

KARMA AND THE UNITED STATES  
GOVERNMENT: HOW MASS  
INCARCERATION POLICIES CREATED AN  
AILING AND COSTLY AGING POPULATION  
IN THE PRISON SYSTEM AND HOW CAN  
CIVIL LEGAL SERVICES ASSIST THE  
ELDERLY AFTER RELEASE

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## I. INTRODUCTION

*A. Purpose of Prison*

Prison is defined as “a place of confinement especially for lawbreakers” by Merriam-Webster dictionary.<sup>1</sup> But when talking about prisons, we must ask ourselves “what is the real purpose of prison?” Prison is thought to prevent the recurrence of crime by reducing it.<sup>2</sup> The United States self-proclaims itself as the “land of the free” but simultaneously holds the title for the highest prison population rate in the world.<sup>3</sup> Are prisons serving the function they need to or have they become superficial holding cells for individuals with the least amount of resources in today’s society?

*B. The Aging in Prisons and the Problems They Face*

The purpose of this note will be to focus on the elderly in prison and how civil legal services can assist them post-release. An intersection between civil legal services, the elderly, and the formerly incarcerated needs to be created to assist formerly incarcerated older adults because the barriers to employment, housing, and healthcare that exist for either demographic is escalated when an individual is both elderly and a former inmate. The intersection could be created through several strategies, which include adopting models used by certain civil legal service providers on a larger scale. New legislation can also be

<sup>1</sup> Prison, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/prison> (last visited Mar 4, 2019).

<sup>2</sup> Austin MacCormick, *The Prison’s Role in Crime Prevention*, 41 J. CRIM. L. & CRIMINOLOGY 36 (1950-1951).

<sup>3</sup> Francis Scott Key, *Star Bangled Banner* (1779-1843).; Highest to Lowest - Prison Population Rate, NORWAY | WORLD PRISON BRIEF, [http://www.prisonstudies.org/highest-to-lowest/prison\\_population\\_rate?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All) (last visited Mar 4, 2019).

passed to expand legal service coverage for the type of legal help individuals can be entitled to and to increase funding for civil legal services providing help to older formerly incarcerated individuals.

The intersection of the elderly and the incarcerated should be a primary concern of our society because the elderly population in prisons is increasing as the overall prison population is decreasing.<sup>4</sup> First, we must define what it means to be elderly. 60 or 65 is the age utilized for most purposes such as federal elder justice statutes (such as the Elder Abuse Prevention and Prosecution Act, adopting the definition of elder from 42 U.S. Code § 1397j) or Medicare, respectively.<sup>5</sup> In prison, “elderly” is considered to be individuals aged 50 or over.<sup>6</sup> This is due to a variety of factors surrounding a lower quality of life in prison, such as unhealthy diets, substance abuse, stress, and low quality of health care.<sup>7</sup> Second, we must observe the statistics regarding incarcerated older adults. Focusing on New York State, the population of incarcerated older adults who are 55 and over has increased by 81%, while the overall number of prisoners has decreased by 23%.<sup>8</sup> From 2007 to 2012, the percentage of adults 50 or over has increased from 11% of the overall prison population in New York to 17%.<sup>9</sup> On a national scale, the number of incarcerated individuals increased by 41%, but the population of those 55 and older in prison increased fourfold.<sup>10</sup> With the increase of older adults behind bars comes the increase of costs for their wellbeing. The cost of housing a single prisoner over the age of 50 is \$68,270 per year, while housing an average prisoner costs \$31,135.<sup>11</sup> The reason that the cost for an aging inmate is almost double that of an average prisoner is because older inmates use more healthcare than any other subpopulation in prisons.<sup>12</sup> Older inmates have some of the most debilitating health conditions that impacts their lives to the point of minimal functioning. From the research that has been conducted, the most frequent debilitations are those associated with vision, hearing,

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<sup>4</sup> Publication, Center for Justice at Columbia University, *Aging in Prison: Reducing Elder Incarceration and Promoting Public Safety* (Nov. 2015), <http://centerforjustice.columbia.edu/policy/aging-in-prison>.

<sup>5</sup> 42 U.S. Code § 1397j.

<sup>6</sup> Kathryn M. Nowotny et al., *Growing Old Behind Bars*, 28 *JOURNAL OF AGING AND HEALTH* 935, 935–956 (2015).

<sup>7</sup> *Id.*

<sup>8</sup> Publication, Center for Justice at Columbia University, *Aging in Prison: Reducing Elder Incarceration and Promoting Public Safety* (Nov. 2015), <http://centerforjustice.columbia.edu/policy/aging-in-prison>.

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

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

<sup>11</sup> Kathryn M. Nowotny et al., *Growing Old Behind Bars*, 28 *JOURNAL OF AGING & HEALTH* 935, 935–956 (2015).

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

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and frequent falling.<sup>13</sup> Aside from the physiological impairments, there are also psychological impairments that run rampant amongst older inmates. Conditions such as dementia, depression, and post-traumatic stress disorder are the major cognitive and psychological deficiencies that are most prevalent.<sup>14</sup> To take care of these ailments, prisons have nurses that range from around the clock, 24-hour care to occasional care nurses.<sup>15</sup> But this does not apply to all aging prisoners; unless they have a terminal disease or cannot fulfill their basic functions without assistance, they receive only periodic help through the prisons healthcare system. Follow-up care to manage conditions such as anxiety, thoughts of suicide, and drug abuse is rare and is a factor that contributes to the premature aging and worsening of overall health and mental capacity in older inmates.<sup>16</sup>

A public health issue is created when older inmates are released from prison. The rate of healthy older inmates is 45.1%, with more than half dealing with at least one health issue.<sup>17</sup> Post-release, older formerly incarcerated adults have little to no resources to survive outside of the prison system, and a majority of the time they end up homeless or in low-income inner-city neighborhoods, where they continue to struggle with their health. In an article by *The Gothamist*, multiple older adults who were formerly incarcerated shared their stories of their post-release struggles.<sup>18</sup> Gloria Rubero spent 26 years in prison for robbery and murder and was released in 2007 to a world she described as a “time warp.”<sup>19</sup> Rubero explained that she never used the internet, cell phone, or MetroCard and even asked to be returned to prison when she assumed people talking on wireless cell phones and headsets were mentally ill.<sup>20</sup> While she was incarcerated, Rubero worked as an electrician and plumber but did not receive a license for either trade, making finding a job post-release a struggle.<sup>21</sup> Another story was told by Lawrence White, who was released from prison on parole in his seventies. He stated “You don’t spend three decades in an eight-by-sixteen-foot cell then come out and expect to live a normal life. You

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<sup>13</sup> *Id.* at 4.

<sup>14</sup> *Id.* at 4; Jamie Fellner, *Old Behind Bars: The Aging Prison Population in the United States*, Human Rights Watch, 6 (2012).

<sup>15</sup> Jamie Fellner, *Old Behind Bars: The Aging Prison Population in the United States*, Human Rights Watch, 74 (2012).

<sup>16</sup> Kathryn M. Nowotny et al., *Growing Old Behind Bars*, 28 *JOURNAL OF AGING & HEALTH* 935–956 (2015).

<sup>17</sup> *Id.* at 13.

<sup>18</sup> Victoria Law, *You’re Old & Finally Out of Prison: What Happens Now?*, *THE GOTHAMIST* (Sept. 18, 2014), [http://gothamist.com/2014/09/18/elderly\\_ex\\_prisoners\\_nyc.php](http://gothamist.com/2014/09/18/elderly_ex_prisoners_nyc.php).

<sup>19</sup> *Id.*

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

<sup>21</sup> *Id.*

become acclimated to prison life and get institutionalized.”<sup>22</sup> Mujahid Farid experienced a similar fate after his release. Once hoping to start his own printing business once out of prison, he had to rethink that decision when printing became obsolete over the course of his 33 years behind bars.<sup>23</sup> Farid also experienced difficulty in finding housing, as did White and Rubero.<sup>24</sup> These stories are not unique to these three individuals as most formerly incarcerated seniors face the same issues plus others, such as access to health care and other public benefits. Older former inmates find it difficult to embrace an ever-changing society, especially because most of them serve longer than ten years behind bars.<sup>25</sup>

### *C. Lack of Civil Legal Aid for Older Inmates*

It has become obvious that older formerly incarcerated individuals need assistance post-release. Many of the issues they face are specific to being elderly and former inmates. This cross-over of issues can be addressed by civil legal services. Civil legal aid is defined as “free legal assistance to low- and middle-income people who have civil legal problems. These problems are non-criminal; rather, civil legal aid helps people access basic necessities such as healthcare, housing, government benefits, employment, and educational services.”<sup>26</sup> While civil legal aid has been made accessible nationwide to a variety of people through efforts of Congress since 1973,<sup>27</sup> more can be done to address the intersection of incarceration and age. Many models of multidimensional solutions for this specific population advocate for civil legal services, but not enough is being done to bring these models to fruition.<sup>28</sup> The specific civil legal aid that formerly incarcerated older adults need is assistance with healthcare planning in terms of obtaining Medicaid and Medicare, securing jobs (especially when they involve professional certificates or licenses), and housing, which includes fighting discrimination based on their criminal history both in private housing and nursing homes.

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

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Kathryn M. Nowotny et al., *Growing Old Behind Bars*, 28 JOURNAL OF AGING AND HEALTH 935–956 (2015).

<sup>26</sup> Legal Aid Interagency Roundtable Toolkit Overview, U.S. Dept. of Justice Access to Justice Initiative (April 2014), <https://www.justice.gov/sites/default/files/atj/legacy/2014/04/16/civil-legal-aid-101.pdf>.

<sup>27</sup> Legal Services Corporation Act, Pub. L. No. 93-355, H.R. 7824, 93rd Cong. (1974).

<sup>28</sup> Publication, Center for Justice at Columbia University, *Aging in Prison: Reducing Elder Incarceration and Promoting Public Safety* (November 2015), <http://centerforjustice.columbia.edu/policy/aging-in-prison>.

## II. BACKGROUND OF MASS INCARCERATION FROM THE 1970'S TO PRESENT

### *A. The War on Drugs*

The issue of aging in prison stems from the problem of overcrowding prisons for many decades. The causes of overcrowded prisons stem from the poor policy choices formed in collaboration with the War on Drugs, which targeted young black males and was sensationalized by former President Richard Nixon in 1971.<sup>29</sup> A culture of harsh penal punishments and institutionalized racism was created, and it thrived in the judicial system during the 1980's and 1990's. In 1972, the prison system had roughly 300,000 prisoners and by 1998, there were 1,802,496 prisoners.<sup>30</sup>

The ways politicians function and the statistics that are reported regarding crime and incarceration rates are widely misconstrued by public opinion in the United States. A majority of people voice that they believe sentencing can be harsher and that crime rates are higher than they actually are.<sup>31</sup> Meanwhile, the reality is that sentences given out by judges are typically longer than individuals would place on a particular crime themselves, and crime rates have primarily declined across the nation.<sup>32</sup> Politicians act on public opinion, even if it is inaccurate. A vicious cycle is created through media's exaggeration of crimes through the reporting of only the most heinous crimes and fear mongering to the public; the public in turn elects politicians that will enact harsher criminal laws and sentences on all criminal offenses to reduce the crime rate that is naturally declining despite the laws passed.

### *B. Intersection of Law Enforcement and Prosecutorial Discretion*

Prosecutorial discretion is a factor that should be examined when understanding why certain individuals are incarcerated and how long prison sentences are. Prosecutors in certain counties and districts have the right to charge certain offenders and relieve the charges of others.<sup>33</sup> Often times, prosecutorial discretion is performed subjectively with few

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<sup>29</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS* 48 (2010).

<sup>30</sup> MICHAEL TONRY, *Why Are U.S. Incarceration Rates So High?*, 45 *CRIME & DELINQUENCY* 421 (1999).

<sup>31</sup> *Id.* at 424.

<sup>32</sup> *Id.* at 425.

<sup>33</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS* 104 (2010).

standards followed. This allows for racial biases to seep into the prosecution and discriminate against black offenders, even when they commit non-violent, drug-related offenses. An example of this was the crack-cocaine epidemic of the 1980's that increased the mass incarceration of black communities while white communities were abusing the drug at higher rates.<sup>34</sup>

Prosecutors are not the only ones that had an impact on mass incarceration. All prosecutions start with the enforcement of law by police authorities. The police force is a direct, grassroots form of authority that acts proactively when it comes to drug offenses specifically.<sup>35</sup> Violent crimes, such as murder, burglary, and assault produce a disruptive environment to one or more parties and this is the basis for a criminal complaint. Once a complaint is made, police rightfully act on it and they use their power to serve and protect those in need or in trouble. When a drug sale is made, or even when an individual is simply in possession of drugs, the police are proactive – they actively pursue individuals violating drug laws. This means that police would seek out drug users to charge them with a crime versus receiving a call from a victim of a crime. That is because most drug crimes did not have a victim and most drug offenders were non-violent. In addition to the drug laws, the media played a role in creating an image of inner city residents that law enforcement became enthralled in. Images of the “crack whore”, the “dangerous dealer”, and the “gangbanger” created predatory and dangerous perceptions that law enforcement was influenced by, leading to specific targeting of lower income urban residents, specifically of the African-American and Latino populations.<sup>36</sup> These images and stereotypes were being repeated by politicians and the media with such frequency to win over public approval of the War on Drugs policies, that the biases of law enforcement were not questioned when drug arrests increased within the African-American and Latino demographics.<sup>37</sup> The implicit biases of law enforcement regarding the black community caused them to disproportionately target them for drug offenses. Young black men would face hard choices in court when it came down to fighting their charges in court or accepting severely harsh plea bargains, which they would have to do most of the time due to lack of proper legal aid. The collaboration between the police and the prosecutors would make it seem like President Reagan's campaign to fight drugs was working, when in fact white drug offenders were still out in the communities committing crime and crack-cocaine was a continuing issue amongst all

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<sup>34</sup> *Id.* at 52, 99.

<sup>35</sup> *Id.* at 104.

<sup>36</sup> *Id.* at 107.

<sup>37</sup> *Id.*

racess.<sup>38</sup>

*C. Sentencing Policies and the Perpetuation of Mass  
Incarceration*

Additional policies that supported the mass incarceration of non-violent offenders and drug users were implemented that increased the sentencing time and incarceration rate at rapid speeds. One of these policies was called truth-in sentencing, which would not only enforce the completion of 85% of a prison sentence before given permission for release, but also ensuring that parole was never granted for certain crimes.<sup>39</sup> Another policy was the Three-Strike Law, which mandated extremely long sentences or even life sentences for offenders that were convicted of crimes multiple times, regardless of whether they were violent or non-violent crimes.<sup>40</sup> Both of these policies were used by politicians to appeal to the public as being tough on crime, but in reality, this created violent consequences for society but negatively impacting offenders that were not dangerous to begin with.

The young prisoners from the 1980's and 1990's are now growing older every day and this creates an economic burden for state governments and quality of life issues of individuals behind bars. This creates a worse prison environment and affects public health in low-income inner-city neighborhoods affected by the release of unwell older adults from prison. The policies from the War on Drugs era that impacted drug-related and non-violent offenses are the main reasons for the greater portion of elderly prisoners sentenced to 20 years or more.<sup>41</sup>

Part I of this note establishes the data surrounding aging prisoners, the financial costs of keeping older adults behind bars, and the trials and tribulations they face while incarcerated, such as rapidly declining physical and mental health. Part II establishes the history of mass incarceration and the policies that have been put into place that have perpetuated placing individuals behind bars and keeping them locked up for prolonged periods of time. Part III describes the federal and local civil legal services efforts that have been made available through legislation in the United States and New York City and how both can be improved upon to devote more resources to elderly inmates being released from prison. Part IV describes the barriers to employment

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<sup>38</sup> *Id.*

<sup>39</sup> Jamie Fellner, *Old Behind Bars: The Aging Prison Population in the United States*, Human Rights Watch, 24 (2012).

<sup>40</sup> *Id.* at 29.

<sup>41</sup> Kathryn M. Nowotny et al., *Growing Old Behind Bars*, 28 JOURNAL OF AGING AND HEALTH 935, 935–956 (2015).

former inmates face, especially in obtaining licensed occupations specifically in New York. It then emphasizes what civil legal service providers are on the fore front of helping older adults obtain employment post-incarceration and the models that should be adopted by other civil legal service providers. Part V describes the problem older adults face in the area of housing and how challenging it could be for former inmates to obtain housing and the problems it can cause for older adults, followed by the support and further recommendations to the new legislation passed in New York that establishes a right for an attorney in housing court. Part VI draws on the attention of the difficulties former incarcerated older adults face when it comes to obtaining proper healthcare coverage, especially with the restrictions created by Medicaid and Medicare. Part VII considers other challenges and questions that can surround expanding civil legal aid services to concentrate on older adults who have been incarcerated and proposes recommendations based on models that have been created and implemented in various places across the country. Part VIII is a call to action that advocates for civil legal service providers to create an intersection in the help they provide to the elderly and the help they provide to former incarcerated individuals because of the unique challenges older adults face post-release as they transition back into their communities.

### III. CIVIL LEGAL SERVICES

#### *A. Federal Legislative Action*

The government has acknowledged that low to middle income individuals require no-cost civil legal services in their communities. This has been done through statutes like Title III of the Older Americans Act and the formation of the Legal Services Corporation.<sup>42</sup> Section 1321.71 of the Older Americans Act lays out a structure for legal assistance providers to receive federal funding in exchange for supplying legal assistance to older adults.<sup>43</sup> Specifically, Section 1321.71(c) establishes the standards each legal assistance provider must meet to receive funding.<sup>44</sup> These standards include “have staff with expertise in specific areas of law affecting older persons in economic or social need...” and “demonstrate the capacity to provide effective

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<sup>42</sup> Older Americans Act, Title III, 42 U.S.C. § 3001 (1988); Legal Services Corporation Act, 42 U.S.C. § 2996 (1974).

<sup>43</sup> Older Americans Act, Title III, 42 U.S.C. § 3001 (1988).

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

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administrative and judicial representation in the areas of law affecting older persons with economic or social need”.<sup>45</sup> The Legal Services Corporation was established in 1974 as a result of passing H.R. 7824, also known as the Legal Services Corporation Act.<sup>46</sup> The act was established to provide federal funds for organizations that provide noncriminal legal assistance to low-income individuals.<sup>47</sup>

## 1. Proposal to Amend Federal Legislation

The general language of the statute could benefit from magnifying the different issues the aging demographic across the country faces. In this instance, the language of the statute should be amended to highlight the formerly incarcerated older adults who are reentering society for the first time in years, sometimes decades. One provision specifically in Section 1321.71(c) instructs legal assistance providers to “demonstrate the capacity to provide legal services to institutionalized, isolated, and homebound older individuals effectively.”<sup>48</sup> The language of this subsection should be edited to define “institutionalized” beyond the scope of nursing homes and medical facilities. Prisons should be included in the interpretation of the word to help legal assistance providers expand the scope of the assistance they offer.

## 2. Proposal to Appropriate More Federal Funding to Legal Services Corporation

The Legal Services Corporation should be appropriated more federal funding to provide more resources to non-profit legal assistance organizations in assisting older adults in their reentry process.<sup>49</sup> Because older inmates already cost the government such high amounts of money, diverting that money instead to provide for their proper caretaking and reentry into their communities would be a more efficient use of taxpayers’ money.<sup>50</sup> Based on the research done, the high estimate of the annual incarceration cost per aging or elderly prisoner is \$102,000, the middle estimate is \$69,500, and the low estimate is \$35,000.<sup>51</sup> Any

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

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

<sup>48</sup> *Id.*

<sup>49</sup> Legal Services Corporation Act, 42 U.S.C. § 2996 (1974).

<sup>50</sup> Publication, Center for Justice at Columbia University, *Aging in Prison: Reducing Elder Incarceration and Promoting Public Safety* (Nov. 2015), <http://centerforjustice.columbia.edu/policy/aging-in-prison>.

<sup>51</sup> *Id.* at 37.

sum of money could be rerouted to civil legal services that can help with securing housing, employment, and proper medical care for older adults leaving prison.

### *B. New York City Legislative Action*

Where the federal government cannot meet the needs of civil legal assistance organizations and the demographics that need the assistance, the local governments should take responsibility. With a focus on New York City, certain legislative actions have previously been attempted and advocacy for proper legislation to assist formerly incarcerated older adults should continue.

New York City has previously tried to introduce legislation that supports comprehensive and collaborative efforts through New York City agencies and the stakeholders in the proper reentry of older adults. Int. No. 1616-A would try to form a temporary task force that would focus specifically on older adults coming out of prisons and trying to reenter their communities.<sup>52</sup> The task force would be comprised of 12 members with orders that:

eight members shall be appointed by the mayor, chosen from individuals representing relevant city agencies, provider organizations and advocacy groups, and individuals representing impacted communities, provided that at least 3 members shall be formerly incarcerated individuals; and four members shall be appointed by the speaker of the council, chosen from individuals representing provider organizations and advocacy groups, individuals representing impacted communities, and academics with expertise in post-incarceration reentry for older adults.<sup>53</sup>

This would pose the perfect example where civil legal service providers can be mandated to provide their legal efforts in assisting a population that has not been considered much for individualized attention but a population that will cause increased concern for the city if not addressed through as many means as possible.

## IV. EMPLOYMENT

One area where civil legal aid can be useful for older formerly incarcerated adults is in attaining a job. Many former prisoners learn

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<sup>52</sup> Int. No. 1616-A (2007).

<sup>53</sup> *Id.*

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trades while in prison that can turn into careers when they are released. In 1997, the Bureau of Justice Statistics reported that 32.2% of state prisoners and 31% of federal prisoners were enrolled in vocational education programs during their incarceration, both an increase from 1991.<sup>54</sup> The vocational skills that prisoners are learning do not always translate to employment because of legal obstacles that have to be overcome by former inmates. Civil legal assistance is one tool benefit that former inmates can receive that will give them an advantage in overcoming the legal barriers that exist in obtaining jobs post-release from prison.

*A. Licensure for Different Professions and the Issue of Obtaining Licensure for the Formerly Incarcerated*

The vocational education for inmates is important to help with their reentry process and job security. The issue stems from state laws that require “good moral character” to be proven to obtain a license in various trades.<sup>55</sup> Many professions that require licenses in New York, such as dental hygienists, bus drivers, barbers, electricians, EMTs, and others require “good moral character”, which can be hard to show with a criminal record.<sup>56</sup> Agencies can consider several factors when deciding if someone with a criminal history should be granted a license. The factors are outlined in Article 23-A of the New York Correction Law and some of them include public policy considerations, how long ago the offense took place, the seriousness of the offense, if the offender has been rehabilitated, the balance of the employer’s interest versus granting employment to the ex-offender, and more.<sup>57</sup> If an agency denies a license to someone with an ex-offender, they can submit “Evidence of Rehabilitation” that show the positive changes an individual has made post-conviction. The documentation that goes into showing “evidence of rehabilitation” includes letters of support from clergy members, parole or probation officers, proof of employment and/or schooling, volunteer work, and proof of counseling or social

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<sup>54</sup> U.S. DEPARTMENT OF JUSTICE, EDUCATION AND CORRECTIONAL POPULATIONS (2003).

<sup>55</sup> Adam Edelman, *Inmates Who Learn Trades Are Often Blocked From Jobs. Now Something’s Being Done.* NBC, (May 26, 2018, 8:09 AM), <https://www.nbcnews.com/politics/politics-news/inmates-who-learn-trades-are-often-blocked-jobs-now-something-n877666>.

<sup>56</sup> The Prisoner Reentry Institute at John Jay College of Criminal Justice & Youth Represent, *Getting to Work With A Criminal Record: New York State License Guides*, [https://static1.squarespace.com/static/5672e21ddf40f3fd5f527d40/t/5b06c7790e2e7287abcf0259/1527170956953/Getting+to+Work+with+a+Criminal+Record\\_+NYS+License+Guides.compress+ed.pdf](https://static1.squarespace.com/static/5672e21ddf40f3fd5f527d40/t/5b06c7790e2e7287abcf0259/1527170956953/Getting+to+Work+with+a+Criminal+Record_+NYS+License+Guides.compress+ed.pdf) (last visited Mar. 4, 2019).

<sup>57</sup> New York Correction Law Article 23-A (2008).

services.<sup>58</sup> An ex-offender will also need a Certificate of Relief from Disabilities or a Certificate of Good Conduct, two forms that show rehabilitation depending on the number of convictions you have and whether they are a felony or misdemeanor.<sup>59</sup>

§752 of Article 23-A establishes that no individual should be denied employment or a license by a public or private agency based on their previous criminal convictions.<sup>60</sup> This provision lays out two exceptions to this general policy. These two exceptions are: 1) if there is a direct relationship between one or more of the previous criminal convictions and the specific license or employment that is being obtained by the individual, or 2) if granting the license or employment or the continuation of either would create an unreasonable risk to property, welfare, or safety of individuals or the public.<sup>61</sup> The law is clear that when weighing the factors established by Article 23-A, the interest lies in granting employment or a license to an individual with prior convictions.<sup>62</sup>

In New York, if you are denied a license by a state agency, you can appeal the agency's decision through an Article 78 proceeding.<sup>63</sup> An Article 78 proceeding allows a petitioner to challenge the actions of administrative agencies and other government bodies.<sup>64</sup> If a private employer denies employment based on prior criminal convictions, a proceeding before the New York City Commission on Human Rights can be brought in violation of Article 23-A.<sup>65</sup> This is where civil legal aid can assist formerly incarcerated older adults the most. Many older adults, especially ones coming out of incarceration, might not possess the knowledge that Article 23-A protects them when it comes to employment. This includes §754 of Article 23-A which requires a written statement by the public agency or private employer specifying the reasons the individual was denied employment or a license.<sup>66</sup>

*B. Assistance of Attorneys with Persuing Discrimination Claims  
Against Agencies and Employers Pursuant to Article 23-A*

Pilot projects have been launched by organizations in New York

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<sup>58</sup> Legal Action Center, *HOW TO GATHER EVIDENCE OF REHABILITATION* (2016).

<sup>59</sup> *Id.*

<sup>60</sup> New York Correction Law, Article 23-A, (2008).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Supreme Court, Civil Branch, *How To Start A Special Proceeding*, <https://www.nycourts.gov/courts/1jd/suptmanh/SelfRep%20Forms/Special%20Proceeding2.pdf>.

<sup>64</sup> *Id.*

<sup>65</sup> New York Correction Law, Article 23-A, (2008).

<sup>66</sup> *Id.*

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City that have demonstrated their efforts in providing free legal assistance to formerly incarcerated adults with employment specifically. The New York County Lawyers Association has instituted a legal assistance program called “Project Restore”, whose main purpose is to provide pro bono representation to individuals challenging their denial of a license based on their prior criminal convictions.<sup>67</sup> The pro bono assistance represents individuals in Administrative Court hearings, which includes assistance with appeals to the Administrative Court and the New York Supreme Court through Article 78.<sup>68</sup> Because of the specific needs of elderly formerly incarcerated, the program should focus more on their needs when being represented, especially since age is a factor that employers and public agencies should consider, as stated in Article 23-A.<sup>69</sup> With more knowledge of research and statistics surrounding older adults and recidivism, lawyers can effectively argue on behalf of their clients seeking to obtain a employment or a license, or overturn an adverse judgment by an administrative law judge. For example, it has been shown that adults over 50 are less likely to engage in criminal activity, and adults over 65 have the lowest rates of recidivism.<sup>70</sup>

The courts in New York have acknowledged and supported the fight against discrimination based on criminal records when it comes to job employment and professional licensing. In *Griffin v. Sirva, Inc.* the plaintiffs, who were convicted sex offenders, filed suit against their former employer Astro Moving and Storage Co. Inc., who contracted with Allied’s Certified Labor Program to provide moving services, and Sirva, which was the company that investigated employers’ criminal records.<sup>71</sup> Plaintiffs claimed that the respondents discriminated against them based on their prior criminal convictions under New York State’s Human Rights Law § 296 (15).<sup>72</sup> New York State’s Human Rights Law § 296 (15) lays out multiple categories that employers cannot discriminate on, including prior criminal convictions.<sup>73</sup> In this case, the New York’s Court of Appeals upheld § 296 (15), which is incorporated

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<sup>67</sup> Press Release, New York County Lawyer’s Association, NYCLA Launches Two Pro Bono Programs: Project Restore and Manhattan Claro (Dec. 12, 2007).

<sup>68</sup> GENERAL PUBLIC NEED LEGAL HELP? NEW YORK COUNTY LAWYERS ASSOCIATION HOME, [http://www.nycla.org/NYCLA/General\\_Public/NEED\\_LEGAL\\_HELP/NYCLA/GeneralPublic/Need\\_Legal\\_Help.aspx?hkey=1bf4f39a-dcf9-442d-ae28-c9c90d0ce96f](http://www.nycla.org/NYCLA/General_Public/NEED_LEGAL_HELP/NYCLA/GeneralPublic/Need_Legal_Help.aspx?hkey=1bf4f39a-dcf9-442d-ae28-c9c90d0ce96f) (last visited Mar 3, 2019).

<sup>69</sup> New York Correction Law, Article 23-A, (2008).

<sup>70</sup> Eileen Kelly & Danylle Rudin, *Growing Old is Hard Enough: Prison, Jail and Post-Release Life for Older Adults*, GRANTMAKERS IN HEALTH, (August 2017, <http://www.gih.org/Publications/ViewsDetail.cfm?ItemNumber=8958>).

<sup>71</sup> *Griffin v. Sirva, Inc.*, 29 N.Y.3d 174, (N.Y. 2017).

<sup>72</sup> *Id.* at 179.

<sup>73</sup> *Id.*

through Article 23-A.<sup>74</sup> The Court of Appeals reiterated that the law applies to private employers and employers hold the liability to not discriminate under the law.<sup>75</sup>

In emphasizing how important legal representation can be for someone with a criminal history in obtaining employment, the case of *Peluso v. Smith* serves as a proper example. In this case, the petitioner, Peter A. Peluso, filed suit because he was denied certification by the New York City Department of Buildings and the Department of Personnel of the City of New York to continue working as a site safety manager.<sup>76</sup> Peluso's history includes employment by the New York City Department of Buildings, where he was brought up on a disciplinary hearing due to several violations of Civil Service Law § 75.<sup>77</sup> After an appeal before the New York City Civil Service Commission, Peluso was criminally charged for bribery by the Kings County District Attorney's Office.<sup>78</sup> Peluso pled guilty and served five years of probation, in addition to a fine and community service.<sup>79</sup> Peluso was subsequently fired from the New York City Department of Buildings.<sup>80</sup> At the time of the certification denial, Peluso was employed by Inspeco, Inc., as a site safety coordinator.<sup>81</sup> In the suit, Peluso contended that he was denied a fair hearing in response to the denial of his certification by the New York City Department of Buildings. The Supreme Court of New York ruled in favor of Peluso, ordering that his procedural due process was violated by the New York City Department of Buildings when they did not hold a hearing to take into consideration his certificate of relief from disabilities, which would shift the burden to the respondents to show that a presumption of rehabilitation has not been established.<sup>82</sup> This is an example where civil legal aid attorneys could assist in the hearings and present proper representation for more people like Peluso to advocate for them to receive employment and be productive members of society like they want to be.

New York should continue its efforts in easing restrictions for occupational licenses while making the changes in the law easily accessible and widely known to constituents and civil legal aid providers. Governor Cuomo has included this objective in his 2019 fiscal budget, proposing to "remove bans on occupational licensing"<sup>83</sup>

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<sup>74</sup> *Id.* at 182.

<sup>75</sup> *Id.* at 183.

<sup>76</sup> *Peluso v. Smith*, 142 Misc. 2d. 642, (N.Y.S. 1989).

<sup>77</sup> *Id.* at 643.

<sup>78</sup> *Id.* at 644.

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

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 646.

<sup>83</sup> Governor Cuomo Announces Comprehensive Reforms to Improve the Re-Entry Process

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by:

Expanding on existing laws outlawing blanket employment discrimination against people with criminal convictions, the Governor's proposal removes outdated bans in occupational licensing for professions outside of law enforcement. Applicants for these licenses will instead be assessed on an individualized basis. Eliminating these antiquated bans will effectively increase the number of occupational fields formerly incarcerated individuals have the opportunity to enter, promote economic stability after release, and aid in successful re-entry into society.<sup>84</sup>

If civil legal aid providers are properly equipped with the knowledge of the occupational licensing laws, they can be more prepared to handle inquiries by formerly incarcerated elderly who are seeking to reenter the workforce through licensing opportunities.

## V. HOUSING

Many older adults that have been incarcerated find housing to be one of their biggest challenges. Under the Fair Housing Act, possessing a criminal record does not protect you from discriminatory landlord practice.<sup>85</sup> This leads to recidivism or homelessness, both of which cause increasing conflicts for local governments, especially when it comes to the fiscal costs of caring for older adults on the street or in prison. Prior criminal convictions are not a factor Public Housing Agencies (PHA) can consider when extending opportunities for housing to low-income individuals.<sup>86</sup> The two limitations to this are individuals who have been convicted of producing methamphetamine in their homes and individuals who have been designated as sex offenders.<sup>87</sup>

The addition of Intro 214-b to New York City local law has created a pathway for anyone to obtain free legal counsel for housing court matters, including eviction.<sup>88</sup> Intro 214-b is a bill that was signed into law on August 11, 2017 that guarantees a right to counsel for income-

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for Formerly Incarcerated Individuals, GOVERNOR ANDREW M. CUOMO (2018), <https://www.governor.ny.gov/news/governor-cuomo-announces-comprehensive-reforms-improve-re-entry-process-formerly-incarcerated> (last visited Mar 4, 2019).

<sup>84</sup> *Id.*

<sup>85</sup> Camila Domonoske, Denying Housing Over Criminal Record May Be Discrimination, *Feds Say* NPR (2016), <https://www.npr.org/sections/thetwo-way/2016/04/04/472878724/denying-housing-over-criminal-record-may-be-discrimination-feds-say> (last visited Mar 4, 2019).

<sup>86</sup> Information about Public Housing for Felons, HELP FOR FELONS, <https://helpforfelons.org/information-public-housing-for-felons/> (last visited Mar 4, 2019).

<sup>87</sup> *Id.*

<sup>88</sup> Int. No. 214-B (2018).

eligible individuals (those that fall below 200% of the federal poverty guideline).<sup>89</sup> This will immensely help formerly incarcerated older adults who could run into issues with landlords regarding their criminal records. The initiative to protect individuals from eviction with the assistance of free legal counsel shows the importance of civil legal services for those that need them, including those with special legal needs like felons.

If older adults cannot find adequate housing or they are too debilitated coming out of the prison system, they must turn to nursing homes. The issue is then which nursing home can they enter and stay in and how do they pay for it. Even if a nursing home is willing to take a senior into their care after prison, poor care is usually provided, or in the worst-case scenario, full blown elder abuse can occur.<sup>90</sup> Civil legal aid attorneys can provide special assistance in this area, particularly in “patient’s rights, including right to refuse treatment, involuntary mental health interventions, and nursing home residents’ rights.”<sup>91</sup>

## VI. HEALTHCARE

Medicaid and Medicare are federal healthcare programs that allow low income Americans to be provided for medically.<sup>92</sup> Medicaid affords the elderly, children, pregnant women, low-income adults, and the disabled healthcare coverage through the states.<sup>93</sup> Medicare is also a federal health insurance plan consisting of different parts for different services that primarily covers individuals 65 or older.<sup>94</sup> The issues that older adults in prison face regarding public healthcare coverage is that in the case of Medicare, while the eligibility persists during an individual’s incarceration period, there is no coverage for medical costs from Medicare until the individual is released.<sup>95</sup> This means anyone 65

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<sup>89</sup> *Id.*

<sup>90</sup> “For decades, nursing homes have been plagued with reports suggesting widespread and serious maltreatment of residents, including abuse, neglect, and theft of personal property.” Catherine Hawes, National Institute of Health, National Research Council (US) Panel to Review Risk and Prevalence of Elder Abuse and Neglect, *Elder Abuse in Residential Long-Term Care Settings: What Is Known and What Information Is Needed?* (2003).

<sup>91</sup> Candace Heisler, *The Role of Civil Attorneys on Elder Abuse Multidisciplinary Teams*, NYC Elder Abuse Center (2018).

<sup>92</sup> Medicaid, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/index.html> (last visited Mar 4, 2019)., What’s Medicare?, MEDICARE.GOV - THE OFFICIAL U.S. GOVERNMENT SITE FOR MEDICARE, <https://www.medicare.gov/what-medicare-covers/your-medicare-coverage-choices/whats-medicare> (last visited Mar 4, 2019).

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

<sup>94</sup> *Id.*

<sup>95</sup> Medicare coverage during incarceration, MEDICARE INTERACTIVE, <https://www.medicareinteractive.org/get-answers/medicare-health-coverage-options/medicare-and-incarceration/medicare-coverage-during-incarceration> (last visited Mar 4, 2019).

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or over incurring medical care costs in prison has to have the correctional facility they are in cover the costs.<sup>96</sup> The same issue occurs with Medicaid coverage, although state Medicaid policies can affect an individual's enrollment in Medicaid while they are incarcerated.<sup>97</sup>

When an individual is released from prison, they face an abundance of challenges in obtaining medical healthcare coverage, especially through the government. This is because many felons, especially the older felons, have low literacy rates, making it hard to fill out proper applications and follow the necessary procedural steps to obtain health insurance.<sup>98</sup> So while medical coverage through Medicaid and/or Medicare can resume when reentry begins, an individual may not be aware of this or have the skills to reinstate their coverage.

The New York Legal Assistance Group is one example of a direct legal services organization that can assist older adults with getting Medicaid and Medicare coverage.<sup>99</sup> While the work they do for the general aging population is sufficient, the aging adults that are released from prison have more needs when discussing healthcare coverage, just as they do in employment and housing.

## VII. OTHER CONSIDERATIONS

It is important to address the overlying responsibilities of lawyers and social workers when it comes to the transition of convicts from incarceration to life beyond prison. The Center for Justice at Columbia University presented a model in November 2015 called the Community Re-Integration Pilot Case Management Model, and this model outlines ways to provide for older adults as they are released from prison through organizations and various stakeholders of proper reintegration.<sup>100</sup> While this model is just a pilot program and makes

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

<sup>97</sup> Health coverage options for incarcerated people, HEALTHCARE.GOV, <https://www.healthcare.gov/incarcerated-people/> (last visited Mar 4, 2019).

<sup>98</sup> "...inmates under age 35 demonstrate higher document proficiency than those 35 and older." U.S. Department of Education, *Literacy Behind Prison Walls*, National Center for Education Statistics, 37 (1994).

<sup>99</sup> "The Evelyn Frank Legal Resources Program (EFLRP) provides legal services to hundreds of elderly clients each year, helping them navigate the complex systems that provide access to health care and home care." "NYLAG's Public Benefits Unit primarily handles matters related to eligibility for a full range of federal and state public benefits that provide a critical lifeline for New Yorkers in need. Attorneys work to ensure that low-income families, children, the elderly, those with disabilities, veterans, and other vulnerable populations have access to the public benefits they are entitled to, including public assistance, SNAP benefits, Medicaid, Medicare, Social Security Disability Insurance and Supplemental Security Income." Evelyn Frank Legal Resources, NEW YORK LEGAL ASSISTANCE GROUP, <https://www.nylag.org/units/evelyn-frank-legal-resources> (last visited Mar 3, 2019).

<sup>100</sup> Publication, Center for Justice at Columbia University, *Aging in Prison: Reducing Elder*

room for adjustments and customization, legal help is mentioned vaguely. Based on this model, case workers in the social work field hold the main responsibility in implementing the model and one of the pieces of knowledge recommended by the model is the knowledge of laws and legal issues specific to those who are coming out of prison.<sup>101</sup> This is where tension might be created between legal service providers and attorneys and organizations providing social work resources to previously incarcerated individuals. While basic ideas of what older adults coming out of prison might need in the legal realm is useful for social workers, the duties of a lawyer can become diminished when they are not clearly established via a proper model for transition into post-incarceration life.

Extending the reach of attorneys working in civil legal services to parole hearings and criminal defense matters could be useful but not always possible. One possible model that could be adopted is the Project for Older Prisoners (POPS) model of legal work, which was a clinic established in George Washington University by Jonathan Turley in 1989.<sup>102</sup> The basics of the project are assessing individual case files through different lenses to see if a petition for early release is possible with proper reentry safeguards.<sup>103</sup> According to POPS, clinic students first carefully examine each prisoners background, including factors such as criminal history, family composition, health status, and more. Then, using the information they obtain from the prisoner through a questionnaire, students use two recidivism tests to examine the likelihood the prisoner is to recommit when released from prison.<sup>104</sup> After the two tests are evaluated, there is a mandatory “victim consultation” stage, where victims or victims’ families get to come forward and discuss possible inconsistencies regarding the prisoner’s record.<sup>105</sup> This is where the criminal law boundary seems to lie but the civil law aspect begins when students start examining if the prisoner is entitled to veteran’s benefits, social security payments, and other public assistance.<sup>106</sup> Students also assess the prisoner’s post-release housing situation and potential employment opportunities.<sup>107</sup> As the POPS program is run by students, it would be an innovative model to adopt by organizations with more legal resources and capabilities, such as the

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Incarceration and Promoting Public Safety (Nov. 2015), <http://centerforjustice.columbia.edu/policy/aging-in-prison>.

<sup>101</sup> *Id.* at 86.

<sup>102</sup> POPS project for older prisoners, *PATH TO FREEDOM FOR THE ELDERLY PRISONER* (2012), <https://elderlyrelease.wordpress.com/pops-project-for-older-prisoners/> (last visited Mar 3, 2019).

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

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

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

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Legal Aid Society and the New York Legal Assistance Group. By adopting a model of this sorts, more screening can occur for older inmates and possibly secure them an early release through the civil legal aid route, where funding exists but not for typical criminal matters such as criminal defense work.

New York City has also attempted to codify into its law a re-entry task force for older adults.<sup>108</sup> Int. No. 1616-A was introduced in 2017 and while it was passed by the City Council in December of 2017, it was never signed by Mayor Bill de Blasio. The Aging Reentry Task Force had the constituents and city representatives' approval, as seen through a Resolution written and released by Manhattan Community Board 10.<sup>109</sup> The resolution detailed what the Aging Reentry Task Force's purpose, the stakeholders, and why it would be necessary for the community.<sup>110</sup> Based on the testimony of James Royall from the Brooklyn Defender Services before the New York City Council Committee on Aging, recommendations for the taskforce including assistance with housing, special protocol for reentry of elderly adults convicted of sex offenses, and allowing the voices of those who have had personal experiences with incarceration in their lives to serve on the taskforce.<sup>111</sup>

While the taskforce has not been adopted into passed legislation yet, it should be, and furthermore, it serves as an ample opportunity for civil legal aid providers to get involved in both policy work and individual assistance to those who are elderly and have been formerly incarcerated. By working with the various departments established as stakeholders in the task force, civil legal services should be considered as an additional moving part to the task force for successful reintegration of the elderly post-release. Because the work in collaborative in nature, the overlap of criminal defense work and civil legal services could strike a balance through a task force framework, as

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<sup>108</sup> Int. 1616-A (2017).

<sup>109</sup> Manhattan Cmty. Bd. 10, Res. In Support of Aging Reentry Task Force and Elders Released From N.Y. State Corr. Facilities (2017).

<sup>110</sup> "Whereas it is the responsibility and the privilege of Community Board 10 to support our entire community, and for the public safety issues of Manhattan Community Board 10, to support the more elderly and vulnerable among our community;" "Whereas a large number of organizations, including the New York State Department of Corrections and Community services (DOCCS), New York City Department of Corrections (DOCS), New York City Department of Probation (DOP), the Public Advocate's Office, the New York Mayor's Office, the New York City Department of Aging (DFTA) and many others, have come together as the Aging Reentry Task Force and have created a model pilot program and resource guide for elders upon release from prison;" "Therefore be it RESOLVED that Community Board 10-Manhattan supports the Aging Reentry Task Force model and will hold educational and other meetings to make certain that our community understands the needs of elders released from prison and can help to reintegrate them into our community." *Id.*

<sup>111</sup> James Royall, Reentry Specialist/Advocate, Brooklyn Defender Services, Testimony presented before The New York City Council Committee on Aging (Sept. 20, 2017).

it has in other models. An example of this model that has worked successfully is the Multidisciplinary Team to address elder abuse established by the New York City Elder Abuse Center.<sup>112</sup> The Elder Abuse MDT is comprised of several organizations and partners including prosecutors, forensic accountants, geriatric psychiatrists, Adult Protective Services, civil legal service providers, and more.<sup>113</sup> These partners meet to discuss complex elder abuse cases and are able to provide different perspectives on how to assist with the cases that all contribute to a final action plan to assist the elder individual suffering from abuse.<sup>114</sup> According to NYCEAC, “research on MDTs suggests that they significantly improve the efficiency and effectiveness of response to cases of elder abuse” and “MDTs improve the rate of prosecution in financial exploitation cases, increase the rates of elder abuse reporting in general, and are cost effective.”<sup>115</sup> With the positive evidence that has been showed from MDTs, which includes the addition of civil legal service providers, in the area of elder abuse, it can be proposed that taking the same approach to reentry of the elderly after prison could return the same results, including saving communities money and efficiently using resources.

### VIII. CONCLUSION

There are many civil legal services available for formerly incarcerated individuals and the senior population, but separately. Very little intersectionality exists between the two population groups. The idea is to have specialized civil legal services in various organizations that provides for the specific needs of older adults being released from prison. There are also specific needs older adults in prison face that would be served best through the assistance of civil legal services. Because older adults already have funding and statutory mandates set out for them specifically to receive legal assistance, it just needs to envelop a more niche population. Issues for older adults coming out of prison range from employment, housing, and healthcare, and if not properly addressed, any combination of those issues can cause homelessness and possible recidivism, both affecting public health and the safety of communities on a large scale.

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<sup>112</sup> Multidisciplinary Teams: Overview, NYCEAC, <https://nyceac.org/clinical-services/mdts/> (last visited Mar 4, 2019).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*