). Starting the early 1950s, crime rates increased throughout the United States. For example, during this time, the homicide rate doubled and in some cities, the rate tripled or quadrupled. 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. For a 50-year period, between the 1920 and 1970s, the number of incarcerated people in the United States remained stable, with an incarceration rate of about 110 per 100,000 population.

³¹ *Id.* at 62. In 1973, New York enacted the harshest drug laws in the nation. Known as the “Rockefeller Drug Laws,” individuals convicted of selling or possessing drugs were sentenced to a minimum term of 15 years.

³² *Id.* at 63.

³³ Metia, *supra* note 29. As the Department of Justice recently commented in its findings relating to its proposed amendments to the Title II regulations, “[w]ith thousands of prisoners serving life sentences without eligibility of parole, prisoners are aging, and the prison population of individuals with disabilities and elderly individuals is growing.” *See also* Nondiscrimination on the Basis of Disability in State and Local Government Services, 73 *FED. REG.* 34,465, 34,494 (June 17, 2008), <https://www.federalregister.gov/documents/2008/06/17/E8-12622/nondiscrimination-on-the-basis-of-disability-in-state-and-local-government-services>.

³⁴ Cartwright, *supra* note 30.

³⁵ Chiu, *supra* note 29.

³⁶ *See* DAVID SHICHOR, *PUNISHMENT FOR PROFIT* 46 (1995). “Punishment, including imprisonment, is meted out by the criminal law that is fundamentally a ‘governmental social control.’” *See also* Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 *U. PA. J. L. & SOC. CHANGE* 125 (2017), <https://scholarship.law.upenn.edu/jlasc/vol20/iss2/3>. Michelle Alexander also argued that the War on Drugs converted the criminal justice system into a new form of racialized social control. “In Alexander’s framework, the criminal justice system “is no longer concerned primarily with the prevention and punishment of crime, but rather with the management and control of the dispossessed.”

³⁷ Sarah Childress, *Michelle Alexander: “A System of Racial and Social Control,”* *FRONTLINE* (Apr. 29, 2014), <https://www.pbs.org/wgbh/frontline/article/michelle-alexander-a-system-of-racial-and-social-control/>. “Today, as bad as crime rates are in some parts of the country, crime rates nationally are at historical lows, but incarceration rates have historically soared. In fact, most criminologists and

discouraged from being “too soft on crime,” judges and parole boards shied away from using their discretion in sentencing and release, and less often permitting a sentence below the mandatory minimum, such as by taking into account the offender’s old age and infirmity.³⁸

Old age is symptomatic and a direct consequence of punitive drug sentencing, “three strikes”³⁹ and mandatory minimum laws⁴⁰ that have created a population of elderly people who have simply aged inside of prisons⁴¹ after having been incarcerated for life or long sentences.⁴² For such elderly people, they are required to serve the full, indeterminate duration of their sentence until late in life, or to their death, unless granted early release.⁴³ Yet, early release is only ordered in a set of rare and particularized circumstances that are more exclusive than inclusive.

sociologists today will acknowledge that crime rates and incarceration rates in the United States have moved independently [of] each other.”

³⁸ Lydia Brashear Tiede, *The Swinging Pendulum of Sentencing Reform: Political Actors Regulating District Court Discretion*, 24 *BYU J. PUB. L.* 1, 2 (2013), <https://digitalcommons.law.byu.edu/jpl/vol24/iss1/2>. “Sentencing law reform is a manifestation of the constant battle waged between politicians who want to appear tough on crime and judges who want to act independently to apply their expertise and judgment in adjudicating criminal cases. . . . legislators enact and amend criminal and sentencing laws at a constant pace in the hope of constraining judges deemed to be too soft on crime.”

³⁹ See STEVEN RAPHAEL, *THE NEW SCARLET LETTER? NEGOTIATING THE U.S. LABOR MARKET WITH A CRIMINAL RECORD* 22–23 (2014). Three strikes” law for repeat offenders, truth-in-sentencing conditions, and technical parole revocations are all cited as contributing factors to the increase in the aging prison population in America. In particular, laws mandating sentencing enhancements for repeat offenders impose tough penalties for second and third strikers regardless of the nature of the most recent offense. For example, a minor crime could be enhanced for a long-term sentence inside federal prison.

⁴⁰ Michael Ollove, *Elderly Inmates Burden State Prisons*, PEW RES. CTR. (Mar. 17, 2016), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/03/17/elderly-inmates-burden-state-prisons>. As Linda Redford, Director of the Geriatric Education Center at the Center on Aging at the University of Kansas Medical Center, suggested: “It was the push for mandatory sentences three strikes you’re out. . . . [W]e are seeing people who came to prison in their 30s and 40s and 50s in their 50s and 60s and 70s today.”

⁴¹ *Old Behind Bars: The Aging Prison Population in the United States*, HUMAN RIGHTS WATCH (Jan. 27, 2012), https://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0.pdf. A considerable number of older people entered in their younger years and have aged behind bars. “15.2 percent of prisoners who were between the ages of 61 to 70 in 2009 had entered prison at or under 40 years of age. Of those who were between the ages of 71 and 80, 17.8 percent entered at or under 50 years of age.”

⁴² *Lifer*, MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/lifer> (last visited Jan. 16, 2019). Someone who is serving a life sentence.

⁴³ VERGIL L. WILLIAMS, *DICTIONARY OF AMERICAN PENOLOGY* 206 (1996). The sentencing guidelines, with their determinate sentences, act to abolish parole in federal prisons. Consequently, people behind bars in federal prisons are serving longer sentences.

A. The Rising Elderly Prison Population

Since the 1950s, the elderly prison population has increased at a fearsome pace. Between 1993 and 2013, people who are 55 years of age and older increased 400 percent, while the overall prison population increased 55 percent.⁴⁴ Between 2000 and 2009, the annual number of people entering federal prison at 61 years of age and older increased by 55 percent, although the total number of new admissions in that period increased only 14.5 percent.⁴⁵ The number of people behind bars serving life sentences continues to also increase.⁴⁶ Researchers have estimated that between 1984 and 2008, the number of life sentences increased about four times, from 34,000 to 140,610 people.⁴⁷ In 2009, 7,771 people behind bars were serving sentences ranging from 30 years to life, while 12,612 people behind bars had sentences of 20 to 30 years.⁴⁸

Today, the elderly prison population accounts for approximately 16 percent of the total prison population.⁴⁹ By 2030, researchers have forecasted that people 55 years of age and older will represent approximately one-third of the total prison population and that the prison system would be ill-prepared to accommodate such cataclysmic proportions.⁵⁰ As a counterbalance to this expected rise, and to address a prison system that has paradigmatically shifted towards a culture of mass incarceration, prolonged punishment and institutionalization, the culture must shift towards the eventual early release of thousands of elderly people behind bars.⁵¹

For all people who have served time behind bars, they, too, are entitled to social justice and an equal opportunity to reintegrate into society. This would bring about a meaningful, and necessary, conscious degree of closure and finality. For people behind bars who no longer poses a risk because of age and infirmity, and who have already served a substantial part of the prison sentence, continued incarceration constitutes a complete violation of their right to a just and proportionate punishment.⁵²

⁴⁴ Metia, *supra* note 29.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* See also 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, 481 (2007); Carrie Abner, *Graying Prisons: States Face Challenges of an Aging Inmate Population* 10 (2006), <http://www.csg.org/knowledgecenter/docs/sn0611GrayingPrisons.pdf>.

⁴⁸ *Old Behind Bars: The Aging Prison Population in the United States*, *supra* note 41.

⁴⁹ Metia, *supra* note 29.

⁵⁰ *Id.*

⁵¹ Jeff Yates, *The Elderly and Prison Policy*, 11 *J. OF AGING & SOC. POL'Y* 167 (2000).

⁵² *Old Behind Bars: The Aging Prison Population in the United States*, *supra* note 41.

2020]

NOT FAR ENOUGH

641

B. Old Age and Physical and Mental Impairments

Criminal justice and prison reform require universal humanity and compassion towards people behind bars. Old age is commonly associated with infirmity and for elderly people behind bars who are advanced in age, they are vulnerable to a myriad of physical and mental impairments that are all amplified under incarceration.⁵³ Elderly people behind bars have a higher risk of developing a significant loss of muscle and brittle bones as they age, memory loss and other age-related cognitive and developmental impairments,⁵⁴ and a heightened intolerance to poor environmental conditions especially if and when elicited by heightened surveillance and violence.⁵⁵ These impairments negatively impact adaptive behavior and daily living while inside the prison system.⁵⁶

Mental health, and the over-incarceration of people with mental illnesses, remain a critical issue in the prison system, especially for elderly people behind bars.⁵⁷ While incarcerated, elderly people behind bars disproportionately suffer from mental illnesses.⁵⁸ Similarly, according to the DOJ, approximately 44.8 percent of the federal prison population suffers

⁵³ Ronald H. Aday, *Golden Years Behind Bars – Special Programs and Facilities for Elderly Prisoners*, 58 FED. PROBATION 47 (1994). See also Anthony A. Sterns et al, *The Growing Wave of Older Prisoners: A National Survey of Older Prisoner Health, Mental Health and Programming*, ENGLISH TODAY (January 2008), https://www.researchgate.net/publication/236121499_The_Growing_Wave_of_Older_Prisoners_A_National_Survey_of_Older_Prisoner_Health_Mental_Health_and_Programming. For example, 46 percent of male prisoners 50 years or older and 82 percent of prisoners 65 years or older have a chronic physical problem. In addition, they are in need of acute or chronic medical care. Many elderly prisoners need corrective aids and prosthetics devices including eyeglasses, dentures, hearing aids, ambulatory equipment, and special shoes. Issues such as providing special diets and round-the-clock nursing care, building new facilities or altering old ones, and restructuring institutional activities are becoming more frequent topics of discussion that provide unique needs and vulnerabilities experienced by the elderly prison population.

⁵⁴ TCR Staff, *The Rising Cost of Incarcerating the Elderly*, THE CRIME REPORT (May 17, 2018), <https://thecrimereport.org/2018/05/17/the-rising-cost-of-punishing-the-elderly/>. “[I]nmates suffer from such pronounced dementia that they are unable to follow rules, and may not remember why they are incarcerated. For many with cognitive, visual, or hearing loss, a diminished capacity leads to behaviors that are mistaken for disobedience, subjecting them to punishments such as solitary confinement.”

⁵⁵ *Old Behind Bars: The Aging Prison Population in the United States*, *supra* note 41.

⁵⁶ “[I]nmates suffer from such pronounced dementia that they are unable to follow rules, and may not remember why they are incarcerated. For many with cognitive, visual, or hearing loss, a diminished capacity leads to behaviors that are mistaken for disobedience, subjecting them to punishments such as solitary confinement.” TCR Staff, *The Rising Cost of Incarcerating the Elderly*, THE CRIME REPORT (May 17, 2018), <https://thecrimereport.org/2018/05/17/the-rising-cost-of-punishing-the-elderly/>.

⁵⁷ Notably, the deinstitutionalization of people with mental illness in the last half of 20th century, and the lack of adequate mental health treatment, have led to the overincarceration of people with mental disabilities. See RUTH COKER, THE LAW OF DISABILITY DISCRIMINATION 33 (2009).

⁵⁸ Aday, *supra* note 53. Elderly people behind bars suffer from an average of three chronic illnesses and approximately 20 percent have at least one mental illness during their incarceration.

642 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 3]

from mental illness.⁵⁹ Social isolation from the outside world, such as from family and loved ones, is also another major consequence of incarceration that affects mental health, such as leading to trauma or toxic stress.⁶⁰ For elderly people behind bars who are parents, grandparents, or even great-grandparents, they can become absent and detached from their children's life to adulthood.⁶¹ On the alternative, family members outside of the prison may decrease during their period of incarceration, which adds the feeling of loss and need for bereavement.⁶²

Broader in perspective, elderly people behind bars often find it increasingly difficult to maintain a meaningful connection or generational ties with life and family outside the prison walls.⁶³ Consequently, even when released, it is not uncommon to have formerly incarcerated elderly people discover barriers and struggle to reintegrate and adjust to a world that is vastly different than when they first entered prison, especially without strong social support after a long period of confinement and trauma.⁶⁴ As a result, release should be granted sooner, rather than later, to minimize the effects "time warping," which is the significant "shock" experienced by people behind bars who are released after long periods of incarceration and their struggle to make large life adjustments.⁶⁵ Early release provides elderly people behind bars a more compassionate and sensible opportunity to reintegrate back into society and live the remainder of their life after serving time in prison, but should not

⁵⁹ DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 213600, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 4 tbl. 3 (2006), <https://www.bjs.gov/content/pub/pdf/mhppji.pdf>.

⁶⁰ See, e.g., Amy Alexander, *Why Children With Parents in Prison Are Especially Burdened*, THE ATLANTIC (Dec. 14, 2015), <https://www.theatlantic.com/politics/archive/2015/12/why-children-with-parents-in-prison-are-especially-burdened/433638/>. Children with incarcerated parents have increased risk for trauma, or toxic stress, particularly when they are cumulative, as well as adverse childhood experiences.

⁶¹ *At America's Expense: The Mass Incarceration of the Elderly*, ACLU (June 2012), <https://www.aclu.org/report/americas-expense-mass-incarceration-elderly>. "In addition to the vast fiscal costs, keeping aging prisoners locked up unnecessarily has vast societal consequences such as separating grandparents from their grandchildren."

⁶² Suleika Jaouad, *The Prisoners Who Care for the Dying and Get Another Chance at Life*, N.Y. TIMES (May 16, 2018), <https://www.nytimes.com/interactive/2018/05/16/magazine/health-issue-convicted-prisoners-becoming-caregivers.html>.

⁶³ Cartwright, *supra* note 30. "Separation between loved ones, particularly children and incarcerated parents, are further compounded by problems associated with maintaining contact during the period of incarceration. . . . harsh prison rules and poor treatment by staff generally discourages family members from visiting incarcerated loved ones." *Id.*

⁶⁴ Michelle Chen, *By 2030, 1 in 3 US Prisoners Will Be Over 50*, THE NATION (May 29, 2018), <https://www.thenation.com/article/by-2030-one-in-three-us-prisoners-will-be-over-50/>. "If they are eventually freed, they may rejoin a world that's generations out of sync, perhaps without family, housing, or job prospects, carrying a lifetime's burden of illness and trauma."

⁶⁵ Dominique Ritvo, *The Leftover: Where Do Elderly Prisoners Go When Released?* 26 ELDER L. J. 227, 245 (2018), <https://theelderlawjournal.com/wp-content/uploads/2018/06/Ritvo.pdf>.

2020]

NOT FAR ENOUGH

643

be only when they are terminally ill, with an unreasonably limited amount of time to live, or near the end of their sentence and time served. Therefore, elderly people should be released earlier.

C. *Non-Integration in a Correctional Setting*

The BOP manages prison facilities that are structurally deficient and provides a *non-integrative* environment in a correctional setting that was never meant to and is unable to meet the unique needs of elderly people behind bars.⁶⁶ Many elderly people behind bars cannot actively climb stairs, go long distances, and traverse through uneven walking areas.⁶⁷ As a consequence, they experience high risks of falls due to the poor and dim lighting and daily rigors of prison life, such as from waiting on hurried lines for medicine and food.⁶⁸ To ambulate around the prison, many require prosthetic and assistive devices, such as wheelchairs, walkers, canes, special boots, portable oxygen tanks or other breathing aids, and other accommodations.⁶⁹ Elderly people behind bars require community support, or an aide or attendant if they are unable to go to independently use the toilet, bathe, dress, or participate in activities of daily living, which all can be spurred by physical or mental impairments, such as incontinence.⁷⁰

Inside the cells, the environment is frequently cold, damp, and erratic.⁷¹ Elderly people behind bars struggle to cope with less than ideal sleeping arrangements, such as thin mattresses or cold temperatures that exasperate muscle and joint pain.⁷² For people with back problems and fragile bones, sitting or sleeping on cement slabs and metal beds contributes to intense pain.⁷³ They can also experience difficulty transferring onto their bed, especially if it is the top of a bunk bed, and may need a reasonable

⁶⁶ *Old Behind Bars: The Aging Prison Population in the United States*, *supra* note 41. “Prison officials are hard-pressed to provide conditions of confinement that meet the needs and respect the rights of their elderly prisoners. They are also ill-prepared—lacking the resources, plans, commitment, and support from elected officials—to handle the even greater numbers of older prisoners projected for the future.”

⁶⁷ *Id.* “In the community, falls are associated with poor lighting, uneven or icy pavement, loose rugs, and lack of handrails.”

⁶⁸ *Id.*

⁶⁹ Aday, *supra* note 53.

⁷⁰ *Id.*

⁷¹ Evie Litwok, *Prison is No Place For The Elderly – Even Paul Manafort*, FORWARD (June 22, 2018), <https://forward.com/scribe/403639/prison-is-no-place-for-the-elderly-even-paul-manafort/>. Based on one elderly prisoner behind bars’ experience, they woke up every day crippled with pain from sleeping on a metal bed, which persevered for years after release.

⁷² *Id.*

⁷³ *Id.* Between back problems and fragile bones, elderly people face many physical challenges inside prisons.

accommodation or reassigned a lower bunk that might be limited or unavailable.⁷⁴ During the winter season, they require additional blankets and clothing to stay warm, as they have a higher risk of getting sick from the cold temperature.⁷⁵

As a consequence of their unique vulnerabilities, elderly people behind bars are isolated and segregated in the prison system.⁷⁶ They are unable to attend and fully participate in rehabilitative programs without reasonable accommodations, such as reading and writing or being transported for a far distance across the facility from housing units and prison services and programs.⁷⁷ They are also at a higher risk of victimization and harassment from other people behind bars and prison staff, as a consequence of their disabilities.⁷⁸ Without a higher degree of empathy, care, and proper training and education, correctional officers can contribute to routine abuse, intimidation, and maltreatment.⁷⁹

D. Health Care and Medical Services

The rising elderly prison population has turned some prison wings into “*de facto* nursing homes” with prisons responsible for providing challenging medical care to a growing pool of older and ailing people behind bars.⁸⁰ While the BOP is required to provide “medically necessary health care” for people behind bars in federal prisons, they have failed to define and implement a quality standard of care to which it adheres to be best practices.⁸¹ Elderly people behind bars are more likely to need long-term care, therapy,

⁷⁴ *Old Behind Bars: The Aging Prison Population in the United States*, *supra* note 41. “Housing the elderly has become a daily game of musical chairs.” Correctional officers struggle each day to find enough lower bunks for elderly prisoners who cannot climb to upper ones.

⁷⁵ *Id.* Some need to stand outside in harsh weather to wait to receive medication.

⁷⁶ *Id.* “In some systems, old and infirm individuals end up in administrative segregation beds—with all the restrictions of segregation—due to the lack of alternative housing options.” *See also Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 593 (1999) (holding that unjustified isolation . . . is properly regard as discrimination based on disability.”

⁷⁷ *Id.*

⁷⁸ *Id.* “Geriatric incontinence puts unique demands on older prisoners. It puts them at risk of social isolation, depression, diminished independence, and even harassment and physical confrontations from inmates offended when an older person urinates or defecates in [their] clothes.”

⁷⁹ *See generally* THE MARSHALL PROJECT, <https://www.themarshallproject.org/records/318-shackling> (last visited Jan. 16, 2019).

⁸⁰ *See* Alessandra Malito, *What elderly inmates — like Bill Cosby — have to look forward to in prison*, MARKETWATCH (Oct. 21, 2018), <https://www.marketwatch.com/story/what-elderly-inmates-like-bill-cosby-have-to-look-forward-to-in-prison-2018-10-03>. “About 75 prisons have built hospice and medical facilities to care for the imprisoned.”

⁸¹ Erica Zunkel, *18 U.S.C. § 3553(a)’s Undervalued Sentencing Command: Providing a Federal Criminal Defendant with Rehabilitation, Training, and Treatment in “the Most Effective Manner*, 9 NOTRE DAME J. INT’L & COMP. L. 49, 58 (2019), <https://scholarship.law.nd.edu/ndjicl/vol9/iss1/5>.

and treatment, as well as visits by different types of medical providers and specialists.⁸² However, research and studies have consistently found that genuine access to health care and services cannot be provided in an institutionalized correctional setting and the BOP commonly fall short of providing the standard of care that is available outside the prison walls.⁸³

One of the most profound effects of the elderly prison population at the forefront of prison reform is the increased costs of housing and medical care of elderly people behind bars.⁸⁴ According to the DOJ, the average cost of housing people in federal prisons nearly doubles for elderly people from \$27,549 a year per person to \$58,956 for the elderly person for greater health care, medicine, and treatment.⁸⁵ Generally, elderly people behind bars are two to three times more expensive than younger people, costing up to \$72,000 per year for each person.⁸⁶ Moreover, elderly people behind bars with significant medical needs have to be housed in specific facilities that most prisons do not have, or, if they do, are expensive to maintain.⁸⁷

People behind bars are not eligible for federal health insurance programs such as Medicaid and Medicare, but by law are required to receive medical treatment.⁸⁸ As a result, federal prisons, which receive taxpayer funding for a bulk of its operations, have to cover the costs.⁸⁹ With a need for higher medical care, the steady rise in elderly people behind bars has increased medical costs for the BOP by 55 percent since 2006.⁹⁰ As such, in

⁸² *Old Behind Bars: The Aging Prison Population in the United States*, *supra* note 41.

⁸³ Cartwright, *supra* note 30.

⁸⁴ Metia, *supra* note 29. See also *Old Behind Bars: The Aging Prison Population in the United States*, *supra* note 41 (citing Herbert J. Hoelter: “Elderly inmates pose a minimal threat to society, they require special attention and care, and as a group they consume a disproportionate amount of correctional funds.”).

⁸⁵ Sam Levine, *Federal Prisons are Failing Aging Prisoners, Justice Department Says*, HUFFINGTON POST (May 6, 2015), https://www.huffingtonpost.com/2015/05/06/aging-prisoners-federal-prisons_n_7225674.html. See also Cartwright, *supra* note 30 (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. However, older prisoners are responsible for a disproportionate share of prison medical expenses. 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. Thus, annual medical expenditures for older state prisoners are three to eight times greater than those for offenders in the general population.).

⁸⁶ Metia, *supra* note 29.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Federal Prison Over-Crowding an Ongoing “Crisis,” Says DOJ Inspector General Memo*, FAMM (Nov. 18, 2014), <https://famm.org/federal-prison-over-crowding-an-ongoing-crisis-says-doj-inspector-general-memo/>.

646 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 3]

2013, the BOP spent \$1 billion on people behind bars' health care.⁹¹ Some prisons are forced to consider developing geriatric facilities and training personnel to provide long-term medical care to aging, infirmed, or terminally ill people behind bars—at exorbitant cost.⁹² Therefore, federal prisons have failed elderly people behind bars.⁹³

The BOP has sought to provide medical services “at the lowest possible cost.”⁹⁴ For example, staffing shortages have marred the BOP's efforts to provide adequate health care and services.⁹⁵ While past consulting physicians and dentists employed by the BOP were required to have a current license “in the state where services are provided,” the BOP unilaterally removed this requirement to allow a license “from any state” to stimulate recruitment from less qualified candidates, noting that staffing shortages and recruitment remained part of the BOP's biggest problems.⁹⁶ Even despite the staff shortages, the BOP has also highlighted that medical care in a correctional setting often inherently conflicts with correctional guidelines and procedures.⁹⁷

As a consequence of insufficient resources, elderly people behind bars are moved in and out of the prison by the BOP to receive health care and treatment at outside hospitals, which substantially increases and accumulates

⁹¹ *Id.* By 2016, the BOP spent \$1.3 billion on health care in 2016. Roughly 12 percent of prisoners are 55 or older, and of those, many will spend their final years behind bars, <https://www.themarshallproject.org/2018/03/07/old-sick-and-dying-in-shackles>

⁹² Cartwright, *supra* note 30.

⁹³ Levine, *supra* note 85.

⁹⁴ Zunkel, *supra* note 81.

⁹⁵ Cartwright, *supra* note 30. Prisons are unable to hire trained medical staff to provide an adequate standard of care to meet the elderly prison population's needs. Furthermore, in prisons, the medical staff are considered as correctional officers and tend to have dual loyalties that prevent them from making an impartial determination about a prisoner's health. Their training is also the same as correctional officers since they are required to have full-time contact with the prison population. They also maintain large caseloads and rely heavily on non-physician health care workers. Furthermore, the medical staff is typically less qualified and the compensation offered to medical personnel makes it difficult to find qualified physicians willing to work in prisons. Accordingly, most physicians that are 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. Yet, medical negligence or malpractice resume in prison as prisons do not even screen for “age-related” cognitive illnesses; dementia and other cognitive illnesses are first observed by staff or other prisoners “when a prisoner exhibits bizarre or erratic conduct.”

⁹⁶ Zunkel, *supra* note 81. A 2016 report from the Office of the Inspector General highlighted staffing shortages as one of the biggest problems: “[R]ecruitment of medical professionals is one of the BOP's greatest challenges and staffing shortages limit inmate access to medical care, result[ing] in an increased need to send inmates outside the institution for medical care, and [contributing] to increases in medical costs.”

⁹⁷ *Id.* “[T]here may be an incompatibility between medical and correctional guidelines; conflicts related to medical care should be resolved, as far as practical, in favor of medicine. At the same time the medical staff must be part of the institution's correctional team.”

2020]

NOT FAR ENOUGH

647

costs⁹⁸ with additional time and resources for staff members that are required to accompany and supervise the incarcerated person.⁹⁹ While some prisons have re-fit or built accommodations for medical treatment and facilities for elderly people behind bars, these are provisional solutions in avoidance of resolving the greater problem of prisons not being able to provide adequate services.¹⁰⁰ Furthermore, this demonstrates that community-based services and solutions outside of the prison are not unfamiliar to the BOP's operations. Rather, they are, in fact, necessary.

Ultimately, the BOP is consistently unable to provide correctional treatment and rehabilitation in "the most effective manner" as required by federal law.¹⁰¹ For example, the BOP does not invariably document and cannot accurately assess the number of people with mental illness in their prisons and ensure that they receive appropriate care.¹⁰² Treatment programs are also underfunded, neglected, or inaccessible, such as the Residential Drug Abuse Program (RDAP) which has stringent eligibility restrictions, including only allowing people with 24 months remaining in their sentence to participate.¹⁰³ With all of these failures, the BOP has a long track record of unreliability and failing to follow even legislative mandates for reform.¹⁰⁴

E. Disproportionate Number of Deaths in Prison

Elderly people behind bars comprise a disproportionate number of all deaths while incarcerated. Data from the New York Department of Corrections elucidated that people behind bars at 51 to 60 years of age have the highest rate of mortality due to illnesses than any other age group.¹⁰⁵ From 2001 to 2007, 8,486 elderly people behind bars died while in the prison system.¹⁰⁶ Also, the number of deaths has increased from 33.9 percent in 2001 to 45.7 percent in 2007.¹⁰⁷ For people entering prison at an old age, there is a strong likelihood that they would enter with the expectation that

⁹⁸ *Id.*

⁹⁹ Cartwright, *supra* note 30.

¹⁰⁰ Chiu, *supra* note 29.

¹⁰¹ Zunkel, *supra* note 81.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Justin George, *Okay, What's the Second Step?* THE MARSHALL PROJECT (Dec. 19, 2018), <https://www.themarshallproject.org/2018/12/19/okay-what-s-the-second-step>. "According to multiple Inspector General and Government Accounting Office reports, the agency has a long track record of failing to follow Congress' intent on reform, as well as its own policies when it comes to sending prisoners to halfway houses, where they can get help transitioning back to society."

¹⁰⁵ Metia, *supra* note 29.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

they would die before completing their sentence, as even a modest sentence at old age may represent a death sentence. As the elderly prison population continues to increase, the number of deaths will likely grow.¹⁰⁸

Yet, the BOP fails to provide a standard of dignity and humanity for elderly people behind bars. Specifically, palliative care and end-of-life treatment have not all been extended to the prison system.¹⁰⁹ Therefore, people behind bars approaching the end of their lives are often without adequate medical attention and legal planning (e.g., advance directives or estate planning).¹¹⁰ Furthermore, studies have also demonstrated that elderly people behind bars experience disproportionate anxiety over dying while incarcerated in prison, depression, and loneliness.¹¹¹ Having elderly people die behind bars does not afford society any meaningful benefit that would justify not providing him or her an early release from old age.¹¹²

II. CRIMINAL JUSTICE, COMPASSIONATE AND EARLY RELEASE, COMMUNITY SUPERVISION AND CIVIL RIGHTS AND LEGAL PROTECTIONS

The most significant challenge for elderly people behind bars is having the opportunity to be released from prison.¹¹³ However, the criminal justice and prison system are currently built to *keep* people incarcerated as long as justifiable. As crime rates increased from the 1950s to 1970s, the federal government continuously sought new ways to address and control crime, which resulted in a fascination for perpetual punishment as justified by rehabilitation and other principles of punishment.¹¹⁴ Lengthy sentences and the subsequent aging of the prison population have also intersected with deinstitutionalization and subsequently the over-incarceration of people with

¹⁰⁸ *Id.*

¹⁰⁹ Jeff Yates, *The Elderly and Prison Policy*, 11 J. OF AGING & SOC. POL'Y 167 (2000).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Eric Tucker, *Changes Weighed to Federal Program for Ailing, Aging Inmates*, BUSINESS INSIDER (Mar. 10, 2016), <https://www.businessinsider.com/ap-changes-weighed-to-federal-program-for-ailing-aging-inmates-2016-3>. For family who have a final visit, the details are often sorrowing. “It was such a painful experience — so painful and difficult, recalled [their] daughter, Allison Rice, still shaken by the memories of [their] father’s gaunt and jaundiced face and their final visit with [them].”

¹¹³ *Old Behind Bars: The Aging Prison Population in the United States*, *supra* note 41.

¹¹⁴ Cartwright, *supra* note 30.

2020]

NOT FAR ENOUGH

649

disabilities.¹¹⁵ Disability, with its nexus with race and poverty, have all contributed to an emergent carceral state of mass incarceration.¹¹⁶

A. Punishment and Criminal Justice

Punishment in criminal justice was manufactured to serve numerous purposes: retribution, incapacitation, deterrence, and rehabilitation.¹¹⁷ To combat criminalized drug use in the 1970s, the criminal justice system's approach to punishment first focused on retribution and incapacitation to punish offenders convicted of a crime.¹¹⁸ Judges systematically punished offenders according to the perceived seriousness of their crime, which was often set in the outer extremities, and resulted in the maximum possible sentence that allowed for a longer period of incapacitation.¹¹⁹ These harsh sentences affected each person for the entirety of their incarceration, even in parole hearings that remain engrossed on past convictions and after release when applying for housing and employment and having the obligation to disclose felony convictions.¹²⁰ Moreover, the severity and punitive nature of these sentences had the effect of deterrence, creating and relying on the fear of punishment to dissuade others from committing a crime.¹²¹

Confinement has recently shifted again towards rehabilitation. The need for complete rehabilitation has been used to justify prolonged and extended imprisonment, which reinforces indeterminate sentences until they

¹¹⁵ Betsy Ginsberg, *Out With The New, In With The Old: The Importance of Section 504 of the Rehabilitation Act to Prisoners With Disabilities*, 36 *FORDHAM URB. L.J.* 713 (2009), <https://ir.lawnet.fordham.edu/ulj/vol36/iss4/4>.

¹¹⁶ WALIA, *supra* note 27, at 38.

¹¹⁷ David J. Shestokas, *The Purpose of Criminal Punishment*, SHESTOKAS (Oct. 25, 2012), <http://www.shestokas.com/general-law/criminal-law/the-purpose-of-criminal-punishment>.

¹¹⁸ See *A Brief History of the Drug War*, DRUG POL'Y ALLIANCE, <http://www.drugpolicy.org/facts/new-solutions-drug-policy/brief-history-drug-war-0>.

¹¹⁹ *Old Behind Bars: The Aging Prison Population in the United States*, *supra* note 41. "Some victims, criminal justice professionals, and members of the public believe offenders should always serve the maximum possible sentence. If the maximum sentence is life, they argue the offender should remain in prison the rest of their life. They oppose early release regardless of the offender's age and infirmity. But such opposition would not seem to be grounded solely in retributive principles. Grief, rage, contempt for those who break the law, punitive ideologies, and politics may influence it as well."

¹²⁰ RAPHAEL, *supra* note 39 (detailing the difficulties of released prisoners to non-institutional society, such as precarious housing situations, high risk of homelessness, small amount of "gate money" upon release, often returning to custody for either parole violations or a new felony offense). See also Shristi Devu, *Trapped in the Shackles of America's Criminal Justice System*, 20 *THE SCHOLAR* 217, 226 (2018).

¹²¹ However, enhancing the severity of punishment will not always have an impact on offenders as they may not believe they will be apprehended for their actions. Valerie Wright, *Deterrence in Criminal Justice*, THE SENTENCING PROJECT (2010), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf>.

650 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 3

are determined rehabilitated enough to reintegrate into society.¹²² Rehabilitation has treated people as deformed and broken and required them to be cured of their criminogenic tendencies to justify their release.¹²³ Under the belief that all people can be rehabilitated with enough time, rehabilitation has been used to argue that a sentence should last as long as possible to allow for the person behind bars to be rehabilitated.¹²⁴ Rehabilitation has also been presented as a formalized science-based approach¹²⁵ and led to the use of algorithms to assess how to best rehabilitate people behind bars.¹²⁶ In adopting a clinical approach to the criminal justice and prison system, new roles in penology opened for psychiatrists, psychologists, and therapeutic counselors to work for the BOP in assessing their prison populations.¹²⁷

Yet, a criminal justice and prison system based on rehabilitation have been a failure.¹²⁸ Further incarceration does little to serve the interests of punishment, especially at an old age, and the auspices of rehabilitation cannot be used to justify prolonged duration of imprisonment. Instead, there needs to be a definitive sense of closure to incarceration¹²⁹ and sound relief for a person who has served enough time behind bars that they should be given an opportunity into reintegrated back to society.¹³⁰

¹²² ANN CHIH LIN, REFORM IN THE MAKING: THE IMPLEMENTATION OF SOCIAL POLICY IN PRISON 29 (2002). Also calling rehabilitation a “moral education” and a “coerced cure” or “humane containment.”

¹²³ *Id.* (calling rehabilitation a “coerced cure” or humane containment”).

¹²⁴ Takei, *supra* note 36.

¹²⁵ Stanley Cohen, AGAINST CRIMINOLOGY 177 (1988). “The history of crime control is seen as a record of inexorable progress: a triumph of enlightened humanism over barbarity, and of rationality and scientific knowledge over irrationality and prejudice.”

¹²⁶ LIN, *supra* note 122, at 29 (highlighting medical experiments by prison staff with the hope of changing a prisoner’s propensity to crime).

¹²⁷ TODD R. CLEAR, HARM IN AMERICAN PENOLOGY: OFFENDERS, VICTIMS, AND THEIR COMMUNITIES (1994).

¹²⁸ *See, e.g.*, United States v. Tapia, 665 F.3d 1059 (9th Cir. 2011) (holding that rehabilitation is an inappropriate considering in prison sentencing . . . the court cannot give a person a longer sentence just to promote rehabilitation as a factor). Yet, judges and experts who determine the progress of rehabilitation are usually too insulated and virtually unaccountable for the promises of rehabilitation instilled in the system and imposed on people who have diverse needs. Even as legislative have lost faith in rehabilitation as a Senate report accompanying the Sentencing Reform Act stated, “almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated.” Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 209 (2019) (quoting S. REP. NO. 98-225, at 38 (1983)).

¹²⁹ Segura, *supra* note 23. “[T]reatment industrial complex’ [and] . . . the increased use of electronic monitoring can risk putting more people on stricter forms of supervision than is necessary, for longer than is warranted.”

¹³⁰ SHICHOR, *supra* note 36 at 45.

B. Compassionate and Early Release

After being told by their physicians that they had only a little more than a year to live, Kevin Zeich requested for compassionate release after 24 years in prison for a drug-related crime.¹³¹ Kevin was blind and visually impaired, battling cancer, and unable to eat.¹³² Although Kevin's warden approved the request, the BOP turned him down and declined to say their "life expectancy is currently indeterminate" and repeatedly told they were "not sick enough."¹³³ On Kevin's fourth try, their daughter finally received a phone call saying that their father would be headed home; however, early next morning, they awoke to the news that their father had died.¹³⁴ Kevin's story is not uncommon in the routine of applying for compassionate release. BOP officials deny or delay the vast majority of requests, including an elderly person who was 94 years of age.¹³⁵ The BOP's denials, a review of dozens of cases shows, often override the opinions of those closest to the people behind bars, like their physicians and wardens.¹³⁶

Stakeholders have advocated that early release should factor in compelling substantive changes in a person's health and its effect on their incarceration, acknowledging that offenders deserve the opportunity to spend their last days with their family and loved ones rather than dying alone in prison.¹³⁷ In federal law,¹³⁸ compassionate release and medical parole allow for the early release and sentence reduction of elderly and terminally ill¹³⁹ people who cannot fully function in the prison system, experience certain significant health issues,¹⁴⁰ need extensive medical care that cannot be adequately provided in an institutionalized setting, and do not present a threat to society.¹⁴¹ First, as set by the United States Sentencing Commission, there

¹³¹ Christie Thompson, *Old, Sick and Dying in Shackles*, THE MARSHALL PROJECT (March 7, 2018), <https://www.themarshallproject.org/2018/03/07/old-sick-and-dying-in-shackles>.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Thompson, *supra* note 131.

¹³⁷ Cartwright, *supra* note 30.

¹³⁸ 18 U.S.C. §§ 3582(c)(1)(A), 4205(g) (2018).

¹³⁹ For the terminally ill, the general prognosis is six months or less to live. Aday, *supra* note 53. Accordingly, even after released, this allows a short amount of time to live.

¹⁴⁰ For instance, the six most common conditions for medical parole requests were cancer, end-stage liver disease, cerebrovascular disease, diabetes, or other endocrine disorders, pulmonary conditions, and renal disease. Broadly, compassionate release is reserved for people who are dying, incapacitated, and elderly. Rebecca Silber et al, *A Question of Compassion: Medical Parole in New York State*, VERA INST. OF J. (April 2018), https://storage.googleapis.com/vera-web-assets/downloads/Publications/medical-parole-new-york-state/legacy_downloads/a-question-of-compassion-full-report_180501_154111.pdf.

¹⁴¹ MARY BOSWORTH, *ENCYCLOPEDIA OF PRISONS AND CORRECTIONAL FACILITIES* 447 (2005). "Compassionate release or medical furlough programs, while available in the majority of states and the

652 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 3

are four broad criteria¹⁴² for compassionate release or sentence reduction in which “extraordinary and compelling reasons” must be met by the person’s medical condition,¹⁴³ age,¹⁴⁴ family circumstances,¹⁴⁵ and other reasons other than, or in combination with, the other criteria.¹⁴⁶ On the alternative, these extraordinary and compelling circumstances can be circumvented if the person is at least 70 years of age and served at least 30 years in prison.¹⁴⁷ Second, in addition to either one of the above conditions, the person behind bars cannot be a danger to the safety of any other person or the community¹⁴⁸ and the reduction is “consistent.”¹⁴⁹

In federal prisons, both the Attorney General and BOP wield extraordinary discretion and authority to dictate, by motion, which people behind bars are considered by the court for compassionate release.¹⁵⁰ First, the person behind bars, or someone on their behalf, has to submit a request to the warden highlighting each of the criteria used for compassionate release as well as a release plan.¹⁵¹ Second, the warden, medical team, and probation office all review the request, but there is no mandatory deadline that must be met.¹⁵² If and when the warden approves the request, it goes to the general

Federal Bureau of Prisons, are rarely used, also ensuring that inmates will die while incarcerated . . . must weigh the needs of the ill and dying inmate against society’s need for protection, retribution, and deterrence.”

¹⁴² See generally USSG § 2D1.1 (2018).

¹⁴³ USSG § 2D1.1, Section 1B1.13 (2018) (focusing on a terminal illness (i.e., a serious and advanced illness with an end of life trajectory), such as a metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia, where the person is suffering from a serious physical or medical condition, functional or cognitive impairment, or experiencing deteriorating physical or mental health because of the aging process that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which they are not expected to recover).

¹⁴⁴ *Id.* (at least 65 years old; experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of their or their term of imprisonment, whichever is less).

¹⁴⁵ *Id.* (death or incapacitation of the caregiver of the prisoner’s minor child or minor children, or the incapacitation of a spouse or registered partner when the prisoner would be the only available caregiver).

¹⁴⁶ *Id.* (detailing that other reasons are determined by the Director of the BOP).

¹⁴⁷ *Id.* Pursuant also to a sentence under 18 U.S.C. § 3559(c) (2006) for the offense(s).

¹⁴⁸ As provided in 18 U.S.C. § 3142(g) (2008).

¹⁴⁹ Under 18 U.S.C. § 3582(c)(1)(A) (2018), the BOP may also impose a term of supervised release with or without conditions that do not exceed the unserved portion of the original term of imprisonment.

¹⁵⁰ As pursuant to 18 U.S.C. § 3582(c)(1)(A) (2018). While the United States Sentencing Commission *encourages* the Director of the BOP to file such a motion *if* a prisoner meets any of the circumstances for sentence reduction, there is wide latitude to similarly allow the Director to determine not to file such motion on a prisoner’s behalf. For private prison companies, this become self-interested as they profit based on how many they incarcerate, and not how many are necessarily freed.

¹⁵¹ 18 U.S.C. §§ 3582(c)(1)(A), 4205(g) (2018).

¹⁵² In cases where the request is based on family circumstances, the warden convenes a multidisciplinary committee to assess the request in light of the BOP criteria. The probation office also visits the residence to evaluate the release plan.

2020]

NOT FAR ENOUGH

653

counsel who goes through another layer of review before deciding to also give their approval.¹⁵³ If and when the general counsel approves, the Director of the BOP finally gets the request and can decide to approve or reject the request. Even when the Director approves the request, there is another administrative layer of review.¹⁵⁴ Typically, the general counsel also drafts the motion for a sentence reduction and asks the Attorney General to file the motion with the sentencing court. Finally, the court provides a ruling on the motion and can either deny compassionate release, if they find that release does not fulfill the purposes of punishment, or mandate supervised release with other release conditions with probation.

Not only can the BOP deny the applicant's request at any stage of the compassionate release process, but also applicants have limited avenues for recourse. The compassionate release denial procedures vest the warden, general counsel, and Director of the BOP all with the authority to deny the request.¹⁵⁵ In such an instance, all must people "written notice and a statement of reasons for the denial."¹⁵⁶ While a denial by the warden is appealable, denials by either the general counsel or Director of the BOP are "final administrative decisions" and are not appealable.¹⁵⁷ In granting compassionate release, BOP prison officials arbitrarily assume a judicial role in determining whether a person deserves to have their sentence reduced and this precludes courts from reviewing requests.¹⁵⁸ Courts have largely recognized that the Attorney General and BOP's discretion, and have withdrawn from ruling to grant compassionate release requests, noting that the First Step Act does not specifically mandate that the BOP place people behind bars on home confinement when they meet the age and other attendant restrictions for such placement; rather, the First Step Act merely provides the Attorney General and BOP with the discretion to make these determinations.¹⁵⁹

The Attorney General and BOP have continued to exercise their discretion to deny or delay their determinations regarding an early release for

¹⁵³ Before the General Counsel's approval, the General Counsel: (i) in medical cases, refers the request to the Medical Director who can conduct an independent review of the grounds for release; (ii) in non-medical cases, the General Counsel refers the request to the Correctional Programs Division for review; and (iii) the General Counsel also seeks the opinion of the Assistant United States Attorney where the prisoner was convicted.

¹⁵⁴ If the request is non-medical or is a medical request based on non-terminal severe and permanent medical or mental health condition, the Director forwards the case to the Office of the Deputy Attorney General (ODAG) for review. The ODAG can object or raise concerns with the Director before the motion is filed.

¹⁵⁵ 28 C.F.R. § 571.63 (2013).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *The Answer is No: Too Little Compassionate Release in U.S. Federal Prisons*, *supra* note 15.

¹⁵⁹ *Reeb v. Thomas*, 636 F.2d 1224, 1227 (9th Cir. 2011).

654 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 3]

elderly people behind bars. As a result, elderly applicants have died while in custody waiting for their request to be reviewed.¹⁶⁰ In particular, from 2013 to 2017, the BOP approved only 6 percent of the 5,400 applications received for compassionate release; during that same period, 266 of those requests died in custody.¹⁶¹

Even though elderly applicants present the lowest risk of committing a crime after their release, they are commonly denied based on crimes committed long in the past.¹⁶² Case files show that prison officials reject many people behind bars' applications because they pose a risk to public safety or that their past crime was "too serious" to justify their early release.¹⁶³ In 2013, the DOJ's Inspector General reported that nearly 60 percent of people behind bars were denied based on the severity of their past offense or criminal history.¹⁶⁴ While the United States Sentencing Commission has said that such considerations are better left to judges, the Commission has refrained from ruling on compassionate release requests unless the BOP has approved the request.¹⁶⁵ Often, parole denials have cited the nature of the crime and the facts of the underlying case as the primary reason for the denial, frequently disregarding the accomplishments of the applicant and their often categorically low risk of recidivism, and denies a person's freedom based on a single, unchanging moment that occurred decades ago.¹⁶⁶

¹⁶⁰ See Silber *et al.*, *supra* note 140. Few requests make it as far as release. According to the Vera Institute of Justice's sample, only 12 percent of cases were approved; 55 percent of the initial medical parole requests and 44 percent of those approved were for elderly prisoners who were 55 years of age and older. The average time it took a case to progress from initial request to parole board interview was 3.7 months, and requests were sometimes initiated too late in a person's illness.

¹⁶¹ Thompson, *supra* note 131. "Officials deny or delay the vast majority of requests, including that of one of the oldest federal prisoners, who was 94, according to new federal data analyzed by The Marshall Project and The New York Times. The bureau's denials, a review of dozens of cases shows, often override the opinions of those closest to the prisoners, like their doctors and wardens."

¹⁶² *Old Behind Bars: The Aging Prison Population in the United States*, *supra* note 41.

¹⁶³ Christie Thompson, *Frail, Old and Dying, but Their Only Way Out of Prison Is a Coffin*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/us/prisons-compassionate-release-.html>. See also Nat Hentoff, *A Slow, Lonely Death in Prison For A 94-Year-Old Serving Drug Charges*, HUFFINGTON POST (Jan. 21, 2016), https://www.huffingtonpost.com/entry/94-year-old-drug-charges_us_56a02d8ee4b076aadcc54130. For example, in 2016, officials turned down one of the oldest federal prisoners, 94-year-old Carlos Tapia-Ponce, on the grounds that their crime, a role in a large-scale cocaine trafficking operation, was "too serious." Consequently, they died the following month.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See, e.g., Michael Wilson, *A Crime's Details Are Rehashed and Parole Is Denied, Again and Again*, N.Y. TIMES (July 3, 2015), <https://www.nytimes.com/2015/07/04/nyregion/a-crime-rehashed-and-parole-denied-again-and-again.html>.

2020]

NOT FAR ENOUGH

655

C. Community Supervision

From 1976 to 2010, the probation population grew from 923,000 to 4.06 million.¹⁶⁷ Similarly, from 1975 to 2010, the parole population grew from 143,000 to 841,000.¹⁶⁸ By 2010, nearly 5 million people were on probation and parole.¹⁶⁹ Even when released from prison under probation or parole, life outside of prison under community supervision is conditioned on mandatory supervision and laden with overly stringent restrictions.¹⁷⁰ These restrictions have inevitably resulted in a significant number of probation and parole violations that end in reincarceration.

Home confinement has garnered more attention in recent years and has become more common with electronic monitoring and surveillance of people using GPS monitors.¹⁷¹ Between 2005 and 2015, the number of people in the criminal justice and prison system subjected to monitoring grew by nearly 140 percent.¹⁷² Home confinement is particularly lucrative as a new form of incarceration because it allows prisons to alleviate their overcrowding concerns, adopt a cost-effective alternative to keeping people inside prisons, and extend new contracts to private corporations that manage the monitoring and tracking.¹⁷³

The reach of incarceration extends far beyond the prison system through community supervision. Unlike prisons, halfway houses, and other correctional facilities in the community, are not directly operated by the federal government. Instead, they are operated by non-governmental entities that are for-profit that contract with correctional agencies. Studies of intensive supervision carried out over 30 years have shown that the method does not reduce recidivism but appears actually to increase it.

D. Section 504 of the Rehabilitation Act, Civil Rights, and Constitutional Protections

Standing over the analysis of the First Step Act, Section 504 of the Rehabilitation Act of 1973¹⁷⁴ and other constitutional protections help to

¹⁶⁷ Takei, *supra* note 36.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Takei, *supra* note 36.

¹⁷³ James Kilgore, *The First Step Act Opens the Door to Digital Incarceration*, TRUTHOUT (Dec. 18, 2018), <https://truthout.org/articles/the-first-step-act-opens-the-door-to-digital-incarceration/>.

¹⁷⁴ Section 504 of the 1973 Rehabilitation Act states: No otherwise qualified individual with a disability . . . shall, solely by reason of their disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial

656 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 3]

ground the different legal arguments and criticisms of the First Step Act that elderly people behind bars and others can present in response. Section 504 [of the Rehabilitation Act] and 29 U.S.C. Section 794(a) provide civil rights and legal protections for people behind bars in federal prisons.¹⁷⁵ The Rehabilitation Act was created to apply to federal executive agencies, including the BOP and other programs that receive federal funding, such as the BOP and its network of prisons.¹⁷⁶ While the Americans with Disabilities Act (“ADA”) was created to regulate state and local government programs, even for those that do not receive federal funding, the ADA generally does not apply to federal prisons.¹⁷⁷ However, courts have analyzed and used cases to interpret the laws the same way and mandated reasonable accommodations to support people behind bars with disabilities.¹⁷⁸

For lawsuits under the Rehabilitation Act, people behind bars with disabilities must show that they have a disability, “qualified” to participate in a program and that they are excluded from, not allowed to benefit from, or subjected to discrimination in the program based on their disability.¹⁷⁹ Furthermore, under the Rehabilitation Act, people behind bars must show that the prison receives federal funding.¹⁸⁰ Courts have relied on factual evidence to demonstrate that people behind bars with disabilities are qualified individuals.¹⁸¹ Also, people behind bars are “qualified” to participate in a program under the Rehabilitation Act if they meet the program requirements.¹⁸² People behind bars with disabilities have sued to get equal access to facilities, programs, and services and challenged inadequate medical care and prison officials’ failure to provide them with medical supplies or devices such as wheelchairs or canes.¹⁸³

assistance or under any program or activity conducted by any [Federal] Executive agency. Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2012). Accordingly, Section 504 guarantees that anyone qualified to participate in a program, service, or activity will have meaningful access to it when it is offered by a state or local recipient of federal funds.

¹⁷⁵ Section 504 of the Rehabilitation Act creates protections against disability discrimination in programs receiving federal financial assistance. *COKER*, *supra* note 57, at 33. *See also* School Board of Nassau County v. Arline, 480 U.S. 273, 278 (1987).

¹⁷⁶ *Know Your Rights: Legal Rights of Disabled Prisoners*, ACLU NATIONAL PRISON PROJECT (2005), http://www.aclu.org/images/asset_upload_file735_25737.pdf.

¹⁷⁷ Thomas R. Kane, *Reasonable Accommodation Program*, U.S. DEP’T OF JUSTICE FEDERAL BUREAU OF PRISONS (2016), <https://www.bop.gov/policy/progstat/3720.03.pdf>.

¹⁷⁸ *Id.*

¹⁷⁹ 29 U.S.C. § 794(a) (2012).

¹⁸⁰ *Id.*

¹⁸¹ *See, e.g.*, *Lue v. Moore*, 43 F.3d 1203, 1205, 1206 (8th Cir. 1994) (blind inmate denied access to vocational training programs may bring claim for damages and affirmative relief).

¹⁸² *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979) (“An otherwise qualified person is one who is able to meet all a program’s requirements in spite of [their] handicap.”)

¹⁸³ *Saunders v. Horn*, 960 F. Supp. 93 (E.D. Pa. 1997) (failing to provide orthopedic shoes and cane).

2020]

NOT FAR ENOUGH

657

Federal prisons, however, are not required to provide accommodations that impose “undue financial and administrative burdens” or require “a fundamental alteration in the nature of [the] program.”¹⁸⁴ They are also allowed to discriminate if the people behind bars with disabilities’ participation would pose “significant health and safety risks” or a “direct threat” to others.¹⁸⁵ Finally, some courts have found that prisons can discriminate against people with disabilities behind bars as long as the discriminatory policies serve “legitimate penological interests.”¹⁸⁶

Nevertheless, federal prisons are allowed to and should be required to move qualified people behind bars out of prison under its “integration mandate”¹⁸⁷ that posits that “a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”¹⁸⁸ Since prisons and the correctional setting are fundamentally *non-integrative* to the unique needs and vulnerabilities of many elderly people behind bars, this mandate can justify early release to provide them with a more integrated setting outside of the prison walls.

One of the reasons why prisons are non-integrative is because of the lack of health care and treatment.¹⁸⁹ Incarcerated men and women have a constitutional right to health care. When prisons fail to provide adequate medical care to people behind bars, prison officials can be held responsible for violating the Eighth Amendment’s cruel and unusual punishment provisions.¹⁹⁰ The BOP and its prisons must also provide the same level of medical treatment that is available to people in society and failure to provide such standard of care constitutes a violation of the Eighth Amendment.¹⁹¹

Under *Estelle v. Gamble*,¹⁹² a person behind bars filed a pro se complaint against various prison officials under 42 U.S.C. § 1983 against the

¹⁸⁴ *Southeastern Community College*, 442 U.S. at 406.

¹⁸⁵ *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987) (holding that a person who poses a significant risk to others is not “otherwise qualified” for the activity, establishing a four-part test for determining whether contagious disease constitutes such a risk).

¹⁸⁶ *Gates v. Rowland*, 39 F. 3d 1439, 1439, 1446–47 (9th Cir. 1994) (upholding discriminatory policy on security grounds on unsubstantiated fears of other prisoners); *cf. Yeskey v. Penn. Dep’t of Corrections*, 118 F. 3d 168, 174–75 (3rd Cir. 1997) (prohibiting exclusion of people with disabilities from government programs).

¹⁸⁷ Accordingly, prisons must ensure that people in prison are housed in the most integrated setting appropriate to their needs, cannot place them in inappropriate security classifications because no accessible cells or treatment, and cannot place them in facilities that do not offer the same programs as facilities where they would otherwise be housed.

¹⁸⁸ 28 CFR § 35.130(d) (2016).

¹⁸⁹ *See supra* Part I(D).

¹⁹⁰ *Ritvo*, *supra* note 65.

¹⁹¹ *Id.*

¹⁹² *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

658 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 3]

state corrections department medical director and two correctional officials claiming that they were subject to a cruel and unusual punishment for inadequate treatment of a back injury allegedly sustained while they engaged in prison work. On behalf of the Court, Justice Marshall stated that the Eighth Amendment proscribes more than “physically barbarous punishments,” but embodies specifically “broad and idealistic concepts of dignity, civilized standards, humanity, and decency.”¹⁹³ In addressing the prison system, the Court discouraged repugnant practices that are “incompatible with ‘the evolving standards of decency that mark the progress of a maturing society.’”¹⁹⁴ Accordingly, the Court concluded the government is obligated to “provide medical care to those whom it is punishing by incarceration” as the person behind bars “must rely on prison authorities to treat [their] medical needs.”¹⁹⁵ Failure to provide adequate treatment to a person behind bars may “produce ‘torture or a lingering death’” which is pain and suffering that would serve no “penological purpose.”¹⁹⁶ Furthermore, the Court reasoned that the infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation and that the public is required to care for the person behind bars and cannot deprive him or her of liberty and care.¹⁹⁷ As such, *Estelle* established a constitutional right to healthcare for people behind bars.¹⁹⁸

Furthermore, in *Brown v. D.C.*,¹⁹⁹ the Court of Appeals in Washington, D.C. held that prison guards or other non-medical officials may not intentionally deny or delay a person behind bar’s access to treatment. In *Brown*, the person behind bars stated a claim for the violation of their Eighth Amendment rights through “deliberate indifference” to their serious medical needs.²⁰⁰ While they entered the prison in good health, over the next five years their health had deteriorated. Even after they reported their symptoms to the prison’s medical personnel, they were repeatedly refused treatment or

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Estelle*, 429 U.S. at 102.

¹⁹⁸ Cartwright, *supra* note 30. See also Steve Coll, *The Jail Health-Care Crisis*, THE NEW YORKER (Mar. 4, 2019), <https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis>. The decision in *Estelle* was handed down just as the American Medical Association was leading a drive to reform health care for the incarcerated. It conducted a survey of conditions in hundreds of jails, which reported dilapidated and ill-equipped facilities, a lack of emergency medical equipment, such as first-aid kits. Yet, the standard of care set by *Estelle* was established by the standard of “deliberate indifference” to demonstrate a constitutional violation. See also *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (must show that the prison officials showed deliberate indifference to have a constitutional challenge under the Eighth Amendment).

¹⁹⁹ *Brown v. D.C.*, 514 F.3d 1279, 1281 (D.C. Cir. 2008).

²⁰⁰ *Id.*

2020]

NOT FAR ENOUGH

659

wrongfully diagnosed. Although several medical personnel ordered their transfer to a hospital, prison officials refused and instead transferred him to another prison. Here, the court concluded that their Eighth Amendment rights were violated because they were subjected to “unnecessary and wanton infliction of pain out of deliberate indifference . . . to [their] serious medical needs” which should have been adequately addressed by the prison officials by transferring him to a hospital for genuine medical care.²⁰¹ Accordingly, keeping elderly people behind bars for a prolonged period in a non-integrative setting that extends what is necessary should also be perceived as “cruel and unusual punishment.”²⁰²

Although less impactful, the Fourth Amendment also has the potential of being raised in constitutional challenges outside of prisons. With community supervision by home confinement, people are released back into their homes to serve the remainder of their sentence and they are required to be supervised and subjected to electronic surveillance and monitoring.²⁰³ Although constitutional protections are usually limited against searches as they have fewer expectations of privacy, future challenges can question whether there should be warrantless searches inside the homes and a person released from prison without probable cause.²⁰⁴

Under this background, this puts into perspective the climate in criminal justice and prison reform that predated the First Step Act. However, as detailed in the next part, the First Step Act is a clear embodiment of principles of rehabilitation, attempts to address compassionate and early release for elderly people behind bars, and increased use of community supervision in home confinement and halfway houses. The next part will cover not only the First Step Act but also the varying criticisms of its shortcomings and failures.

²⁰¹ *Id.*

²⁰² *Old Behind Bars: The Aging Prison Population in the United States*, *supra* note 41. “Disproportionately lengthy prison terms may violate the prohibition on cruel and inhuman punishment. They may also constitute arbitrary deprivations of liberty in violation of the right to liberty. In either case, they are inconsistent with respect for human dignity.”

²⁰³ *See infra* Part III(E).

²⁰⁴ *Takei*, *supra* note 36. *See also* *Samson v. California*, 547 U.S. 843, 857 (2006) (upholding police officer’s warrantless search of parolee) and *United States v. King*, 736 F.3d 805, 810 (9th Cir. 2013) (upholding warrantless searches into supervision conditions). Similarly, there is no reasonable expectation of privacy in prison cells that is afforded to people behind bars. *Hudson v. Palmer*, 468 U.S. 517 (1984) (no inmate had no reasonable expectation of privacy in their prison cell entitling them to protection of Fourth Amendment).

III. ANALYZING THE FIRST STEP ACT OF 2018

In 2018, a desperate letter helped to rekindle a spirited decades-long national discourse calling for prison reform in the United States.²⁰⁵ Alice Marie Johnson, a 63 years of age African-American great-grandmother imprisoned with a life sentence without a possibility of parole for nonviolent federal drug crimes,²⁰⁶ wrote to her judge in a plea of clemency: “I am closer to heaven than to [E]arth. I’m a broken woman. More time in prison cannot accomplish more justice.”²⁰⁷ After more than 21 years incarcerated in Aliceville,²⁰⁸ President Donald Trump commuted her sentence.²⁰⁹ Released on parole, Johnson’s clemency²¹⁰ led to surprising bipartisan support for

²⁰⁵ Gregory Korte, *Trump Grants Clemency to Grandma Whose Case was Championed by Kim Kardashian West*, USA TODAY (June 6, 2018), <https://www.usatoday.com/story/news/politics/2018/06/06/kim-kardashian-convinces-trump-grant-clemency-alice-marie-johnson/657511002/>. Since the late 1960s, there has been a national call from government commissions and national organizations alike to urge for large-scale reform of the nation’s crime control policies, law enforcement practices, and penal institutions. Craig Haney, *Politicizing Crime and Punishment: Redefining “Justice” to Fight the “War on Prisoners,”* 114 W. VA. L. REV. 378 (2012).

²⁰⁶ In Johnson’s Executive Grant of Clemency, she was convicted on March 21, 1997 on indictment for violations of 18 U.S.C. § 1956 (2016) (laundering of monetary instruments) (a) and (h), 21 U.S.C. § 841 (2018) (prohibiting manufacturing, distributing, or dispensing, or possessing with intent to manufacture, distribute, or dispense, a controlled substance or counterfeit substance) and 21 U.S.C. § 846 (2018) (attempt and conspiracy); 31 U.S.C. § 5324(a) (2004) (structuring transactions to evade reporting requirements prohibited) for a total sentence of life imprisonment and five years of supervised release. U.S. DEP’T OF JUSTICE, WARRANT COMMUTATION OF ALICE JOHNSON, <https://www.justice.gov/pardon/page/file/1068926/download>.

²⁰⁷ Korte, *supra* note 205.

²⁰⁸ Aliceville is a federal correctional institution managed by the Bureau of Prisons and located in Aliceville, Alabama. *FCI Aliceville*, FEDERAL BUREAU OF PRISONS, <https://www.bop.gov/locations/institutions/ali/> (last visited Jan. 16, 2019).

²⁰⁹ *Commutation*, BLACK’S LAW DICTIONARY (2nd ed. 1910). Black’s Law Dictionary defines commutation as: “The substitution of one punishment for another, after conviction of the party subject to it. The change of a punishment from a greater to a less; as from hanging to imprisonment.” For example, while Trump commuted Johnson’s sentence, this act allowed them to leave prison and be promptly released. Yet, Johnson is still conditionally subject to a term of supervised release, which remained part of their sentence.

²¹⁰ *Clemency*, BLACK’S LAW DICTIONARY (2nd ed. 1910). Black’s Law Dictionary defines clemency as: “Governor’s or president’s power to pardon a person convicted of a criminal offense or to commute the related sentence.” In addition to Johnson’s clemency, which was to commute the drug-related sentence, Trump also commuted a “few high-profile cases brought to [them] by associates and allies.” Peter Baker, *Alice Marie Johnson is Granted Clemency by Trump after Push by Kim Kardashian West*, N.Y. TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/us/politics/trump-alice-johnson-sentence-commuted-kim-kardashian-west.html>. Accordingly, the other two prisoners Trump commuted were Sholom Rubashkin (bank fraud) and Dwight and Steven Hammond (arson on federal land). See Mitch Smith, *President Commutes Sentence of Iowa Meatpacking Executive*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/us/president-trump-iowa-commutation.html> and Eileen Sullivan & Julie Turkewitz, *Trump Pardons Oregon Ranchers Whose Case Inspired Wildlife Refuge Takeover*, N.Y. TIMES (July 10, 2018), <https://www.nytimes.com/2018/07/10/us/politics/trump-pardon-hammond-oregon.html>.

prison reform—the most significant effort by the federal government in years²¹¹—and the passage of the BOP.

While Trump has routinely sported and embraced a “law and order” stance in his presidential campaign²¹² and administration²¹³ in furthering increased penalties and criminalization, their quaint rallying call for the First Step Act to be passed by Congress and placed at their table to be signed to law²¹⁴ appeared to be a complete reversal of their past “tough on crime” position on crime.²¹⁵ Furthermore, the First Step Act’s passage has been controversial amidst an increasingly polarized political climate.²¹⁶ Therefore, it is important amidst the chorus of praise toward this legislative accomplishment that there is a degree of skepticism and a comprehensive review of the First Step Act’s merits, substance and its impact on the system of federal prisons as managed by the BOP.²¹⁷

²¹¹ German Lopez, *The Senate Just Passed Criminal Justice Reform*, VOX (Dec. 19, 2018), <https://www.vox.com/future-perfect/2018/12/18/18140973/first-step-act-criminal-justice-reform-senate-congress>.

²¹² Louis Nelson, Trump: ‘I am the law and order candidate,’ POLITICO (July 11, 2016), <https://www.politico.com/story/2016/07/trump-law-order-candidate-225372>.

²¹³ See Jared Keller, *The Triumph of Trump’s Law and Order Politics*, PACIFIC STANDARD (May 23, 2018) <https://psmag.com/news/the-triumph-of-trumps-law-and-order-politics> (Protect and Serve Act); Eric Lichtblau and Matt Flegenheimer, *Jeff Sessions Confirmed as Attorney General, Capping Bitter Battle*, N.Y. TIMES (Feb. 8, 2017); Charlie Savage, *Trump Will Nominate William Barr as Attorney General*, N.Y. TIMES (Dec. 7, 2018); and German Lopez, *Attorney General Nominee William Barr’s ‘Tough on Crime’ Record, Explained*, VOX (Feb. 14, 2019), <https://www.vox.com/policy-and-politics/2019/1/15/18183573/william-barr-attorney-general-confirmation-vote-mass-incarceration>. Accordingly, nominating Sessions and Barr to serve as the Attorney General, who all adopt “tough on crime” policies, is contradictory to the FSA’s goals. Edward Chung, *Trump Fails the First Test of the First Step Act*, THE HILL (Jan. 10, 2019), <https://thehill.com/opinion/criminal-justice/424612-trump-fails-the-first-test-of-the-first-step-act>.

²¹⁴ “Today, I am thrilled to announce my support for this bipartisan bill that will make our communities safer and give former inmates a second chance at life after they have served their time. . . . I’m waiting. I’ll be waiting with a pen and we will have done something that hasn’t been done in many, many years, and it’s the right thing to do.” Maegan Vazquez, Liz Stark & Jeremy Diamond, *Trump Announces Support for Bipartisan Prison Reform*, CNN (Nov. 14, 2018), <https://www.cnn.com/2018/11/14/politics/trump-prison-reform/index.html>.

²¹⁵ See, e.g., Ayesha Rascoe, *How Trump Went From ‘Tough on Crime’ to ‘Second Chance’ for Felons*, NPR (Dec. 17, 2018), <https://www.npr.org/2018/12/17/676771335/how-trump-went-from-tough-on-crime-to-second-chance-for-felons>.

²¹⁶ See Zak Cheney-Rice, *The First Step Act Deserves Your Skepticism*, N.Y. MAG. (Dec. 20, 2018), <http://nymag.com/intelligencer/2018/12/first-step-act-skepticism.html>.

²¹⁷ *Historical Information*, FEDERAL BUREAU OF PRISONS, <https://www.bop.gov/about/history/> (last visited Jan. 16, 2019). Pursuant to Pub. L. No. 71-218, 46 Stat. 325 (1930), the BOP was established within the DOJ and charged with the “management and regulation of all Federal penal and correctional institutions.” See also Eric Boehm, *Spending Bill Ignores Promised Funding for Major Criminal Justice Reform Passed Last Year*, REASON (Feb. 14, 2019). Even after the FSA was passed in 2018, Congress failed to include funding into its budget bill early in 2019 that would have provided financial support for reentry programs and job training, which puts into question the level of commitment from the government for criminal justice reform.

A. The Risk and Needs Assessment System

By late July 2019, within 210 days after the First Step Act became law, the Attorney General was required to develop a Risks and Needs Assessment System (“RNAS”) to assess the individual risk that a person behind bars will recidivate and identify the programs which will address the needs of the person to reduce their recidivism risk. Accordingly, on July 19, 2019, the DOJ unveiled the new tool, which was announced as the Prisoner Assessment Tool Targeting Estimated Risk and Needs (“PATTERN”).²¹⁸ As the DOJ described, PATTERN is modeled specifically for the federal prison population and aims to achieve “a higher level of predictability and surpasses what is commonly found for risk assessment tools for correctional populations in the [United States].”²¹⁹

After the Attorney General developed the assessment, the BOP was required, by late January 2020, to implement the assessment and complete the initial intake assessment of all federal people behind bars, including those imprisoned before the First Step Act’s effective date, regardless of their length of incarceration. Accordingly, the assessment produces an individualized measurement of each person as having minimum, low, medium, or high risk for recidivism,²²⁰ assesses and determines the risk of violent or serious misconduct of each person behind bars,²²¹ and reassesses the recidivism risk of each person periodically and consistently.²²² Based on the assessment and the subsequently collected data, the BOP staff decides which evidence-based recidivism reduction, rehabilitative program(s) individual people behind bars must participate in during their imprisonment

²¹⁸ United States Department of Justice, Office of Public Affairs, *Department Of Justice Announces the Release of 3,100 Inmates Under First Step Act, Publishes Risk And Needs Assessment System* (Jul. 19, 2019), <https://www.justice.gov/opa/pr/department-justice-announces-release-3100-inmates-under-first-step-act-publishes-risk-and>. By the time this Note has published, the DOJ will have continued to make changes to PATTERN. For example, to increase its “high-level of predictability,” changes include adding a dynamic measure of offender’s “infraction free” period during their current term of incarceration; modifying programming measures by adding psychology treatment programs (Bureau Rehabilitation and Values Enhancement Program (BRAVE), Challenge, Skills Program, Sex Offender Treatment (both residential and non-residential), Steps Toward Awareness, Growth, and Emotional Strength Program (STAGES), and Step Down programs), the faith-based Life Connections Program (LCP), and the BOP’s Drug Education program, to the “Number of programs completed (any)” measure and combine technical/vocational and Federal Prison Industries (UNICOR) into a new work programming measure; and removing Age of first arrest/conviction and voluntary surrender.

²¹⁹ *Id.*

²²⁰ 18 U.S.C. § 3632(a)(1) (2018).

²²¹ 18 U.S.C. § 3632(a)(2) (2018).

²²² 18 U.S.C. § 3632(a)(4) (2018). Based on factors including indicators of progress, and of regression, that are dynamic and that can reasonably be expected to change with in prison. However, 18 U.S.C. § 3632(d)(5) specifies that a prisoner determined to be at a medium or high risk of recidivating and who has less than five years until their projected release date shall receive more frequent risk reassessments.

2020]

NOT FAR ENOUGH

663

based on their criminogenic needs,²²³ tailor and expand programs and productive activities offered, add new programs and activities, and start to implement other risk and needs assessment tools necessary to reduce recidivism. As of January 15, 2020, all people behind bars have received an initial assessment using PATTERN and will be subsequently assigned to participate in “evidence-based recidivism reduction programs and productive activities based on an initial needs assessment conducted by BOP.”²²⁴

The First Step Act stipulates that two years after RNAS’ implementation, no later than January 2022, the Comptroller General is required to conduct a Government Accountability Office (“GAO”) report to audit the assessment and deliver on a degree of governmental oversight and accountability to ensure the program is “fair and effective.”²²⁵ When this report is conducted and published, it will provide valuable insight on the successes and failings of the RNAS’ implementation.

At first blush, the First Step Act will help elderly people behind bars. They are more likely to be classified as low or minimal risk of recidivism and should be able to use their credits, which are especially beneficial if already collected and applied retroactively, to exchange for the rest of their sentence to be in “post-confinement” supervised release either in home confinement or halfway house. However, evidence-based models for the assessment and implementation of the program are also concerning as such models rely on manufactured algorithms that are used to calculate risk amounts that perpetuate racial profiling and discrimination.²²⁶ Such models are also

²²³ 18 U.S.C. §§ 3632(a)(3), (b) (2018).

²²⁴ United States Department of Justice, Office of Public Affairs, *Department of Justice Announces Enhancements to the Risk Assessment System and Updates on First Step Act Implementation* (Jan. 15, 2020), <https://www.justice.gov/opa/pr/departments-justice-announces-enhancements-risk-assessment-system-and-updates-first-step-act>.

²²⁵ Section 103 discusses the GAO report’s requirements. The Comptroller General’s audit includes: (1) Whether inmates are being assessed under the risk and needs assessment system with the frequency required under such Section 3621 of Title 18, U.S.C.; (2) Whether the BOP is able to offer recidivism reduction programs and productive activities (as such terms in § 3635 of Title 18, U.S.C., as added by Section 101(a) of this Act); (3) Whether the BOP is offering the type, amount, and intensity of recidivism reduction programs and productive activities for prisoners to earn the maximum amount of time credits for which they are eligible; (4) Whether the Attorney General is carrying out the duties under § 3631(b) of Title 18, U.S.C., as added by Section 101(a) of this Act; (5) Whether officers and employees of the BOP are receiving the training described in § 3632(f) of Title 18, U.S.C., as added by Section 101(a) of this Act; (6) Whether the BOP offer work assignments to all prisoners who might benefit from such an assignment; (7) Whether the BOP transfers prisoners to prerelease custody or supervised release as soon as they are eligible for such a transfer under § 3624(g) of Title 18, U.S.C., as added by Section 102(b) of this Act; (8) The rates of recidivism among similarly classified prisoners to identify any unwarranted disparities, including disparities among similarly classified prisoners of different demographic groups, in such rates.

²²⁶ While evidence-based models have garnered increased attention in the past couple of years, especially in the criminal justice system, the use of mathematical modelling and indicators can convey a spurious and superficial impression of each prisoner and when they are successfully rehabilitated enough

dehumanizing because each person behind bars is assessed to establish and categorize him or her into a risk level; these levels are used to require care to help them lower the prescribed level so that it is low enough to justify their release.

This provision also misses an opportunity to address the fundamental nature of the prison system and the correctional setting. Even if the prison system moves *some* eligible elderly people behind bars and others out of prison, the non-integrative environment inside prisons will still exist. People also continue to be forced to participate in rehabilitative programs to justify their release when they are determined as rehabilitated. It remains to be seen whether these required rehabilitative programs can accommodate people behind bars with disabilities to allow full participation. Nonetheless, the assessment continues to perpetuate rehabilitation as a standard for release.

PATTERN also provides a suspect formula in their recidivism calculations. To assign a “recidivism risk score” to each person, the tool considers “dynamic” factors, which include the participation in education and drug treatment programs, but weighs them against “static risk factors,” such as age and crime of conviction, that can never be changed and permanently held against incarcerated people no matter how long they have served their sentence.²²⁷ Risk assessments that heavily rely on these static factors, such as criminal history, family members’ criminal history, and the community in which a person lived before entering the criminal justice system, are flawed. These factors open the doors to target communities of color, which are heavily and over-policed across the nation and that a person’s criminal history will likely result in bias against persons of color.²²⁸ Moreover, dynamic factors, such as work history, family ties, and pro-social networks, are difficult for people behind bars in prisons to change.²²⁹ Therefore, the First Step Act will and has resulted in a large number of people in prison

for release. Risk-assessment tools are exogenous to the theories of punishment and problematic because they include characteristics that are prohibited by constitutional and statutory law, subject the individual to punishment for characteristics over which the individual has no meaningful control, and presume that the individual is a static entity predisposed. Dawinder Sidhu, *Moneyball Sentencing*, 56 B.C.L. REV. 671 (2015), <https://lawdigitalcommons.bc.edu/bclr/vol156/iss2/6/>. See also Carla Schultz, *Prison Privatization: Driving Influences and Performance Evaluation*, 3 THEMIS 92 (2015), <http://scholarworks.sjsu.edu/themis/vol3/iss1/5> (arguing that measurements by recidivism only support a market for prison privatization, United States conservatism and neoliberalism).

²²⁷ See Emily Tiry & Julie Samuels, *How Can the First Step Act’s Risk Assessment Tool Lead to Early Release from Federal Prison?* THE URBAN INSTITUTE (Sept. 5, 2019), <https://www.urban.org/urban-wire/how-can-first-step-acts-risk-assessment-tool-lead-early-release-federal-prison>. The Urban Institute created an interactive tool that helps to visualize how each risk factor either increases or decreases a person’s risk score. The tool could be found at: <https://apps.urban.org/features/risk-assessment/>.

²²⁸ The Leadership Conference on Civil & Human Rights, *Vote “No” on The FIRST STEP Act* (May 8, 2018), <https://civilrights.org/resource/vote-no-first-step-act/>.

²²⁹ *Id.*

2020]

NOT FAR ENOUGH

665

unable to earn early release credits from programming by decreasing their risk category. Instead, rehabilitative programs in prison should use a needs-based assessment to identify the criminogenic needs of each individual and develop a program of interventions to address those needs to lower the individual's risk of recidivating.

As the Leadership Conference on Civil and Human Rights argued, in a letter to U.S. House of Representatives Judiciary Committee members, relying on a risk assessment tool may amplify gender, racial, and socioeconomic bias and disparities and perpetuate other injustices in the criminal justice system.²³⁰ PATTERN is also gender-specific, and the tool begins with merely a binary selection of only either male or female.²³¹ This completely neglects all other non-conforming gender types and inherently discriminatory with different risk scores. Studies have also shown that these tools can produce results that are heavily biased against minorities and have a disparate negative impact on African Americans.²³² Accordingly, both static and dynamic factors tend to correlate with socioeconomic class and race, and studies show that African Americans are more likely to be misclassified as high risk than other groups.²³³

Finally, there must be more guidance to review and provide a check on the Attorney General in the development of the assessment. The First Step Act stipulates that the Attorney General will be guided by an independent review committee with a non-partisan and non-profit organization with an "expertise in the study and development of risk and needs assessment tools" as selected by the National Institute of Justice.²³⁴ Yet, this committee unjustly excludes community-based criminal justice and prison reform advocates and organizations, and also the very people behind bars who are most directly impacted by the First Step Act.²³⁵ Having a fairly balanced committee is even more important given that the new Attorney General is William Barr who has supported mass incarceration and tough-on-crime policies.²³⁶ The GAO report to audit the assessment is also susceptible to failure because the report

²³⁰ *Id.*

²³¹ See *Prisoner Assessment Tool Targeting Estimated Risk and Needs (PATTERN) Interactive Tool*, THE URBAN INSTITUTE (Sept. 4, 2019), <https://apps.urban.org/features/risk-assessment/>.

²³² The Leadership Conference on Civil & Human Rights, *supra* note 228.

²³³ *Id.*

²³⁴ First Step Act, Pub. L. No. 115-391 § 107 (2018).

²³⁵ 18 U.S.C. § 3632(a) (2018). See also The Committee, First Step Act Independent Review Committee, <https://firststepact-irc.org/about/>.

²³⁶ Lara Yeretsian, *Barr Could Steer First Step Act Off Course*, LAW 360 (Jan. 27, 2019), <https://www.law360.com/articles/1122358/barr-could-steer-first-step-act-off-course>. Barr has a history of supporting mass incarceration and tough-on-crime policies. As Deputy Attorney General and Attorney General from 1990 to 1993, they helped implement the Crime Control Act of 1990, which escalated the war on drugs, and they supported the DOJ report "The Case for More Incarceration."

only reports to Congress who would determine how and if they should respond; there remains no accountability should the assessment fail to be implemented or do not produce desired results and positive improvements to the criminal justice and prison system.

B. Good Time Credits

The First Step Act also provides a new and retroactive calculation for good time credits, which people behind bars in federal prisons can earn, which helps to reduce prison time for good behavior. First, instead of the previously imposed 47 days,²³⁷ they can now receive up to 54 days of good time credit per year for “following prison rules,” and successfully participating in rehabilitative programs,²³⁸ which can reduce sentences by months, depending on the time needed to serve.²³⁹ Second, the system of earning credits aims to provide several other incentives. For example, credits can be exchanged for 10 days in pre-release custody for every 30 days of successful participation with no maximum capacity on credits that can be earned. Other incentives include longer visitation hours (as determined by the prison’s warden),²⁴⁰ non-discretionary increased phone privileges (or, if available, video-conferencing privileges for up to 30 minutes per day, and up to 510 minutes per month),²⁴¹ consideration for transfer to an institution closer to the person behind bars’ release residence²⁴² or other preferred housing units such as different prison facilities,²⁴³ and extended opportunities to access e-mails,²⁴⁴ increased commissary spending limits and product offerings,²⁴⁵ and other incentives solicited from people behind bars and

²³⁷ Gina Martinez, *The Bipartisan Criminal-Justice Bill Will Affect Thousands of Prisoners. Here’s How Their Lives Will Change*, TIME (Dec. 20, 2018), <http://time.com/5483066/congress-passes-bipartisan-criminal-just/>. Deegan-McCree, a policy associate from Cut50, a prison reform advocacy group that worked to get the FSA passed, said that the “good time credit” amendment in the Act was added to adjust the amount of credit prisoners get: “What happens if that this was not calculated correctly and people were actually getting 47 days of good time credit. So what this Act does is that it fixes that and gives people the appropriate amount of time that people were supposed to get in the first place.”

²³⁸ While the BOP can also reduce rewards and incentives that prisoners can earn under the FSA, the BOP is required to provide written notice to the prisoner of any reduction that includes the loss of time credits and cannot punish to take away any future time credits earned.

²³⁹ Alternatively, good time can, at any time, be taken away from prisoners if they have an infraction while inside a facility.

²⁴⁰ 18 U.S.C. § 3632(d)(1)(B) (2018).

²⁴¹ 18 U.S.C. § 3632(d)(1)(A) (2018).

²⁴² 18 U.S.C. § 3632(d)(2) (2018).

²⁴³ 18 U.S.C. § 3632(d)(3)(C) (2018).

²⁴⁴ 18 U.S.C. § 3632(d)(3)(B) (2018).

²⁴⁵ 18 U.S.C. § 3632(d)(3)(A) (2018).

2020]

NOT FAR ENOUGH

667

determined appropriate by the Director of the BOP.²⁴⁶ Furthermore, people behind bars, who the BOP determines to qualify under “minimum” or “low risk” for recidivating and have not increased their risk over two consecutive assessments, will earn an additional five days of time credit for every 30 days of successful program participation.

Only after two years of non-infraction, and if classified as low or minimal risk, a person behind bars will have the opportunity to exchange their credits to serve the rest of their sentence in home confinement or a halfway house. Accordingly, the First Step Act allows for credits to apply towards supervised release either in home confinement or halfway house, as alternatives to being incarcerated inside of the prison. Since the First Step Act retroactively applies, people behind bars in federal prisons, who have already accumulated earned credit for good behavior in the past, will allow some people to leave prison upon its passage into law.²⁴⁷

Good time credits are intrinsically limited and require caution. Many people behind bars in federal prisons are improperly excluded²⁴⁸ from earning credits and subject to another layer of discriminatory punishment if they cannot benefit from the incentives that other people behind bars can benefit from. The First Step Act comes with so many exemptions, including provisions that prevent immigrants from benefiting.²⁴⁹ The exclusions in the law will disproportionately affect racial minorities since the majority of people held in federal prison for immigration and drug offenses are people of color—and because of the system of segregation and racism within the prisons.²⁵⁰

The credits do not essentially reduce a person’s sentence, because they can only be exchanged for an increased amount of time a person behind bars can spend in pre-release custody or further institutionalization by supervised release in home confinement or halfway house. Under the requirements of supervised release, even by using their credits for early release, they are still restricted in their liberty and independence because they are required to

²⁴⁶ 18 U.S.C. § 3632(d)(3)(D) (2018).

²⁴⁷ Julieta Martinelli, *Released From Prison Again, After Criminal Justice Reform Became Law*, NPR (Jan. 3, 2019), <https://www.npr.org/2019/01/03/681979139/released-from-prison-again-after-criminal-justice-reform-became-law>. See also Chris Mills Rodrigo, *Trump Signs Criminal Justice Overhaul*, THE HILL (Dec. 21, 2018), <https://thehill.com/homenews/administration/422517-trump-signs-criminal-justice-reform-bill>.

²⁴⁸ Federal prisoners excluded from earning good time credits include those convicted of manufacturing or distributing drugs, with death or serious bodily injury resulting from drug use, Armed Career Criminal Act, assault with intent to commit murder, influencing, impeding, retaliating against a federal officer by injuring a family member, except for a threat, biological weapons, chemical weapons, assassinations, kidnapping, or assault of a congressional, cabinet, or Supreme Court member, etc.

²⁴⁹ Joan Parkin, *Is First Step a Step Forward?* SOCIALIST WORKER.ORG (Feb. 25, 2019), <https://socialistworker.org/2019/02/25/is-first-step-a-step-forward>.

²⁵⁰ *Id.*

report to their supervisor regularly or be at risk of being reincarcerated back into prison with another sentence for violating the terms of their release.

C. Compassionate Release and the Reauthorization of the Early Release Pilot Program from Second Chance Act of 2007

The First Step Act broadens the opportunity for elderly people behind bars and the terminally ill to apply for compassionate release.²⁵¹ The two biggest limitations to compassionate release before the First Step Act was that only the BOP could bring a motion seeking compassionate release; if the BOP did not want to bring a motion for compassionate release, even if the person behind bars met the criteria, there was nothing that the person applying for compassionate release could do to have their request reviewed by a court.²⁵² While compassionate release was typically a long and arduous process that has led to the early release for only a minimal number of federal people behind bars, the First Step Act provides several key reforms to make it more transparent, accountable, and expedient.

First, the First Step Act allows a person behind bars to petition the court to expedite compassionate release, a reduction of the term of imprisonment.²⁵³ The person behind bars submits a motion, after exhausting all their administrative rights, to appeal the BOP's failure to bring a motion on the person behind bars' behalf for compassionate release.²⁵⁴ On the alternative, a court can also expedite a reduction after 30 days of a person behind bars' request to the warden for release after the warden fails to act on it.²⁵⁵ This allows the person behind bars to bring a motion for compassionate release that is less reliant on the BOP. Second, the First Step Act also provides additional support to people behind bars with a terminal illness. With a diagnosis of a terminal illness, the BOP is required to provide notice to the person behind bars' lawyer, partner, and family members about the terminal illness;²⁵⁶ an opportunity for an in-person visit;²⁵⁷ BOP staff are also

²⁵¹ First Step Act, Pub. L. No. 115-391 § 603(b) (2018).

²⁵² Brandon Sample, *First Step Act: A Comprehensive Analysis*, SENTENCING.NET (Dec. 19, 2018), <https://sentencing.net/legislation/first-step-act>.

²⁵³ 18 U.S.C. § 3582 (2018).

²⁵⁴ 18 U.S.C. § 603(b)(1) (2017). While this gives some power to a prisoner to move their motion for compassionate release forward, the Director of the BOP is still required to review the request for compassionate release, as subjected to a multi-leveled review process, retaining significant influence in whether a prisoner is ultimately eligible for a sentence reduction. See 18 U.S.C. § 3582(c)(1)(A) (2018).

²⁵⁵ First Step Act, Pub. L. No. 115-391 § 603(b)(1) (2018).

²⁵⁶ First Step Act, Pub. L. No. 115-391 § 603(b)(3)(2)(A)(i) (2018).

²⁵⁷ First Step Act, Pub. L. No. 115-391 § 603(b)(3)(2)(A)(ii) (2018).

2020]

NOT FAR ENOUGH

669

required, upon request, to help the person behind bars with the preparation, drafting, and submission of a request for a sentence reduction,²⁵⁸ and then help to expedite the request once completed for compassionate release.²⁵⁹ More information is also provided about compassionate release,²⁶⁰ as well as annual data reporting,²⁶¹ to ensure compliance with the increased use and transparency and numbers of compassionate release requests granted. However, the First Step Act does not change the statutory standard for receiving a compassionate release, which can continue to exclude important populations of eligible people.

Until 2023, the First Step Act is scheduled to reauthorize the elderly home detention program and expand its eligibility criteria to offer the opportunity of early release for eligible terminally ill offenders in addition to elderly offenders.²⁶² With the expansion, the program will be available to all BOP facilities,²⁶³ the age of qualification reduced from 65 years to 60 years of age,²⁶⁴ and only two-third of the sentence must be served by the person behind bars before being eligible for release.²⁶⁵ The First Step Act also eliminated the prior requirement that the person behind bars must have served 10 years or 75 percent of their sentence, whichever is greater.²⁶⁶

The Act also mandates that the Attorney General and the BOP consider other factors in deciding whether a person is eligible for home detention. In addition to age and nature of the offense, determinations also include whether the offender has a history of violence, attempted to escape from a BOP institution, presents a “substantial risk of engaging in criminal conduct or of endangering any person or the public if released to home detention.”²⁶⁷ This

²⁵⁸ First Step Act, Pub. L. No. 115-391 § 603(b)(3)(2)(A)(iii) (2018).

²⁵⁹ First Step Act, Pub. L. No. 115-391 § 603(b)(3)(2)(A)(iv) (2018).

²⁶⁰ First Step Act, Pub. L. No. 115-391 § 603(b)(3)(2)(C) (2018) (BOP facilities [must] regularly and visibly post, including in prisoner handbooks, staff training materials, and facility law libraries and medical and hospice facilities, and make available to prisoners upon demand, notice of compassionate release, how to apply for it and appeal a denial.).

²⁶¹ First Step Act, Pub. L. No. 115-391 § 603(b)(3)(3) (2018).

²⁶² Under the First Step Act, “eligible terminally ill offender” is defined as an offender in the custody of the BOP who is serving a term of imprisonment based on conviction of an offense of offenses that do not include any crime of violence, sex offense, or act of terrorism transcending, espionage, and censorship; and either in need of care at a nursing home, intermediate care facility, or assisted living facility, or diagnosed with a terminal illness. First Step Act, Pub. L. No. 115-391 § 603(a)(5)(B) (2018).

²⁶³ First Step Act, Pub. L. No. 115-391 § 603(a)(1)(B) (2018).

²⁶⁴ First Step Act, Pub. L. No. 115-391 § 603(a)(5)(A)(i) (2018) (striking “65 years of age” and inserting “60 years of age”).

²⁶⁵ First Step Act, Pub. L. No. 115-391 § 603(a)(5)(A)(ii) (2018) (striking “75 percent” and inserting “2/3”).

²⁶⁶ First Step Act, Pub. L. No. 115-391 § 504(b)(1)(B) (2018).

²⁶⁷ *United States v. Tikal*, No. 212CR00362TLNKJN, 2019 WL 3035557, at *4 (E.D. Cal. July 11, 2019).

670 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 3]

emboldens the Attorney General and the BOP with profound latitude to deny requests from eligible elderly offenders.

Additionally, upon meeting all eligibility criteria, the First Step Act will allow terminally ill offenders to also be placed on home confinement for the duration of their sentence.²⁶⁸ Besides, the First Step Act provides \$100 million per year to establish and enhance state and local programs that promote critical reentry services for people returning to the community after incarceration.²⁶⁹

While the changes to compassionate release and early release help to reduce time in prison for elderly people behind bars, as well as reduce untimely deaths while waiting for and delayed by the past process for compassionate release,²⁷⁰ it remains uncertain whether the First Step Act will make any significant improvements. As with the assessments, the responsibility must rest with the oversight committee and other stakeholders, such as congressional appropriators, government watchdogs, and the United States Sentencing Commission, to ensure that the BOP is fulfilling more compassionate release requests following the passage of the First Step Act and the new provisions.²⁷¹ Although the First Step Act purports to expedite the processing of a terminally ill person behind bars' request for a sentence reduction and release, it is unclear whether the request processed would mean a final determination or that a lengthy multi-leveled review is still required. For the terminally ill and elderly, it would be necessary to ensure that compassionate release is given more liberally and without unnecessary delay. Additionally, while the First Step Act requires the BOP to increase the amount of information about how to request for compassionate release, there still may need additional supports required to ensure that people use the new information available.

Compassionate release continues to be very restricted and only granted for extraordinary and compelling reasons,²⁷² 70 years of age and older who have served at least 30 years in prison and other conditions,²⁷³ or terminal illness.²⁷⁴ A compassionate release should also not be normally exclusive to the terminally ill, but also allow for more compassion by having people

²⁶⁸ See generally First Step Act, Pub. L. No. 115-391 § 602 (2018).

²⁶⁹ The Council of State Governments Justice Center Staff, *President Trump Signs First Step Act into Law, Reauthorizing Second Chance Act*, THE COUNCIL OF STATE GOVERNMENTS (Dec. 21, 2018), <https://csgjusticecenter.org/jc/president-trump-signs-first-step-act-into-law-reauthorizing-second-chance-act/>.

²⁷⁰ *The Campaign for Compassionate Release*, FAMM, <https://famm.org/our-work/compassionate-release/campaign-compassionate-release/> (last visited Jan. 17, 2019).

²⁷¹ *Id.*

²⁷² 18 U.S.C. § 3582(c)(1)(A)(i) (2018).

²⁷³ 18 U.S.C. § 3582(c)(1)(A)(ii) (2018).

²⁷⁴ First Step Act, Pub. L. No. 115-391 § 603 (2018).

2020]

NOT FAR ENOUGH

671

behind bars released earlier even without a terminal illness. While early release is more reasonable with its reduction to people behind bars who are 60 years of age with two-third of their sentence remaining before being eligible for release, the requirements could still be lessened. Besides, the program remains a pilot program and not permanent.

D. Sentencing Reform

The First Step Act provides for a series of sentencing reforms, although not retroactive and excludes current people behind bars with the sole exception of the Fair Sentencing Act of 2010. First, the First Step Act makes significant changes to drug sentencing laws and mandatory minimums for repeat offenders in general. The Act adds the terms “serious drug felony” and “serious violent felony” with both definitions requiring that for any prior conviction to be used, the particular person must have received a sentence of more than 12-month imprisonment, which represents a change from current law that applies to all prior convictions where a sentence of 12 months or more could have been imposed for the offense.²⁷⁵ Furthermore, the prior “serious drug felony” definition incorporates a time limitation for penalty enhancements which is important because it will no longer allow massively higher mandatory minimums for offenses where the defendant was released from prison more than 15 years before their current offense. For offenders with one prior qualifying convictions (“serious drug felony” or “serious violent felony”), the mandatory minimum is reduced to 15 years rather than 20 years; for two or more qualifying convictions, the mandatory minimum is reduced to 25 years. Nonetheless, these changes end the “three strikes” laws that have forced mandatory life sentences in the last 30 years. However, the First Step Act broadens how enhancements can be applied as enhanced penalties will not be limited to drug priors and will affect all violent felonies no matter how old.

Second, the First Step Act broadens the existing safety valve²⁷⁶ and expands the point system. The First Step Act changes the safety valve to make relief available to people with limited criminal histories: no more than four total criminal history points, no prior three-point sentences, and no prior two-point “violent” offense.²⁷⁷ These specific changes allow courts to apply safety valve relief to a wider range of offenders who had been previously ineligible because they had more than one criminal history point. Accordingly, federal judges will have more discretion to use their judgment

²⁷⁵ See generally First Step Act, Pub. L. No. 115-391 § 401 (2018).

²⁷⁶ 18 U.S.C. § 3553(f) (2018).

²⁷⁷ First Step Act, Pub. L. No. 115-391 § 402 (2018).

672 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 3]

in providing lower sentences outside of mandatory minimum sentencing guidelines.

Third, the First Step Act resolves an existing ambiguity in 18 U.S.C. Section 924(c)(1)(c) about when to apply enhanced penalties for using a firearm during certain crimes based on a defendant's prior convictions. The Act makes clear that the enhanced mandatory minimums for using a firearm during certain crimes only apply when the qualifying prior conviction was already final at the time of the new offense. While in the past the government obtained higher mandatory minimum penalties based on the ambiguity, the change would not affect people behind bars who have been already detrimentally affected by the unjust sentences.

The First Step Act will make the Fair Sentencing Act of 2010 retroactive and subsequently provide a measure of justice to many long-time incarcerated offenders. This provision helps to alleviate the disparity between how crack-cocaine offenses and powder-cocaine offenses were punished since the difference overwhelmingly punished people of color.²⁷⁸ For previously sentenced people behind bars, they may file a motion seeking to reduce their sentence as if the revised guidelines had been in effect on the day they were originally sentenced.²⁷⁹

Each person behind bars, however, only gets one opportunity to file a motion under the First Step Act, and courts will not entertain any future motion after a complete review of the initial motion was made on the merits.²⁸⁰ Furthermore, courts will maintain flexibility with the provision that included at the end: "Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section."²⁸¹ The First Step Act can also go further to allow federal prosecutors to use discretion to seek lower charges to avoid overly-punitive mandatory minimum laws, which former Attorney General Sessions dismantled during their tenure while they recalibrated resources so that DOJ could focus enforcement efforts on individuals accused of more violent offenses.²⁸² Nonetheless, it is estimated that approximately 3,000 cocaine offenders will have reduced sentences in federal prison.²⁸³

²⁷⁸ First Step Act, Pub. L. No. 115-391 § 404 (2018).

²⁷⁹ First Step Act, Pub. L. No. 115-391 § 404(b) (2018).

²⁸⁰ First Step Act, Pub. L. No. 115-391 § 404(c) (2018).

²⁸¹ First Step Act, Pub. L. No. 115-391 § 404(c) (2018).

²⁸² Rebecca Autrey, *Five Steps for William Barr on Criminal Justice Reform*, BRENNAN CENTER FOR JUSTICE (Feb. 11, 2019), <https://www.brennancenter.org/blog/five-steps-william-barr-criminal-justice-reform>.

²⁸³ See C.J. Ciaramella, *Congress Passes FIRST STEP Act, Sending Criminal Justice Reform to Trump's Desk*, REASON (Dec. 20, 2018), <https://reason.com/blog/2018/12/20/congress-passes-first-step-act-sending-c>.

2020]

NOT FAR ENOUGH

673

E. Community Supervision, Home Confinement, and Halfway Houses

The First Step Act requires the BOP to release people behind bars in federal prisons with lower risk and needs levels into home confinement or halfway houses for the maximum amount of time permitted under law.²⁸⁴ Generally, a person behind bars is released into the community still is required to serve no less than 85 percent of their imposed term of imprisonment.²⁸⁵ By part, community supervision was created under the recognition that prisons are fundamentally isolated, remote by design, and inaccessible to the person behind bar's family and friends. As a solution, the First Step Act helps to address family separation caused by imprisonment. Accordingly, under the Act, the BOP is required to place people behind bars in a facility within 500 driving miles to the person behind bars' primary residence, as close and to the extent practicable.²⁸⁶ This provision helps to remove the burden of families who may need to make long-distance and costly trips, with the hope that the shorter distance will make it more likely that people behind bars will be visited by family members, benefit from additional health benefits, such as from a reduction in social isolation, and make it easier for people behind bars to reintegrate into society after they are released.

Since the First Step Act's enactment, courts have concluded that people behind bars have no constitutional or statutory right and liberty interest to be placed in home confinement or any other particular place.²⁸⁷ Accordingly, the BOP retains a long-standing and unfettered discretion to determine whether a person qualifies for prerelease custody in home confinement.²⁸⁸ The Attorney General and BOP have no actual obligation to release any eligible elderly and/or terminally ill offenders.²⁸⁹ The BOP also maintains significant flexibility and discretion to delay its implementation and enforcement from the availability of beds, coordination of community

²⁸⁴ The FSA amended 18 U.S.C. § 3624(c)(2) to add home confinement for low risk federal prisoners. First Step Act, Pub. L. No. 115-391 § 602 (2018).

²⁸⁵ First Step Act, Pub. L. No. 115-391 § 102(a)(2)(A)(ii) (2018). See also Jason Pye, *Critics are Wrong on First Step Act That can Fix Criminal Justice System*, THE HILL (Oct. 26, 2018), <https://thehill.com/opinion/criminal-justice/413334-critics-are-wrong-on-first-step-act-that-can-fix-criminal-justice>. While the First Step Act might have been critiqued as a "jailbreak," the person released from prison is still required to serve a large majority of their sentence and community release does not remove this obligation.

²⁸⁶ First Step Act, Pub. L. No. 115-391 § 601(1) (2018).

²⁸⁷ *Parsons*, 2019 WL 469913, at *3.

²⁸⁸ *United States v. Caiado*, No. 8:17-CR-561-T-17TGW, 2019 WL 5653810, at *2 (M.D. Fla. Oct. 31, 2019) (citing *Jones v. Woods*, 2019 WL 2754731 (M.D. Ala. June 4, 2019)).

²⁸⁹ If they chose to, they could release not a single person. *United States v. Tikal* (citing 34 U.S.C. § 60541(g)) ("In carrying out a pilot program as described . . . the Attorney General may release some or all eligible elderly offenders and eligible terminally ill offenders from [BOP] to home detention. . . .").

674 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 3

supervision, continued rehabilitative needs, securing a recommendation from the sentencing concern, and other security concerns related to rehabilitation and reintegration back into society.²⁹⁰ As a result, people behind bars who are eligible are still completely at the mercy of prison administrators.

Home confinement and halfway houses represent new forms of incarceration.²⁹¹ If and when the First Step Act is enacted, the increased use and support for community supervision would precipitate a much wider use of “e-carceration,” which advocates the discreet deprivation of liberty through the advent of technology, such as ankle monitors that provide for continuous monitoring, rather than actual independence when released from prison.²⁹² Still limited in freedom, the person behind bars must remain in their residence with some exceptions, such as medical treatment, family, or vocational activities.²⁹³ With surveillance and monitoring, home confinement represents “digital prisons” that imitate the same conditions proffered by a physical correctional setting.²⁹⁴ Accordingly, whether a person is released into the community and kept inside the prison, they experience a similar restriction on their freedom. The First Step Act would also “normalize” monitoring in the community which is an unprecedented technologically-driven invasion of privacy into the homes and communities already devastated by mass incarceration.²⁹⁵ As an extension of incarceration, community supervision allows the criminal justice and prison

²⁹⁰ When Matthew Charles was released from federal prison at 52 years of age after 22 years of incarceration as a repeat offender, they struggled to reflect on their imprisonment: “It’s something I’ve been dreaming about for close to . . . 22 years now, and since I went back. But I’ve just been praying and hoping that this day would come. And it has come. And it’s a remarkable feeling.” Believed to be one of the first person released under the FSA, they were a direct beneficiary of the provisions that provide for a retroactive implementation of a 2010 law that eased mandatory minimum sentences for crack offenses. While the FSA will help some people, for Charles they still need to abide by the rules of good behavior and under a five-year term of supervised release before they are completely free.

²⁹¹ Deanna R. Hoskins, *The FIRST STEP Act Sets Up a Dangerous Future*, THE HILL (Jul. 20, 2018), <https://thehill.com/opinion/criminal-justice/397931-the-first-step-act-sets-up-a-dangerous-future>. Additionally, there is the concern that the First Step Act risks replacing “one form of incarceration with another” by placing more and more people on electronic monitoring. The contracts for such technology can be particularly exploitative since they can rely upon the subjects of such monitoring — disproportionately poor people and communities of color — to pay for the devices themselves. Once private firms have secured contracts to provide such tools, she warns, there is no incentive to reduce their use.

²⁹² See, e.g., Chaz Arnett, *Virtual Shackles: Electronic Surveillance and the Adultification of Juvenile Courts*, 108 J. CRIM. L. & CRIMINOLOGY 399 (2018), <https://scholarlycommons.law.northwestern.edu/jclc/vol108/iss3/1>.

²⁹³ First Step Act, Pub. L. No. 115-391 § 102(a)(2)(A) (2018). Although a prisoner may leave their home, there must be permission from the Director of the BOP.

²⁹⁴ Kilgore, *supra* note 173. “Digital prisons” was used to describe the “new shackles” imposed by electronic monitors.

²⁹⁵ Vivian Nixon, *The Doublethink of the FIRST STEP Act*, THE HILL (Dec. 17, 2018), <https://thehill.com/blogs/congress-blog/judicial/421687-the-doublethink-of-the-first-step-act>.

2020]

NOT FAR ENOUGH

675

system to incarcerate even more people than what is physically possible behind prison walls.²⁹⁶

Halfway houses also represent temporary holding cells to keep people behind bars while they transition out of prison. A recent Rutgers University study concluded that “very little is known about the effectiveness” of halfway houses and that “[r]esearch has not yet suggested an evidence-based residential reentry model for handling the complex problems of special needs groups on the path to reintegration.”²⁹⁷ A recent study of BOP halfway houses concluded that participation in halfway house programs “does not have a more positive influence on offender outcomes,” and that increasing the length of time a person spends in a halfway house has no relationship with positive outcomes. Therefore, halfway houses fail to provide any permanent solution except for continued institutionalization and rehabilitation.

Neither home confinement nor halfway houses are not legitimate solutions for reform. With home confinement, people should be given more liberty and independence, which cannot be met through surveillance and monitoring inside of their home. Rather than halfway houses, there must be more done to ensure that there is supportive housing or other forms of residential housing that provides not only a supportive setting but also a more integrative setting with an atmosphere of normality. There is also an additional array of criticism as halfway houses are significantly reliance on the federal government and a product of contracting with outside private corporations.²⁹⁸

F. Re-Entry and Job Training Opportunities and the Expansion of Labor

The First Step Act expands the way the Federal Prison Industries or “UNICOR” is allowed to operate and who they can sell products to.²⁹⁹ Additionally, all people behind bars working in UNICOR will be required to

²⁹⁶ See SHICHOR, *supra* note 36 at 65. Expanded privatization results in the extended capacity to punish large numbers of people more so than incarceration.

²⁹⁷ Takei, *supra* note 36.

²⁹⁸ Walter Pavlo, *Prison Reform Starts With Me*, FORBES (Dec. 28, 2018), <https://www.forbes.com/sites/walterpavlo/2018/12/28/prison-reform-starts-with-me/> - 2781f8f16a6b. When former President George W. Bush signed the Second Chance Act in April 2008, which also made prisoners eligible for extended stays in halfway houses, the problem back then was that there were insufficient beds. As such, the same could happen with the FSA. Yet, Trump has been vouching to use private prison companies for incarceration which could lead to more contacts with CoreCivic and the GEO Group for halfway houses. In 2018, CoreCivic actively supported and advocated for the passage of the First Step Act.

²⁹⁹ LIN, *supra* note 122, at 40. Particularly, UNICOR provides programs that result in prisoners occupying their time in programs to build topics, textiles, and working in the cable factory or printing plant.

676 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 3]

defer 15 percent of all compensation money earned into a release fund.³⁰⁰ The funds are intended to be used by the person behind bars “to assist the inmate with costs associated with release from prison.”³⁰¹ As part of the assessment, the Attorney General is authorized to review products purchased by federal agencies that are manufactured overseas and could be manufactured by people behind bars participating in prison work programs without reducing job opportunities for other American workers.³⁰² Also, the BOP is required to establish mentorship and skills-based pilot programs for five years in at least 20 facilities.³⁰³

This final part of the First Step Act is concerning because it aspires to expand and increase profitability from prison labor in a rather explicit and bold manner. This also questions the inherent intent and purpose of the First Step Act which should be people behind bars first. The First Step Act does not fix the inherent problem that people behind bars are not getting enough money through their labor, which is significantly undervalued. For people behind bars, their compensation is already low and even a marginal cut of their earned income would be substantial.³⁰⁴ Besides, there is also no guarantee that a person behind bars will ever be released from prison, so their compensation may never be retained. While this could help elderly people behind bars who have been working for years, this falls short in providing any meaningful change.

G. More Cosmetic Than Consequential

The First Step Act falls short of being a meaningful step forward and has been viewed as “more cosmetic than consequential.”³⁰⁵ More than 100 civil rights organizations have opposed the First Step Act, calling it short-sighted, filled with compromises, and do not go far enough for transformative change and criminal justice and prison reform.³⁰⁶ As former Attorney

³⁰⁰ First Step Act, Pub. L. No. 115-391 § 605(c) (2018).

³⁰¹ *Id.*

³⁰² First Step Act, Pub. L. No. 115-391 § 101(b)(3)(D) (2018).

³⁰³ *See generally* First Step Act, Pub. L. No. 115-391 § 608 (2018). The latter is a program to provide inmates with skills to provide training to animals seized by law enforcement or otherwise rescued.

³⁰⁴ UNICOR, https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp (last visited Mar. 1, 2019). According to the BOP, the typical pay is between 12 cents and 46 cents per hour for unskilled, institutional work, and between 23 cents and \$1.15 per hour for skilled work in UNICOR factories. Generally speaking, 50 percent of inmate earnings must be put into Inmate Financial Responsibility Program. Funds from this program go towards the Crime Victims’ fund, as well as to fund state crime victim programs. Prisoners also must pay towards their legal obligations, such as restitution to victims and child support.

³⁰⁵ George, *supra* note 104.

³⁰⁶ *Id.*

2020]

NOT FAR ENOUGH

677

General Eric Holder said: “Momentum for sentencing reform is being derailed by an effort that is misguided, ideological, and outdated. The narrow [First Step Act] won’t deliver the transformative change we need. The only way to achieve that is by passing bipartisan, comprehensive sentencing reform.”³⁰⁷ Similarly, Todd Cox, the policy director at the NAACP Legal Defense and Educational Fund, called the First Step Act “sloppy and dangerous,” noting that there had been no hearings or floor debate on the Act, nor any budget scoring or analysis of the First Step Act’s social impacts.³⁰⁸ Numerous legislators have said that the First Step Act would mark “a step backward from our shared goal of ending America’s mass incarceration crisis.”³⁰⁹ Another legislator stressed her dissatisfaction with the Act: “[T]o be clear, the First Step Act is very much just that—a first step. It is a compromise of a compromise, and we ultimately need to make far greater reforms if we are to right the wrongs that exist in our criminal justice system.”³¹⁰ In a letter with labor and social justice organizations, it noted that “any effort to pass prison reform (or ‘back-end’ reform) legislation without including sentencing reform (or ‘front-end’ reform) will not meaningfully improve the federal system.”³¹¹ Yet, for conservative commentators, the Act also failed to meet more a more aggressive stance against crime.³¹²

The effects of the First Step Act have not yet been fully felt, understood, and may not be for many years. The BOP has also been silent in response to the passage of the First Step Act, which has created some fear.³¹³ For example, while the new law gives many people behind bars an extra seven days off their sentences for each year of good behavior, it is still unclear when

³⁰⁷ *Id.*

³⁰⁸ Jamiles Lartey, *Trump’s Prison Reform: Republicans on Side but Progressives Hold Out*, THE GUARDIAN (June 5, 2018), <https://www.theguardian.com/us-news/2018/jun/05/trump-prison-reform-first-step-act-tension>.

³⁰⁹ Zak Cheney-Rice, *supra* note 216.

³¹⁰ Igor Bobic & Arthur Delaney, *Senate Passes Criminal Justice Reform Bill*, THE HUFFINGTON POST (Dec. 18, 2018), https://www.huffingtonpost.com/entry/criminal-justice-reform-bill-senate_us_5c1981a7e4b0432554c542b9.

³¹¹ Parkin, *supra* note 249.

³¹² Salvador Rizzo, *Does the Sentencing Bill Give Early Release to Drug Traffickers, Sex Offenders?* THE WASHINGTON POST (Nov. 30, 2018), https://www.washingtonpost.com/politics/2018/11/30/does-sentencing-bill-give-early-release-drug-traffickers-sex-offenders/?utm_term=.bfe24ddbada4. It also had vehement opponents, including Senator Tom Cotton, who said, “If the Act is passed, thousands of federal offenders, including violent felons and sex offenders, will be released.”

³¹³ Steven Nelson, *Prisoners Due for Release Under First Step Act Stuck in Limbo*, WASHINGTON EXAMINER (Dec. 28, 2018), <https://www.washingtonexaminer.com/news/white-house/prisoners-due-for-release-under-first-step-act-stuck-in-limbo>. “Silence from the Federal Bureau of Prisons is creating fear that foot-dragging will eat into reductions mandated by Trump’s most significant bipartisan policy achievement.”

authorities will make the calculations.³¹⁴ As a result, people continue to anxiously wait for the results as promised by the First Step Act.³¹⁵

H. Judicial Ability or Inability to Review: A Look at Present Litigation Efforts Under the First Step Act

Reviewing present litigation efforts under the First Step Act provides critical and important insight into how courts in their judicial review have interpreted the law since its enactment. As of February 2020, approximately 1,400 cases have been filed in federal courts across the country under the First Step Act since its enactment.³¹⁶ More than half, approximately 760 out of 1,400, were filed pro se or without legal representation. Only three cases were on petition with a writ of certiorari to the United States Supreme Court, and all three have been remanded to their respective circuit courts to consider the First Step Act.³¹⁷

First, federal courts have interpreted the First Step Act to grant exclusive and total authority and sole discretion to the Attorney General—and by delegation or extension the BOP—to decide all release determinations, such as each person’s designated place of confinement and whether a person behind bars will be released into home confinement, so long as the conditions of confinement are not unconstitutional.³¹⁸ Specifically, since the First Step Act’s enactment, judges have consistently refrained from deciding cases regarding compassionate and early release and held that they possess no power to grant people behind bars any form of such release.³¹⁹ Even though extraordinary and compelling reasons may warrant an abuse of discretion to deny a compassionate release request under the First Step Act, courts have also refrained from ruling against such determinations to deny

³¹⁴ *Id.*

³¹⁵ *Id.* “For many inmates, anxiety is likely to grow as they struggle to learn what’s happening. ‘These are people at the holidays jumping up and down because the bill passed, and then they’re like, ‘Now what are we waiting for?’ [Kevin Ring from FAMM] said.”

³¹⁶ This data was personally compiled on Westlaw in which there were 1,379 search results regarding the First Step Act.

³¹⁷ *Jefferson v. United States*, No. 18-9325, 2020 WL 129507 (2020); *Richardson v. United States*, 139 S. Ct. 2713, 204 L. ed. 2d 1107 (2019); and *Wheeler v. United States*, 139 S. Ct. 2664, 204 L. Ed. 2d 1067 (2019).

³¹⁸ *See, e.g., Parsons v. Howard*, 2019 WL 469913, at *2 (M.D. Pa., February 6, 2019); *Jones v. Woods*, 2019 WL 2754731 (M.D. Ala. June 4, 2019); and *Marshall v. Hudson*, No. 19-3236, 2020 WL 1131228, at *3 (10th Cir. Mar. 9, 2020).

³¹⁹ *See, e.g., Kieffer v. Rios*, No. 19-CV-899 (PJS/SER), 2019 WL 5150054, at *4 (D. Minn. June 25, 2019); and *Lewis v. Rios*, No. 19-CV-1030 (SRN/ECW), 2020 WL 555373, at *4 (D. Minn. Jan. 13, 2020).

these requests even when the defendant was eligible.³²⁰ Furthermore, judges also lack the authority under the First Step Act to order the BOP to recalculate good time credits to which a person may be entitled to under the Act.³²¹ With no statutory mechanism or provision for judicial review of all BOP determinations of compassionate and early release, courts are simply insulated and foreclosed from the process since they have no authority to order home detention.³²²

Second, courts have uniquely exercised their discretion following the First Step Act's enactment regarding the Fair Sentencing Act to reduce people behind bars' sentences. First, the First Step Act permits a court that imposed a sentence for a covered offense committed before August 3, 2010 to now impose a reduced sentence following the Act's enactment.³²³ Accordingly, a judge may, but is not required to, reduce sentences for qualifying offenses as if the Fair Sentencing Act was in effect at the time the defendant committed the covered offense.³²⁴ Although judges first recognize that relief under the First Step Act is entirely discretionary,³²⁵ they broadly interpreted the First Step Act to provide courts with the discretion to reduce a sentence under the rule of lenity, which holds that where a criminal statute is ambiguous, "doubts are resolved in the favor of the defendant."³²⁶ In applying this modal of statutory interpretation, a judge held:

Given the First Step Act's remedial purpose of furthering the Fair Sentencing Act's objective of mitigating the effects of a sentencing scheme that had a racially disparate impact, the First Step Act should be construed to provide courts with discretion to reduce a sentence when the statute the defendant violated has been modified by the Fair Sentencing Act to provide less severe penalties.³²⁷

³²⁰ See, e.g., *United States v. Chambliss*, 948 F.3d 691, 694 (5th Cir. 2020) (although the defendant was eligible with a diagnosed terminal illness for compassionate release, the court denied to review the BOP's denial which was predicated on the nature of their past offense and criminal history).

³²¹ *Schlegel v. Rios*, No. 19-CV-338 (SRN/ECW), 2019 WL 3417053 (D. Minn. June 18, 2019).

³²² *Austin v. Woods*, No. 2:19-CV-7-WHA, 2019 WL 2417654 (M.D. Ala. May 17, 2019); see also *United States v. Cantu*, No. 1:05-CR-458-1, 2019 WL 2498923, at *2 (S.D. Tex. June 17, 2019).

³²³ See, e.g., *United States v. Rose*, 379 F. Supp. 3d 223, 225 (S.D.N.Y. 2019).

³²⁴ *United States v. Gospidon*, 793 F. App'x 992, 993 (11th Cir. 2020).

³²⁵ *Rose*, 379 F. Supp. 3d at 233. "The text of the First Step Act, read in conjunction with other sentencing statutes, requires the Court to consider all relevant facts, including developments since the original sentence. Congress clearly intended relief under § 404 of the First Step Act to be discretionary, as the Act specifically provides that '[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section.'" Because Congress is not legislating on a blank slate, the scope of the district court's discretion must be defined against the backdrop of existing sentencing statutes."

³²⁶ *United States v. Black*, 388 F. Supp. 3d 682, 690 (E.D. Va. 2019). See, e.g., *United States v. Thompson*, 404 F. Supp. 3d 1003, 1007 (W.D. La. 2019) (applying rule of lenity to resolve an ambiguity in the First Step Act in order to grant relief from a drug crime sentence).

³²⁷ *United States v. Allen*, 384 F. Supp. 3d 238, 242 (D. Conn. 2019).

Nonetheless, it is important to recognize that the First Step Act “merely unlocks the door to sentencing” and it is up to the court to open that door and decide to use their discretion to reduce any sentence under the law.³²⁸

United States v. Medina provides a significant illustrative example in which the court exercised discretion to impose plenary resentencing under the “full benefit of the First Step Act’s remedial purpose.”³²⁹ In *Medina*, the defendant pled guilty and was sentenced in 2016 for three drug-related counts. They sought relief under the First Step Act and requested to be immediately released or, in the alternative, to be resentenced. In finding that the defendant was entitled to resentencing, the judge held that the drug-related counts were a covered offense for the First Step Act and that the law “should be construed to provide courts with discretion to reduce a sentence when the statute the defendant violated has been modified by the Fair Sentencing Act to provide less severe penalties” and ambiguities should be resolved in the defendant’s favor under the rule of lenity.³³⁰ Furthermore, the First Step Act grants “broad discretion to judges to decide whether to impose a reduced sentence,” and “should be read in the broadest way possible, consistent with the remedial purpose of the First Step Act.”³³¹ As such, a limited application of the First Step Act would weaken its intent.³³²

IV. A PROPOSAL FOR A SECOND STEP

A. *First Recommendation: Reform the Risk and Needs Assessment System*

To improve the First Step Act, a second step will require several reforms to the RNAS. While the Act required an independent review committee to provide consultation regarding the assessment, the committee members do not include people behind bars or formerly incarcerated persons.³³³ People behind bars and the formerly incarcerated are the ones

³²⁸ *United States v. Maxwell*, No. 19-5312, 2020 WL 429838, at *4 (6th Cir. Jan. 28, 2020).

³²⁹ *United States v. Medina*, No. 3:05-CR-58 (SRU), 2019 WL 3769598, at *6 (D. Conn. July 17, 2019).

³³⁰ *Id.* at *3.

³³¹ *Id.* at *6.

³³² *Id.*

³³³ See, e.g., Alyxaundria Sanford, *Why the Formerly Incarcerated Need to Be Involved in Criminal Justice Reform*, MEDIUM (Aug. 9, 2017), <https://medium.com/valiance/why-the-formerly-incarcerated-need-to-be-involved-in-criminal-justice-reform-audio-report-64cb9f18fc0>. “While all criminal justice reform efforts are moves in the right direction, to really make change effective politicians and policy makers must include those closest to the issue: people who were formerly incarcerated.” See also First Step Act Independent Review Committee, HUDSON INSTITUTE (2019), <https://firststepact-irc.org/>. The current review committee is represented by six members and five of whom are White and only one is Black. More diversity is needed to ensure that there is fairness and effectiveness.

2020]

NOT FAR ENOUGH

681

affected most by the First Step Act and its progeny must be consulted and centrally included to enact meaningful and comprehensive criminal justice and prison reform. One of the criticisms of rehabilitation is that the people who make the determinations about the levels of risk are detached and removed and often do not possess the same lived experiences as people behind bars have when they participate in the rehabilitative programs and embark on the road to release.³³⁴ Without comprehensive reform that brings in the people behind bars into the national conversations of criminal justice and prison reform, that must also be accompanied and grounded by compassion, empathy, and trust rather than punishment, the First Step Act misses a valuable opportunity to solidify an element of humanity in the Act and would continue to fall short in providing meaningful and revolutionary change.

Framing rehabilitation using evidence-based models is inherently concerning because it presupposes that punishment boils down to scientific formulas and analysis.³³⁵ This further dehumanizes people behind bars and ignores the unique needs and vulnerabilities that they face, and the mistreatment by the current criminal justice and prison system. Placing people with disabilities in categories continues to encourage isolation and segregation, which are constitutional violations under *Olmstead*.³³⁶

The bill also gives the Attorney General and BOP Director overly broad discretion to “use existing risk and needs assessment tools as appropriate” to implement the system.³³⁷ This is problematic, as it could allow the Attorney General to use the BOP’s current security classification system, a system that is not designed to identify specific criminogenic needs and heavily relies on static factors, as a proxy for the risk and needs assessment tool, which could ultimately undermine the purpose and effectiveness of the system. Moreover, the First Step Act fails to mandate the implementation of safeguards that are necessary whenever such tools are used. More discretion must be given broadly to community organizations and advocates who would provide a different perspective than the scientists and criminal justice scholars. Moreover, since static risk factors continue to discriminate against people based on their gender and race, rehabilitative programs in prison should use a needs-based assessment to identify the criminogenic needs of each individual and develop a program of interventions to address those needs to lower the individual’s risk of recidivating.

³³⁴ See LIN, *supra* note 122.

³³⁵ See *supra* Part II(A).

³³⁶ *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 581 (1999).

³³⁷ The Leadership Conference on Civil & Human Rights, *supra* note 228.

682 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 3]

Rather than assessing for manufactured risk and needs levels, each person must be given a more comprehensive individualized assessment that is unrestricted, non-probative of their assigned level of need, and given ample opportunity to exercise self-independence in choosing which programs fit the most and match their interests and goals. Voluntary participation in programs, for example, has been demonstrated to show increased success in rehabilitation and general wellbeing.³³⁸ A broader reconceptualization of rehabilitative programs must also include people who are formerly incarcerated, as well as people with a background in criminal justice and prison reform, not only the scientific and research community as purported experts on rehabilitation. People should be similarly assessed and integrated with others no matter their identified risk and needs level, and be given the same opportunities for release. This includes allowing all people to earn credits no matter their criminal conviction that they were sentenced for. Furthermore, any assessment of people behind bars must also be accompanied by a culture of finality and closure to accept that prolonged punishment is a counterintuitive and inhumane treatment for people behind bars. Community education, acceptance, and restorative justice, above all, that destigmatizes people upon their release and provides opportunity and investment will go further than the current solutions available by the First Step Act.³³⁹

B. Second Recommendation: Increase Compassionate and Early Release and Make All Sentencing Reforms Retroactive

While the First Step Act requires the BOP to help increase the amount of information provided about how to request compassionate release³⁴⁰ by regularly and visibly posting, including in-person behind bars handbooks, staff training materials, and facility law libraries and medical hospice facilities, and make available to people behind bars upon demand,³⁴¹ elderly people behind bars should not have the sole burden and responsibility of finding out and applying for sentence reductions, especially when compassionate release is “underused.”³⁴² Elderly people behind bars should

³³⁸ CLEAR, *supra* note 127.

³³⁹ See Shailly Agnihotri & Cassie Veach, *Reclaiming Restorative Justice: An Alternative Paradigm for Justice*, 20 CUNY L. REV. 323 (2017), <https://academicworks.cuny.edu/clr/vol20/iss2/3>.

³⁴⁰ First Step Act, Pub. L. No. 115-391 § 603(b)(3)(2)(C)(i)–(iii) (2018) (describing that the information made available include notice of a defendant’s ability to request a sentence reduction; the procedures and timelines for initiating and resolving requests; and the right to appeal a denial after all rights to appeal within the BOP have been exhausted).

³⁴¹ First Step Act, Pub. L. No. 115-391 § 603(b)(3)(2)(C) (2018).

³⁴² See Sarah N. Lynch, *Compassionate Release for Dying Prisoners Underused: Report*, REUTERS (June 27, 2018), <https://www.reuters.com/article/us-usa-justice-prison-illness/compassionate-release-for-dying-prisoners-underused-report-idUSKBN1JN0EL>.

2020]

NOT FAR ENOUGH

683

be automatically eligible and considered for compassionate release without requiring an application and starting what may be a prohibitively lengthy, information-intensive, and confusing process.³⁴³ While additional support is only given to people behind bars physically or mentally unable to submit a request for compassionate release,³⁴⁴ more people must also qualify if and when direct assistance is needed. For people who are serving longer sentences, they should also be automatically eligible for early release, or in a form alternative to prison, once a significant portion of their time has been served. On the alternative, for people sentenced when they are older, they should be evaluated and recommended for such release or alternatives to incarceration at the onset.

Although the First Step Act attempts to expedite the processing of a terminally ill person behind bars' request for a sentence reduction for compassionate and early release, the process continues to be lacking. First, it is unclear whether the request processed would mean a final determination about whether their early release is granted, or if it merely pushing forward the beginning of the process for the person behind bars who must still go through a lengthy multi-leveled review.³⁴⁵ Second, leaving the Director of the BOP with the sole authority to evaluate compassionate release requests has created problems and been widely criticized, such as for having no timeliness standards for review or lacking adequate guidance to staff regarding the criteria for compassionate release.³⁴⁶ Accordingly, the DOJ's Office of the Inspector General concluded in a report: "The BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible for release not being considered."³⁴⁷ Thus, more accountability and transparency is needed to better ensure that compassionate release requests are submitted and reviewed broadly and inclusively, which requires collaboration with community partners, oversight committees, other stakeholders such as the United States Sentencing Commission, as recommended by some advocates.³⁴⁸

³⁴³ See Taylor Walker, *State-by-State Analysis Shows Confusing & Problematic Rules And Delays Make Compassionate Release A Rarity*, WITNESS LA (June 29, 2018), <https://witnessla.com/state-by-state-analysis-shows-confusing-problematic-rules-and-delays-make-compassionate-release-a-rarity/>.

³⁴⁴ First Step Act, Pub. L. No. 115-391 § 603(b)(3)(2)(B) (2018).

³⁴⁵ See *supra* Part II(B).

³⁴⁶ Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 101, 105-06 (2019). The Office of the Inspector General concluded that: "[t]he BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered."

³⁴⁷ U.S. DEP'T JUSTICE, THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM (2013), at i-iv.

³⁴⁸ *The Campaign for Compassionate Release*, *supra* note 270.

684 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 3]

The First Step Act must go further in reducing the far-reaching restrictions for compassionate release.³⁴⁹ Currently, the compassionate release is only granted for “extraordinary and compelling reasons,”³⁵⁰ 70 years of age and older who have served at least 30 years in prison and other conditions,³⁵¹ or terminal illness.³⁵² One recommendation would be to add an expanded definition to reduce the age from 70 years of age to include an even younger age. This would make sense because people age quicker in prison and the definition of “elderly” is often blurred.³⁵³ Above all, a compassionate release should not be exclusive to the terminally ill, but also allow for more compassion in expanding its eligibility standards to include people behind bars who may not have the severity of a terminal illness. Currently, even when people are granted compassionate release because of their terminal illness, they are not afforded enough time after their release to fully have the opportunity to live their life outside of prison. On the alternative, they are also subjected to a process that is too lengthy when applying for compassionate release, which has led to some people passing away before their request has been exhaustively reviewed.³⁵⁴

Another solution to circumvent the restrictions of compassionate release without fundamentally changing its program is presumptive parole. Presumptive parole, which has been adopted by some states, means “presuming that inmates are eligible for parole, rather than requiring them to convince the parole board that they should be released.”³⁵⁵ As an implemented policy, it allows a person behind bars who is eligible for parole to be released after serving their minimum sentence, unless there is verifiable evidence that they should not be released.³⁵⁶ Different from compassionate release, presumptive parole puts the burden on the prison administration to show a compelling reason why they should not be released; in contrast, compassionate release places the burden on the person behind bars to demonstrate that they have a terminal illness or extraordinary and compelling reason for the release.

³⁴⁹ As well as other forms of release like medical parole.

³⁵⁰ 18 U.S.C. § 3582(c)(1)(A)(i) (2018). See also *The Answer is No: Too Little Compassionate Release in U.S. Federal Prisons*, *supra* note 15.

³⁵¹ 18 U.S.C. § 3582(c)(1)(A)(ii) (2018).

³⁵² First Step Act, Pub. L. No. 115-391 § 603 (2018).

³⁵³ See Metia, *supra* note 29.

³⁵⁴ See *supra* Part II(B).

³⁵⁵ Rebecca Beitsch, *States at a Crossroads on Criminal Justice Reform*, THE PEW CHARITABLE TRUSTS (Jan. 28, 2016), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/01/28/states-at-a-crossroads-on-criminal-justice-reform>.

³⁵⁶ Kathleen Gray, *Mich. House Passes Bill Supporting “Presumptive Parole,”* DETROIT FREE PRESS (Oct. 1, 2015), <https://www.freep.com/story/news/2015/10/01/mich-house-passes-bill-adopting-presumptive-parole/73155514/>.

2020]

NOT FAR ENOUGH

685

Also missing from the First Step Act is the crucial issue of sentencing reform, which is distinct from prison reform. Mandatory minimum sentencing should be entirely reduced or removed and we should set ceilings, not the floor, in which sentences should be enforced. While mandatory minimums for offenders with one prior qualifying “serious drug felony” or “serious violent felony” was reduced to 15 years, the First Step Act can go further and reduce or remove the minimum altogether.³⁵⁷ At the very least, there needs to be more discretion in applying mandatory minimums.³⁵⁸ Officials should review their sentencing and release laws and practices to determine what can be adjusted to reduce the elderly prison population without risking public safety. Meanwhile, corrections officials should review the conditions of confinement for their elderly people behind bars, including the services and programs available to them, and make changes as needed to ensure their human rights are respected and reasonable accommodations are provided to the fullest extent.

C. Third Recommendation: Support Deinstitutionalization While Addressing Concerns About Home Confinement and Halfway Houses

Home confinement or halfway houses are not legitimate alternatives to incarceration. Supportive housing in the community must also be suggested as an alternative to the current options in community supervision by home confinement and halfway houses. Supportive housing is defined³⁵⁹ as a “combination of permanent housing (not a temporary shelter) and on-site services,” providing “a reliable place to live, coupled with case management that connects residents to needed services such as job and life-skills training and alcohol and drug abuse programs.”³⁶⁰ Residents of supportive housing have found that they were less likely to re-incarcerate, experienced fewer visits to the emergency room, and needed fewer inpatient hospital stays.³⁶¹ Supportive housing has been used to provide a meaningful alternative to the

³⁵⁷ See *supra* Part III(D).

³⁵⁸ See, e.g., *Alleyne v. United States*, 570 U.S. ___ (2013) (holding because mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an “element” that must be submitted to the jury).

³⁵⁹ *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 298 (E.D.N.Y. 2009), vacated by *Disability Advocates, Inc. v. New York Coalition for Quality Assisted Living, Inc.*, 675 F.3d 149 (2d Cir. 2012). Another definition of supportive housing is “an alternative form of housing in which individuals with mental illness live in their own apartments scattered throughout the community and receive supportive services.”

³⁶⁰ Public Affairs, UC Berkeley, *Frequently Asked Questions About Supportive Housing at People’s Park*, BERKELEY NEWS (May 3, 2018), <https://news.berkeley.edu/2018/05/03/frequently-asked-questions-about-supportive-housing-at-peoples-park/>.

³⁶¹ *Id.*

686 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 3]

institutionalization in adult and nursing homes, as a method of deinstitutionalization, to provide many units in the community of which are filled by elderly people.³⁶² Rather than riddled with restrictions, supervision, and mandatory participation, supportive services “are designed to be flexible, so that residents may receive help with cooking, shopping, budgeting, medication management and making appointments as needed, but can do all of these things themselves if they can.”³⁶³

Another solution that the BOP should adopt is that release planning should begin *as soon as a person is incarcerated* to not only establish the aspirational goal of eventual release but also to prepare and reduce any unnecessary delays. To transfer an elderly person back to the community, housing and financial assistance must usually be secured.³⁶⁴ They may also need identification and other accommodations like a cell phone or bus ticket back home.³⁶⁵ Furthermore, more efforts must also be made to expunge criminal records to destigmatize formerly incarcerated persons and discourage perpetual punishment,³⁶⁶ which allows more of a second chance.³⁶⁷ Lastly, instead of contracting private corporations, the BOP should continue to maintain relationships with a variety of community-based organizations to provide grassroots support, such as with public benefits assistance.³⁶⁸

D. Fourth Recommendation: Provide Early Release for Elderly People Behind Bars

To find an appealing slogan for their campaign in advocating for the release of elderly prisoners, the Release Aging People in Prison (“RAPP”)

³⁶² See generally *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 593 (1999) (landmark Supreme Court case that recognized that people with mental disabilities have the right to live in the community rather than in institutions).

³⁶³ Kevin M. Cremin, *Challenges to Institutionalization: The Definition of “Institution” and the Future of Olmstead Litigation*, 17 TEX. J. ON C. L. & C. R. 143 (2012).

³⁶⁴ Aday, *supra* note 53.

³⁶⁵ Ritvo, *supra* note 65.

³⁶⁶ See, e.g., Celia Clarke, *Perpetual Punishment, The Collateral Consequences Of Life With a Criminal Record*, WSKG (Jan. 31, 2018), <https://wskg.org/news/perpetual-punishment-the-collateral-consequences-of-life-with-a-criminal-record/>.

³⁶⁷ Eric Westervelt & Barbara Brosher, *Scrubbing The Past To Give Those With a Criminal Record A Second Chance*, NPR (Feb. 19, 2019), <https://www.npr.org/2019/02/19/692322738/scrubbing-the-past-to-give-those-with-a-criminal-record-a-second-chance>. See also Brian Hamilton, *Trump Signed the First Step Act for Criminal Justice Reform. Here’s the Second Step*, FORTUNE (Dec. 27, 2018), <http://fortune.com/2018/12/27/first-step-criminal-justice-reform/>. “[O]ne recent study found that when people’s eligible criminal records are expunged—and that employment barrier removed—their employment rates and earnings both increase.”

³⁶⁸ Aday, *supra* note 53.

2020]

NOT FAR ENOUGH

687

settled on: “If the risk is low, let them go!”³⁶⁹ According to the New York Department of Corrections and Community Supervision on recidivism by age, only one percent of people after 65 years of age return to prison, as compared to an approximately 60 percent return rate for other people behind bars.³⁷⁰ As such, old age has been linked with lower levels of criminality and least likely to recidivate after serving time in prison.³⁷¹ In 1998, a study found that only 3.2 percent of formerly incarcerated people older than 55 years of age returned to prison within a year of release.³⁷² Likewise, a 2004 analysis of people sentenced under federal sentencing guidelines found that within two years of release, the recidivism rate among formerly incarcerated people older than 50 years of age was only 9.5 percent compared with a rate of 35.5 percent among people younger than 21 years of age.³⁷³ Given the data that elderly people behind bars are low risk and do not present significant issues with recidivism, more elderly people behind bars should be expedited for early release.

The prison system was not designed to incarcerate elderly people behind bars.³⁷⁴ As the elderly prison population continues to grow, more limitations become more self-evident because of their infirmity, lack of health care, treatment, and services, and barriers to participation in rehabilitative programs and opportunities.³⁷⁵ Keeping elderly people behind bars presents an uncompassionate and immoral layer of punishment that has resulted in untimely deaths and danger to people’s health, safety, and well-being. Above all, maintaining a culture in the prison system that continues to incarcerate and keep elderly people behind bars runs counter to the purpose of rehabilitation. As the United States Sentencing Commission has recognized, old age and infirmity must be relevant to advocate for alternatives to incarceration that exist outside of the prison walls.³⁷⁶

Elderly people behind bars present minimal risk and should *automatically* qualify for release.³⁷⁷ Rather than focusing on recidivism

³⁶⁹ Katharine Q. Seelye, *Mujahid Farid, 69- Ex-Prisoner Who Advocated for Older Inmates, Dies*, N.Y. TIMES (Nov. 28, 2018), <https://www.nytimes.com/2018/11/28/obituaries/mujahid-farid-dead.html>.

³⁷⁰ Heather Habes, *Paying for the Graying: How California Can More Effectively Manage its Growing Elderly Inmate Population*, 20 S. CAL. INTERDISC. L. J. 395, 406 (2011).

³⁷¹ *Metia*, *supra* note 29.

³⁷² Chiu, *supra* note 29. As compared to 45 percent of offenders who were 18 to 29 years old.

³⁷³ *Id.*

³⁷⁴ *Old Behind Bars: The Aging Prison Population in the United States*, *supra* note 41. “Prisons are primarily designed for the young and able-bodied; it takes additional effort on the part of corrections officials to meet the needs and respect the rights of the old and infirm.”

³⁷⁵ *Id.*

³⁷⁶ USSG § 2D1.1 (2018). A form of punishment such as home confinement which might be equally efficient as and less costly than incarceration.

³⁷⁷ *See, e.g.*, *United States v. Carter*, No. 7:09-CR-00027-1, 2019 WL 2477626, at *5 (W.D. Va. June 13, 2019) (ordering a lesser sentence highlighting that an elderly offender was eligible after turning 60

control, programs should alleviate suffering and disorientation among ex-inmates, provide social service, and reestablish a tolerable life for themselves in the community. Assistance needs to be separate from criminal justice enforcement and its progeny. On the alternative, federal prisons must be subject to stricter standards to show a compelling reason why a person behind bars should not be released on parole. A compassionate release should also be less exclusive to only terminal illnesses and allow for early release for generally the ailing.

Full integration back into the community is the most effective treatment and should be granted without a supervised release that restricts people of their liberty and represent another source of punishment. If so, punishment does not reduce crime and recidivism, but only exasperates it.³⁷⁸ We need to expand our conception of justice, which is not to control to police and imprison people behind bars but to empower them with self-independence and allow them to freely live their lives without being on parole or surveillance.

E. Fifth Recommendation: Review the Authority and Substantial Discretion Provided to the Attorney General and the BOP

A consistent and reoccurring issue with the First Step Act is that the law grants exclusive authority and sole discretion to the Attorney General and by delegation or extension the BOP to decide all release determinations, particularly in compassionate and early release and home confinement. While this interpretation has insulated judicial review in compassionate and early release determinations, judges in various courts across the United States have also exercised broad discretion in granting reductions in sentences or resentencing under their interpretation and judicial review. This has allowed courts to apply the rule of lenity and go beyond the plain reading or text of the First Step Act to ensure that its remedial purpose is met through the courts.

More meaningful judicial discretion and review are needed to effectuate the First Step Act's remedial purpose and intent, specifically in compassionate and early release determinations. Under the current apparatus, all denials by either the general counsel or Director of the BOP are final administrative decisions and are not appealable. Only a denial by the

years of age and that Congress believed offenders aged 60 and over to be "less of a threat of the public and to require less deterrence than their younger counterparts" when the First Step Act reduced the eligibility age from 65 to 60).

³⁷⁸ William R. Kelly, *Why Punishment Doesn't Reduce Crime*, PSYCHOLOGY TODAY (Apr. 25, 2018), <https://www.psychologytoday.com/us/blog/crime-and-punishment/201804/why-punishment-doesnt-reduce-crime>.

warden is appealable, and even then they are seldom overturned. By providing courts and judges with more discretion, they would be able to provide another layer of accountability to ensure that they have a larger role in the compassionate and early release process and that the denials are no longer arbitrarily made. While the fallout has been that compassionate release requests have given rise to only a small number of release motions to the court annually,³⁷⁹ more should be done to allow courts to have the same discretion they have in reducing sentences or resentencing under the reforms to the Fair Sentencing Act under the First Step Act. Above all, maintaining a culture in the prison system that continues arbitrarily decline compassionate request releases and incarcerate and keep elderly people behind bars runs counter to the purpose of rehabilitation.

F. Sixth Recommendation: Increase Access to Counsel for Pro Se Individuals and Independent From the Attorney General

Courts have held that people behind bars are not entitled to counsel for administrative proceedings before the BOP.³⁸⁰ Furthermore, courts have held that they were “not prepared to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings.”³⁸¹ For both compassionate release and reductions in sentences, there is no constitutional right to counsel that exists for such filings.³⁸² Consequently, no appointment of counsel is usually provided.

A disproportionate number of elderly people behind bars who petition for release *pro se*, do not have legal representation, or represented by the Attorney General. Out of around 70 cases filed in court, 47 cases were filed *pro se*; out of the 47 cases, 43 cases were denied release by the court. Studies have continued to show the importance of legal representation and access to counsel in the legal system.³⁸³ *Pro se* individuals are more likely to fail.³⁸⁴ To bridge the gap, there must be counsel provided to people behind bars.

³⁷⁹ *The Campaign for Compassionate Release*, *supra* note 270.

³⁸⁰ *United States v. Curry*, No. CR 6:06-082-DCR, 2019 WL 508067, at *2 (E.D. Ky. Feb. 8, 2019) (citing *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974)).

³⁸¹ *Id.*

³⁸² *Id.* (citing *United States v. Bruner*, 2017 WL 1060434 at *2 (E.D. Ky. Mar. 21, 2017)).

³⁸³ Michael W. Martin, *Foreword: Root Causes of the Pro Se Prisoner Litigation Crisis*, 80 FORDHAM L. REV. 1219 (2011), <http://ir.lawnet.fordham.edu/flr/vol80/iss3/9>. “[I]ncarceration itself imposes upon *pro se* prisoners another layer of steep disadvantages . . . They have restricted access to libraries, legal materials, the internet, and telephones. The limited resources available within prisons are often inadequate to allow prisoners to navigate the complex legal system and consistently contribute to their losing cases on procedural grounds before ever reaching a decision on the merits.”

³⁸⁴ *Id.*

The Parole Preparation Project is one example of a program that has found success in representing parole-eligible incarcerated people, particularly the elderly.³⁸⁵ The project is entirely volunteer-run but supervised by attorneys. The Project trains community volunteers to work alongside and assist parole-eligible people in New York State as they prepare for their upcoming interviews with the parole board.³⁸⁶ Also, the Project provides community education and helps to increase public awareness of the problems of punitive parole policies and support parole reform advocates working for systemic and legislative change. While the statewide average is 35 to 40 percent of parole applicants released who are unrepresented in parole hearings, nearly 60 percent are granted release when they are represented by the Project.³⁸⁷ More should be done to bring attorneys into the prisons to provide representation and counsel. This can also come from law school clinics following the First Step Act's enactment. This would have better supported people behind bars in the proliferation of cases filed under the First Step Act since its enactment.

Courts have held that the appointment of counsel may be warranted when there are exceptional circumstances.³⁸⁸ These exceptional circumstances should exist for elderly people behind bars. Nonetheless, more community-based movements should arise to raise awareness about the importance of counsel for people behind bars.³⁸⁹

CONCLUSION

The First Step Act ultimately falls short of meaningful criminal justice and prison reform that is needed. Criminal justice and prison reform is a human rights issue. Further institutionalization will not advance rehabilitation and the BOP must work toward a significant reduction in the federal prison population, in the number of elderly people behind bars, to provide an opportunity for elderly people to live their lives outside of the prison walls free of surveillance and mistreatment. Besides, for many elderly people behind bars, they are not receiving services in the most integrated

³⁸⁵ For more information about the Parole Preparation Project, see Lewin & Carroll, *supra* note 5.

³⁸⁶ *Id.* Since 2013, the Parole Preparation Project trained over 500 volunteers and worked with more than 250 people in prison. Each year, the Project trains, on average, 100 new volunteers and take on approximately 50 new parole applicants.

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ See, e.g., James Forman Jr. & Sarah Lustbader, *Every D.A. in America Should Open a Sentence Review Unit*, N.Y. TIMES (Aug. 1, 2019), <https://www.nytimes.com/2019/08/01/opinion/mass-incarceration-prosecutors-sentencing.html> (recommending that prosecutors can open "sentence review units" to review past cases, identify particularly egregious sentences, and give these cases a second look, which helps to recognize their role in creating the crisis and work towards fixing it).

2020]

NOT FAR ENOUGH

691

setting that is appropriate to their needs.³⁹⁰ Absent significant changes in sentencing and release policies, the number of elderly people behind bars will continue to grow. Therefore, the country should question whether the incarceration of elderly people is a sensible form of criminal justice. Lastly, further caution must be extended against the build-up of private prison corporations and their influence over home confinement and halfway houses. Abolitionist Frederick Douglass once said, “Power concedes nothing without a demand.”³⁹¹ As such, criminal justice and prison reform must be uncompromising, comprehensive, and more ambitious. For change, the opportunity is there.³⁹²

³⁹⁰ See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 593 (1999).

³⁹¹ Parkin, *supra* note 249.

³⁹² Natasha Leonard, *The First Step Act Is Not Sweeping Criminal Justice Reform—and the Risk Is That It Becomes the Only Step*, THE INTERCEPT (Dec. 19, 2018), <https://theintercept.com/2018/12/19/first-step-act-criminal-justice-reform-bill/>. In 2019, with Democratic control of the House of Representatives after the midterm elections, this should embolden liberal and progressive reformers to fashion something more robust.