A LITTLE CHILD SHALL LEAD THEM: JUVENILE JUSTICE, AGING OUT, AND THE FIRST STEP ACT

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"When I was a child, I spake as a child, I understood as a child, I thought as a child: but when I became a man, I put away childish things"[1]

INTRODUCTION

Sentencing reform remains imminent.[2] Relentless efforts by federal and state legislators have become final law or are ambling through various legislative processes.[3] In their earliest iterations, modern sentencing reforms focused largely on reconfiguring punishments for drug offenses in order to ensure equality in sentencing.[4] The movement was later fueled by bipartisan efforts seeking to shorten terms of incarceration in order to reduce the exorbitant costs of imprisonment.[5] The latest addition to modern sentencing reform arises in the form of seeking and studying alternatives to incarceration, including identifying who deserves to be

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1. 1 *Corinthians* 13:11 (King James).

2. *See* Peter Baker, '*16 Rivals Unite in Push to Alter Justice System,* N.Y. TIMES, Apr. 28, 2015, at A1 (noting bipartisan support for prison reform); Peter Baker, *Bill Clinton Disavows His Crime Law as Jailing Too Many for Too Long,* N.Y. TIMES, July 16, 2015, at A16 (reporting on former President Bill Clinton's support for sentencing reform); Kelly Cohen, *Criminal Justice Reform Poised to Take Off in* 2018, WASH. EXAMINER (Dec. 30, 2017, 12:01 AM), http://www.washingtonexaminer.com/criminal-justice-reform-poised-to-take-off-in-2018/article/2644603 (describing increased congressional support for sentencing reform); Erik Eckholm, *A.C.L.U. in $50 Million Push to Reduce Jail Sentences,* N.Y. TIMES, Nov. 7, 2014, at A14 (identifying major financial donations to the prison reform movement); Editorial Board, *Ending the Rikers Nightmare,* N.Y. TIMES, June 24, 2015, at A22 (explaining the reforms occurring at Rikers Island); Editorial Board, *Justice Kennedy's Plea to Congress,* N.Y. TIMES, Apr. 5, 2015, at SR10 (remarking on the rarity of sitting U.S. Supreme Court justices sharing their views on needed prison reform); Bill Keller, *Prison Revolt,* NEW YORKER (June 22, 2015), https://www.newyorker.com/magazine/2015/06/29/prison-revolt (commenting on rising support for prison reform among political conservatives).

3. *See* NICOLE D. PORTER, SENTENCING PROJECT, TOP TRENDS IN STATE CRIMINAL JUSTICE REFORM, 2018, at 1 (Jan. 2019), https://www.sentencingproject.org/wp-content/uploads/2019/01/Top-Trends-in-State-Criminal-Justice-Reform-2018.pdf (noting that lawmakers in California, Florida, Michigan, Mississippi, and Oklahoma have all recently adopted various aspects of sentencing reform).

4. *See* Adam B. Weber, *The Courier Conundrum: The High Costs of Prosecuting Low-Level Drug Couriers and What We Can Do About Them*, 87 FORDHAM L. REV. 1749, 1756–60 (2019).

5. *See id.* at 1770–71.

spared prison time. Though helpful and certainly welcome, current proposed reforms largely ignore the special needs of the imprisoned elderly. It is imperative that any overhaul of criminal sentencing focuses on how to meaningfully address the graying of America's prisons. The prison "silver tsunami" phenomenon provokes compelling moral, health, and fiscal considerations requiring immediate attention.[6] Currently, elderly inmates comprise an astounding nineteen percent of the total prison population, a number which continues to rise.[7] According to the Federal Bureau of Prisons, prisons are ill-equipped to adequately manage the exorbitant health care, social, educational, physical, infrastructure, and other costs associated with imprisoning the elderly.[8] The costs of incarcerating aged offenders are, quite simply, unsustainable.[9] Further, continued incarceration of most classes of elderly offenders frustrates compulsory retributive and utilitarian goals of punishment, and fails to comport with expressive condemnation and restorative justice goals as well. In the case of many groups of offenders who age in prison, enforcing sentences based on these factors, then, is illogical, unfair, and unnecessary. Studies consistently isolate age as one of the most

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6. *See generally* OSBORNE ASS'N, THE HIGH COSTS OF LOW RISK: THE CRISIS OF AMERICA'S AGING PRISON POPULATION (2014), http://www.osborneny.org/news/unite-for-parole-and-prison-justice/osborne-aging-white-paper/ (explaining issues raised by our aging prison population and surveying solutions to those issues).

7. U.S. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE IMPACT OF AN AGING INMATE POPULATION ON THE FEDERAL BUREAU OF PRISONS iii (2015) [hereinafter IMPACT OF AN AGING INMATE POPULATION], https://oig.justice.gov/reports/2015/e1505.pdf; *see* Edward Lyon, *Compassionate Releases Needed for an Aging Prisoner Population*, PRISON LEGAL NEWS (Nov. 6, 2019), https://www.prisonlegalnews.org/news/2019/nov/6/compassionate-releases-needed-aging-prisoner-population/.

8. *See* IMPACT OF AN AGING INMATE POPULATION, *supra* note 7, at 10–37 (explaining the unique financial burdens associated with elderly prisoners).

9. *See* Eric Holder, U.S. Att'y Gen., Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013); Memorandum from Michael E. Horowitz, U.S. Inspector Gen. of the U.S. Dep't of Justice, to Eric Holder, U.S. Att'y Gen., Top Management and Performance Challenges Facing the Dep't of Just. (Dec. 11, 2013, reissued Dec. 20, 2013) (listing the "growing crisis in the federal prison system" as a top management and performance challenge); *see also* Editorial Board, *Prison Reform: Seize the Moment*, CHRISTIAN SCI. MONITOR (Aug. 12, 2013), http://www.csmonitor.com/Commentary/the-monitors-view/2013/0812/Prison-reform-Seize-the-moment/ (advocating for prison reform). *See generally* JULIE SAMUELS, NANCY LA VIGNE, & SAMUEL TAXY, STEMMING THE TIDE: STRATEGIES TO REDUCE THE GROWTH AND CUT THE COST OF THE FEDERAL PRISON SYSTEM (Nov. 2013), http://www.urban.org/UploadedPDF/412932-stemming-the-tide.pdf (identifying cost saving solutions to the mounting expense of increased incarceration).

significant predictors of criminality for most crimes, with the likelihood to commit crimes peaking in late adolescence or early adulthood and decreasing as a person ages.[10] Based upon the aging out theory, many scholars agree that incarceration of most classes of elderly offenders is not necessary to deter crime, is not as fair as retribution requires, expresses an inappropriate brand of condemnation to the community, and is a barrier to the type of reintegrative messaging that facilitates reentry.[11]

For reasons articulated in previous works, compassionate release has proven ineffective at abating prison graying.[12] This is so because the Bureau of Prisons (BOP) remains as the strict, less than compassionate gatekeeper, awarding few aged-based compassionate releases since the governing statute was amended to include age as an extraordinary and compelling circumstance in 2013.[13] Since the passage of the First Step Act, the Department of Justice (DOJ) has approved fifty-one compassionate release requests for elderly, sick, and disabled prisoners, which represents an increase from the thirty-four requests approved in 2018.[14] Though strides have been gained through the First Step Act, those improvements fail to achieve the status of "groundbreaking."[15] The First Step Act limits aged-based early releases to inmates who are sixty years old and have served at least two-thirds of their sentence, thereby precluding two critical classes of elderly offenders from release eligibility: (1) elderly inmates who have not yet reached sixty years of age, but whose aging process

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10. *See infra* Part II.

11. *See infra* Part II.

12. *See, e.g.*, Jalila Jefferson-Bullock, *Quelling the Silver Tsunami: Compassionate Release of Elderly Offenders*, 79 OHIO ST. L.J. 937, 941, 967–89 (2018).

13. *See* IMPACT OF AN AGING INMATE POPULATION, *supra* note 8, at iii (noting that only two inmates were released based on expanding eligibility requirements); Christie Thompson, *Little "Compassionate" About New Prison Release Initiative for Elderly, Ill*, SALON (Dec. 6, 2013, 6:30 PM), http://www.salon.com/2013/12/06/bureaucrats_kept_this_woman_from_being_with_her_dying_husband_partner/ (describing the traditional reluctance of BOP officials in granting compassionate release).

14. Scott Shackford, *Thousands Freed from Federal Prison by First Step Act Reforms*, REASON (July 19, 2019, 2:10 PM), https://reason.com/2019/07/19/thousands-freed-from-federal-prison-by-first-step-act-reforms/.

15. Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J. F. 791, 801 n. 49, 804 (2019); John Lam, *Prominent Attorney Notes First Step Act Is Insufficient*, SAN QUENTIN NEWS (Feb. 7, 2019), https://sanquentinnews.com/prominent-attorney-notes-first-step-act-is-insufficient/. S*ee generally* First Step Act of 2018, Pub. L. No. 115-391, § 602, 132 Stat. 5194 (2018) (describing all the provisions included in the new law).

has been accelerated by lengthy periods of incapacitation; and (2) elderly inmates who were sentenced to lengthy periods of incapacitation, have been incarcerated for significant periods of time, but have not yet completed two-thirds of their sentence.[16] Both groups of elderly offenders benefit from the aging out of crime theory and should, therefore, be included in any age-related release calculus. This Article offers that it is time to radically transform our view of elderly offenders.

One possible solution to quell the silver tsunami may be found by looking to the Supreme Court's treatment of juvenile offenders. Much attention has been given to juvenile sentencing.[17] Reduction in sentence length, redesign of incarcerative spaces, discretion in applying strict sanctions, and prohibition of the harshest criminal punishment—death—are integral components of juvenile sentencing reform.[18] The accepted core message of juvenile sentencing reform is that youth are less culpable for the same offenses than are adults.[19] For that reason, the Supreme Court has declared the death penalty, life in prison without the possibility of parole for non-homicide offenses, and mandatory life in prison without the possibility of parole unconstitutional punishment for juvenile offenders.[20] At the heart of these cases are the concepts of diminished capacity and rehabilitation. It is well-established that juveniles simply do not possess the experience and appropriate level of brain development to be capable of exercising the type of sound judgment that is expected of adults.[21] Accordingly, since juveniles are still developing, they are suitable candidates for rehabilitation. For these reasons, juveniles are spared the maximum criminal punishment, the death penalty.[22] Youth may become a "proxy for culpability."[23] Diminished capacity as a general mitigating factor, however, has only been reserved for a small group

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16. *See* First Step Act § 603.

17. *See, e.g.*, Elizabeth Scott et al., *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMP. L. REV. 675, 676 (2016); *see also* Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016) (retroactively applying *Miller v. Alabama*, 567 U.S. 460 (2012) to all offenders serving time for a juvenile conviction).

18. *See* Scott et al., *supra* note 17, at 675–77.

19. *Id.* at 676; *see Miller*, 567 U.S. at 472; Graham v. Florida, 560 U.S. 48, 74 (2010); Roper v. Simmons, 543 U.S. 551, 573 (2005).

20. *See* cases cited *supra* note 19.

21. *Graham*, 560 U.S. at 68.

22. *Roper*, 543 U.S. at 573.

23. Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 141 (2013).

of offenders and has been purposely denied to others.[24] Juvenile offenders, then, have been spared the blanket risk assessments that befall other classes of offenders.

Juvenile punishment reform has shifted the discussion away from risk in a way that may prove helpful in punishing other groups of vulnerable offenders, including the elderly. Juvenile justice reform results inspire. Numbers of juveniles committed to correctional facilities have dropped by 53% over the past twelve years.[25] Leaders attribute this decline to a targeted, intentional focus on alternative interventions and punishments.[26] Policy leaders propose that juvenile justice successes can stand as a model for criminal justice reform by "'divert[ing] more people, reduce[ing] the length of time people spend in the system, and invest[ing] in [sentencing] alternatives for people.'"[27] Since such policies "make[] sense for juveniles," they can be "adapted for adults."[28] This work, however, requires "revising how we think about people who commit crime" in a fashion similar to our evolution in the area of juvenile justice.[29] Relying upon the aging out of crime theory, old age should be regarded as a proxy for risk. This Article argues that because of the widespread agreement that the aging out of crime theory is solid and dependable, punishment of the elderly must be reformed immediately so that early release is granted to elderly offenders for two principal reasons: (1) incarceration of certain classes of elderly offenders does not serve any punishment purpose; and (2) incarceration of the elderly is fiscally unsound. This work ultimately proposes a novel punishment model that is directly aligned with the underlying purposes of federal criminal punishment. In so doing, this Article borrows from the literature of juvenile sentencing by repurposing notions of retributive proportionality, justice, and mercy. Further, this Article offers easily practicable amendments to current compassionate release policies and the First

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24. *See* PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED AND HOW MUCH? 78 (2008).

25. Henry Gass, *Juvenile Incarceration Rate Has Dropped in Half. Is Trend Sustainable?*, CHRISTIAN SCI. MONITOR (Nov. 10, 2015), https://www.csmonitor.com/USA/Justice/2015/1110/Juvenile-incarceration-rate-has-dropped-in-half.-Is-trend-sustainable.

26. *Id.*

27. *Id.*

28. Ashley Nellis & Marc Mauer, *What We Can Learn from the Amazing Drop in Juvenile Incarceration*, MARSHALL PROJECT (Jan. 24, 2017), https://www.themarshallproject.org/2017/01/24/what-we-can-learn-from-the-amazing-drop-in-juvenile-incarceration.

29. *Id.*

Step Act that can offer prompt relief to certain classes of elderly offenders.

Following this Introduction, Part I of this Article explores the concept of aging and crafts a new category of elderly offenders for early release purposes. Part II explains the loss of dignity that necessarily accompanies a criminal conviction and discusses its role in stripping elderly prisoners of their basic humanity. Part III calculates the cost of incarcerating elderly inmates and concludes that continued incarceration of certain classes of elderly offenders is cost-prohibitive. Part IV examines BOP-created roadblocks to congressionally-envisioned release provisions in the First Step Act and the original compassionate release statute. Part V discusses theories of punishment, applies them to current early release practices, and concludes that realization of theories of punishment requires expansive application of early release. Part VI of this Article explores the Supreme Court jurisprudence regulating juvenile sentencing reform and offers that those reforms can be instructive in reimagining criminal sentencing for elderly offenders. Finally, Part VII proposes a novel model of early release that assures immediate release of deserving elderly offenders, preserves community safety, and ensures that punishment is appropriate.

I. WHO IS ELDERLY?

In previous works, I have examined the difficulty in resolving who may be labeled elderly.[30] For example, "'[s]ocial security retirement benefits . . . begin at age sixty-five, or sixty-two if one takes "early" retirement,' while 'the Older Americans Act provides benefits for persons aged sixty and over.'"[31] However, "[t]he elderly classification . . . is accelerated for inmates, and can include individuals as young as fifty."[32] Moreover, "a 2012 report by the American Civil Liberties Union designates prisoners aged fifty and older as elderly, citing 'poor health . . . and the stress of confinement once there' as factors leading to more rapid aging among prisoners."[33]

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30. Jefferson-Bullock, *supra* note 12, at 943.

31. *Id.* (quoting William E. Adams, Jr., *The Incarceration of Older Criminals: Balancing Safety, Cost, and Humanitarian Concerns*, 19 NOVA L. REV. 465, 467 (1995)).

32. *Id.* ("[T]he National Institute of Corrections chooses the even younger age of fifty as the age which defines the older criminal." (quoting Adams, *supra* note 32, at 467).

33. *Id.* (quoting Kevin Johnson & H. Darr Beiser, *Aging Prisoners' Costs Put Systems Nationwide in a Bind*, USA TODAY (July 11, 2013, 10:37 AM)),

Other scholars add that, due to "background socioeconomic statuses, lifestyle choices, access to preventive health care, and . . . institutional stressors," inmates may present as "10 to 15 years older psychologically than their chronological age."[34] For this Article, I choose the age of fifty as appropriately elderly because of the accelerated process experienced by offenders who, due to lengthy periods of incapacitation, must grow old behind bars. Lack of access to medical and dental facilities, poor diet, and other social factors dramatically accelerate the rate of aging in prison.[35] According to medical professionals, "'[a] prisoner aged fifty may be classified by society as [] middle-aged; he may, in fact, already be an elderly person if many of his years have been spent in the prison system.' . . . due to lack of care and frequent engagement in risky behaviors, which leads to premature aging."[36] There are currently 35,000 prisoners in federal prison who are aged fifty-one and older, and would, therefore, classify as elderly.[37]

In other writings, I also craft a new class of elderly offenders for whom early release should be secured.[38] Scholars often group elderly offenders into three main categories: (1) those imprisoned for the first time; (2) those with long criminal histories who, for years, have alternated between freedom and incarceration; and (3) those who grow old in prison after being sentenced to a deservedly long sentence for a serious crime.[39] I create a fourth category of elderly offenders, consisting of elderly prisoners who are victims of the unreasoned, excessively long sentences produced by so-called sentencing reform

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https://www.usatoday.com/story/news/nation/2013/07/10/cost-care-aging-prisoners/2479285/. "Following any or all of these models, approximately 220,000 state and federal prisoners may be classified as elderly." *Id.* at 943 n.28 (citing Johnson & Beiser, *supra*).

34. Ronald H. Aday & Jennifer J. Krabill, *Older and Geriatric Offenders: Critical Issues for the 21st Century*, *in* SPECIAL NEEDS OFFENDERS IN CORRECTIONAL INSTITUTIONS 206 (2013).

35. *See generally* Nancy Dubler, *Ethical Dilemmas in Prison and Jail Health Care*, HEALTH AFF. BLOG (Mar. 10, 2014), http://healthaffairs.org/blog/2014/03/10/ethical-dilemmas-in-prison-and-jail-health-care/ (identifying challenges for health care providers in prisons).

36. Jefferson-Bullock, *supra* note 13, at 963 (quoting Nancy Neveloff Dubler, *The Collision of Confinement and Care: End-of-Life Care in Prisons and Jails*, 26 J.L. MED. & ETHICS 149, 150 (1998)).

37. *Id.* at 947; *see Inmate Age*, FED. BUREAU PRISONS (Apr. 18, 2020), https://www.bop.gov/about/statistics/statistics_inmate_age.jsp.

38. *See, e.g.*, Jefferson-Bullock, *supra* note 12, at 944.

39. Adams, *supra* note 31, at 482.

and its spillover effects.[40] Members of this fourth category may or may not be first time offenders, may or may not have long criminal histories, but are serving lengthy sentences, and have not been adjudged guilty of a heinous crime. This group deserves immediate early release. In addition to the unsustainable and steadily rising cost of imprisoning them, their continued incarceration offends both basic human dignity and acceptable theories of punishment.[41] The crisis must be confronted forthwith. It will only grow considerably worse as offenders with lengthy sentences continue to age.

Due to 1980's and 1990's era purported sentencing reforms, category four elderly inmates continue to gray America's prisons. Between 1993 and 2003, inmates between the ages of forty-five and forty-nine were the most rapidly growing age demographic in correctional facilities.[42] In a few years' time, by 2013, a large contingent of that group had aged into the elderly prisoner category, and were not yet near sentence completion.[43] In 2000, three percent of the prison population was aged fifty-five and older.[44] That number had risen to eight percent by 2010.[45] This represents a 166% increase in just one decade.[46] Further, of the 150,000 prisoners over age fifty-five in state or federal correctional facilities, the population aged sixty-five and over is growing the most rapidly.[47] Between 2007 and 2010, the number of prisoners aged sixty-five and older has increased by 63%.[48] According to a recent study, 41% of prisoners aged fifty-one or older are serving prison terms of more than twenty years or life sentences, and 20% of prisoners aged sixty-one to seventy are currently serving prison sentences of more than twenty years.[49] This compares to 11% of prisoners between the ages of thirty-one and forty,

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40. *See* IMPACT OF AN AGING INMATE POPULATION, *supra* note 7, at 3.

41. *See infra* Part IV.

42. NAT'L ASS'N OF AREA AGENCIES ON AGING, SUPPORTING AMERICA'S AGING PRISONER POPULATION: OPPORTUNITIES & CHALLENGES FOR AREA AGENCIES ON AGING 4–5 (2017), https://www.n4a.org/Files/n4a_AgingPrisoners_23Feb2017 REV%20(2).pdf.

43. *Id.* at 5.

44. *Id.* at 4.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. HUMAN RIGHTS WATCH, OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES 26 (2012), http://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0.pdf.

who are serving prison terms that exceed twenty years.[50] Further, between 2000 and 2009, the number of federal prisoners aged fifty-one and over increased by 76%, while the total federal prison population only grew 43% during that same time period.[51] Astoundingly, older prisoners are now serving longer sentences than younger prisoners.[52]

Older inmates experience increased physical, psychological, and social needs that prisons are ill equipped to effectively handle.[53] Elderly inmates are more prone to experience chronic health problems, mental illness, cognitive deficiencies, and many other age-related infirmities.[54] Studies indicate that, on average, they suffer from three chronic conditions, and as many as 20% have been diagnosed with a mental illness.[55] Further, aged inmates have a greater propensity for developing gross functional impairments and mobility disabilities.[56] While the aforementioned prison terms are set for a specified term of years, "in practice they will amount to life sentences" for many elderly offenders.[57] The crushing indignities that elderly offenders suffer deserve profound review and prompt amelioration.

II. THE UNDIGNIFIED ELDERLY PRISONER

In previous works, I write that "[b]oth United States society and the criminal justice system overwhelmingly view incarcerated people as undeserving of compassion."[58] For example, "[t]his is strikingly

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50. *Id.*

51. *Id.* at 40.

52. *Id.* at 26.

53. *See* William E. Adams, Jr., *The Intersection of Elder Law and Criminal Law: More Traffic than One Might Assume,* 30 STETSON L. REV. 1331, 1347–48 (2001); Jefferson-Bullock, *supra* note 12, at 943–54.

54. Mirko Bagaric, Marissa Florio, & Brienna Bagaric, *A Principled Approach to Separating the Fusion Between Nursing Homes and Prisons*, 44 PEPP. L. REV. 957, 1004 (2017).

55. *Id.* (citing HUMAN RIGHTS WATCH, *supra* note 49, at 7).

56. *Id.* at 1009 (citing HUMAN RIGHTS WATCH, *supra* note 49, at 6–7).

57. HUMAN RIGHTS WATCH, *supra* note 49, at 30.

58. Jefferson-Bullock, *supra* note 12, at 954 (citing Nadine Curran, *Blue Hairs in the Big House: The Rise in the Elderly Inmate Population, Its Effect on the Overcrowding Dilemma and Solutions to Correct It*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 225, 244 (2000) (stating that "compassion shown to the elderly by family, friends and caregivers is replaced by the indifferent correction officer.")). *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE

evident in the case of elderly prisoners who are not afforded the care and consideration that is commonly bestowed upon the general elderly population."[59] Further, "[o]lder offenders are not viewed as elderly, but simply as prisoners. They therefore share the label of 'sub-human' with their more youthful incarcerated counterparts."[60] In the words of Professor James Q. Whitman:

> Criminal punishment does not only visit measured retribution on blameworthy offenders. Nor does it only deter. Nor does it only express considered condemnation. It also expresses contempt. We do indeed harbor a strong natural tendency to perceive offenders as "dangerous and vile," and therefore to strike them hard: Human beings are so constituted that they typically want, not to punish in a measured way, but to crush offenders like cockroaches.[61]

All prisoners endure the indignities of incapacitation, but the burden is heavier for elderly inmates. Inhumane prison conditions illuminate this point clearly. The evidence is clear that the prison environment is "crimogenic," elevating crime and increasing recidivism, and rendering "'debilitation much more likely than rehabilitation.'"[62] In previous works, I write:

AGE OF COLORBLINDNESS 205–07 (2010) (discussing racial inequality in the criminal justice system).

59. Jefferson-Bullock, *supra* note 12, at 954 (citing Lyle B. Brown, *The Joint Effort to Supervise and Treat Elderly Offenders: A New Solution to a Current Corrections Problem*, 59 OHIO ST. L.J. 259, 271–75 (1998) (explaining the challenges faced by elderly inmates)).

60. Jefferson-Bullock, *supra* note 12, at 954–55; *see also* Jalila Jefferson-Bullock, *Are You (Still) My Great and Worthy Opponent?: Compassionate Release of Terminally Ill Offenders*, 83 UMKC L. REV. 521, 544 (2015) (citing Zulficar G. Restum, *Public Health Implications of Substandard Correctional Health Care*, 95 AM. J. PUB. HEALTH 1689, 1691 (2005) (explaining the challenges of bringing malpractice suits on behalf of inmates)).

61. James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85, 98 (2004).

62. Jalila Jefferson-Bullock, *The Time Is Ripe to Include Considerations of the Effects on Families and Communities of Excessively Long Sentences*, 83 UMKC L. REV. 73, 87–89 (2014) (citing United States v. Blake, 89 F. Supp. 2d 328, 345 (E.D.N.Y. 2000)) (arguing that excessively lengthy prison sentences produce ruinous outcomes by transforming inmates into "hardened criminals who are more likely to reoffend."). *See generally* Press Release, Bureau of Justice Statistics, U.S. Dep't of Justice, U.S. Correctional Population Reaches 6.3 Million Men and Women Represents 3.1 Percent

> The prison atmosphere drains inmates of their essential humanity, "[w]hether by introducing petty criminals to more violent offenders, forcing prisoners into racist gangs, or subjecting them to violence and rape."[63] Inmates suffer unsound, unreliable medical care, use of excessive force by prison guards, lack of basic sanitation, extreme temperatures, and a multitude of other experiences that pose risks to prisoner health, safety, and general well-being.[64] Often, inmates "simply idly pass the time all day long" because rehabilitative educational programs, libraries, and drug program funding have been cut.[65]

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of the Adult U.S. Population (July 23, 2000) [hereinafter Press Release, U.S. Correctional Population] (noting the growth of the federal prison population in the late 1990s); Press Release, Bureau of Justice Statistics, U.S. Dep't of Justice, National Correctional Population Reaches New High (Aug. 26, 2001) [hereinafter Press Release, National Correctional Population Reaches New High] (noting the growth of the federal prison population in the year 2000).

63. Jefferson-Bullock, *supra* note 12, at 958; *see also Blake*, 89 F. Supp. 2d at 344 (noting the egregious conditions inside prisons). Additionally, lengthy prison sentences and higher spending has not decreased recidivism. In the state system, over 40% of offenders return to prison within three years of release. Richard A. Viguerie, *A Conservative Case for Prison Reform*, N.Y. TIMES (June 9, 2013), http://www.nytimes.com/2013/06/10/opinion/a-conservative-case-for-prison-reform.html?mcubz=0 (noting that his number is close to 60 percent in some states); *see also* Jefferson-Bullock, *supra* note 63, at 87 (citing the recidivism rate in the federal system).

64. Jefferson-Bullock, *supra* note 12, at 958; Lauren Salins & Shepard Simpson, *Efforts to Fix a Broken System:* Brown v. Plata *and the Prison Overcrowding Epidemic*, 44 LOY. U. CHI. L.J. 1153, 1155–56 (2013) (highlighting egregious health care in prisons). *See generally* Alan Blinder, *In U.S. Jails, a Constitutional Clash over Air-Conditioning*, N.Y. TIMES (Aug. 15, 2016), https://www.nytimes.com/2016/08/16/us/in-us-jails-a-constitutional-clash-over-air-conditioning.html?mcubz=0 (describing the extreme heat inside a Louisiana jail); *Cruel, Inhumane, and Degrading Conditions*, AM. C.L. UNION, https://www.aclu.org/issues/prisoners-rights/cruel-inhuman-and-degrading-conditions/ (last visited Sept. 25, 2017) (providing a central location for activists to find cases of prison abuse); Michele Deitch & Michael B. Mushlin, *What's Going On in Our Prisons,* N.Y. TIMES (Jan. 4, 2016), https://www.nytimes.com/2016/01/04/opinion/whats-going-on-in-our-prisons.html?mcubz=0 (arguing for reform of the New York penal system); Martin Garbus, *Cruel and Usual Punishment in Jails and Prisons*, L.A. TIMES (Sept. 29, 2014, 5:52 PM), http://www.latimes.com/opinion/op-ed/la-oe-garbus-prison-cruel-and-unusual-20140930-story.html (arguing that egregious prison conditions constitute an Eighth Amendment violation).

65. Jefferson-Bullock, *supra* note 12, at 558–59; *see, e.g.*, Jefferson-Bullock, *supra* note 63, at 88; *Rehabilitation Programs Can Cut Prisons Cost, Report Says*, ORANGE COUNTY REG. (July 1, 2007, 3:00 AM), http://www.ocregister.com/articles/inmates-194495-prison-programs.html (discussing how rehabilitation programs can

> Furthermore, a shortage of rehabilitative programs leads to increased recidivism, such that many inmates never ultimately escape prison life. Together, these conditions strip inmates of their basic humanity, regardless of age.[66]

Presently, elderly inmates comprise a disproportionate number of the inmate population residing at institutions, and require higher levels of medical care, increased instances of outside care, and enhanced levels of catastrophic care.[67] By their own admission, prisons are not equipped to handle the care of an increasingly grayer prison population.[68] For example, prisons' physical designs are not suited for the elderly, often lacking in accommodations for the mobility impaired.[69] It must be noted that there is "no automatic requirement that older prisons be retrofitted architecturally."[70] Also, elderly prisoners are often lodged in facilities with younger, more robust prisoners, placing them at an increased risk of victimization.[71] Further, prison programs are rarely designed to meet the specific "educational, physical, psychological, social, and rehabilitative needs of older persons," who must compete with younger inmates for access to recreational facilities and equipment, and do not enjoy the benefits of programs that "address the realities of aging or help them understand and protect their health in later years."[72] A study reports, that as a result, "[m]any . . . older prisoners . . . have little to do besides read, watch television, or talk to each other."[73] Regular, daily care also

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cut prison costs); Michael Rothfield, *Cuts Dim Inmates' Hope for New Lives*, L.A. TIMES (Oct. 17, 2009, 12:00 AM), http://articles.latimes.com/2009/oct/17/local/me-rehab17 (analyzing how cutting rehabilitation programs increases recidivism); Mike Ward, *State Jails Struggle with Lack of Treatment, Rehab Programs*, STATESMAN (Dec. 30, 2012, 12:01 AM), https://www.statesman.com/article/20121230/NEWS/312309785 (describing how a rehabilitation plan could reduce recidivism).

66. Jefferson-Bullock, *supra* note 12, at 959.

67. *See* IMPACT OF AN AGING INMATE POPULATION, *supra* note 7, at 4.

68. *Id.* at 16.

69. Examples include wheelchair ramps, walking aids, bath lifts, and lower bunks, among other things. *See* Ronald H. Aday, *Golden Years Behind Bars: Special Programs and Facilities for Elderly Inmates*, 58 FED. PROB. 47, 48 (1994); HUMAN RIGHTS WATCH, *supra* note 49, at 46; Jefferson-Bullock, *supra* note 12, at 980.

70. Ronald. H. Aday & Jennifer J. Krabill, *Aging Offenders in the Criminal Justice System*, 7 MARQ. ELDER'S ADVISOR 237, 246 (2006).

71. HUMAN RIGHTS WATCH, *supra* note 49, at 46. This dysfunctional relationship is commonly referred to as "wolf-prey" syndrome.

72. *Id.* at 68.

73. *Id.*

suffers, as elderly prisoners are often unable to participate in daily inmate life, including basic prisoner work duty.[74] Finally, prison officials fail to "resolve concerns about the dignity of dying in the harsh environment of prison."[75] Plans for a dignified death, surrounded by loved ones, are frustrated by inflexible visiting hours, unwelcoming visiting venues, and less qualified doctors.[76] According to a 2015 Office of Inspector General (OIG) report, BOP institutions are struggling to maintain adequate levels of appropriately trained staff to manage a growing elderly inmate population.[77] Prison simply is not intended to house inmates with any measure of special need, including the elderly.

Together, the above-mentioned treatment brings elderly prisoners within the coverage of 'undignified' as scholars have defined it.[78] Scholars note that human dignity has come to be accepted as a core value of human rights jurisprudence. According to Professor Michael Pinard, "[t]he human rights model of dignity seeks to provide robust protections for the dignity of individuals who are incarcerated."[79] Further, "in the United States the concept of dignity is an end point that cannot be passed."[80] A sentencing reform approach focused on dignity would "aim to truly reintegrate these individuals into society" by seeking to "restore the individuals . . . to their prior status," instead of "degrad[ing] and marginal[izing] them."[81] Any credible, sustainable model of sentencing reform must restore dignity to elderly offenders. Such reform is most urgent, as most category four offenders have

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74. *See* Johnson & Beiser, *supra* note 33. Warden Burl Cain of the Louisiana State Penitentiary notes that of 1000 prison field workers, only 600 to 700 are physically able to complete assigned tasks due to age-related physical decline. One third of Louisiana State Penitentiary inmates are over the age of fifty and each cost over $100,000 to incarcerate. *See id.*

75. HUMAN RIGHTS WATCH, *supra* note 49, at 86; Jefferson-Bullock, *supra* note 61, at 547.

76. Jefferson-Bullock, *supra* note 60, at 547.

77. *See* IMPACT OF AN AGING INMATE POPULATION, *supra* note 7, at i.

78. Though labeled as "terribly, even terrifyingly vague," scholars conceptualize human dignity in two distinct ways: (1) social dignity is described "hierarchical," "relative," "nonessential," and easily lost with a downward departure in social status; and (2) moral dignity is conceptualized as "an essential characteristic of all persons" and a "necessary attribute of individuals who satisfy the minimum requirements of personhood." Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 533, 535 (2004).

79. Michael Pinard, *Collateral Consequences of Criminal Convictions Confronting Issues of Race and Dignity*, 85 N.Y.U. L. Rev. 457, 519 (2010).

80. *Id.* at 521.

81. *Id.* at 526–27.

simply aged out of a life of crime. Further, the cost of imprisoning them has become, quite simply, unsustainable.

III. INCARCERATION OF THE ELDERLY IS COST-PROHIBITIVE

It must be noted that we can no longer afford to imprison low-risk offenders. Caring for an elderly prison population is a costly endeavor that can be avoided. Professor William E. Adams, Jr., writes:

> On average, the older inmates have low intelligence, alcohol problems, "and a higher proportion of mental health problems than younger prisoners." These additional problems may result in the costs of incarcerating an older prisoner to be more than three times as much as the costs of incarcerating a younger one. . . . Part of the increased costs of caring for older prisoners is a result of collateral costs in obtaining special services or transporting prisoners off-site to obtain the special services. These growing financial needs are reflected in a study in which nearly half of the states indicated that their most pressing problem was responding to the medical costs of aging and infirm inmates.[82]

It is estimated that prison geriatric care costs $72,000 per year, per inmate, which is three times the cost of incarcerating a younger, heartier inmate.[83] Prison systems must bear this massive financial burden exclusively because Medicaid and Medicare eligibility for prisoners is severely limited.[84] Broadly applied release programs could relieve the government's financial burden by shifting care costs from the overburdened Department of Corrections to Medicare and Medicaid, where the costs would be *largely invisible*.[85]

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82. Adams, Jr., *supra* note 53, at 1347–48 (citations omitted).

83. *See id.*; *The Plight of the Elderly in Prison*, ACLU, https://www.aclu.org/other/plight-elderly-prison (last visited Mar. 3, 2020); *see also* Dubler, *supra* note 36. *See generally* NATHAN JAMES, CONG. RESEARCH SERV., R44087, RISK AND NEEDS ASSESSMENT IN THE FEDERAL PRISON SYSTEM (2018). Additionally, the costs of the prison system to the states is more than $50 billion per year, second only to the spending amount of Medicaid. Viguerie, *supra* note 63.

84. HUMAN RIGHTS WATCH, *supra* note 49, at 78.

85. *See* Dubler, *supra* note 36, at 154; *see* Brie A. Williams et al., *Balancing Punishment and Compassion for Seriously Ill Prisoners*, 155 ANN. INTERN MED. 122, 122–23 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3163454/.

As a direct result of prison overcrowding and subsequent graying, the cost of funding corrections has risen to unsustainable levels. Included in the cost of housing offenders is the cost of food service, medical treatment, grounds upkeep, waste removal, utilities provisions, facility maintenance and repair, guard service, and personnel. In fiscal year 2014, the BOP budget consisted of 25% of the entire DOJ budget, while it was only 20% of the budget in fiscal year 2000.[86] BOP's rate of growth is "twice the rate of growth of the rest of the DOJ."[87] As I previously wrote, "[t]hree primary 'drivers' of increased prison costs are 'expenditures on utilities, food, and medical care,' but none of these factors has been as 'pronounced as the increase in the per capita cost of inmate medical care.'"[88] Granting release to elderly prisoners would significantly reduce DOJ and BOP budgets and ease taxpayer burdens.

Furthermore, an increasingly grayer prison population is a significant factor in the upsurge in prison health care costs, especially for costs related to end-of-life care.[89] Health care costs for elderly prisoners, who are more likely to experience chronic medical conditions and terminal illness, is "two to three times that of the cost for other inmates."[90] According to a recent DOJ study:

> From FY 2010 to FY 2013, the population of inmates over the age of 65 in BOP-managed facilities increased by 31 percent, from 2708 to 3555, while the population of inmates 30 or younger decreased by 12 percent, from 40,570 to 35,783. This demographic trend has significant budgetary implications for the Department because older inmates have higher medical costs. . . . Moreover, inmate health services costs are rising: BOP data shows that the cost for providing health services to inmates increased from $677 million in FY 2006 to $947 million in FY 2011, a 40 percent increase. [91]

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86. SAMUELS, LA VIGNE, & TAXY, *supra* note 9, at 7.

87. *Id.*

88. Jefferson-Bullock, *supra* note 60, at 553 (quoting JAMES, *supra* note 84, at 16).

89. Christine Vestal, *Study Finds Aging Inmates Pushing Up Prison Health Care Costs*, PEW CHARITABLE TR. (OCT. 29, 2013), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/10/29/study-finds-aging-inmates-pushing-up-prison-health-care-costs [https://perma.cc/EM3Y-VR6M]. In this study, elderly prisoners are categorized as those who are fifty-five years of age and older. *Id.*

90. *Id.*

91. Memorandum from Michael E. Horowitz, *supra* note 9.

Prisons in the United States contain "an ever growing number of aging men and women" who are "suffering chronic illnesses, extremely ill, and dying."[92] The cost of housing and caring for elderly prisoners is simply unsustainable and irrational. According to analysts, it is estimated that releasing infirmed prisoners could save correctional systems "$900 million in the first year alone," and would not reduce public safety.[93]

The exorbitant cost of health care cannot be ignored. Caring for elderly inmates far exceeds health care costs for the unincarcerated elderly. This is due to "additional layers of costs," such as transportation to receive parallel care in external medical facilities and the cost of security while transporting.[94] Prison facilities are often too meager and prison staff far too incapable of providing adequate health care on site.[95] It must be noted that "aged prisoners visit healthcare facilities at five times the rate of nonincarcerated persons of the same age."[96]

Moreover, little attention is afforded to the particularly significant topic of elderly inmate reentry and the inordinate associated costs. As scholars correctly note, "[s]ooner or later, one of two things will happen to an aging prisoner: she will either be released from prison or she will die behind bars."[97] Lengthy prison terms destroy families and communities.[98] This is especially true for category four elderly inmates who have spent several years in prison. Following a lengthy prison term, elderly inmates are released into a completely transformed environment.[99] Due to years of displacement, support from families, friends, and communities is strained or non-existent.[100] Many are completely devoid of or have outdated employment skills, and may be barred, as ex-offenders, from engaging in certain employment or from receiving specific government benefits.[101] All of the aforementioned details, coupled with chronic health issues,

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92. Caroline M. Upton, *A Cell for a Home: Addressing the Crisis of Booming Elder Inmate Populations in State Prisons*, 22 ELDER L. J. 289, 290 (2014) (citing HUMAN RIGHTS WATCH, *supra* note 50, at 4).

93. MELVIN DELGADO & DENISE HUMM-DELGADO, HEALTH AND HEALTH CARE IN THE NATION'S PRISONS: ISSUES, CHALLENGES, AND POLICIES 201 (2009).

94. Bagaric, *supra* note 54, at 1007.

95. *Id.*

96. *Id.*

97. *See* HUMAN RIGHTS WATCH, supra note 49, at 80.

98. *See* Jefferson-Bullock, *supra* note 62, at 75.

99. *See* NAT'L ASS'N OF AREA AGENCIES ON AGING, *supra* note 42, at 3.

100. *See id.*; *see also* HUMAN RIGHTS WATCH, *supra* note 49, at 80.

101. *See* NAT'L ASS'N OF AREA AGENCIES ON AGING, *supra* note 42, at 3.

disease, and the decline that accompanies life in prison, renders many category four offenders in need of residential, social, transportation, health, and financial support.[102] In computing these costs, the effect of the extraordinary degree of stigma to which ex-offenders are subjected must also be gauged.

The fiscal impact of refusing to release category four elderly offenders is exceedingly larger than contemplated thus far. According to recent studies, ex-offenders aged fifty and over are more likely to experience unemployment and possess less resources for retirement than those who have never been imprisoned.[103] They are four times as likely to have no source of retirement income.[104] Further, elderly ex-offenders are "less likely to have income from Social Security, retirement accounts or a pension, and are more likely to rely on disability payments" than elderly non-offenders.[105] In addition to the immediate cost savings associated with releasing category four offenders, there are also longer-term financial impacts that must be addressed. By confining these inmates for so long, we are setting them up to become wholly dependent on the government for the remainder of their lives, should they survive until released. This can be avoided by implementing a novel, broadened release model that is humane, aligned with theories of punishment, fiscally responsible, and socially respectable.

The most readily identifiable proposed solutions to this problem, however, provide no cognizable relief. The current compassionate release model does not provide the type of reprieve originally intended. Despite seeming best efforts, neither does the recently enacted First Step Act.

IV. THE PROBLEM WITH COMPASSIONATE RELEASE AND THE NEWLY-MINTED FIRST STEP ACT

Compassionate release authorizes judges to review criminal sentences post-sentencing to determine whether, under sufficiently extraordinary and compelling circumstances, they remain

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102. *See id.*

103. *See id.*

104. AP-NORC, *The Impact of Incarceration on Older Americans' Work and Retirement Planning*, ASSOC. PRESS, https://apnorc.org/projects/the-impact-of-incarceration-on-older-americans-work-and-retirement-planning/ (last visited Nov. 1, 2020).

105. Maria Ines Zamudio, *Poll: Older Ex-cons Have Fewer Sources of Retirement Income*, ASSOC. PRESS (May 4, 2017), https://apnews.com/article/095721d078ad4ff78a18cb45ca2121f8.

appropriate.[106] Compassionate release theory draws from fundamental beliefs rooted in human dignity that an inmate's altered and unfortunate circumstance may demand early release from incarceration.[107] Compassionate release's legal justification asserts that impending death, sickness, extreme family responsibilities, or age have cancelled a prisoner's debt to society, such that release, prior to the completion of the prisoner's sentence, is warranted.[108] Its moral rationale demands that dying prisoners be deemed worthy of a dignified death, indispensable to the fabric of their families as sole caregivers, and/or worthy of experiencing their final living days unconfined by prison walls. In the case of elderly offenders, compassionate release is driven by more than a need to be compassionate.[109] Studies demonstrate that overwhelming financial burdens, coupled with minimal public safety benefits support a broadened view of compassionate release application.[110] Congress attempted to account for this by adding novel features to the compassionate release process in the First Step Act of 2018. While an aspirational first attempt, the First Step Act leaves much to be desired.

A. Compassionate Release, Generally

Compassionate releases are rarely granted because BOP continues to usurp judicial power, and only grants compassionate releases in the narrowest of circumstances.[111] BOP are jailers, not

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106. Marjorie P. Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners—Is the Cure Worse than the Disease*, 3 WIDENER J. PUB. L. 799, 821 (1994).

107. *See id.* at 804. This is so as long as Bureau of Prisons determines that the inmate is no longer a threat to society.

108. *See id.* at 829.

109. *See* Brie A. Williams, Alex Rothman & Cyrus Ahalt, *For Seriously Ill Prisoners, Consider Evidence-Based Compassionate Release Policies*, HEALTH AFFAIRS BLOG (Feb. 6, 2017), https://www.healthaffairs.org/do/10.1377/hblog20170206.058614/full/.

110. *See id.*

111. *See generally* FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, CHANGE NOTICE: COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. 3582 (C)(1)(A) AND 4205(G) 3 (2015) [hereinafter PROGRAM STATEMENT], https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf; FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PROGRAM STATEMENT: COMPASSIONATE RELEASE; PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. 3582 (C)(1)(A) & 4205(G) 3 (2013), https://www.bop.gov/policy/progstat/5050_048.pdf; U.S. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE FEDERAL BUREAU OF

judges, and base release policies upon antiquated and unfounded beliefs that long criminal sentences deter crime and sufficiently justify retribution. For years, BOP has effectively apprehended the compassionate release process by creating an internal review scheme that is contrary to both statutory language and congressional intent. In order to prevail, prisoners have been forced to struggle through four, strict, time-consuming layers of BOP review before their petition could be reviewed by a judge. The final decision by BOP was not appealable.[112] Following scores of criticism, BOP promulgated new rules that seemingly addressed deficiencies.[113]

In response to an embarrassingly scathing DOJ report criticizing BOP's chronic mishandling of the compassionate release program, BOP announced that it would amend its program rules in both 2013 and 2015.[114] According to a responsive 2016 OIG report, BOP's "amendments" relied on three policies, which "already existed at the time of BOP's earlier compassionate release policy, and none had resulted in the release of many BOP inmates."[115] Following BOP's "revisions," the compassionate release process remained unduly burdensome.[116] BOP's first amended guideline allowed for compassionate release of inmates who are seventy years and older and have served thirty years or more of their sentence for an offense that was committed on or before November 1, 1987 under 18 U.S.C. § 3559(c).[117] Under the second Guideline, elderly offenders may be eligible for compassionate release if they are at least sixty-five years old, suffer from a chronic or serious medical condition related to the aging process, are experiencing deteriorating mental or physical health that substantially diminishes their ability to function in a correctional facility for which conventional treatment promises no substantial improvement, and have served at least fifty percent of their sentence.[118] Lastly, the third Guideline applies to "inmates

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PRISONS' COMPASSIONATE RELEASE PROGRAM (2013) [hereinafter COMPASSIONATE RELEASE PROGRAM], https://oig.justice.gov/reports/2013/e1306.pdf; IMPACT OF AN AGING INMATE POPULATION, *supra* note 7.

112. *See* COMPASSIONATE RELEASE PROGRAM, *supra* note 111, at 3–6.

113. *See infra* note 116.

114. *See* COMPASSIONATE RELEASE PROGRAM, *supra* note 111, at i–iii; IMPACT OF AN AGING INMATE POPULATION, *supra* note 7, at i–iii.

115. IMPACT OF AN AGING INMATE POPULATION, *supra* note 7, at 42; *see* COMPASSIONATE RELEASE PROGRAM, *supra* note 111, at i.

116. *See* Jefferson-Bullock, *supra* note 60, at 530.

117. *See* IMPACT OF AN AGING INMATE POPULATION, *supra* note 7, at 42; *see also* 18 U.S.C. § 3559(c) (2020) (covering violent felony offenses).

118. IMPACT OF AN AGING INMATE POPULATION, *supra* note 7, at 6–7.

without medical conditions who are age 65 and older and who have served the greater of 10 years or 75 percent of their sentences."[119]

BOP's revised program Guidelines resulted in an illiberal model that favors imprisonment over release.[120] Though enacted in 2013, inmates were not eligible for release under the first Guideline until 2017, and then, only eighteen inmates met the requirements of the first Guideline at that time.[121] The second provision directly defies previous Guideline policy by requiring elderly inmates to complete fifty percent of their sentence in order to be eligible for release.[122] The BOP inappropriately justifies this time requirement by balancing time served against "the resources that the Department spent to prosecute the inmate," which is wholly unrelated to the spirit and letter of compassionate release.[123] Finally, the third Guideline is not clearly understood by BOP staff, who describe it as "unclear," and have only applied it to prisoners who have served both a minimum of ten years and seventy-five percent of their sentence.[124] Consequently, only elderly prisoners with more than ten year sentences are candidates for compassionate release under Guideline three.[125] The result of BOPs stranglehold on the process are clear. From August 2013 through September 2014, 0 of 52 elderly inmates who applied received Guideline one compassionate releases, 0 of 203 applying elderly inmates received Guideline two compassionate releases, and 2 of 93 elderly inmates requesting Guideline three compassionate releases received them.[126] Between 2014 and 2017, a total of 3,182 inmates requested compassionate releases.[127] The BOP granted 306 requests.[128] Approximately 25% of requests were from terminally ill inmates, 35% were from seriously ill inmates, 15% were made by elderly inmates with medical conditions, and 8% were made by elderly inmates, generally.[129] Only one out of four compassionate release requests from elderly inmates was granted, while one-third of

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119. *Id.* at 43.
120. *See id.* at 42.
121. *Id.*
122. *Id.* at 43.
123. *Id.*
124. *Id.* at 45–46.
125. *Id.* at 46.
126. *Id.* at 45.
127. Letter from Steven E. Boyd, Assistant Attorney Gen., U.S. Dep't of Justice, Office of Legislative Affairs, to Brian Schatz, U.S. Senator (Jan. 16, 2018) [hereinafter Boyd Letter].
128. *Id.*
129. *Id.*

otherwise general elderly inmate requests was approved.[130] BOP admits that eighty–one inmates have died while their requests were pending.[131] BOP has crafted implementation guidelines that render compassionate release policies meaningless. BOP's commandeering of the process effectively decimates opportunities for elderly compassionate release. Further, they stand opposed to Congress' original intent that judges maintain authority in compassionate release situations.[132] The vision of a reformed, more flexible program remains unrealized.

BOP's rationale for controlling compassionate release in such a heavy-handed fashion is that elderly offenders, as a class, still pose a danger to society and therefore, only deserve a reduction in sentence in the narrowest of circumstances.[133] In a 2018 letter to a United States Senator, BOP stated that compassionate release requests were routinely denied because *its* criteria were not met.[134] For elderly offenders, BOP-crafted, limiting criteria include whether an inmate has served enough time and can provide stable residence and release plans.[135] It must be remembered that age criteria is confusing and nearly impossible to practically apply, due to inadequate training, lack of information, poor legislative drafting, and a basic disinterest in releasing prisoners before the end of their originally imposed term of imprisonment.

It bears noting that 18 U.S.C. § 3582(c) authorizes *courts* to reduce or end a prisoner's sentence of incarceration for "extraordinary and compelling reasons [that] warrant reduction" subject to § 3553(a) factors, if applicable, and guidelines established by the Sentencing Commission.[136] Although the ultimate authority rests with the courts, BOP has historically settled compassionate release requests first, without judicial oversight.[137] Before passage of the First Step Act, BOP was able to commandeer the compassionate release process by both developing its own set of detailed, narrow criteria that

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130. *Id.*

131. *Id.*

132. *See* Jefferson-Bullock, *supra* note 60, at 528, 530.

133. *See, e.g.*, *id.* at 526–27.

134. *See* Boyd Letter, *supra* note 127.

135. *See id.*

136. 18 U.S.C. § 3553(c)(1)(A), (B) (2020). Between 1999 and 2008, 2,902 prisoners died in federal prison from illness. ALEKSANDR KHECHUMYAN, IMPRISONMENT OF THE ELDERLY AND DEATH IN CUSTODY 2 (2018).

137. *See generally* PROGRAM STATEMENT, *supra* note 111.

unilaterally withheld release for those it deemed undeserving of compassion *and* denying the right to appeal.[138]

Judges, not the BOP, are best positioned to render impartial decisions concerning release because BOP's principal role is to confine. They simply cannot operate outside of the limits of their responsibility as jailers.[139] Per current policy, inmates' requests must be approved by the Warden, General Counsel, Assistant Director of the Correctional Programs Division or Medical Director (for medical releases), and finally, the BOP Director before being sent to the Assistant United States Attorney.[140] Until enactment of the First Step Act, only the Warden's decision was appealable.[141] While the First Step Act provides some relief for the elderly inmates requesting compassionate releases, it simply does not do enough.

B. Compassionate Release and the First Step Act

The First Step Act (Act) was created to reform the federal corrections system. Its stated aim is to "enhance public safety by improving the effectiveness and efficiency of the federal prison system in order to control corrections spending, manage the prison population, and reduce recidivism."[142] To that end, the Act reforms and expands a large number of statutory provisions to facilitate the release of lower risk offenders from prison and transfer more prisoners into home confinement to complete a larger portion of their sentence. Accordingly, § 603(b) of the Act is titled, "Increasing the Use and Transparency of Compassionate Release."[143] The Act alters compassionate release policy in two significant ways: (1) by allowing prisoners the autonomy to request compassionate releases instead of relying on their prison Warden to do so on their behalf; and (2) by providing prisoners the option to make appeals directly to courts.[144] A prisoner must still submit compassionate release requests to BOP, but may proceed to court if the Warden fails to respond to the request within thirty days or if the BOP, after its fourth and final stage of

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138. FAMM, COMPASSIONATE RELEASE AND THE FIRST STEP ACT: THEN AND NOW 1, https://famm.org/wp-content/uploads/Compassionate-Release-in-the-First-Step-Act-Explained-FAMM.pdf.

139. *See* Jefferson-Bullock, *supra* note 60, at 549.

140. *See id.* at 527–28; *see also* COMPASSIONATE RELEASE PROGRAM, *supra* note 111, at 3–6.

141. *See* Jefferson-Bullock, *supra* note 60, at 530–31.

142. H.R. REP. NO. 115-699, at 22 (2018).

143. First Step Act of 2018, Pub. L. No. 115-391,, § 603, 132 Stat. 5194.

144. *See id.*

review, denies the prisoner's request.[145] This is progress and is a definite step in the right direction. It is, however, a meager stride, and is not devoid of severe limitations.

While great concessions are rightfully made for the terminally ill under the Act, similar deserved allowances are not granted to the elderly.[146] Certainly, elderly offenders may avail themselves of the novel self-submitted petition and court appeal provisions, just as any other prisoner. The quandary is that the underlying governing Sentencing Guideline, 1B1.13, remains the same, and any reduction in sentence must still be consistent with applicable policy statements issued by the Sentencing Commission. Unlike preconditions for terminally offenders, then, eligibility requirements for elderly offenders seeking compassionate releases linger undisturbed. An elderly offender convicted of a violent offenses must still be seventy years old, must still have served thirty years of his or her sentence, and must still not be deemed a danger to society by BOP.[147] The "extraordinary and compelling circumstance" criteria remains unmodified as well.[148] For an elderly offender's altered circumstance to be deemed "extraordinary and compelling," that offender must still be at least sixty-five years old, must still be experiencing an age-related serious decline in physical or mental health, and must still have served ten years or 75% of their sentence.[149] Nothing in the guiding policies has changed. These are the exact same limiting Guidelines that BOP has relied upon since the enactment of the aforementioned 2013 program "revisions." As before, elderly offenders receive no cognizable relief from federal compassionate release policies.

Further, enormous disparities persist between controlling Sentencing Guidelines and BOP's Program Statement, rendering statutory changes nearly moot. For example, under BOP's Program Statement, elderly inmates with medical conditions requesting release must meet five specific criteria. They must: (1) be sixty-five years old or older; (2) suffer from a chronic or serious medical condition related to age; (3) experience deteriorating physical or mental health that substantially diminishes their ability to function

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145. *See id.*

146. *See id.* The Act allows for shortened response times to petitions, petition preparation assistance, mandatory education of compassionate release policy and procedures, and compulsory family notification for terminally ill offenders.

147. *See generally* PROGRAM STATEMENT, *supra* note 111.

148. *Id.* at 10.

149. *Id.* at 4–5.

in prison; (4) have exhausted conventional treatments; and (5) have served at least 50% of their sentence. Sentencing Guidelines, however, treat these same prisoners completely differently.[150] Per Sentencing Guidelines, in order to be eligible for release, elderly inmates with medical conditions must: (1) be sixty-five years or older; (2) experience serious physical or mental health deterioration due to age; and (3) have served the lesser of ten years or 75% of their sentence.[151] These policies are in direct conflict with one another. In their role as jailers, BOP has constructed a release policy that is narrower in both application and practice to that of the Sentencing Commission. Again, BOP has usurped the release system. It must be noted that the Sentencing Commission has publicly stated that they believe BOP's authority should be limited to determining whether inmates meet eligibility criteria only, and that release decisions should be made solely by judges.[152] Reauthorization of the Second Chance Act of 2007 in the First Step Act is more apt at quelling the silver tsunami, but also neglects to provide the type of reprieve initially intended by Congress.

C. Early Release to Home Confinement and the First Step Act

Section 603 of the First Step Act reauthorizes and broadly expands the Second Chance Act of 2007, a federal prisoner reentry initiative, to provide for an increased number of elderly offenders to finish more of their sentences through home confinement. Though the provision initially presents as constructive and favorable, in practice, it is astoundingly limited. BOP refuses to give it the broadest possible interpretation, thereby ignoring the goals clearly set forth by Congress. In determining inmate eligibility under the original 2007 version of this provision, BOP determined that good time credits should not be included in eligibility calculations.[153] While the program is now available at all BOP facilities (unlike the original 2007 program), BOP continues to utilize the same limiting practices that

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150. FAMM, *supra* note 138, at 2–3.

151. *Id.* at 3.

152. U.S. SENTENCING COMM'N, §1B1.13 (POLICY STATEMENT) – COMPASSIONATE RELEASE (2016), https://www.ussc.gov/sites/default/files/elearning/2016-guideline-amendments/story_content/external_files/Comp%20Release.pdf; U.S. Sentencing Comm'n, *U.S. Sentencing Commission Approves Significant Changes to the Federal Sentencing Guidelines* (Apr. 15, 2016), https://www.ussc.gov/about/news/press-releases/april-15-2016.

153. *See generally* NATHAN JAMES, CONG. RESEARCH SERV., R45558, THE FIRST STEP ACT OF 2018, AN OVERVIEW (Mar. 4, 2019).

prefer confinement to release in direct contravention of congressional intent. BOP remains committed to their role as jailers and refuses to honor the congressional intent and statutory language of the Act. Under the Act, an elderly offender is now eligible to be released to serve his or her remaining term of imprisonment in home detention if he or she has reached sixty years of age and has served two-thirds of his or her sentence.[154] BOP's refusal to include good time credits in computing whether a prisoner has served two-thirds of his or her sentence to be eligible for home confinement inappropriately functionally deprives elderly inmates of the grant of good time credit that they receive upon reporting to prison.[155] It bears noting that federal good time credit is not the same as credit for time served. Rather, good time credit in the federal system is granted upon reporting to prison and becomes part of a prisoner's term of sentence.[156] BOP's policy regarding good time credit raises constitutional concerns and is clearly contrary to congressional intent.

A stated purpose of the Act is to "enhance public safety by improving the effectiveness and efficiency of the Federal prison system with offender risk and needs assessment, individual risk reduction incentives and rewards, and risk and recidivism reduction."[157] Another purpose of the Act is to reduce the growing prison population.[158] Several provisions of the Act plainly indicate congressional intent to reduce the prison footprint, while simultaneously ensuring community safety through appropriate, cost-effective punishments. For example, § 602 provides that "[t]he Bureau of Prisons shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under this paragraph."[159] Notably, Congress chose the word "shall" in drafting the Act, indicating a mandatory directive to BOP.[160] Section 603 clearly adds "eligible terminally ill offenders" as eligible for release to home detention, thereby expanding the category of possible candidates.[161] In its plain

154. *Id.* at 14.

155. *See id.* at 46.

156. *Helpful Chart of First Step Act Earned Good Time Credits*, FD.ORG (Jan. 10, 2020) (discussing the good time credit), https://www.fd.org/news/helpful-chart-first-step-act-earned-time-credits#:~:text=All%20incarcerated%20persons%2C%20other t%20than,year%20of%20their%20sentenced%20served.

157. H.R. REP. NO. 115–699, at 22 (2018).

158. *See id.*

159. First Step Act of 2018, Pub. L. No. 115–391, § 602, 132 Stat. 5194.

160. *See id.*

161. *Id.* § 603.

terms, § 101 creates a risk and needs assessment system, creates evidence-based recidivism reduction programs, crafts program incentives to welcome participation, and encourages accelerated prison and pre-release custody release.[162] Section 101 provides that "[a] prisoner shall earn 10 days of time credits for every 30 days of successful participation" and "shall earn an additional 5 days of time credits for every successful participation in evidence–based recidivism reduction programming" if certain criteria are met.[163] Likewise, § 102 defines, in clear language, prerelease custody categories, eligibility, types, and effectively broadens its use.[164] The unambiguous language of the Act and its legislative history show that Congress intended to increase release eligibility for release to home confinement and other alternatives to federal prison. This is especially so for inmates with a low risk of recidivism. Age, not sentence duration, is key in identifying recidivism risk.

Congress should direct BOP to give the broadest interpretation possible to § 603 of the Act in order to bestow congressionally envisioned early release to category four elderly offenders. Since BOP persists in this constricted interpretation of the statutory language, a novel approach is necessary. We must reimagine criminal punishment's meaning, purposes, and modes of expression.

V. ALTERNATIVE SANCTIONS, EXPRESSIVE CONDEMNATION, AND THEORIES OF PUNISHMENT

It must be noted that the American prison system was originally created to facilitate offender rehabilitation.[165] Prisons and jails were initially envisioned as institutions that would allow offenders the opportunity to physically separate from society in order to "reflect on the evil of his ways."[166] The 1980's and 1990's era purported sentencing reforms, however, radically transformed our punishment model from one mindful of rehabilitative reform to one motivated by retribution, with empty promises of deterring crime.[167] Despite this shift in punishment purpose, our default punishment mode,

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162. *See id.* § 101.

163. *Id.*

164. *See id.* § 102.

165. *See* Edward L. Rubin, *The Inevitability of Rehabilitation*, 19 LAW & INEQ. 343, 352 (2001).

166. *Id.* at 347.

167. *See, e.g.*, Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 104 (1988).

incarceration, curiously remained unchanged.[168] "Reformers" opined that "prisons lacked the capacity to rehabilitate, yet failed to fully consider whether prisons were capable of successfully deterring crime or properly punishing moral blameworthiness."[169] It is difficult to condone imprisonment as default punishment for the plurality of offenses when attempting to justify its use through the critical lens of theories of punishment. Utilizing theories of punishment to defend imprisonment for elderly offenders proves even more perplexing.

A. Punishment, Justification, and Alternative Sanctions

Theories of punishment directly inform this country's federal sentencing structure. The purposes of federal punishment are expressed in the provisions of 18 U.S.C. § 3553(a), which melds utilitarian and retributivist theories of punishment.[170] This hybrid approach purports to punish offenders for both a larger societal benefit (deterrence) and to justly penalize moral blameworthiness (retribution).[171] Among the governing principals of punishment enumerated in the statute are deterrence of specific offenders, incapacitation, crime prevention, distribution of just punishment, and effective offender rehabilitation.[172] It has become clear that incarceration cannot be supported by any theory of punishment.[173] Maintaining incarceration as our principal sentencing paradigm, then, is simply unreasonable. Stakeholders on both sides of the political and policy aisles agree that "[i]mprisonment is harsh and degrading for offenders," "extraordinarily expensive for society," and is less effective than alternative forms of punishment in deterring crime.[174] This is especially true for category four elderly offenders, for whom a sentence of incarceration can no longer fulfill any theory of criminal punishment.[175] The time is ripe to consider and utilize alternative forms of punishment.

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168. *See* Jalila Jefferson-Bullock, *How Much Punishment is Enough?: Embracing Uncertainty in Modern Sentencing Reform*, 24 J.L. & POL'Y 345, 390 (2016).

169. *Id.* at 389–90 (internal citations omitted).

170. *See* 18 U.S.C. § 3553(a) (2020).

171. *See id.*; PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH 75 (2008).

172. *See* 18 U.S.C. § 3553(a).

173. *See, e.g.*, Jefferson-Bullock, *supra* note 12, at 971; Jefferson-Bullock, *supra* note 60, at 522.

174. Dan M. Kahan, *What Do Alternative Sanctions Mean*?, 63 U. CHI. L. REV. 591, 592 (1996).

175. *See* Jefferson-Bullock, *supra* note 12, at 971.

One obstacle in promoting alternative sanctions is their perceived "political unacceptability."[176] According to Professor Dan M. Kahan, "[t]he public rejects the alternatives not because they perceive that these punishments won't work or aren't severe enough, but because they fail to express condemnation as dramatically and unequivocally as imprisonment."[177] In explaining further, he correctly proclaims, that "[t]he purpose of imprisonment . . . is to make offenders suffer. The threat of such discomfort is intended to deter criminality, and the imposition of it to afford a criminal his just deserts."[178] Studies show, however, that our system of imprisonment does not deter crime, and that imprisonment cannot satisfy retribution because it is impossible to correctly determine how much punishment is enough.[179] Professor Kahan further notes that "liberty deprivation . . . is not the only way to make criminals uncomfortable," and that "alternatives . . . should be preferred whenever they can feasibly be imposed and whenever they cost less than the equivalent term of imprisonment."[180] Valuable substitutes for incapacitation must be constructed in order to effectively realize legislatively-envisioned, stated goals of punishment. Alternative sanctions must, however, appropriately express condemnation. Elderly offenders are optimally suited to commence this urgent reform.

Professor Kahan suggests that alternative sanctions have not been widely accepted because they fail to articulately express punishment's meaning.[181] He suggests that infusing current retributive and deterrence doctrines with expressive theory will result in the public's acceptance of much-needed alternatives to traditional incapacitation. In his words, "theorizing that excludes the expressive dimension of punishment generates incomplete explanations of what the criminal law is and unreliable prescriptions of what it should be."[182] If the law guiding criminal punishment can state its purposes with precision and consistency, and express those purposes clearly to the public, perhaps the public will begin to understand the value of seeking alternative punishment forms. Under the expressive view,

176. Kahan, *supra* note 174, at 592.
177. *Id.*
178. *Id.* at 593.
179. *See generally* Jefferson-Bullock, *supra* note 168.
180. Kahan, *supra* note 174, at 593.
181. *See id.* at 604.
182. *Id.* at 596.

"we can give a satisfactory account of crime and punishment only if we pay close attention to their social meaning."[183]

Following Professor Kahan's model, then, "from an expressive point of view, what is critical is not that society inflict the same amount of pain on all wrongdoers or impose the same form of deprivation on all, but that it select afflictions that unambiguously express condemnation against the background of social norms."[184] Reforming our "expressive sensibilities" will assist in transforming the public's view that imprisonment is the sole and best punishment mechanism.[185] The question becomes what message(s) should punishment specifically express? The moral education theory of punishment proves instructive in this area and can be invaluable in ascertaining whether punishment effectively deters crime and fairly executes retribution.

B. Moral Education, Expression, and Theories of Punishment

The moral education theory of punishment suggests that "punishment is justified as a" benefit to the criminal by guiding offenders in making improved moral decisions.[186] Under this model, the degree and scope of moral education depends upon the severity of the crime committed.[187] This concept is worthy of inclusion in establishing how to competently express punishment's meaning(s) to would-be offenders and the larger society. Still the question of what message(s) should be communicated remains.

Theorists suggest that punishment's effectiveness requires an expression that an offender's behavior is shameful.[188] Shaming, however, must be reintegrative, and not disintegrative.[189] In the words of Professor John Braithwaite: "Reintegrative shaming means that expressions of community disapproval, which may range from mild rebuke to degradation ceremonies, are followed by gestures of reacceptance into the community of law-abiding citizens. . . . Disintegrative shaming (stigmatization), in contrast, divides the community by creating a class of outcasts."[190]

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183. *Id.*at 597.

184. *Id.* at 631.

185. *Id.* at 630.

186. Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 215, 221 (1984).

187. *Id.*

188. *See* Kahan, *supra* note 174, at 591.

189. JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 4 (1989).

190. *Id.* at 55.

Professor Braithwaite points to suitable shaming models utilized in families to demonstrate reintegrative shaming's mechanics. In a family that employs reintegrative shaming, "the effectiveness of shaming depends on continued social integration in a relationship sustained by social approval."[191] Under this theory, "the contrast between the ordinary enjoyment of [parents'] approval and the distress of being temporarily out of favor is essential."[192] Such a model allows for correction, repentance, reform, and reacceptance into the larger community. The type of correction followed by social approval expressed by Professor Braithwaite must be a critical component of any reformed punishment model. The type of strong, coherent, appropriate messages of reintegrative condemnation supported by the moral education theory will assist in creating wide-spread acceptance of alternatives to traditional incapacitation. Such far-reaching approval is a compulsory constituent of criminal justice reform.

C. Punishment and Acceptance

The criminal justice system is effective only when those governed trust in its validity, and it is rendered inept when society loses faith in its efficacy.[193] Those empowered to administer the system, then, must be mindful of public perceptions of fairness and justice.[194] Studies demonstrate that perceptions of criminal law's legitimacy give rise to "higher levels of cooperation and lower rates of recidivism."[195] Additionally, "[p]eople are less likely to comply with laws they perceive to be unjust" or "with the law generally when they perceive the criminal justice system as tolerating such injustice."[196] This concept is a critical component of any reformed sentencing model. In order to change our view of elderly offenders, thereby engendering authentic sentencing reform, we must craft a system that people believe is fair, just, and competent.

Scholars note that "a criminal justice system derives practical value by generating societal perceptions of fair enforcement and

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191. *Id.* at 57.

192. *Id.*

193. *See* Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims & Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 212 (2012).

194. *See* Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1386 (2003).

195. Bowers & Robinson, *supra* note 193, at 253.

196. *Id.* at 262.

adjudication."[197] Professors Josh Bowers and Paul H. Robinson classify this concept of "societal perceptions of fair enforcement and adjudication" into two distinct categories: (1) legitimacy, and (2) moral credibility.[198] Legitimacy considers criminal justice processes, and demands that they are fairly, accurately, and uniformly executed.[199] Moral credibility negotiates justice and challenges the criminal justice system to produce equitable outcomes, thereby preserving its "reputation for moral credibility with its community."[200] Though their internal operations vary significantly, the concepts of legitimacy and moral credibility possess the same ultimate goal. The aim of both is that people come to believe that the criminal justice system works, and, for that reason, they choose to behave lawfully. The criminal justice system simply cannot function as effectively as government requires if the general population refuses to believe in it and conform to its laws.

The perception of fair process induces a commitment to fully participate in the system by adjusting one's conduct to comport with the system's requirements. According to Bowers and Robinson, "procedure is legitimacy's starting point."[201] People adapt their behavior to a specific system of criminal laws, policies, and programs because they believe that the process is fair. Bowers and Robinson note that "perceptions of procedural fairness facilitate a kind of normative, as opposed to purely instrumental, crime control."[202] In the words of Bowers and Robinson:

> [C]itizens of a procedurally just state comport their behavior to the substantive dictates of the law not because the state exercises coercive power . . . but because they feel a normative commitment to the state. . . . [A]n individual . . . complies with the law not because he rationally calculates that it is in his best interest to do so, but because he sees himself as a moral actor who divines that it is right to defer to legitimate authority.[203]

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197. *Id.* at 211.
198. *Id.* at 211–12.
199. *See id.* at 215.
200. *Id.* at 218.
201. *Id.* at 214.
202. *Id.*
203. *Id.*

Fair process, then, leads to increased compliance with and belief in the law. The perception that outcomes are just does as well.

Moral credibility's principles are readily translatable and easily applicable to modern sentencing reform. While legitimacy ponders criminal justice processes, moral credibility contemplates the fairness of criminal punishment and outcomes. Moral credibility contends that "[d]oing justice may be the most effective means of fighting crime."[204] Per moral credibility theory, the criminal justice system is rendered legitimate only if it appeals to a community's shared intuitions of justice. In this way, moral credibility is steeped in retributivist theory. In the words of Bowers and Robinson:

> Some of the system's power to gain compliance derives from its potential to stigmatize . . . . Yet a criminal law can stigmatize only if it has earned moral credibility with the community it governs. That is, for conviction to trigger community stigmatization, the law must have earned a reputation with the community for accurately reflecting the community's views on what deserves moral condemnation. A criminal law with liability and punishment rules that conflict with a community's shared intuitions of justice will undermine its moral credibility.[205]

Our shared intuitions of justice are beginning to abandon the notion of traditional incapacitation as singularly effective. The moral credibility theory, then, can be instrumental in justifying the crafting of alternative sanctions. It is only fitting that such a movement begins with the elderly.

Legitimacy and moral credibility assist in deciphering if, why, and when our criminal justice system works. Both rely, rather soundly, upon public perception, and legitimize the criminal justice system by rendering it fair, just, and therefore, efficacious to people.[206] Moral education, legitimacy, and moral credibility theories can work cooperatively to assist in properly expressing alternatives to incarceration as effective and appropriate punishment that is supported by compulsory retributive and utilitarian theories of punishment. Juvenile justice is an area that has melded all of these components together well to garner support for and passage of

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204. *Id.* at 216.
205. *Id.* at 217.
206. *See id.*

punishment reform that capably expresses reintegrative condemnation, provides latitude and flexibility to employ alternative sanctions, and inspires belief in its validity. Juvenile justice reform is, therefore, instructive in reimagining punishment of elderly offenders.

VI. JUVENILE JUSTICE REFORM AS INSTRUCTIVE—A NEW MODEL OF SENTENCING REFORM

The creed that "juveniles are 'different'"[207] is "long-standing."[208] The first juvenile court was established in Chicago in 1899 under that doctrine.[209] According to Professor Perry Moriearty,

> [n]early every component of the nascent juvenile system accounted for adolescents' reduced culpability and greater capacity for change: Charges against child lawbreakers were deemed civil rather than criminal, social workers and clinicians replaced lawyers, prosecutors, and juries, "crimes" were called "delinquent behavior," young offenders were adjudicated not convicted, and judges issued "dispositions" rather than sentences. Formal rules were abandoned in favor of broad discretionary powers, which, it was thought, would best enable the states to carry out their role as "*Parens Patriae*."[210]

In the 1960s and 1970s, concern regarding the lack of uniformity in juvenile sentencing led to the crafting of various constitutional protections for juvenile offenders, including the right to counsel.[211] This and other innovations "brought a procedural formality and the beginning of an ideological shift in focus from the 'best interests' of the child to the gravity of the offense itself."[212]

So-called sentencing reforms of the 1980s and 1990s threatened to disband the juvenile justice model.[213] For example, "between 1992 and 1997 alone, state legislatures in forty-five states enacted laws making

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207. Perry L. Moriearty, Miller v. Alabama *and the Retroactivity of Proportionality Rules*, 17 U. PA. J. CONST. L. 929, 938 (2015).

208. *Id.*; *see* Thompson v. Oklahoma, 487 U.S. 815, 837 (1988) (acknowledging that juveniles are different and therefore should not be subjected to the death penalty).

209. Moriearty, *supra* note 207, at 938.

210. *Id.* at 938–39 (internal citations omitted).

211. *Id.* at 939–40.

212. *Id.* at 940.

213. Perry L. Moriearty, *The Trilogy and Beyond*, 62 S.D. L. REV. 539, 544 (2017).

it easier to punish children like adults," with "[a]dolescent offenders . . . branded juvenile 'super-predators,'" and life sentences rising "dramatically."[214] The Court responded by upholding "age [as] a constitutionally significant mitigating factor" in many instances, while simultaneously "resist[ing] throughout the twentieth century the call to find juvenile sentences constitutionally excessive."[215] The Court revived its Eighth Amendment proportionality jurisprudence at the beginning of the twentieth century, inserting it, rather significantly, into juvenile sentencing analyses.[216] The result, over a series of cases relying upon studies documenting the developmental and neurological differences between adolescents and adults, was the creation of the doctrine that juveniles should be held less culpable than adults because they are "different."[217]

A. Juveniles are Different

Supreme Court jurisprudence clearly establishes that juveniles are "different."[218] In *Roper v. Simmons*, the Court expanded its holding in *Thompson v. Oklahoma* by prohibiting imposition of the death penalty for offenders under the age of eighteen.[219] The Court reasoned that the Eighth Amendment's core purpose is to "respect the dignity of all persons" by adhering and "referring to 'evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual."[220] The Court interpreted this standard to embody a two-fold approach: (1) examining "objective indicia of consensus" in order to identify a national agreement; and (2) exercising the Court's "own independent judgment" to determine "whether the death penalty is disproportionate punishment for juveniles."[221] As to the first prong of its inquiry, the Court considered state legislative enactments and

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214. *Id.*

215. Moriearty, *supra* note 207, at 942.

216. *See id.* at 943.

217. *See id.* at 944.

218. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 68 (2010) (acknowledging that juvenile offenders are developmentally and morally distinct from adults).

219. Roper v. Simmons, 543 U.S. 551, 561, 575 (2005) (*Thompson* held that "our standards of decency do not permit the execution of any offender under the age of 16 at the time of the crime" and *Roper* held that "he death penalty is disproportionate punishment for offenders under 18"). *See generally* Thompson v. Oklahoma, 487 U.S. 815 (1988).

220. *Roper*, 543 U.S. at 560–61.

221. *Id.* at 564.

jurisdictional practice. In doing so, the Court found that even among the twenty states that had not formally prohibited use of the death penalty for juvenile offenders, "the practice is infrequent" and the "direction of change" was "consistent."[222] The Court used this data to prove the existence of a national consensus that society views juveniles as being "categorically less culpable than the average criminal."[223] The second prong of its inquiry allowed the Court to exercise its judgment to assess whether the death penalty may ever be proportionate punishment for juveniles. In this analysis, the Court recognizes three attributes distinguishing juveniles from adults: (1) "lack of maturity and an underdeveloped sense of responsibility"; (2) increased "susceptib[ility] to negative influences and outside pressure, including peer pressures"; and (3) "transitory" personality traits that delay character development.[224] Because they are "different," juveniles are less culpable and "their irresponsible conduct is not as morally reprehensible as that of an adult."[225] These three unique traits "render suspect any conclusion that a juvenile falls among the worst offenders,"[226] thereby rejecting any assertion that youth are unredeemable, and therefore, worthy of death. According to the Court, "[t]he differences between juvenile and adult offenders are too marked and well understood."[227]

Graham v. Florida follows the same reasoning.[228] Here, the Court deemed that imposition of a sentence of life without parole on juveniles committing non-homicide offenses was a violation of the Eighth Amendment ban on cruel and unusual punishment.[229] As in *Roper*, the Court relies on the evolving principles of the decency standard, but changes course slightly by emphasizing proportionality more heavily.[230] The *Graham* Court underscores that proportionality is the cornerstone of Eighth Amendment jurisprudence, and that a proper Eighth Amendment analysis considers whether a punishment is "'disproportionate' to the crime."[231] The Court relies upon the same two-pronged approach in considering evolving standards of decency that was offered in *Roper*, but inserts proportionality-based

222. *Id.* at 564, 566.
223. *Id.* at 567.
224. *Id.* at 569–70.
225. *Id.* at 570.
226. *Id.*
227. *Id.* at 572.
228. Graham v. Florida, 560 U.S. 48, 68 (2010).
229. *Id.* at 74.
230. *Id.* at 59.
231. *Id.* at 60.

arguments therein. As to the first prong of the test, the Court concludes that "an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use," as a sentence of life without the possibility of parole for juvenile non-homicide offenders was "most infrequent," despite its statutory availability.[232] The crux of the Court's argument, however, is grounded in the second prong of the *Roper* test.

In determining whether the "second most severe penalty" is disproportionate punishment for juveniles in the Court's independent judgment, the Court depends upon retributive theory, specifically its proportionality principle.[233] According to the Court, this inquiry requires a consideration of whether the "challenged sentencing practice serves legitimate penological goals" by resolving what degree of punishment the offender deserves.[234] The *Graham* Court agrees with the *Roper* Court's assessment that juveniles' culpability is lessened due to their diminished capacity.[235] According to the Court, "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults."[236] Additionally, the Court writes that, "when compared to an adult murderer, a juvenile offender who did not kill has a twice diminished moral culpability" as "[t]he age of the offender and the nature of the crime each bear on the analysis."[237] The Court dives even further into retributive theory waters by asserting that "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender" and that, per *Roper*, "'[r]etribution is not proportional if the law's most severe penalty is imposed' on the juvenile murderer" due to the juvenile's diminished capacity.[238] In the Court's words, "[m]aturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation."[239]

Miller v. Alabama extends *Graham* by prohibiting mandatory life imprisonment without the possibility of parole for juvenile homicide

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232. *Id.* at 62.

233. *Id.* at 72 (In its analysis, the Court also discusses deterrence, incapacitation, and rehabilitation as sentencing goals. The focus, however, is on retribution.).

234. *Id.* at 67.

235. *Id.* at 68.

236. *Id.*

237. *Id.* at 69.

238. *Id.* at 71.

239. *Id.* at 79.

offenders.[240] Again, the Court's Eighth Amendment analysis is grounded in proportionality and "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty."[241] *Miller v. Alabama* builds upon *Roper*'s and *Graham*'s finding that "youth matters" when imposing punishment because "[t]he penalty when imposed on a teenager, as compared with an older person, is . . . 'the same . . . in name only.'"[242] The Court emphasizes that some of the "hallmark features" of youth are "immaturity, impetuosity, and failure to appreciate risks and consequences."[243] Together, *Graham* and *Miller* clarify that the punishment of life without parole must never be imposed on juveniles committing non-homicide offenses, but may be reserved for juvenile homicide offenders only "in certain 'rare' circumstances where the sentence concludes that the youth is irreparably corrupt."[244] Finally, in *Montgomery v. Louisiana*, the Court again expands upon the notion that juveniles are different by rendering *Miller* retroactive.[245] Per the *Montgomery* Court, "[t]hese differences result from children's 'diminished culpability and greater prospects for reform.'"[246] In the Court's words, "[p]rotection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence."[247]

The Court's juvenile justice reform movement confirms that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences upon them. When considered more broadly, the retributive arguments favoring more lenient punishments for juveniles can transform the general view of proportionality. In each of the aforementioned cases, the Court reasons that the "defendant, not the offense, is of paramount concern when it comes to sentencing children."[248] This view lies counter to the gross proportionality review otherwise promulgated by the Court. In cases concerning adult offenders, "the Court rebuffed challenges to severe non-capital sentences by requiring a threshold showing that

240. Miller v. Alabama, 567 U.S. 460, 465 (2012).

241. *Id.* at 470.

242. *Id.* at 473, 475 (quoting *Graham*, 560 U.S. at 70).

243. *Id.* at 477.

244. Sarah French Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 B.C. L. REV. 553, 564 (2015).

245. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 732 (2016).

246. *Id.* at 733 (quoting *Miller*, 567 U.S. at 571).

247. *See id.* at 732–33.

248. Moriearty, *supra* note 213, at 553.

the punishment in question was grossly disproportionate to the underlying offense before it would subject the state sentencing scheme to constitutional scrutiny,"[249] rendering it far more difficult to determine if a sentence is, in fact, disproportionate. This distinct approach to juvenile sentencing has proven helpful in lowering instances of juvenile crime and may be instructive in designing an improved criminal sentencing structure that focuses on decreased recidivism, rehabilitation, and fiscal responsibility.[250]

Because juvenile offenders are viewed "differently," the juvenile system is more open to "divert[ing] more people, reduc[ing] the length of time people spend in the system, and invest[ing] in [sentencing] alternatives."[251] As a result, juvenile crime rates have dropped dramatically over the past decade, with juvenile prison rates decreasing by a staggering 53% between 2001 and 2013.[252] Policy makers have identified two reasons for this decline: (1) the drop in arrests matched the decline in commitments, and (2) "state policymakers are increasingly interested in reforming their juvenile justice system to prioritize alternative forms of punishment over incarceration of commitment to residential facilities."[253]

This progress in the juvenile arena exists because juveniles are viewed differently. Policy makers believe that "revising how we think about people who commit crime changes how we respond to their actions" and that "if such an approach makes sense for juveniles it can also be adapted for adults."[254] We can begin the process of reforming the criminal justice system by viewing elderly adults as "different." The proportionality analysis that supports treating juvenile offenders differently relies upon the notion that "the transient nature of . . . [juveniles'] developmental influences is . . . important, because it suggests that juveniles are likely to desist from involvement in criminal activity as they mature," and are, therefore, "less likely than their adult counterparts to be 'incorrigible' criminals."[255] At bottom, "the Court's proportionality analysis in the juvenile cases provides a sound basis for its rejection of harsh sentences as excessive."[256] Juvenile reforms focus on "lesser culpability, immaturity, and the

249. *Id.*
250. *See Gass*, *supra* note 25.
251. *Id.*
252. *Id.*
253. *Id.*
254. Nellis & Mauer, *supra* note 28.
255. Elizabeth S. Scott, *"Children are Different": Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 72–73 (2013).
256. *Id.* at 87.

likelihood for change."[257] While the Court has reserved this mercy for juveniles, it also rightly belongs to the elderly. Youth receive a "presumption of immaturity."[258] There is an element of mercy, in the form of individualized and distinctly different sentencing, that only juvenile offenders are gifted. Elderly offenders, likewise, should receive mercy in the form of a presumption of maturity—a presumption of aging out.

B. Aging Out of Crime

The aging out of crime theory is one of the "most widely accepted premises in criminal research."[259] Experts affirm that susceptibility to criminality is, in many respects, directly informed by age.[260] Scholars steadily confirm that criminal patterns may be conceptualized by a "single peak occurring early in life (usually in the late teens for most offenses), with steady declines thereafter."[261] The aging out of crime theory submits that self-control regulates criminality.[262] The attraction to risky behaviors decreases as self-control develops with age.[263] Further, adults generally engage in a less risky lifestyle and have more access to non-criminal thrills should they insist upon engaging risk.[264] Thus, crime generally persists in youth and desists in older age.

The aging out theory confirms that propensity for criminality relies upon a delicate balance of both biological and social factors.[265] Scholars note that:

> [D]uring the aging process, structural changes to the brain result in functional changes in brain processes, whether a consequence of natural aging or of

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257. Lahny R. Silva, *The Best Interest Is the Child: A Historical Philosophy for Modern Issues*, 28 BYU J. PUB. L. 415, 452 (2014).

258. *Id.*

259. Adams, Jr., *supra* note 53, at 1349.

260. *See id.* at 1348–49.

261. Charles R. Tittle & Harold G. Grasmick, *Criminal Behavior and Age: A Test of Three Provocative Hypotheses*, 88 J. CRIM. L. & CRIMINOLOGY 309, 312 (1997).

262. *Id.* at 313–14.

263. *Id.*

264. *Id.* at 313–15.

265. *Id.* at 310–11; Jeffrey T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship: Social Variation, Social Explanations*, *in* THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY: ON THE ORIGINS OF CRIMINAL BEHAVIOR AND CRIMINALITY OF LEGISLATION 379–81 (Beaver et al. eds., 2015).

> pathological cause. These changes may then affect other changes in the body, including anatomical, biochemical, physiological, and behavioral changes.[266]

In many respects, "the link between age and criminal involvement is explained by physical development and aging" because "physical abilities, such as strength, speed, prowess, stamina and aggression," which are necessary for "successful commission of many crimes, for protection, for enforcing contracts, and for recruiting and managing reliable associates," decrease significantly with age.[267] For these reasons, aging "undoubtedly affects a person's functional capacities at least to some extent in a way that is relevant to the imposition of criminal punishment."[268] Persistence in crime during youth is explained by "'a lack of social controls, few structured routine activities, and [less] purposeful human agency,'" while desistance from crime in adulthood is rationalized by a "'confluence of social controls, structured routine activities, and purposeful human agency.'"[269] Additionally, as one physically ages, the social factors accompanying adulthood, such as marriage, child rearing, employment, and community expectations and reputation bear more heavily on decision-making processes, rendering criminality unattractive.[270] For these reasons, "'the rise in crime in adolescence to the edge of young adulthood, and crime's decline with age thereafter reflects both the biological process of aging as well as the roles, norms, and socially constructed perspectives that accompany aging.'"[271] Likewise, BOP admits that "age is one of the biggest predictors of misconduct" in prison, and "inmates tend to 'age out' of misconduct" as they grow older.[272] BOP data reveals that elderly inmates accounted for only 10% of all misconduct incidents for 2013, although they comprised 19% of the total inmate population.[273] Moreover, elderly misconduct violators commit less serious infractions than

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266. Dawn Miller, *Sentencing Elderly Offenders*, 7 NAELA J. 221, 227 (2011).

267. Ulmer & Steffensmeier, *supra* note 265, at 379.

268. Miller, *supra* note 266, at 228.

269. Jefferson-Bullock, *supra* note 12, at 973 (quoting Robert J. Sampson & John H. Laub, *A General Age-Graded Theory of Crime: Lessons Learned and the Future of Life-Course Criminology*, *in* 14 ADVANCES IN CRIMINOLOGICAL THEORY: INTEGRATED DEVELOPMENTAL & LIFE-COURSE THEORIES OF OFFENDING 165, 166 (David P. Farrington ed., 2005)).

270. Jefferson-Bullock, *supra* note 12, at 973.

271. *Id.* (quoting Ulmer & Steffensmeier, *supra* note 165, at 389).

272. *See* IMPACT OF AN AGING INMATE POPULATION, *supra* note 7, at 38.

273. *Id.*

their younger counterparts, with 67% of aging inmates' misconduct at "moderate or low severity compared to sixty percent of younger inmates' misconduct" during 2013.[274]

Statistics also demonstrate that older inmates recidivate far less than younger inmates.[275] According to a 2015 OIG report of inmates age fifty and older who were released between 2006 and 2010, 15% were arrested for new crimes within three years of release, and 7% of those new arrests were for probation violations only.[276] These numbers may be better understood when considered in tandem with overall national recidivism rates. In 2009, the Bureau of Justice Statistics reported that the "recidivism rate for 20-year-old released prisoners is approximately 60 percent but drops dramatically as individuals become older," slowing down around age 40, but continuing to "fall as prisoners approach 80 and older."[277] Further, a 2015 Bureau of Justice Statistics report of recidivism rates for all ages of offenders between 2005 and 2010 shows that about 68% of offenders were arrested for new crimes within three years of release and about 77% were arrested for new crimes within five years of release.[278] Likewise, the probability of parole violations also declines with age. This data clearly supports the aging out theory.

Modern research plainly demonstrates that age, not length of sentence, is an "accurate predictor of recidivism."[279] Because elderly inmates share the lowest recidivism rates among inmates, they "pose almost no threat to public safety."[280] In effect, "[g]iven the strong correlation between aging and reduced rates of offending, the orthodox approach of using prior criminal offenses as a crude measure of predicting future offenses is inapposite to apply to elderly offenders."[281] Further, the main categories of offenses committed by

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274. *Id.*

275. *Id.*

276. *Id.* at 39.

277. KIDEUK KIM & BRYCE PETERSON, URBAN INST., AGING BEHIND BARS: TRENDS AND IMPLICATIONS OF GRAYING PRISONERS IN THE FEDERAL PRISON SYSTEM 5 (Apr. 2014), https://www.urban.org/sites/default/files/publication/33801/413222-Aging-Behind-Bars-Trends-and-Implications-of-Graying-Prisoners-in-the-Federal-Prison-System.pdf.

278. ALEXIA D. COOPER, MATTHEW R. DUROSE, & HOWARD N. SNYDER, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, at 1 (Apr. 2014), https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf.

279. OSBORNE ASS'N, *supra* note 6, at 5.

280. *Id.*

281. Bagaric, *supra* note 54, at 963.

the elderly do not include those for whom the punishment is life imprisonment.[282]

The aging out theory proves that incarceration does not deter elderly offenders. It does not satisfy retribution either. In a previous work, I offer:

> The punishment, a life sentence, in a prison that is ill-suited to meet the elderly inmates' basic health, emotional, psychological, and physical needs, is too harsh to fit the crime. Additionally, studies reveal that "[t]he majority of offenses do not, in society's opinion, merit sentences as harsh as the death penalty or even life in prison," and result in the imposition of "much stiffer penalties than were originally deemed appropriate by the legislature." Our intuitions of justice and fairness do not align with a conversion to a life sentence.[283]

BOP conveniently forgets that many of this group pose no threat to public safety. They disregard that category four elderly offenders have simply aged out of a life of crime. Like juvenile offenders, elderly offenders deserve individualized consideration in sentencing. As with juvenile offenders, continued incarceration of category four offenders leads to outrageously disproportionate outcomes.

C. Life Sentences?

While the Court declares that life in prison may be a disproportionate sentence for juvenile offenders only, this concept may be extended even further to include elderly offenders.[284] For example, Professor Elizabeth S. Scott notes that in addition to declaring that "children are different," the aforementioned trilogy also pronounces that life without the possibility of parole is

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282. Adams, Jr., *supra* note 53, at 1345. According to scholars, elderly offenses are limited to gambling, sex offenses, drunkenness, vagrancy, larceny/theft, disorderly conduct, and weapons offenses. *Id.*

283. Jefferson-Bullock, *supra* note 12, at 977 (quoting Michelle Westhoff, *An Examination of Prisoners' Constitutional Rights to Healthcare: Theory and Practice*, 20 HEALTH L. 1, 10 (2008)).

284. *See* Scott, *supra* note 255, at 88.

indistinguishable from the death penalty for juvenile offenders.[285] In her words,

> It is quite plausible that the Court, focusing on the first theme [juveniles are different], will limit the scope of special Eighth Amendment protection for young offenders to restricting the sentence of LWOP. But if it takes the "children are different" principle seriously, the opinions may have a broader influence on constitutional doctrine.[286]

While this is true, she subsequently limits this consideration by expressing that

> [u]nder a narrow interpretation of *Graham* and *Miller*, the Court has simply extended the constitutional protections that apply to the death penalty to the non-capital sentence of LWOP for juveniles, because the two sentences are analogous for these young offenders. If this is the meaning of *Graham* and *Miller*, the Court's proportionality analysis may be extended to other LWOP challenges, but not to other sentences or to other special protections.[287]

On this point, she and I disagree.

The *Miller* Court states that "[i]mprisoning an offender until he dies alters the remainder of his life 'by a forfeiture that is irrevocable.'"[288] In the aforementioned decisions, the Court relies upon theories of punishment to discount the most severe of punishments for juveniles.[289] The Court raises and then dismisses retribution, rehabilitation, incapacitation, and deterrence as appropriate justifications for life in prison without the possibility of parole and the death penalty.[290] Relying upon both empirical and deontological desert, the Court in *Graham* asserts that "'[t]he heart of

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285. *Id.*

286. *Id.*

287. *Id.*

288. Miller v. Alabama, 567 U.S. 460, 474–75 (2012) (quoting Graham v. Florida, 560 U.S. 48, 69 (2010)).

289. *See generally* Montgomery v. Louisiana, 136 S. Ct. 718 (2016); *Miller*, 567 U.S. at 460; *Graham*, 560 U.S. at 48.

290. *See* sources cited *supra* note 289.

the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.'"[291] In rejecting deterrence as sustaining the harshest of punishments, the Court acknowledges that juveniles are "less likely to take a possible punishment into consideration when making decisions," rendering deterrence an impossible punishment justification.[292] Likewise, while "incapacitation is an important goal" in reducing recidivism, life sentences must be reserved for those who are "incorrigible" and "forever will be a danger to society."[293] Additionally, the penological goal of rehabilitation must concern itself with an offender's "capacity for change and limited moral culpability."[294] In each of the trilogy cases, the Court determines that none of these theories of punishment justify imposing the most serious punishments on juvenile offenders.[295] In so determining, the Court makes a larger pronouncement that a punishment of disproportionate length loses its value because it cannot effectively express the punishment's meaning. The same analysis may be applied to elderly offenders.

For certain categories of elderly offenders, continued incarceration represents a life sentence. The same theory of punishment analysis that rejects life imprisonment for juvenile offenders may be used to validate a novel sentencing model for the elderly. The aging out of crime theory supports release of those offenders who no longer pose a risk to society. Scholars note that "'[i]f a penal sentence falls more harshly on an older person, then it must also be true that a sentence proportioned to a person's age and life expectancy will deter them as much as it would deter someone younger.'"[296] Per retributivist theory, punishment must be proportional. Professors Ronald Aday and Jennifer Krabill note that "freedoms lost are typically in direct relation to the severity of the crime committed and the extent to which the accused is personally responsible for the outcome of his or her action."[297] They further explain that "these two items are not proportional to the number of health problems the [elderly] individual can expect to encounter while serving time," resulting in the prisoner

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291. *Graham*, 560 U.S. at 71.

292. *Id.* at 72.

293. *Id.*

294. *Id.* at 74.

295. *See generally* Montgomery v. Louisiana, 136 S. Ct. 718 (2016); Miller v. Alabama, 567 U.S. 460 (2012); *Graham*, 560 U.S. at 48.

296. Miller, *supra* note 252, at 233–34 (quoting Cristina J. Pertierra, *Do the Crime, Do the Time: Should Elderly Criminals Receive Proportionate Sentences?*, 19 NOVA L. REV. 793, 817 (1995)).

297. Aday & Krabill, *supra* note 70, at 247–48.

serving a grossly disproportionate sentence in direct conflict with retribution's directives.[298]

Those critical of such a position point to the Court's decision in *Harmelin v. Michigan*, citing the unfeasibility of the Court finding such sentences, though the unintended impact is for life, "barbaric or grossly disproportionate" under the Eighth Amendment.[299] Perhaps with a closer look, the Court may adopt an alternative stance. It must be remembered that, in the trilogy, the Court relied upon science to reverse our views concerning juveniles. The time is ripe to embrace the aging out theory and reconsider how we punish elderly offenders. The same mercy and dignity afforded juveniles, through the use of more individualized sentencing considerations, must be extended to apply to other vulnerable offenders. Category four elderly offenders are ideal candidates with whom to commence such an exercise.

D. Mercy and Dignity

The tension between justice and mercy has plagued our understanding of punishment's role and responsibilities. In the case of juvenile offenders, the Court has ruled that infusing mercy into sentencing decisions is just. This is simply not true for other offenders. Scholars describe mercy as "'an autonomous virtue'" that is "part of the larger notion of 'charity,'" and is "'not reducible to some other virtue—especially justice.'"[300] It is assessed as a "free gift rather than something to which one has a right or entitlement," and as "distinct from justice."[301] Our principal punishment theory, retribution, demands justice, and seemingly finds itself at odds with and unable to coexist with mercy. Scholars offer, however, that mercy is actually "a more . . . context-sensitive form of justice than what might *prima facie* be viewed as the meting out of 'just deserts.'"[302] In the words of Professor David Dolinko:

> [A] judge exercises mercy when she imposes a sentence that is: (1) more lenient than what would

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298. *Id.* at 248.

299. Adams, Jr., *supra* note 53, at 1349 (citing Harmelin v. Michigan, 501 U.S. 957, 992, 995 (1991)).

300. Robert L. Misner, *A Strategy for Mercy*, 41 WM. & MARY L. REV. 1303, 1322 (2000).

301. David Dolinko, *Some Naïve Thoughts About Justice and Mercy*, 4 OHIO ST. J. CRIM. L. 349, 349 (2007).

302. *Id.* at 352.

> normally be expected in a case of this sort; (2) yet just, based on consideration of a range of mitigating factors broader than what would be standard in sentencing a criminal like this one for the same crime. On this understanding, the merciful judge is "doing justice"—is imposing a deserved sentence—in light of all the relevant factors, including the non-standard mitigating factors she believes it appropriate to take into account.[303]

When considered in this light, it may become easier to radically transform the criminal justice system by considering relevant, individualized factors, at sentencing and post-sentencing. This movement should emerge by considering the relevant circumstance of age.

Dependent upon a retributivist theory of punishment, "[m]ercy is not earned or deserved but is given freely."[304] Currently, our criminal justice system reserves mercy for the narrowest of crimes. However, any criminal justice reform movement must prominently include an element of mercy and must seriously contemplate its level of influence in decision-making. This Article offers that mercy must be an integral component of our criminal justice system, as "the exercise of mercy gives insight into the underlying character of the mercy giver."[305] Doing so requires the type of individualized attention that offenders are not currently afforded. Such consideration can begin with category four elderly offenders.

Mercy's perceived nemesis, retributive justice, can be viewed in two distinct ways: (1) emotional and (2) intellectual.[306] Emotional retribution is more commonly referred to as vengeance, and makes room for abhorrence of both the offense and the offender.[307] Those who declare that vengeance is a necessary element of criminal punishment declare that indignation, resentment, and even hatred are natural responses to crime done to others and to oneself because of the emotional satisfaction that it provokes.[308] Scholars indicate, then, that any successful reform incorporating mercy must be mindful that "unpunished or underpunished crime may not satisfy the societal

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303. *Id.* at 354.
304. Misner, *supra* note 300, at 1322.
305. *Id.* at 1323.
306. *See id.* at 1336–42.
307. *Id.* at 1336.
308. *Id.* at 1340.

requirement for emotional catharsis" that vengeance is expected to unearth.[309] Professor Robert Misner writes that offenders who commit serious, violent crimes are not ideal candidates for whom mercy should be sought because the crimes committed elicit incredibly strong emotional reactions against the offenders and the offenses. Instead, he writes, "[a]reas of crime in which offenders exhibit the effect of such nonretributive factors such as poverty, illiteracy, and unemployment, or any other factor that engenders a degree of general compassion, are candidates of merciful treatment."[310] Elderly offenders certainly fall into this category. This line of reasoning, however, requires a shift in how elderly offenders are viewed.

The second line of retributive rationalization insists that retribution is a necessary component of a civilized society by plainly delineating between right and wrong.[311] This concept of retribution is said to "'promot[e] the stability of a society governed by law'" by "conserv[ing] the moral conscience, maintain[ing] respect for law," "guard[ing] the breakdown of social solidarity that threatens crime," and "express[ing] its denunciation of wrongdoing."[312] In this way, retribution preserves the social order. Denunciation is a fundamental ingredient of this form of retributive justice, which is built upon the "'interdependence and interpenetration of laws and morals.'"[313] Denunciation theory allows its proponents the opportunity to boldly express pronounced disgust and revulsion at the actions of lawbreakers. It is, however, not above reproach. Critics of denunciation theory tout that it promotes an unfair utilitarian justification. They note that in preserving the "collective conscience," "the offender does not receive that which he deserves, but rather that which is useful for the whole society."[314] Such a notion, however, is inapposite to retributive theory, which insists that an offender be punished according only to her moral blameworthiness.[315] Elderly offenders are suitable candidates with whom to begin dismantling these limited and illogical views of offenders and of punishment.

Combating denunciation with mercy requires that reformers not blindly disregard denunciation theory's distortion of retributive

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309. *Id.* at 1341.
310. *Id.*
311. *Id.* at 1342.
312. *Id.* at 1342–43 (citations omitted).
313. *Id.* at 1343 (citing H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 169 (1968)).
314. *Id.* at 1344.
315. *Id.* at 1347.

principles, but that they consider the "attractiveness of denunciation theory."[316] Professor Misner writes, "[i]f an offender is seen to act with impunity when he is treated mercifully, and if the criminal law is seen as the glue that binds society, mercy will be seen as undermining social cohesion."[317] He offers that mercy may be introduced to a criminal sentencing scheme slowly by seeking an area of criminal conduct where there is, in some respect, consensus that society can express censure without imposing lengthy sentences of incarceration or without imposing incarceration at all.[318] Professor Misner suggests that examining racial disparities in sentencing and thoroughly analyzing present prison demographics could give rise to the crafting of a strategy for infusing mercy that would promote social cohesion by reinforcing retribution's core focus on proportionality and fairness in punishment.[319] He cites to crack and powder cocaine possession prosecutions and sentences, noting that African-Americans were overwhelmingly prosecuted more harshly for small amounts of crack cocaine, while white offenders did not receive the same fate.[320] In his estimation, "[e]xhibiting mercy to all persons possessing all forms of cocaine may be seen as a means of correcting a form of racial discrimination and thereby promoting, not splintering, social cohesion."[321] While not the "area of criminal conduct"[322] that Professor Misner refers to, certain classes of elderly offenders as a group are an ideal body with which to initiate such an exercise. Elderly offenders receive disparate treatment in prisons, in the form of deficient prison designs, inadequate health care, dismal palliative care options, undertrained staff, and, for many, the conversion of their sentence of imprisonment into a life sentence. Because of the indignities that they specifically suffer, they can be viewed as a class for whom society can agree mercy must be granted.

According to Professor William W. Berry III, Professor Bryan Stevenson views justice and mercy as compatible because "to achieve justice means to exhibit mercy—to treat the individual accused of a crime as a person possessing human dignity," and "to offer mercy—meaning to appreciate the circumstances surrounding the actions of the criminal defendant, including his personal story—is the best way

316. *Id.* at 1345–46.
317. *Id.* at 1346.
318. *Id.* at 1347.
319. *Id.* at 1346.
320. *Id.*
321. *Id.* at 1346–47.
322. *See id.* at 1341.

to achieve justice."[323] He offers that disparities and injustices in our criminal system are the consequences of engrained, systemic cultural mores that require eradication.[324] Professor William Berry expounds upon this notion, writing that the primary societal notion of justice relies upon an "in-group/out-group psychology," consisting of "those that abide by the law and those that transgress it," with the first group labeled as good and the second as inherently bad, devoid of "any human dignity or individualized consideration."[325] The resulting stigma that attaches once one is labeled bad under this schema is both dehumanizing and often permanent "because it occurs on the level of individual identity . . . that becomes . . . social identity, often with no hope of redemption."[326] Reversal, then, requires the type of individualized consideration that we do not now afford prisoners. Achieving this merciful ideal in the criminal justice system requires concentrating on prisoners' individual needs, conditions, and circumstances. Elderly offenders afford a reasonable starting point to begin such a shifting that would "embrace[] the personhood of the accused."[327] Berry correctly asserts that individualized concern "does not undermine the proportionality inquiry—it sharpens it."[328]

In a previous Article, I recommend amended sentencing laws so that they both consider the effects on families and communities of excessively lengthy sentences and align with formally expressed theories of punishment. I offer that an additional provision be added to § 3553(a) "factors to be considered in imposing a sentence" to direct courts to consider how the families of prisoners are affected by their sentences. I write that a new paragraph (8) should state that in punishing offenders, courts should consider "the need to avoid unwarranted hardship on the children or other dependent family members of the defendant."[329] Additionally, I suggest that the underlying policy statements in 28 U.S.C. § 994(a)(2) be amended to include considerations of "unwarranted hardship on the children, spouse, and dependent family members of the defendant with respect to the length of the sentence imposed and the terms and conditions under which the sentence is served, including alternative sentencing

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323. William W. Berry III, *Implementing Just Mercy*, 94 TEX. L. REV. 331, 332 (2015).

324. *Id.* at 339.

325. *Id.* at 341–42 (citing Molly Townes O'Brien, *Criminal Law's Tribalism*, 11 CONN. PUB. INT. L.J. 31, 42–43 (2011)).

326. *Id.* at 342.

327. *Id.* at 345.

328. *Id.* at 346.

329. Jefferson-Bullock, *supra* note 62, at 113.

options to imprisonment at a BOP facility, for a part of the sentence."[330] I further advise that § 3553(a)(2)(D) be amended to ensure that the notion of rehabilitation of a defendant is again to be expressly considered as a sentencing factor, and that § 3552(a)(2)(D), which governs presentence reports, be amended at paragraph (B) to require that a part of the presentence report would include a new "Family Impact Statement."[331] I write, the "predictive power drawn from the experiences of the children and families of today's long-serving prisoners" should be used to "make sentencing decisions with 'Family Impacts' in mind."[332] Undergirding these recommendations is the concept of extralegal punishment factors (XPFs), informal considerations that are often used by judges in making sentencing decisions.

Professor Paul H. Robinson describes XPFs as factors that courts use in criminal sentencing, beyond the "crime control goals of deterrence and incapacitation."[333] He labels them as:

> [A]ny factor that may influence the determination of what punishment an offender should receive other than (1) factors relating to the harm or evil of the offense, (2) factors relating to the blameworthiness of the offender in committing the offense, and (3) factors relating to the classic coercive crime-control principles of deterrence and incapacitation.[334]

He categorizes XPFs into four distinct areas that relate to: "(1) the offender's reaction to his own offense, (2) the victim's or public's reaction to the offense, (3) the offender's status or character, and (4) the collateral hardship that normal punishment may cause the offender or third parties."[335] Professor Robinson suggests that for each, "some claim has been made, through explicit argument or open practice, that reliance on the factor in determining punishment is appropriate."[336] In employing XPFs, judges are exercising mercy—

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330. *Id.*

331. *Id.* at 114.

332. *Id.*

333. Paul H. Robinson, Sean E. Jackowitz, & Daniel M. Bartels, *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 739 (2012).

334. *Id.* at 740.

335. *Id.* at 742–43

336. *Id.* at 739–40.

they are utilizing the type of individualized attention cited by Professors Stevenson, Berry, and others.

This Article offers that XPFs are not only used during sentencing but are also utilized when courts "look back" at sentences to determine whether an offender is a suitable candidate for release. In the case of elderly offenders, particular importance should be paid to the possible hardship that incapacitation may wreak on the offender and the prison system. Robinson correctly surmises that the application of an XPF "can have a real effect on the amount of punishment an offender receives."[337]

VII. REMEDIES

Individualized approaches have improved outcomes for juvenile offenders and can do so for elderly offenders as well.[338] This can be done by "revising how we think about people who commit crime" and adapting our responses to their behavior.[339] Engaging in this work, however, requires a multi-faceted approach that challenges existing law and practice, while reserving space for future reforms.

A. Sentencing Reform Now

Category four elderly offenders are perfectly suited to lead immediate sentencing reform in the form of early release. For them, the aging out of crime theory substitutes as a proxy for risk. Compassionate release and the First Step Act provide readily available vehicles for release forthwith.

1. Compassionate Release and the First Step Act

Though the Act amends compassionate release processes so that inmates may petition on their own behalf and may appeal directly to courts, the underlying criteria in determining eligibility remain unaffected. BOP remains as the inflexible sentry of the process, guarding it from ill-perceived and imagined dangers. This must change. In making compassionate release decisions, the warden's role should be restricted to verifying the inmate's age and identifying whether the inmate has a prison disciplinary record that demonstrates an inability to interact safely outside of the prison

337. *Id.* at 742.
338. *See* Nellis & Mauer, *supra* note 28.
339. *See id.*

environment. Unlike the BOP Director, wardens participate in and understand the daily lives of the inmates they supervise. The Director of BOP has no direct contact with prisoners and should not garner a significant role in the compassionate release decision-making process. Instead, wardens should provide: (1) age verification and (2) a report chronicling solely relevant disciplinary information. Minor infractions and those that occurred toward the beginning of a lengthy sentence should not be included in the disciplinary report. Only violations occurring closer in time and those of a serious nature should be taken into consideration and forwarded to the judge. Upon verifying the inmate's age and reviewing the disciplinary record, the warden should alert the Director of BOP, who should automatically send the prisoner's file to the sentencing judge for approval. Participation by the regional director and the prosecuting assistant attorney general is unjust and unwarranted. The regional director has no direct knowledge of the inmate's conduct in the prison facility. Apart from desiring to uphold the inmate's conviction, the assistant attorney general remembers the inmate as his worthy opponent of the past. The sentencing judge can then determine whether the inmate's disciplinary record, if any, suggests an innate inability to operate safely and freely. Again, the judge will not review every infraction—only those recent in time and of major incident. The judge's decision would be appealable through the courts.

2. Early Release in the First Step Act

BOP must release its firm grip on the process governing § 603 of the Act. Section 603 reauthorizes the Second Chance Act of 2007, which allows for early release to home confinement of low risk offenders.[340] This portion of the Act is specifically aimed at easing prisons' burdens on low risk offenders, such as category four elderly offenders.[341] Nevertheless, BOP continues to deny release to eligible elderly prisoners by failing to calculate good time credits in release eligibility determinations. In addition to rejecting congressional intent, BOP's process violates due process and is misaligned with statutory interpretation, and therefore, must be modified immediately.

Good time credits may be considered a liberty interest, of which a prisoner may not be deprived without due process of law. A state-

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340. First Step Act of 2018, Pub. L. No. 115-391, § 603, 132 Stat. 5194, 5238 (2018).

341. *Id.*

created interest should be afforded due process protection where "its restriction or deprivation either: (1) creates an 'atypical and significant hardship' by subjecting the prisoner to conditions much different from those ordinarily experienced by large numbers of inmates serving their sentences in the customary fashion or (2) inevitably affects the duration of the prisoner's sentence."[342] A statute bestowing mandatory good time credits creates a liberty interest because it affects duration of sentence.[343] The Supreme Court has held that if a disciplinary action could deprive an inmate of good time credits, the inmate is entitled to at least three procedural safeguards:

> (1) a twenty-four-hour advance written notice of the hearing on the claimed violation; (2) an opportunity to be heard, including the ability to call witnesses and present evidence in his or her defense, when consistent with institutional safety and correctional goals; and (3) a written statement by the factfinder detailing the evidence relied upon and the reasons for the disciplinary action.[344]

Under BOP's inmate discipline program, BOP may impose a sanction of forfeiture of good conduct sentence credits on inmates who commit prohibited acts for the purpose of "ensur[ing] the safety, security, and orderly operation of correctional facilities."[345] BOP regulations provide that good conduct sentence credits will be forfeited for committing acts proscribed by the regulations.[346] Additionally, BOP regulations prescribe a discipline process for committing the prohibited acts involving an incident report and investigation.[347]

To simply take a prisoner's good time credits in computing the prisoner's total time served renders the prisoner's good time credits meaningless and deprives the prisoner of the use and benefit of the credits. It also provides a disincentive to losing those credits. Taking a prisoner's credits not only misapplies them as a sanction in the

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342. *Prisoners' Rights*, 36 GEO. L.J. ANN. REV. CRIM. PROC. 947, 976–77 (2007) (citations omitted).

343. *Id.* (citing Madison v. Parker, 104 F.3d 765, 769 (5th Cir. 1997)); *see also* Wolff v. McDonnell, 418 U.S. 539, 555 (1974) (due process applies to forfeiture of good-time credits and other positivist granted privileges of prisoners).

344. *Prisoners' Rights*, *supra* note 342, at 978–79 (citations omitted).

345. 28 C.F.R. § 541.1 (2019).

346. *Id.* §§ 541.3–541.4.

347. *Id.* § 541.5.

context of a disciplinary proceeding for misconduct as Congress contemplated, but it occurs without notice to the prisoner or an opportunity to be heard. The good time credits simply disappear as though the prisoner never had a right to them without any action, especially misconduct, on the part of the prisoner. Indeed, such a result is ironic when considering that a prisoner who otherwise meets the eligibility criteria for release to home detention, i.e., elderly and infirm prisoners, are the most likely to retain good time credits. These inmates "generally try to avoid conflict and 'do their time' as quietly and easily as possible," and utilize "passive precautionary behaviors such as keeping more to oneself, avoiding certain areas of the prison, spending more time in one's cell, and avoiding activities" to remain free from danger.[348] Accordingly, elderly inmates are most likely to be in a position to retain the maximum amount of good time credits only to be deprived of the benefit of those credits should the credits not be used to move these prisoners toward release. A closer look at statutory interpretation also supports a more permissive reading of the Act's language.

It must be noted that the language of § 102, "of the term of imprisonment to which the offender was sentenced,"[349] is identical to the language of the Second Chance Act of 2007.[350] In determining whether good time credits would be included in release eligibility calculations under the Second Chance Act of 2007, BOP relied on the Tenth Circuit Court of Appeals decisions in *Izzo v. Wiley*[351] and *Mathison v. Davis*.[352] In both cases, the Court concluded that the statutory language was unambiguous and that, therefore, the rule of lenity did not apply, and a reading of the plain language of the statute was appropriate.[353] For both cases, the Court ruled that the plain language of the statute clearly did not intend to include good time credits.[354] BOP, however, should not rely on these cases in calculating release eligibility to home confinement under the Act. As Tenth Circuit cases, *Izzo v. Wiley* and *Mathison v. Davis* are not universally binding—this matter is not yet resolved nationwide. Rather, they

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348. *See* HUMAN RIGHTS WATCH, *supra* note 49, at 59–60; *see also* Jefferson-Bullock, *supra* note 12, at 974.

349. First Step Act of 2018, Pub. L. No. 115-391, § 102, 132 Stat. 5194, 5212 (2018).

350. *See generally* Second Chance Act of 2007, Pub. L. No. 110-199, § 231, 122 Stat. 657 (2008).

351. Izzo v. Wiley, 620 F.3d 1257, 1260 (10th Cir. 2010).

352. Mathison v. Davis, 398 Fed. Appx. 344, 346 (10th Cir. 2010).

353. *Izzo*, 620 F.3d at 1260; *Mathison*, 398 Fed. Appx. at 346.

354. *See* sources cited *supra* note 353.

provide a limited interpretation of the case that they rely most heavily upon, *Barber v. Thomas*.[355]

In the Supreme Court case, *Barber v. Thomas*, the Court decided that, in interpreting statutory language regarding the calculation of good time credits, both a statute's language *and* its purpose must be considered.[356] In that case, the Court determined that BOP's less generous interpretation of good time credit calculations would prevail because BOP's approach was the most natural reading of the statute *and* because BOP's approach was most consistent with the purpose of the statute at issue, the Sentencing Reform Act (SRA).[357] The purpose of the SRA, however, is far removed from the purpose of the Act. The SRA "sought to achieve both increased sentencing uniformity and greater honesty by 'mak[ing] all sentences basically determinate.'"[358] One purpose of the Act is to reduce the prison footprint responsibly by releasing low-risk prisoners who are unlikely to recidivate to home confinement.[359] The SRA intended to treat all prisoners similarly in order to abolish judges' perceived unfettered discretion. Conversely, the Act seeks to differentiate between low risk offenders and those who present a danger to the community by releasing only one group to home confinement to serve the remainder of their sentence. Further, some purposes of the Second Chance Act of 2007 were to "break the cycle of criminal recidivism," and "rebuild ties between offenders and their families,"[360] purposes which, in contravention of *Barber v. Thomas*, were not considered in the statutory interpretation exercise of either aforementioned Tenth Circuit decision. Another Court in another Circuit could and should easily decide differently. BOP is not bound by these Tenth Circuit decisions and should not conveniently rely upon them. As jailers, BOP proves unreliable in working to free prisoners whom Congress has deemed worthy of release. Congress must immediately direct BOP to alter their position.

B. Sentencing Reform in the Future

In her work, Professor Sally Terry Green argues that a new system, steeped in rehabilitative principles, must be developed

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355. *See generally* Barber v. Thomas, 560 U.S. 474 (2010).

356. *Id.* at 480.

357. *Id.* at 481–82.

358. *Id.* at 482.

359. *See* H.R. REP. NO. 115-699, at 22 (2018).

360. Second Chance Act of 2007, Pub. L. No. 110-199, § 261, 122 Stat. 657, 658 (2008).

because "juveniles are different."[361] *Graham* necessitates that juvenile lifers be awarded a "meaningful opportunity for release."[362] Professor Green argues that "[a] separate prison release model for juvenile life sentence offenders that focuses on substantive rehabilitation could satisfy the *Graham* requirement."[363] Under her model, rehabilitative punishment, managed by distinct benchmarks marking improvement, is the only way to provide youth an opportunity to reform and demonstrate that they deserve to be released. In her words:

> The immaturity of incarcerated juveniles presents particular vulnerabilities that can impede positive social growth, especially in an adult prison culture. When the States impose a life sentence, they subject the incarcerated juvenile to an environment that frustrates personal development. The *Graham* decision is rooted in the notion that rehabilitation of juvenile offenders must follow if the States impose life sentences. The juvenile life sentence offender must receive meaningful opportunity for release, which logically includes determining whether he has "meaningfully" transformed into a productive member of society. [364]

For these reasons, she asserts that creating a separate and distinct juvenile prison release model is necessary.[365] Such a novel model would assess and measure the rehabilitative success a juvenile life offender achieves during their period of incarceration.[366] Once that benchmark is agreed upon and documented, the juvenile would be subject to a risk assessment evaluation of the offender's, "success in attaining growth with a focus on the psychology of human conduct," which would assist in determining the juvenile's propensity for change.[367]

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361. *See generally* Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1 (2011).

362. *Id.* at 1 (quoting Graham v. Florida, 560 U.S. 48, 75 (2010)).

363. *Id.* at 30.

364. *Id.* at 34.

365. *Id.*

366. *Id.*

367. *Id.*

Similar studies that rely upon risk assessments to render release decisions are becoming commonplace.[368] Many may be quite helpful in curing the phenomenon of mass incarceration. This type of risk assessment, with specific, measurable benchmarks, can be used to evaluate all offenders. In fact, the First Step Act engages such assessments.[369] In reforming federal sentencing, however, it is critically important that we take the time to gauge how much punishment is actually enough.[370] Doing so requires small, intentional steps, steeped in experimentalism, that allow us to set appropriate standards, test often, and craft informed improvements.[371] As a general class, aged offenders are an ideal group with which to begin. Those elderly candidates who do not fall into category four can be helpful, as a group, to test the efficacy of such a model.

CONCLUSION

The time again appears ripe for criminal sentencing reform.[372] This time, however, we must cover the plight of the elderly prisoner and include provisions to meet their needs. In this new era of reform, deliberations must include sound, well-researched recommendations. Law and policymakers must consider both the short-term and far reaching effects of their work. The silver tsunami rages. Its force was as easily predictable as the prison overcrowding crisis and the associated exorbitant costs. Modern-day reformers must use research and best practices to identify and acknowledge the foreseeable consequences of proposed amendments.

Juvenile justice reform stands as a shining example of how criminal punishment can be reconceptualized. Just as juvenile offenders are viewed differently, so should category four elderly offenders be viewed as "different," and they should benefit from the aging out of crime theory. Failing to do so is misaligned with theories of punishment.

Dignity need not be earned. It exists as an integral aspect of humanity. Our prison system is neither capable nor inclined to create

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368. *See generally* JAMES, *supra* note 83.

369. *See generally* First Step Act of 2018, Pub. L. No. 115-391, § 602, 132 Stat. 5194 (2018).

370. *See generally* Jefferson-Bullock, *supra* note 168.

371. *Id.*

372. *See supra* note 3 and accompanying text.

a dignified environment for most elderly offenders, especially category four elderly offenders. Mercy requires a more just outcome.