

# **CLE SEMINAR THE BRAIN ON PRISON**

**Presented by:  
Federal Public Defender's Office**

**Speakers:  
Thomas Price, Assistant Federal Public Defender  
Michelle Guyton, Ph.D., Psychologist**

Portland, Oregon  
June 17, 2015  
Noon – 1 p.m.  
Federal Courthouse  
Room 13A

Eugene & Medford, Oregon, Live via Video-Conferencing

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*I was dead for many years. They came and tied me up, tied my arms together behind my back. Then they lowered me into a tomb, with iron bars across the door, and padded walls so that no one up above could hear the shrieks of the dead. . . .*

H. Ibsen, *When We Dead Awaken* (Ibsen Plays Four M. Meyer trans. 1960).

**1. Prison Conditions Tend To Be Inhumane, Exacerbating The Conditions Of Confinement To A Level That Increases Penalty Severity Beyond The Actual Period Imposed.**

Beyond segregating those individuals who pose risk to their fellow citizens, prison is often excessive and counterproductive. See Francis T. Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 Prison J. 48S, 50S (2011) (“[H]aving pulled together the best available evidence, we have been persuaded that prisons do not reduce recidivism more than noncustodial sanctions.”). Community service and other constructive sanctions can better serve community interests, especially for individuals who do not pose a risk. “[T]he enormous problems of crimes and prisons will continue to frustrate our best intentions until and unless we abandon the magical thinking that “just deserts” is a sufficient objective of sentencing and that it actually promotes the objectives we apparently assign to it.” Michael Marcus Circuit Court Judge, *Comments for the UK Parliamentary Justice Committee* at 1 (April 10, 2008) Enclosure 33 at 1.

Furthermore, “confinement or increased length of incarceration serve[s] the crime control purpose of incapacitation, but ha[s] little or no effect as a ‘treatment’ with rehabilitative or specific deterrent effects.” Don M. Gottfredson, *National Institute of Justice, Effects of Judges’ Sentencing Decisions on Criminal Cases, Research in Brief* (1999) (recidivism rates actually are lower when offenders are sentenced to probation, regardless of whether the offenders have prior felony convictions or prior prison incarcerations, available at <http://www.ncjrs.gov/pdffiles1/nij/178889.pdf>). Evidence based practices would tend to suggest that superior and cost effective results can be achieved by sentencing low risk individuals to probation and that imprisonment would be wasteful and counterproductive.

In the United States, prisoners are increasingly an aging population. Similar to Oregon<sup>1</sup>, “[a]ccording to BOP data, inmates age 50 and older were the fastest growing segment of its inmate population, increasing 25 percent from 24,857 in fiscal year (FY) 2009 to 30,962 in FY 2013. U.S. Dep’t. of Just., Office of the Inspector Gen., *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* at i (2015) (quoting Executive Summary). In brief, the OIG results state:

The OIG found that aging inmates are more costly to incarcerate than their younger counterparts due to increased medical needs. We further found that limited institution staff and inadequate staff training affect the BOP’s ability to address the needs of aging inmates. The physical infrastructure of BOP institutions also limits the availability of appropriate housing for aging inmates. Further, the BOP does not provide programming opportunities designed specifically to meet the needs of aging inmates. We also determined that aging inmates engage in fewer misconduct incidents while incarcerated and have a lower rate of re-arrest once released; however, BOP policies limit the number of aging inmates who can be considered for early release.

*Id.* In addition, “BOP facilities remain overcrowded, which research demonstrates leads to increase serious assaults.” U.S. Dep’t. of Just., Federal Prison System, *2015 Performance Budget* at 52 (2015) (hereinafter BOP 2015 Budget). Enclosure 27. The BOP Budget request for Congress for the fiscal year 2015 is now 6.8 billion, with an estimate that the number of prisoners coming into the system is going to rise by another 2%. *See* 2015 BOP Budget at 53. Enclosure 27. According to one unnamed study within the BOP, “a one percentage point increase in a Federal prison’s crowding (inmate population as a percent of the prison’s rated capacity) corresponds with an increase in the prison’s annual serious assault rate by 4.09 assaults per 5,000 inmates.” Todd Bussert, *The BOP: Bureau of Prisons Issues* at 19-1037 (2012), available at <http://dc.fed.org/library/FPD%20Presentation%20Oct%202012%20-%20BOP%20ISSUES.pdf>. This would translate into a potential increase in the rate of serious assault in the BOP by another 8.18 serious assaults per 5,000 prisoners. Subjecting non-violent persons to imprisonment, even at Sheridan Federal Correctional Institution, can expose them to the risk of violence.

Next, prisons, can and do endeavor to insulate themselves from scrutiny. For example, in a very recent case of extreme brutality of a black inmate by three white prison guards originally

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<sup>1</sup> Gabriella Dunn, *An Aging Population of Inmates is Costing Oregon a Bundle*, Willamette Wk., Jan. 28, 2015.

charged with felony assault, the guards received extreme mercy even after they nearly killed a man at Attica State Prison in the State of New York:

Three guards accused of beating an inmate at the Attica Correctional Facility so severely that doctors had to insert a plate and six pins into his leg each pleaded guilty on Monday to a single misdemeanor charge of misconduct. The last-minute plea deal spared them any jail time in exchange for quitting their jobs.

Lauren D'Avolio, Tom Robbins, *3 Attica Guards Resign in Deal to Avoid Jail*, N.Y. Times, Mar. 2, 2015. In the Attica case, the prosecution about to commence exposed a prison culture of abuse that precipitated a debate about whether or not Attica needed to be closed. See <http://www.nytimes.com/2015/03/01/nyregion/attica-prison-infamous-for-bloodshed-faces-a-reckoning-as-guards-go-on-trial.html>; *see also* <http://www.nytimes.com/2015/03/03/nyregion/attica-prison-guards-plead-guilty-in-2011-inmate-beating-case.html> .

Additionally, in a very recent New York Times Magazine Article from March 26, 2015 entitled *Inside America's Toughest Federal Prison*, the description of the actual degree of systemic neglect, lack of protection, and abuse in a federal maximum security prison is nothing short of horrific, available at [http://www.nytimes.com/2015/03/29/magazine/inside-americas-toughest-federal-prison.html?\\_r=0](http://www.nytimes.com/2015/03/29/magazine/inside-americas-toughest-federal-prison.html?_r=0). This article, and facts related to it, emerged after a lawsuit produced evidence of prison conditions that had primarily been out of the public eye. In both the Attica case and the Florence Colorado BOP case, settlement avoided trial and limited the potential for additional exposure of the reality of how conditions of confinement are so traumatizing as to upset notions that sentencing practices and prison conditions have anything to do with justice. Compare Jessica Benko, *The Radical Humaneness of Norway's Halden Prison*, N.Y. Times, Mar. 26, 2015, available at <http://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html>. Prisoners in Norway's maximum security prison experience conditions that are strikingly humane and conducive to rehabilitation wherein prison conditions in the United States tend to be unjust and degrading.

Finally, if nothing else can drive home the conclusion that prison conditions, too often constitute an inhumane flogging of the brain, a case involving the suicide-hanging of Kalief Browder should wake up even the ghosts of Eastern State Penitentiary<sup>2</sup>. Mr. Browder, a former Rikers Island inmate who experienced three years awaiting trial, about two of which were in solitary confinement, could not function after his release. Even though his charges were dropped and he was no longer in custody, he had lost his mind and hung himself outside his mother's apartment window. Jennifer Gonnerman, *Kalief Browder, 1993-2015*, New Yorker, June 7, 2015.

Also, the potential for prisoner-to-prisoner violence is an understood condition in most of our prisons. But there is no logic to the notion that some acceptable risk of prisoner-to-prisoner violence, is a cost of justice in a Constitutional Republic. "[I]nsofar as the incarceration of a particular offender imposes terms and conditions that expand the reach of consequences ordinarily

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<sup>2</sup> Eastern State Penitentiary in Philadelphia, Pennsylvania, which operated from 1829 to 1971, and aimed to pioneer principles of reform and humanitarianism, is considered the world's first true penitentiary and an early example of how solitary confinement degraded and damaged inmates.

associated with confinement . . . the corresponding sentence is likely to work excessive hardships and exact a toll of suffering ‘of a kind, or to a degree,’ that, if not otherwise mitigated, would inflict upon the particular individual a magnitude of punishment effectively disproportionate to that meted out to offenders in the ordinary case.” See *United States v. Mateo*, 299 F. Supp. 2d 201 (S.D.N.Y. 2004) (citing *Koon v. United States*, 518 U.S. 81, 110 (1996) and 18 U.S.C. § 3553(b)); see also *Farmer v. Brennan*, 511 U.S. 825, 833–34 (1994) (“Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society.”). Irrespective, every rational person knows that prison is where the possibility of unpredictable violence, neglect, or abuse is an inherent part of the prison climate against which no prisoner can find adequate refuge. See Enclosures 27-37. It is time we recognize that the system is broken and that, current prison conditions traumatize the brains of those incarcerated. These conditions are not a substitution for flogging, but are a flogging of the most important organ in the human body. And if that is not cruelty, and injustice, what constitutes it?

## **2. Rates Of Imprisonment In The United States Are On The Increase, Even In The BOP.**

Despite the growing evidence that conditions of confinement aggravate the severity of prison sentences and jeopardize the efficacy of community reentry, these system-wide problems persist. Evelyn Malavé, *Prison Health Care after the Affordable Care Act: Envisioning an End to the Policy of Neglect*, 89 N.Y.U. L. Rev. 700, 702-03 (2014) (outlines problems of over incarceration, medical neglect and lack of mental health care in prison). Overcrowding of prisons, logically, increases risks to the vulnerable.

Also, prison tends to increase the chance that individuals who are released from prison return to society as traumatized individuals, less able to function, less able to earn a living and more likely to reoffend than individuals punished with alternatives to prison, such as conditions of probation designed to rehabilitate. See Mo. Sent’g Advisory Comm’n, *Probation Works for Nonviolent Offenders* (2009) available at <http://www.courts.mo.gov/file.jsp?id=45429>; see also Mika’il DeVeaux, *The Trauma of the Incarceration Experience*, 48 C.R.-C.L. L. Rev. 257 (2013); Sheryl P. Kubiak, *The Effects of PTSD on Treatment Adherence, Drug Relapse, and Criminal Recidivism in a Sample of Incarcerated Men and Women*, 14 Res. On Soc. Work Prac. 424, 424 (2004). Persons who can be effectively punished outside of prison should receive sentences outside of prison. As Second Circuit Appellate Judge Lynch has stated:

The United States has a vastly overinflated system of incarceration that is excessively punitive. . . .

Gerard E. Lynch, *Ending Mass Incarceration: Some Observations and Responses to Professor Tonry*, 13 Criminology & Pub. Pol’y 561 (2014).

But the Corrosive Effects of Prison Are Timeless. Irrespective of the admonition contained in 28 U.S.C. § 994(k) against using prison as a substitute for needed treatment, “[w]e’ve come full circle -- back to the time when we left mental illness to the police and jailers.” See Jack Hart, *Insane choices: We, not the police, are responsible for the consequences of how we deal with homeless mentally ill*, (The Oregonian April 3, 2010). In the early 1860s, the progressive reformer, Dorothea Dix, visited Oregon to advocate for humane treatment of the mentally ill. At the time,

persons suffering from mental illness were winding up in prison. Citizens of those days viewed the jailing of the mentally ill as immoral and contrary to the public duty. These efforts at reform resulted in the building of the first mental hospitals both in Oregon and elsewhere in the United States. Today, our prisons have become factories that produce mentally ill people, or aggravate the preexisting trauma to the point of even greater incapacity.

“At the revolution, all the rights of the crown devolved on the commonwealth” and respectively to the states including the power and duty of *parens patriae* with respect to insane persons. *Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs*, 17 U.S. 1, 13-14 (1819). The States in their sovereign capacity “as *parens patriae* have general power and are under the general duty of caring for insane persons.” *Higgins v. United States*, 205 F.2d 650, 653 (9th Cir. 1953). Deinstitutionalization was followed by neglect and indifference. And we continue to operate under a system that is broken and in many cases is the epitome of injustice.

### **3. Just A Few Cases Where Courts Have Recognized Trauma As A Basis to Reduce Prison Sentences.**

“The mentally ill in prison . . . face inadequate mental health services that leave them undertreated or mistreated.” Jaimie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 Harv.Civ. Lib. Civ. R. Law. Rev. 391 (2006).

Even under the more restrictive mandatory guidelines, sentencing courts recognized that an offender's pre-sentencing conditions of confinement are permissible grounds to warrant downward departures where the conditions in question are extreme and their severity falls upon the defendant in some highly unique or disproportionate manner. *See, e.g., United States v. Rodriguez*, 213 F.Supp.2d 1298, 1303 (M.D. Ala. 2002) (noting that "to fail to take this rape into account in [defendant's] sentence would mete out a disproportionate punishment to her .... "); *also United States v. Francis*, 129 F .Supp. 2d 612, 619 (S.D.N.Y.2001) (factual record supported conclusion that defendant had suffered extremely harsh conditions of presentence confinement including mistreatment in state detention facility justified downward departure). Courts recognized that it is “beyond question that abuse suffered during childhood - at some level of severity - can impair a person's mental and emotional conditions. . . in extraordinary circumstances district courts may properly grant a downward departure on the ground that extreme childhood abuse caused mental and emotional conditions that contributed to the defendant's commission of the offense.” *United States v. Rivera*, 192 F.3d 81, 84 (2d Cir. 1999); *United States v. Brown*, 985 F.2d 478 (9th Cir. 1993) (where defendant offered a letter recounting his childhood of severe abuse and neglect and produced psychologist's report concluding that childhood trauma was the primary contributor of criminal behavior, court could grant downward departure). When mental illness has substantially contributed to the crime, a downward variance or departure is justified. *United States v. Schneider*, 429 F.3d 888, 893-94 (9th Cir. 2005). This is because a volitional impairment caused by “serious mental health problem” is “precisely the type of evidence” that is critical to the determination of mitigation of punishment. *Pinholster v. Ayers*, 590 F.3d 651, 676 (9th Cir. 2009) (citation omitted). In the case of serious mental illness, moral culpability is reduced. *Id.* at 676-77. Other examples follow:

*United States v. Camiscione*, 2008 U.S. Dist. LEXIS 106504, \*5 (N.D. Ohio Sept. 16, 2008) (“Camiscione's actions were improper and illegal. But the proper

punishment is not always incarceration. Camiscione is 33 years old and lives with his mother. As a result of having epileptic seizures from the age of three, he was taunted and teased as a child and as a teenager, which greatly affected his schooling and mental and social development. He has had no real friends and has never dated a woman because he is too shy and frightened of rejection. Camiscione's lamentable case would not further any of those reasons and would only be made more tragic were this court to sentence him to prison.”) -The court ordered here that the Guideline’s range is not a proper sentence for this particular defendant and his unique circumstances.

*United States v. Flowers*, 946 F. Supp. 2d 1295 (M.D. Ala. 2013) (Court held that due to defendant’s poor mental health, she should be sentenced to probation, rather than go to prison where her mental illness will likely get worse and where she will not receive adequate psychological treatment).

*United States v. Campbell*, 738 F. Supp. 2d 960, 969 (D. Neb. 2010) (District judge said, “These letters paint a fuller picture of Campbell. In particular, they describe a good man who made a bad mistake and the harm that Campbell's stable and fully functional family will suffer if I put him in prison ... I am tentatively inclined to grant the defendant's motion to vary.”).

*United States v. Davis*, 537 F.3d 611 (6th Cir. 2008) (finding that a downward variance can be appropriate when a defendant is particularly old and would not adjust to prison conditions well).

## **Conclusion**

Terms and conditions of imprisonment create a degree of suffering that traumatizes the brain. To the degree that terms of imprisonment traumatize the brain, they should be reduced. To the degree that conditions of confinement do the same, they should be changed. Only when we recognize that these conditions do not fit our notions of justice will it change.

Our Nation’s first prison, Eastern State Penitentiary, was conceived in Benjamin Franklin’s house in 1787. In its day, it would become the largest and most expensive public structure in the country. Soon thereafter it proved to be a failure—inhumane, costly and destructive. Today, to a great extent, we continue to operate under the system it birthed. That system does not work. It is broken. It is also too costly, cruel and unjust to consider it civilized let alone reasonable. But it is a system deeply embedded in the very DNA of our culture. Examples are all around domestically and internationally about how to reduce trauma and start to restore justice that has been missing for decades. Like it or not, our current system, tells us something about who we see when we look in the mirror. The next time we consider “the brain on prison,” and who it might affect, we need only look and consider our own.

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## Article

**\*257 THE TRAUMA OF THE INCARCERATION EXPERIENCE**

Mika'il DeVeaux [FN1]

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## Introduction

In 2010, I ceased being counted as a member of the United States correctional population. In that year, I was discharged from correctional supervision after serving thirty-two years of a life sentence; twenty-five of those years were spent in several of New York State's maximum-security prisons, and seven on parole. [FN2] This Article reflects my perspective as a formerly incarcerated person, as a doctoral student whose work relates to incarceration, as an adjunct professor at colleges in New York City, and as a director of a nonprofit organization that provides basic support services to men and women returning from prison. This Article will argue that the experience of being incarcerated is traumatic. I will draw additional support for that argument from my personal experience. Although there is much debate about the psychological effects of incarceration, literature describing prison as a site of trauma is still uncommon. [FN3]

The experience of being locked in a cage has a psychological effect upon everyone made to endure it. No one leaves unscarred. The experiences are hard to describe. When I review my experiences, I often feel like a deer caught in oncoming headlights; I seem to stand still and stare. In this Article, I intend to provide an overview of the psychological effects of incarceration, to offer the reader a discussion about the notion of trauma as I have come to know it, to suggest why it is important from a public safety point of view to take note of these considerations, and to conclude with some discussion of my personal experiences that support and confirm my argument.

**\*258 I. Psychological Effects of Incarceration**

Reports regarding the consequences of incarceration vary greatly. Some researchers report findings of psychological harm, while many others do not. [FN4] Researchers have questioned the validity of studies on the prison experience due to inadequately robust research designs. For example, following reviews of a large number of studies related to the psychological harms that result from incarceration, some researchers found faulty research designs, questionable sampling techniques, and other methodological problems. [FN5] These factors have led several researchers to conduct studies, in which they ultimately concluded that the psychological effects of incarceration were not substantial, even when the population studied had spent time in solitary confinement. [FN6]

In contrast, a body of literature concludes that the psychological effect of incarceration is substantial, [FN7]



even among those experiencing relatively short-term confinement in a jail [FN8] or refugee and detention incarceration. [FN9] \*259 Indeed, the prison experience is unlike any other. Sociologist Donald Clemmer [FN10] noted in his classic book, *The Prison Community*, [FN11] that the prison experience is neither normal nor natural, and constitutes one of the more degrading experiences a person might endure. [FN12] People in prison are likely to report that their adaptations to the constant scrutiny of guards and the lack of privacy are psychologically debilitating. [FN13] Some literature suggests that people in prison experience mental deterioration and apathy, endure personality changes, and become uncertain about their identities. [FN14] Several researchers found that people in prison may be diagnosed with posttraumatic stress disorders, as well as other psychiatric disorders, such as panic attacks, depression, and paranoia; [FN15] subsequently, these prisoners find social adjustment and social integration difficult upon release. [FN16] Other researchers found that the incarceration experience promotes a sense of helplessness, greater dependence, and introversion and may impair one's decision-making ability. [FN17] This psychological suffering is compounded by the knowledge of violence, the witnessing of violence, or the experience of violence, all too common during incarceration. [FN18] Some assert that the psychological effects of incarceration, developed during confinement, are likely to endure for some time following release. [FN19]

\*260 Some researchers argue that the psychological pain of incarceration is not inadvertent but inflicted by design. [FN20] Author Gresham Sykes characterizes these psychologically damaging experiences as “deprivations or frustrations,” and suggests that some of these frustrations “appear as a serious attack on the personality, as a ‘threat to the life goals of the individual, to his defensive system, to his self-esteem, or to his feelings of security.’” [FN21] Thus, in addition to tangible and easily identified forms of punishment, incarceration may inflict more subtle emotional and psychological punishment. [FN22] Sykes suggests these forms of punishment result from deprivations caused by a loss of liberty, material impoverishment, personal inadequacy, loss of heterosexual relationships, loss of autonomy, and loss of personal security. [FN23] Moreover, Sykes suggests that the emotional and psychological forms of punishment “of prison life today might be viewed as punishments which the free community deliberately inflicts on the offender for violating the law” or “as the unplanned . . . concomitants of confining large groups of criminals for prolonged periods.” [FN24]

A prison experiment in the early 1970s attests to the psychological damage caused by the experience of incarceration. [FN25] During the Stanford Prison Experiment, a group of college students were randomly assigned roles as guards or as prisoners and then placed in a prison-like environment. Because the prisoner subjects experienced such intense psychological pain in the simulated environment, the researchers terminated the experiment after six days--eight days ahead of schedule. A number of the student prisoners experienced “acute psychological trauma and breakdowns”; some pleaded for release from the environment because of “intense pains” and five were released due to the “extreme emotional depression, crying, rage, and acute anxiety” they suffered during their brief, mock incarceration. [FN26] In one instance,\*261 the Stanford professors observed that a student prisoner “developed a ‘psychosomatic rash which covered portions of his body.’” [FN27] Researchers concluded that “adjusting” to prison life would be difficult for anyone. [FN28] The experience “can create habits of thinking and acting that are extremely dysfunctional” and permanently change those made to endure it. [FN29]

#### A. Trauma

The origins of the word “trauma” lie in the Greek word for wound, *traumat*. [FN30] Trauma is an event in which there is physical harm, the self is wounded, or when a person who directly experiences, witnesses, or learns about a violent event is “damaged” by it. [FN31] Indeed, even the apprehension of a violent event is par-

ticularly stressful when the event involves a family member or close friend. [FN32] Today, researchers writing about trauma rely on the Diagnostic and Statistical Manual of Mental Disorders (4th ed.) for differential diagnosis of the phenomenon. [FN33] Often used interchangeably with posttraumatic stress disorder, which is a psychiatric diagnosis, trauma is a subjective experience. [FN34]

There are two types of trauma. [FN35] Type I Trauma is a level of injury, pain, or shock derived from a rare unanticipated single event, while Type II Trauma is the injury, pain, or shock that results from anticipated, ongoing, or multiple incidents over time. [FN36] Edwin F. Renaud warns that the experience of an event alone does not lead to the diagnosis. [FN37] Rather, he observed that symptoms after the event will trigger diagnosis. [FN38] It is only when a person is \*262 rendered helpless or is overwhelmed by an event that the results may be said to constitute trauma. [FN39] This distinction is important because various individuals are likely to experience a singular event differently. [FN40]

The traumatic experience of incarceration is likely to be varied and to produce both negative and positive psychological results post-release among the formerly incarcerated, [FN41] in some ways similar to repatriated prisoners of war. [FN42] An experience, without more, does not make an event traumatic. [FN43] The conceptualization of trauma is created by the relationship between the event, the individual involved, and her reaction to it. [FN44] When seeking to characterize an event, researchers have often made assumptions about the nature of the event and largely ignored the subjective component or unique perspective of the individual experiencing it. [FN45] Professor Andrew Rasmussen and his colleagues argue that researchers often impose their own beliefs about an experience based upon their assumption about its effect, without ever asking those that have undergone the experience about their interpretations of it. [FN46]

Studies about the traumatic experiences of Black males explore these confounding individual and social factors, though such studies still have not been developed thoroughly and the topic is difficult to subject to rigorous scientific methods. These studies typically focus on incidences that occur in the community prior to prison such as physical assaults, sexual assault or molestation, shootings, stabbings, or other problems associated with living in the inner city. [FN47] Some researchers focus on historical and cultural trauma related to the collective memory of Black people about slavery or the psychological effects of living in a race-conscious society. [FN48] Although these \*263 ideas may be popular and have been advanced by public figures, these discussions are not well developed; they lack any reference to the Diagnostic and Statistical Manual of Mental Disorders and are difficult to study using rigorous research methods. [FN49]

#### B. A Concern Related to Public Safety

By the end of 2010, more than seven million adults in the United States were under correctional supervision. [FN50] This represents about one in every thirty-three adults in the United States's resident population. [FN51] Since the 1970s, the number of people confined to residential correctional facilities (a jail or prison) in the United States has increased by approximately 700%, from an estimated 300,000 to more than two million. [FN52] Today, the United States incarcerates more people per capita than any other country in the world. [FN53]

Incarceration in America disproportionately affects people of color. Among all people currently confined to a state or federal prison, two out of three are persons of color. [FN54] Incarceration rates for Black non-Hispanic male adults are seven times that of White non-Hispanic males. [FN55] Hispanic men are nearly three times as likely to be incarcerated as White men. [FN56] Similarly, Black and Hispanic women are more likely to be in-

carcerated than their \*264 White counterparts. [FN57] My experiences are rooted in New York State where similar trends have been found. As of January 1, 2011, among the 56,315 people incarcerated in New York prisons, nearly four out of five (78%) were persons of color. [FN58]

Most of those incarcerated are released. [FN59] The unprecedented number of people being released from prison, and the rate at which the release is occurring, makes reentry a pressing contemporary social problem. At least 95% of all people incarcerated in state facilities return to the community. [FN60] An even larger percentage of those who spend time in county and city jails return. In 2008, more than 735,000 returned to the community, declining somewhat in 2009 to 729,295. [FN61] In 2009, an average of 1,998 people were released from state or federal prison every day; this number does not include those released from county or city jails. [FN62] The condition of people returning to their communities should be of great public concern because the environment in which people are confined affects the psychological condition in which they return. [FN63] I found the prison experience traumatic because of the \*265 assaults and murders I witnessed while incarcerated, because of the constant threat of violence, because of the number of suicides that took place, and because I felt utterly helpless about the degree to which I could protect myself. I found the experience extremely stressful--during my incarceration, I was tense and always on guard because the threat of violence was real and ever present. In this piece, I will relate only a few examples of what I endured to show that prison is indeed a site of trauma and that, as a result, we should be more concerned about the conditions inside correctional facilities and the state in which the formerly incarcerated reenter society.

## II. The Incarceration Experience

During the twenty-five years I spent in prison, I was incarcerated in several of New York State's maximum-security prisons. Today, they are like my alma maters: Sing Sing, Comstock, Green Haven, Auburn, Clinton, Sullivan, Attica, and Eastern New York State Prison. The shock of being sentenced following my jury trial took my breath away. In 1979, at the age of twenty-three, I was convicted of violating New York State's Criminal Procedure Law 125.25--murder in the second degree--and was given an indeterminate sentence with a minimum of twenty-five years and a maximum term of life to be served in a New York State prison. At twenty-three years old, a twenty-five-year minimum sentence was more time than I had been alive. Twenty-five years was a lifespan--my lifespan. I was stunned by it--stunned after hearing the numbers, stunned after learning that the maximum term was life. I had a hard time adjusting to the idea of twenty-five years to life. It was unimaginable. I never positively adjusted to the idea of being in prison.

I remain haunted by the memories and images of violence--violence I experienced, violence I witnessed, and violence that I heard or learned about. I can still see the murders I witnessed. I still see the image of a person being hit at the base of his skull with a baseball bat on a warm, sunny afternoon during recreation hours. The entire scene plays like a silent movie. He is smashed in the back of his head, crumbles, and falls to the ground. While he lays helpless on the ground, his head is smashed again and again until the sight of blood seems to satisfy his attacker. I watch as the perpetrator then calmly returns the baseball bat to the location where he had retrieved it and just walks away as if nothing had happened, while others entering the yard area walk around the lifeless body.

I can still see the rapid hammering motions of a hand plunging an ice pick-like object into the back of another person standing with his hands in his pockets. Perhaps he died as he was falling to the ground. The stabs were so powerful that the victim fell face forward, like the ground was preparing \*266 to embrace him with open

arms. His hands were still in both of his pockets. No one rushed to his aid as he lay face down in the dirt. Instead, he was like a pebble that had fallen in a pond of people. The crowd backed away, like a hole in the middle of a circle growing larger and larger. I wrote a poem about this event because of the impression it made on me. It began, “somebody died today . . .”--a nameless body with a hood covering a head, face down in a pool of blood.

I can recall two men engaged in a fistfight after one of them had been stabbed in the neck with a “homemade” knife. What made this fight more memorable than others was that one of the men fought while the handle of the knife protruded from his neck on one end, while the point of the blade showed on the other. The image still makes me gasp in awe; it was incredibly mad. I can only describe it as mad. I can still recall these attacks like they just happened a moment ago.

Even so, not all of the violence in my incarceration experience was physical. It also included verbal abuse. I can still hear a prison guard saying, “get in the cage, nigger,” with a stinging voice that continues to slice through time. I remember the threats of being told by the guards, “one of these days . . .” I remember being asked by the guards if I wanted to be a martyr and pretending that I did not know what the word meant. Violence permeated the prison atmosphere. I lived in a constant state of paranoia. The rampant possibility of violence reminded me of a dark side I had previously thought only existed in nightmares and stories told to errant youth to frighten them into silence or obedience. Although I had been arrested before, I had never lived in a cell for longer than a few hours prior to my incarceration. A few hours in a jail cell are not the same as being in a jail or prison cell for days on end. [FN64]

I began my twenty-five-year incarceration in the Westchester County Jail located in Valhalla, New York. Although not yet convicted of a crime, jail residents are often mistreated by guards and subject to violations of their constitutional rights. I recall being very afraid when I first entered the Westchester County Jail. I was afraid of being raped. This possibility of being raped dominated my mind because horror stories about rape are prevalent among people who have not gone to jail or prison. Moreover, before my incarceration, men I knew who had gone to prison had spoken of rape as the customary fate of the young and inexperienced. Even today, rape is such a part of prison folklore that it has been reenacted in popular movies like *Midnight Cowboy* and *The Shawshank Redemption*. I was so frightened by the \*267 possibility that I remember yelling out, “nobody is going to fuck me,” while brandishing two makeshift ice picks during a gathering in a common room. I was terrified and tried to escape from the jail mainly because of my fears. Rather than having drugs brought into the prison, a common occurrence facilitated by guards and visitors, I arranged for a diamond cutter to be smuggled into the jail. My escape plot failed because my in-house couriers were caught bringing the diamond cutters into the jail and subsequently directed the authorities to me. Afterwards, I was sent to the maximum-security section of the jail to live in isolation from the general population in order to deter any further escape attempts.

Isolation did not help my mental state. More than anything else, I recall feeling sad and depressed. I felt caged, alone, and helpless. Nothing was familiar. Even in isolation, I had a physical fight with a peer housed in the same unit of cells. At that time, we were the only two people housed in that five-cell unit. We fought because he would not stop yelling when no one was around. It never occurred to me that he might be mentally ill. I could not bear the quiet, and I could not tolerate his screaming and yelling at the guards when none were present. I thought he was just trying to frighten me. He did frighten me. I thought he yelled because he knew I did not like it. I just wanted him to be quiet.

While it is difficult for me to substantiate the negative experiences with guards that I endured during my

time at Westchester County Jail in 1978, recent reports have found conditions substantially similar to those I experienced. For example, in November 2009, the Department of Justice Civil Rights Division and the United States Attorney's Office for the Southern District of New York published a set of findings from their investigation of the Westchester County Jail, which had begun in 2008. In part, the report found that detainees were not afforded adequate protection from harm perpetrated by staff at the facility. [FN65] More specifically, investigators found that detainees were routinely subjected to excessive force when lesser forms of intervention were appropriate. Their review found evidence of officers

shoving inmates aggressively into fixed objects when less injurious tactical holds could be safely employed . . . routinely applying needlessly painful escort techniques (bent wrist locks while apparently applying intense pressure) . . . routinely employing crowd control contaminants (MK-9 in a 16 ounce canister) when they are tactically contraindicated rather than utilizing an equally effective personal size canister (MK-4 in a three ounce canister) . . . disregard[ing] some inmates' mental impairments in use of force incidents, which appears to greatly heighten the volatility of a given situation. Indeed, they utilize threatening and aggressive verbal \*268 strategies, which tend to escalate rather than de-escalate a potentially volatile situation. [FN66]

The report also found that officials at the Westchester County Jail failed to provide adequate protection from infectious disease, proper access to dental care, and provisions for adequate mental health care. [FN67] The report detailed the use of force by officials to administer involuntarily medication, "including the use of chemical agents," [FN68] noted inadequate documentation of force incidents, and a lack of acceptable grievance procedures for complaints and/or allegations made by detainees. [FN69] These behaviors and practices implicate jail guards and others from whom detainees expect protection. Unfortunately, the conditions exposed at the Westchester County Jail are not isolated. The United States Justice Department filed reports finding problematic conditions at the Baltimore City Detention Center, the Cook County Jail in Illinois, the Dallas County Jail in Texas, the Grant County Detention Center in Kentucky, and other jails and detention centers around the country. [FN70]

#### A. Sing Sing Prison

I remained in the Westchester County Jail for about nine months. I was brought to the jail in October 1978 and was transferred to Sing Sing Prison in August 1979 after being convicted at trial by a jury. At that time, there were about 20,000 people confined within New York State's prisons system. [FN71] Being transferred from a New York City jail was referred to as "going up north" or "going on a boat" because all of New York State's prisons were north of New York City and because in the early days of the State's prison system, new arrivals at Sing Sing Prison may have gone up the Hudson River to Sing Sing Prison by boat.

Sing Sing Prison, now known as Ossining Correctional Facility, housed over 2,000 people in 1979, though its capacity was only around 1,800. [FN72] \*269 Today, following the closing of one of the prison's buildings--the "Tappan" building--the facility generally houses between 1,600 and 1,800 men. [FN73] Besides its ominous appearance, the shockingly large number of people crowded in its cell blocks, the crowds in the prison's mess halls during meals, and the hundreds of inmates that populated its recreation yards, for me the most memorable thing about Sing Sing was the noise inside its housing units. I was housed in both the A-Block and the B-Block. Sing Sing includes open cellblock galleries (nothing is enclosed), and those housed within the galleries talked, screamed, yelled, and cried at each other and at the guards during nearly every hour of the day and night. A guard who worked at the prison described the scene thusly:



A-block, probably the largest freestanding cellblock in the world, is 588 feet long, twelve feet shy of two football fields. There are some 684 inmates, more than the entire population of many prisons. You can hear them-- an encompassing, overwhelming cacophony of radios, of heavy gates slamming, of shouts and whistles and running footsteps--but, oddly at first, you can't see a single incarcerated soul. All you see are the bars that form the narrow fronts of their cells, extending four stories up and so far into the distance on the left and right that they melt into an illusion of solidity. And when you start walking down the gallery, eighty-eight cells long, and begin to make eye contact . . . a sense grows of the human dimensions of this colony . . .

A-block and B-block are . . . very similar in structure, except B-block is twenty cells shorter (sixty-eight) and one story taller (five). . . . [E]ach structure is made up of two almost separate components. One is the all-metal interior, containing the [cells of] inmates; it's painted gray, and looks as though it could have been welded in a shipyard. The other is comprised of the exterior walls and roof, a brick-and-concrete shell that fits over the cells like a dish over a stick of butter. One does not touch the other . . . . A series of tall, barred windows run down either side of the shell. [FN74]

I also remember the pigeons and the cats that lived there and roamed the galleries. The pigeons were fed bread or rice, and would congregate in front of the cells out of which these and other food items were thrown. The cats were cared for--they were the pets of some of the residents who resided on the flats (bottom tiers).

Sing Sing was "prison," the kind of prison that served as a set for Hollywood movies. Sing Sing was the prison that provided images for \*270 United States folklore about prison and prison life. Popular movies depicting Sing Sing include *The Big House* (1930), *Angels With Dirty Faces* (1938), *20,000 Years at Sing Sing* (1932), *Castle on the Hudson* (1940), *Analyze This* (1999), and others. The conditions were dangerous, there were health hazards, and the sounds were maddening for those housed there and for those who worked there as well.

Drugs were rampant. Along with the use of drugs in prison and the money they generated came violence. I typically learned of cases of violence after the fact. In one instance, I learned that a bounty had been placed on a victim in the amount of one carton of cigarettes. In prison, cigarettes serve as currency when cash is not available. Of course, the guards were involved. [FN75] Although I was aware of violence at Sing Sing during my first visit, I did not see or participate in any violent acts. I was afraid. I knew nothing of prison life, its codes, or its rules. I was concerned about my safety and about staying alive.

I had been previously considered "in transit," but finally, at Sing Sing, I received my prison number and the process of institutionalization began. [FN76] Getting my number was a memorable event. The number was how I would be identified from that day forward. It was my number that was shouted over PA systems when I was being summoned. If mail was sent to me but did not include my number, it was returned. I no longer existed. I no longer had a name worth remembering. I had become Inmate 79A2747. This numbering was part of the process to strip me of my humanity, my dignity, and my self-respect. And it was hard getting used to being identified that way. I began my journey as Mr. DeVeaux, and I wanted to remain him. I resisted becoming Inmate 79A2747.

Before being shipped further north, there was nothing for me to do between August and October of 1979 during my stay at Sing Sing. I knew I would be "shipped" to Clinton Dannamora (as it was called), some thirty-three miles from the Canadian border, to really start my "bid." In transit, I was not allowed to participate in any programs. I went to the recreation yard when let out of my cell, to the mess hall for meals, to the bathhouse to

bathe, and to religious services. There was nothing else I was permitted to do.

**\*271 B. Clinton Dannamora**

Clinton Correctional Facility is the largest prison in the State of New York. It houses over 2,500 men. [FN77] In 1979, I knew it as Clinton Dannamora and as Dannamora Prison, mainly because it sat in the middle of the town from which it took its name. It is also known as “Little Siberia” or “Siberia” because it is about thirty or so miles from the Canadian border and because those from New York City find the winters extremely harsh. I remember a January during my time there that recorded at least twenty days with temperatures below zero. It was a cold place. It snowed in the late spring and early fall.

More than the temperature, Clinton is infamous for its culture of violence. I was introduced to that culture on a cold October night in 1979--my first night there. Everyone leaving Sing Sing for Clinton knew that his life was in danger. As soon as the bus carrying us to Clinton stopped, a Hispanic passenger was singled out, interrogated about his behavior at Sing Sing, slapped, kicked, and thrown off of the bus into the snow by the guards. That set the tone. As each person exited the bus, he was asked to state his name and his number. As noted earlier, each of us had been numbered like cattle or chattel slaves. The expectation was that we would go along with this demotion from human to animal. We were all asked to say “Sir” at the end of each response. I did not--perhaps because I did not hear the request or because I was trying not to be intimidated. When my turn came to get off of the bus, I was singled out, called a smartass nigger, and told to get at the end of the line for refusing to say “Sir.” When all were lined up before being escorted to the housing unit, we were told that we would be killed if we stepped out of line, and that Clinton was not like Sing Sing or Rikers Island, a large New York City jail. Once inside the housing area, I was attacked by three officers. Fortunately, I was only roughed up. I was unable to fight them off because they were large men compared to me. I weighed in at 145 pounds and stood about six feet tall. Each of them was well over 200 pounds and towered over me. I was told that I would be killed if I did not watch my step. When the opportunity presented itself, I called home to complain, not realizing that I could not be helped; I was more than 400 miles from home. [FN78]

**\*272 C. Special Housing Units**

During my first three years in prison (1979-1982), I watched my step. I had already been beaten by guards. I saw people murdered. I saw people get assaulted. I heard stories about people being assaulted by guards. These are rarely public spectacles, possibly due to fear that the conduct of guards might incite the incarcerated to come to each other's aid if they witnessed one of their own being assaulted by a guard or guards. Perhaps because of my good conduct, I was eventually transferred from Clinton to Green Haven Prison. People in prison do not have a right to be moved from prison to prison. Requests are made, but transfer is entirely left to the discretion of the prison authorities. Transfers are often made for “security” reasons. That is, someone incarcerated may have known enemies, may be embroiled in gang rivalries, or may be deemed a threat to the prison because of his ability to “rile-up” others.

Between 1982 and 1983, I spent fifteen months in Special Housing Units (SHUs) located in Green Haven State Prison, Auburn State Prison, and Attica State Prison. People in prison refer to SHUs as “the Box.” The public knows of these places as solitary confinement. I was admitted to an SHU following a disturbance involving guards and Muslim worshippers at the end of Ramadan, the Muslim month of fasting. The event was sparked by a worshipper assaulting a prison sergeant whom he believed was responsible for locking and/or for-

cing Friday worshippers into the prayer area and preventing them from going to the recreation yard at the conclusion of their services. The sergeant responded by assaulting the Friday worshipper and was aided by fellow officers before other inmates joined the worshipper. I was one of the worshippers that participated in the brief melee that followed the assault of the prison guard and was later identified after the dust settled.

Before being sentenced to time in the Box, I had long heard stories about the beating and murders that took place there at the hands of prison guards. Going to the Box was like going to prison inside of a prison. During the early part of my incarceration, threats of the Box had accented the fears I developed of prison. They were not unwarranted. In my experience, Attica's was the most notorious Box, and thus made a lasting impression on me. I was there when people housed in the Box were beaten, gassed, had their cells tossed in a "search for weapons," had their clothes taken, and were placed in stripped cells (cells with nothing except a mattress and a blanket, if that). Before coming out of the cell for any reason, a person's \*273 hands had to be extended behind his back, out of the feeding hole, and cuffed. Once the doors were opened, feet had to be cuffed with ankle bracelets, particularly if one was leaving the unit. And then there was the noise in the Box--the yelling, the conversation at all hours of the night, the exchange of chess moves from games played in separate cells, and the counting of jumping jacks, push-ups, or sit-ups as men exercised together in separate cells. These efforts were designed to counter the idleness, lack of programs, and dearth of anything to read.

Except for instances in which individuals are placed in administrative segregation for their own protection, all segregation units are used for disciplinary confinement. The conditions, however, are the same. Disciplinary confinement includes twenty-three- to twenty-four-hour per day lockdown. "Most SHU cells have bars on the front or back of the cell; others are far more isolating, with three concrete walls and a thick metal door." [FN79] Often, if officers sought to teach someone in the Box a lesson or further punish them for some rule violation or some other pretense, he might be subjected to loss of recreation (thirty to sixty minutes), loss of showers (which were only permitted three times a week), imposition of a restricted diet (usually cabbage and bread), or just ignored. I was there when individuals in SHUs stored human waste in cups to throw on officers, when officers were spat on, and when officers were assaulted. These tactics were the only ways by which individuals in the SHUs could fight back; they had no other options. Everyone suffered as a result of the stench and their behavior. It was at this time that some cells were enclosed with Plexiglas to limit individuals' ability to throw things at guards.

The guards did not let these or any other assaults go unanswered. I witnessed the gassing of cells. Guards would spray substances into cells from aerosol cans that made cell inhabitants gasp for air and their skin burn until the cell doors were opened and four to six guards rushed in to drag the person out. These incidents were alarming because while in a cell on the gallery, I could hear the sounds as events were unfolding. And when I could not see, I somehow knew the actions accompanying each sound. These incidents were frightening because being "dragged out" meant that a person was dragged out of a cell feet first, with their head trailing behind on the floor, and often being beaten while being moved. I can still remember the screams, the wailing, the cursing, and the anger. These events were alarming because all who witnessed them unfold could feel the humiliation and shame. We in the cells were utterly powerless and could face a similar fate. There was nothing I could do, nothing anyone could do, except hope to get out of there alive. The possibility of being beaten was all too real. Whom could I tell? Who would listen? Who would care?

\*274 The experiences of solitary confinement have been well-documented. The Correctional Association noted that:



Like animals in a cage, inmates are “cell-fed” through feed-up slots in thick metal doors. Most facilities initially limit showers to just three a week. . . . Visits are conducted behind Plexiglas or mesh-wire barriers and limited to one visit a week. Whenever prisoners leave their cells, they are mechanically restrained with handcuffs and a waist chain, and leg irons if they are considered seriously violent or escape-prone. Some inmates remain handcuffed throughout their visits (thus, they cannot embrace or hold hands with their visitors) and sometimes during their one hour of recreation.

The psychological effects of punitive isolation are well documented . . . . [C]onditions in lockdown can cause such symptoms as perceptual distortions and hallucinations, massive free-floating anxiety, acute confusional states, delusional ideas and violent or self-destructive outbursts, hyper-responsivity to external stimuli, difficulties with thinking, concentration and memory, overt paranoia, and panic attacks. [FN80]

Today, I know that I am fortunate to be alive; but while incarcerated, I could only think of surviving day to day. I also knew that I could not spend the remainder of my twenty-five-year sentence in the Box. I would go crazy. That is all I knew. I would go crazy if I did not get out of that situation, but somehow I did.

#### D. Happy Nap

I spent the last fourteen years of my incarceration at Eastern New York Correctional Facility. Eastern opened its doors in 1900 as Eastern New York Prison and began operating as a maximum-security prison in 1973. I was housed there between 1989 and 2003, the longest time I stayed at any one prison. Approaching the prison from the highway, one sees in the distance a massive, castle-like, red brick-colored structure with a green metal roof. The face of the prison is picturesque, sitting in front of lush hills. For those familiar with the prison, the structure feels strangely out of place.

Eastern New York Correctional Facility has several names. In addition to its formal designation, guards, staff, and those housed there and elsewhere in the New York State Prison system refer to it using one of three tags: Eastern, Nap, or Happy Nap. Eastern was called Happy Nap because there was a time when it was considered the jewel of the state; people around the \*275 state wanted to be housed at Nap. Not only were there academic and vocational programs not found at other prisons--a braille program, a graduate program, and a computer lab, among others--but Nap could also boast of things like pizza parties, pastry parties, dinners, and “chicken drive-bys,” [FN81] which were unthinkable in other prisons. These programs were some of the privileges doled out to counter the effects of the incarceration experience, and to reward compliance or an individual’s agreement to be an inmate. These things led to Nap being called Happy Nap. It was a place where a person could just do his time and socialize with whomever he wanted without the usual stress and violence that people housed in maximum-security prison come to expect. For some, it was difficult adjusting to this peace. I was transferred to Eastern to attend State University of New York college programs just before President Clinton’s Crime Bill eliminated the Pell Grants that paid tuition costs for higher education programs in prison. [FN82]

It became clear to me that the conditions imposed within the prison environment, along with all the processes of institutionalization, are meant to break those entering the system. As a result of the books I read regarding the prison experiences of others, including *Man’s Search for Meaning*, [FN83] *Blood in My Eye*, [FN84] and *Soledad Brother*, [FN85] it was during this time that I became acutely aware of the psychological effects that prison was having on me. I was forming a prison identity, rather than resisting becoming a prisoner. I was in prison, but being a “prisoner” was neither who I was nor who I wanted to be. I wanted to resist, but was hard-pressed to figure out what it was I was resisting. I wanted to grow, but grow into what? Even now, the thought

of twenty-five years in prison is frightening. Prisons are institutions that have a life of their own, but the life is an abnormal one. It is a life filled with deprivations, with isolation, with fantasy and imagination, and with hanging on to what was, despite little preparation for what is to come. We were not able to prepare for the future in prison or, for those fortunate to make it out of prison alive, for leaving prison and transitioning. I was becoming an adult in prison. I was making a life for myself with little reason to ponder what life could be like after prison. The possibility of dying in prison was an ever-present reality; I had been sentenced to twenty-five years to life. But somehow, I had to force myself to think about the prospect of leaving prison and to prepare for it. Prepare to die while preparing to live.

### \*276 III. Conclusion

Living in prison is what I imagine living in suspended animation would be like. I imagined my existence as a being on ice, frozen in time. "On ice" carries the connotation of being dead. When sentenced to a term of life in prison, one is considered civilly dead. Knowing that I was perceived as being dead, regardless of how it was phrased, was psychologically disturbing.

Reading Ervin Goffman's book, *Asylums*, [FN86] helped me understand what was happening during my time in incarceration and what has happened since my release. The self that I had constructed prior to prison was assaulted at the beginning of my incarceration. My reactions to the physical and psychological attacks were defensive in nature. I did not know how to be a prisoner, and I was not willing to learn; even so, the socialization process was unavoidable when immersed in that environment. The degradation and humiliation I and others experienced during my reception was intentional and part of the process of institutionalization. Those feelings endured throughout my incarceration in every prison in which I was housed. The denuding was designed to relieve me of my pre-prison personality and identity; it was an effort of will-breaking, mind-bending, and a contest to get me to conform. I questioned the guards about their actions--something that those believing themselves to be authority figures were not accustomed to experiencing, especially when coming from someone whom they did not view as their equal.

In response to a question I raised in Clinton, I was asked if I wanted to be a martyr. In Attica, I was told, "yours is not to question, to reason, or to ask why, but to merely comply." In both instances, I was punished for my odd behavior. In Eastern, I was told that I did not think of myself as an inmate because I was not humble enough, though I was respectful and polite. I was assaulted so that I could be made into an inmate. Every encounter with people from the outside world, whether visitors or other guests, was followed by acts of humiliation, which included being stripped naked and made to expose every body cavity, running my fingers through my hair, and showing the bottoms of my feet. Unlike the process of institutionalization when I came to prison, there was no corresponding process to prepare me for the time when I would be released. Having been released, I still know of no process designed to repair the damage done. I know of no debriefing. I know of no stand down procedure. All that was provided, and all that is still currently provided, was a "good-bye" and "get out." Those fortunate enough to leave, as I have been, must discover how to rebuild their lives on their own.

Upon my release, I was helped by the support network I maintained during my incarceration. I had the support of my parents and I had the support of my wife. I nurtured the connections I made with professors who \*277 taught in prison before college programs were eliminated. I also managed to keep in contact with one childhood friend whom I had known since elementary school. These contacts and supports provided me a soft landing. I had a place to live. I had food to eat. I had money saved from the prison wages I was paid during my

incarceration to buy clothing. [FN87] I was able to find employment. I had people who forgave and continued to love me for me.

I am in transition. I am still processing my prison experience. I am still thinking about what happened. I want to move on with my life and not be defined by a lone event or a single experience. I have neither visited a mental health professional for an assessment, nor have I had the desire to do so. What would I say? I feel for those I left behind because they have no idea what it is like to feel like a stranger at home, or what it is like to hear people talk about people in prison as if they are not human. What sustains me now is thinking about how I might help those who do make it home. The not-for-profit organization I cofounded with my wife is just one way in which I help. Among the things we do is say, "Welcome home. Welcome home." [FN88]

[FN1]. Executive Director of Citizens Against Recidivism, Inc. and Lecturer in Sociology, City University of New York. Wanda Best-DeVeaux is to be thanked for her contributions to the work of Citizens Against Recidivism, Inc. and for her invaluable insights. A special thanks to Jemel Amin Derbali. The author is also grateful for the comments on earlier editions by editors at the Harvard Civil Rights-Civil Liberties Law Review. Finally, special mention and prayers go out to the men and women behind our nation's prison walls and those who have gotten out, who seek to make amends, and move on with their lives; their spirits fueled this writing.

[FN2]. People under correctional supervision include those confined to residential correctional facilities (jails or prisons) and those who are supervised in the community (on probation or parole).

[FN3]. Sheryl Pimlott Kubiak, The Effects of **PTSD** on Treatment Adherence, Drug Relapse, and Criminal Recidivism in a Sample of Incarcerated Men and Women, 14 Res. on Soc. Work Prac. 424, 424 (2004) ("Rarely is trauma discussed in relation to incarceration--either the effect of incarceration on those with trauma histories, **prison** as a site of new trauma, or the effect of trauma-related disorders on recidivism.").

[FN4]. See e.g., Victoria R. DeRosia, Living Inside Prison Walls: Adjustment Behavior 8 (1998); John Howard Soc'y of Alta., Effects Of Long Term Incarceration 15 (1999); Ivan Zinger, The Psychological Effects of 60 Days in Administrative Segregation 2-9 (Dec. 1998) (unpublished Ph.D. dissertation, Carleton University) (on file with Dissertation Abstracts International, 1999).

[FN5]. See James Bonta & Paul Gendreau, Reexamining the Cruel and Unusual Punishment of Prison Life, 14 Law & Hum. Behav. 347, 348-49 (1990); Zinger, *supra* note 4, at 9-26.

[FN6]. Lee H. Bukstel & Peter R. Kilmann, Psychological Effects of Imprisonment on Confined Individuals, 88 Psychol. Bull. 469, 469 (1980); see also J. Goethals, Study on the Psychological Effects of Long-Term Imprisonment Overview and Evaluation (1980); Timothy J. Flanagan, Dealing With Long-Term Confinement: Adaptive Strategies and Perspectives Among Long-Term Prisoners, 8 Crim. Just. & Behav. 201,201-203 (1981) ("Early views of the impact of serving time in prison depict a process of systematic destruction of the person... [T] his deterministic view is simplistic....").

[FN7]. See, e.g., Mary Bosworth, Explaining U.S. Imprisonment (2010); Facing the Limits of the Law (Erik Claes et al. eds., 2009); Craig Haney, Reforming Punishment: Psychological Limits to the Pains of Imprisonment 161-62 (2006); Adrian Grounds, Psychological Consequences of Wrongful Conviction and Imprisonment, 46 Can. J. Criminology & Crim. Just. 165, 165 (2004); Adrian Grounds & Ruth Jamieson, No Sense of an End-

ing: Researching the Experience of Imprisonment and Release Among Republican Ex-Prisoners, 7 *Theoretical Criminology* 347, 347 (2003); Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-prison Adjustment*, in *Prisoners Once Removed: The Impact of Incarceration and Reentry on Children, Families, and Communities* 33, 33 (Jeremy Travis & Michelle Wauh eds., 2003) [hereinafter Haney, *The Psychological Impact of Incarceration*]; Lorna A. Rhodes, *Pathological Effects of the Supermaximum Prison*, 95 *Am. J. Pub. Health* 1692, 1692 (2005); Clara Geaney, *That's Life: An Examination of the Direct Consequences of Life-Sentence Imprisonment for Adult Males Within the Irish Prison System* 29 (2008) (unpublished M.A. thesis, Dublin Institute of Technology) (on file with Dublin Institute of Technology Library) (“Psychiatric care provision in prisons is severely lacking and as a result many prisoners are developing mental health problems which may not have existed prior to incarceration, and for those with a psychiatric diagnosis, the experience has been shown to worsen their condition.”) (citing Claire Hamilton, *The Presumption of Innocence and Irish Criminal Law: “Whittling the Golden Thread”* (2007); Paul Mahony, *Prison Policy in Ireland - Criminal Justice Versus Social Justice* (2000)).

[FN8]. Hans Toch, *Men in Crisis: Human Breakdowns in Prison* 149 (2007).

[FN9]. Jude McCulloch & Sharon Pickering, *The Violence of Refugee Incarceration*, in *The Violence of Incarceration* 225, 225 (Phil Scraton & Jude McCulloch eds., 2009).

[FN10]. Donald Clemmer was a pioneer whose work focused on the psychological effects of prison life. His work extended more than three decades and included a directorship at the District of Columbia Department of Corrections and in varying capacities in Illinois prisons, the federal penitentiary in Atlanta, and the Federal Bureau of Prisons. For more information about Donald Clemmer, see Nicolle Parsons-Pollard, Clemmer, Donald, in 1 *Encyclopedia of Prisons & Correctional Facilities* 137, 137-38 (Mary Bosworth ed., 2005).

[FN11]. Donald Clemmer, *The Prison Community* (1940).

[FN12]. Samuel G. Kling, *The Prison Community*, 54 *Harv. L. Rev.* 722, 722 (1941).

[FN13]. *Facing the Limits of the Law*, supra note 7; see also Terry A. Kupers, *Prison and the Decimation of Pro-Social Life Skills*, in *The Trauma of Psychological Torture* 127, 129 (E. Almerindo Ojeda ed., 2008).

[FN14]. See Rhodes, supra note 7, at 1692.

[FN15]. See, e.g., *Grounds*, supra note 7, at 169; Geaney, supra note 7, at 4.

[FN16]. See *Grounds & Jamieson*, supra note 7, at 347.

[FN17]. Richard A. Schill & David K. Marcus, *Incarceration and Learned Helplessness*, 42 *Int'l J. Offender Therapy & Comp. Criminology* 224 (1998).

[FN18]. Joycelyn M. Pollock, *Prisons: Today and Tomorrow* (2d ed. 2006); Shelley Johnson Listwan et al., *How To Prevent Prisoner Reentry Programs From Failing: Insights From Evidence-Based Corrections*, 70 *Fed. Probation* 19, 23 (2006); William J. Morgan, Jr., *Major Causes of Institutional Violence*, *Am. Jails*, Nov.-Dec. 2009, at 62 (2009); Steven Patrick, *Differences in Inmate-Inmate and Inmate-Staff Altercations: Examples from a Medium Security Prison*, 35 *Soc. Sci. J.* 253, 253 (1998); Rebecca Trammell, *A Qualitative Approach to Understanding the Connection between Race, Gender and Prison Violence* 1 (2006) (unpublished conference paper, American Sociological Association Conference), available at [http://citation.allacademic.com/meta/p\\_mla\\_apa\\_](http://citation.allacademic.com/meta/p_mla_apa_)

research\_citation/1/0/3/2/4/pages103246/p103246-1.php.

[FN19]. See, e.g., Clemmer, *supra* note 11, at 315; Haney, *supra* note 7, at 13; Kling, *supra* note 12, at 723.

[FN20]. See, e.g., Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* 14 (1961); Derek R. Brookes, *The Possibility of a Correctional Ethic*, in *Discretion, Community, and Correctional Ethics* 39 (John Kleinig & Margaret Leland Smith eds., 2001).

[FN21]. Gresham M. Sykes, *The Society of Captives: A Study of a Maximum Security Prison* 64 (1958) (citing Abraham H. Maslow, *Deprivation, Threat, and Frustration*, in *Readings in Social Psychology* 364, 366 (Theodore M. Newcomb & Eugene L. Hartley eds., 1947)).

[FN22]. Jesenia Pizarro & Vanja M.K. Stenius, *Supermax Prisons: Their Rise, Current Practices and Effects on Inmates*, in *Corrections: A Text/Reader* 238, 242-44 (Mary Stohr et al. eds., 2009).

[FN23]. Sykes, *supra* note 21, at 64.

[FN24]. *Id.* It has also been argued that “the [psychological] pains of imprisonment are not an accidental or unintended by-product of the institution, but are an essential component of what the prison is designed to do ....” Brookes, *supra* note 20, at 40.

[FN25]. See generally Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-Five Years After the Stanford Prison Experiment*, 53 *Am. Psychologist* 709 (1998); Anders Kaye, *Does Situationist Psychology Have Radical Implications for Criminal Responsibility?*, 59 *Ala. L. Rev.* 611 (2008); Philip G. Zimbardo, *On the Ethics of Intervention in Human Psychological Research: With Special Reference to the Stanford Prison Experiment*, 2 *Cognition* 243 (1973).

[FN26]. Haney & Zimbardo, *supra* note 25, at 709; Kaye, *supra* note 25, at 623.

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[FN32]. See *Am. Psychiatric Ass'n*, *supra* note 31, at 463.

[FN33]. See, e.g., Carolyn M. Aldwin, *Stress, Coping, and Development: An Integrative Perspective* 211 (2d ed. 2007); Shelley Johnson Listwan et al., *Victimization, Social Support, and Psychological Well-Being: A Study of Recently Released Prisoners*, 37 *Crim. Just. & Behav.* 1140, 1141 (2010).



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[FN36]. Id.

[FN37]. Renaud, *supra* note 34, at 199.

[FN38]. Id.

[FN39]. Id. at 200.

[FN40]. Id. at 198.

[FN41]. Brookes, *supra* note 20; Haney, *The Psychological Impact of Incarceration*, *supra* note 7.

[FN42]. See William H. Sledge et al., Self-Concept Changes Related to War Captivity, 37 *Archives Gen. Psychiatry* 430 (1980).

[FN43]. Victoria M. Follette & Aditi Vijay, Mindfulness for Trauma and Posttraumatic Stress Disorder, in *Clinical Handbook of Mindfulness* 299, 301 (Fabrizio Didonna ed., 2009).

[FN44]. Id.

[FN45]. Andrew Rasmussen et al., The Subjective Experience of Trauma and Subsequent PTSD in a Sample of Undocumented Immigrants, 195 *J. Nervous & Mental Disease* 137, 137 (2007).

[FN46]. Id.

[FN47]. See, e.g., Christopher B. Booker, "I Will Wear No Chain!": A Social History of African-American Males 205-26 (2000); John A. Rich, *Wrong Place, Wrong Time: Trauma and Violence in the Lives of Young Black Men* (2009); Terrie M. Williams, *Black Pain: It Just Looks Like We're Not Hurting* (2008); John A. Rich & Courtney M. Grey, Pathways to Recurrent Trauma Among Young Black Men: Traumatic Stress, Substance Use, and the "Code of the Street", 95 *Am. J. Pub. Health* 816 (2005).

[FN48]. See, e.g., Juan Battle & Sandra L. Barnes, *Black Sexualities: Probing Powers, Passions, Practices, and Policies* (2010); Priscilla Dass-Brailsford, *A Practical Approach to Trauma: Empowering Interventions* (2007); Ron Eyerman, *Cultural Trauma: Slavery and the Formation of African American Identity* (2001); Kevin Powell, *Black Male Handbook: A Blueprint for Life* (2008); *Re-Centering: Culture and Knowledge in Conflict Resolution Practice* (Mary Adams Trujillo et al. eds., 2008); Kristin N. Williams-Washington, *Historical Trauma, in Handbook of African American Health* 31 (Robert L. Hampton et al. eds., 2010).

[FN49]. Tiffany L. Green & William A. Darity, Jr., Under the Skin: Using Theories from Biology and the Social Sciences to Explore the Mechanisms Behind the Black-White Health Gap, 100 *Am. J. Pub. Health* S36, S36-40 (Supp. 2010); see also Barack Obama, *Democratic National Convention Keynote Address* (July 27, 2004), available at <http://www.americanrhetoric.com/speeches/convention2004/barackobama2004dnc.htm>.

[FN50]. Lauren E. Glaze, Bureau of Justice Statistics, *Correctional Populations in the United States, 2010* 1 (2011), available at <http://njs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf>.

[FN51]. *Id.* at 2.

[FN52]. John F. Pfaff, *The Empirics of Prison Growth: A Critical Review and Path Forward*, 98 *J. Crim. L. & Criminology* 547, 547-619 (2008); Glaze, *supra* note 50, at 2 tbl.1. People in residential correctional facilities include those sentenced and confined in a state or federal prison and those in jail, including prisoners awaiting trial or sentencing. *Id.*; see also Michelle Natividad Rodriguez & Maurice Emsellem, Nat'l Emp't Law Project, 65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment (2011); Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 *J. Crim. L. & Criminology* 1213 (2010); Anthony Calabrese, One in 31 Adults in U.S. Corrections System; Overall Population Growth Slows, State of the USA, July 22, 2010, <http://www.stateoftheusa.org/content/locked-up-a-look-at-crime-and.php>.

[FN53]. Roy Walmsley, Int'l Ctr. for Prison Studies, *World Prison Population List 1* (2012), available at <http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf>.

[FN54]. Paul Guerino et al., Bureau of Justice Statistics, *Prisoners in 2010* 26 app. tbl.12 (2011), available at <http://bjs.gov/content/pub/pdf/p10.pdf>.

[FN55]. *Id.* at 7; see also *id.* at 27 app. tbl.14.

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[FN57]. Pollock, *supra* note 18, tbl. 3-2; Solveig Spjeldnes & Sara Goodkind, *Gender Differences and Offender Reentry: A Review of the Literature*, 48 *J. Offender Rehabilitation* 314, 316 (2009).

[FN58]. Dan Bernstein, State of N.Y. Dep't of Corr. Servs., *Under Custody Report: Profile of Inmate Population Under Custody on January 1, 2011* 2-3 (2011), available at [http://www.prisonpolicy.org/scans/nydocs/UnderCustody\\_Report2011.pdf](http://www.prisonpolicy.org/scans/nydocs/UnderCustody_Report2011.pdf).

[FN59]. Richard P. Seiter & Karen R. Kadela, *Prisoner Reentry: What Works, What Does Not, and What is Promising*, 49 *Crime & Delinquency* 360, 366 (2003). Today, reentry of formerly incarcerated people back into society is a social problem.

[FN60]. Timothy Hughes & Doris James Wilson, Bureau of Justice Statistics, *Reentry Trends in the United States* (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/reentry.pdf>.

[FN61]. Heather C. West et al., Bureau of Justice Statistics, *Prisoners in 2009* 4 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf>.

[FN62]. *Id.*

[FN63]. People who reenter the community following long periods of incarceration face many challenges. They often return in the same or worse condition than they were in before entering prison. They are likely to have few marketable skills and are hard to employ. Some suffer from mental illness. A portion of those in prison are HIV-positive or have AIDS. Overall, among people returning from prison and jail, very few have positive social sup-

ports; they have high rates of death by suicide, homicide, or overdoses from drug use. In addition, people released from prison have high rates of recidivism: three in ten reoffend within six months of their release, a rate that increases to two of three within three years after release. *Increasing Public Safety Through Successful Offender Reentry: Evidence-Based and Emerging Practices in Corrections* 7 (M.M. Carter et al. eds., 2007). Many return to prison following violations of conditions of release or commissions of crime; either scenario has a negative impact on public safety. *Id.*; Nicholas C. Larma, *Changes and Challenges for Counseling in the 21st Century*, in 1 *Encyclopedia of Counseling* 116, 116-19 (Frederick T.L. Leong et al. eds., 2008); Hughes & Wilson, *supra* note 60; Patrick A. Langan & David J. Levin, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994* (2002), available at <http://www.bjs.gov/content/pub/pdf/rpr94.pdf>. Finally, when people do return from prison or jail, they tend to be concentrated in areas that are characteristically poor and that provide little economic opportunity. “The key tasks of communities, such as providing a sense of security and pride, a healthy environment for families, jobs, and open exchanges and support, are hampered when large numbers of the population are recycling in and out of correctional facilities and carrying with them the lasting consequences of incarceration.” Ram A. Cnaan et al., *Ex-Prisoners' Re-Entry: An Emerging Frontier and a Social Work Challenge*, 7 *J. Pol. Prac.* 178, 186 (2008).

[FN64]. The differences between jail and prison are technical. Jails are locally owned by a county, a municipality, or a city government. A prison is owned by the state or federal government. Jails are usually situated in close proximity to the place of arrest and the place where persons arrested reside. Prisons are likely to be hundreds of miles away from both, and in the case of the federal government, thousands of miles away. Stays in jail generally follow arrest. Jails house those who are unable to post bail before a case is adjudicated at trial. Prisons house those convicted of a crime.

[FN65]. Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, to The Hon. Andrew J. Spano, Westchester Cnty. Exec. 2 (Nov. 19, 2009), available at [http://www.justice.gov/crt/about/spl/documents/Westchester\\_findlet\\_11-19-09.pdf](http://www.justice.gov/crt/about/spl/documents/Westchester_findlet_11-19-09.pdf).

[FN66]. *Id.* at 8.

[FN67]. *Id.* at 19-27.

[FN68]. *Id.* at 23.

[FN69]. *Id.* at 14, 16. This report acknowledged that people in prison have the right to be protected from the threat of violence or harm from others so confined, and that it is the duty of prison officials to take on that responsibility. However, the report did not include any findings related to violence between people confined to the Westchester County Jail.

[FN70]. See, e.g., Letter from Grace Chung Becker, Acting Assistant Attorney Gen., U.S. Dep't of Justice, to Todd H. Stroger, Cook Cnty. Bd. President, & Thomas Dart, Cook Cnty. Sheriff (July 11, 2008), available at [http://graphics8.nytimes.com/packages/pdf/national/Cook\\_County\\_Jail\\_Findings\\_Letter.pdf](http://graphics8.nytimes.com/packages/pdf/national/Cook_County_Jail_Findings_Letter.pdf).

[FN71]. *Trends in the New York State Correctional System, Perspectives from the New York State Assembly's Committee on Ways & Means* (Occasional Paper 1998), available at <http://assembly.state.ny.us/Reports/WAM/Perspectives/199803/>.

[FN72]. Prison Visiting Project, *Corr. Ass'n of N.Y., Sing Sing Correctional Facility 1* (Apr. 2009), available at



[http://www.correctionalassociation.org/wp-content/uploads/2012/05/sing-sing\\_4-28-09.pdf](http://www.correctionalassociation.org/wp-content/uploads/2012/05/sing-sing_4-28-09.pdf).

[FN73]. *Id.* at 1.

[FN74]. Ted Conover, *Newjack: Guarding Sing Sing* 8-9 (2002).

[FN75]. “Objective” observers suggest that not much has changed, even from an outsider's perspective, since my time there. Following a visit to the prison in April 2009 by staff from the Correctional Association of New York, it was reported that the prison was still plagued by “limitations on access to medical care; verbal harassment and physical confrontation between staff and inmates and among inmates; and gang activity and use of contraband drugs in the prison.” Prison Visiting Project, *supra* note 72, at 2.

[FN76]. See generally Goffman, *supra* note 20.

[FN77]. Population Statistics for Clinton County, Clinton Cnty. Planning Dep't, [http://www.correctionalassociation.org/wp-content/uploads/2012/05/sing-sing\\_4-28-09.pdf](http://www.correctionalassociation.org/wp-content/uploads/2012/05/sing-sing_4-28-09.pdf)//  
[www.clintoncountygov.com/Departments/Planning/population.pdf](http://www.clintoncountygov.com/Departments/Planning/population.pdf) (last visited Oct. 28, 2012).

[FN78]. Rarely do complaints made by the incarcerated make it out of prison. There have been complaints of prisoners being “beaten, handcuffed, thrown down stairs, taken to the prison hospital and beaten again, sometimes in the presence of sergeants and a lieutenant who failed to intervene.” *New York to Pay \$40,000 to Inmate In Brutality Case*, N.Y. Times, Apr. 19, 1996, at B4, available at <http://www.nytimes.com/1996/04/19/nyregion/new-york-to-pay-40000-to-inmate-in-brutality-case.html>. The official culture of violence has not disappeared. Reports show that “inmates at Clinton Correctional Facility have won seven Federal claims of excessive force by correction officers, and the state has settled 10 brutality lawsuits with Clinton inmates rather than defend them in court.” Matthew Purdy, *Brutality Behind Bars--A Special Report; Prison's Violent Culture Enveloping Its Guards*, N.Y. Times, Dec. 19, 1995, at A1, available at <http://www.nytimes.com/1995/12/19/nyregion/brutality-behind-bars-special-report-prison-s-violent-culture-enveloping-its.html?pagewanted=print&src=pm>. At the time, these seventeen closed claims constituted almost half of the thirty-seven successful suits that had been won or settled by Prisoners' Legal Services in the state since 1990. *Id.* Not all violence came from the guards. I witnessed stabbings, murders with baseball bats, fistfights, fights with rocks in socks, and more. More than any other prison, I wanted out of Clinton.

[FN79]. Corr. Ass'n of N.Y., *Lockdown New York: Disciplinary Confinement in New York State Prisons* 9 (2003), available at [http://www.correctionalassociation.org/wp-content/uploads/2012/05/lockdown-new-york\\_report.pdf](http://www.correctionalassociation.org/wp-content/uploads/2012/05/lockdown-new-york_report.pdf).

[FN80]. *Id.* at 7 (citing Decl. by Dr. Stuart Grassian, *Eng v. Coughlin*, 726 F. Supp. 40 (W.D.N.Y. 1989) (No. 80-CV-385S)).

[FN81]. A chicken drive-by is a fundraising activity organized by prison in-house organizations through which people in prison are allowed to purchase fried chicken in the early part of a week and pick it up on Saturday mornings when prison programs are closed. People in prison often raised money to donate to outside causes including the Tomorrow Children's Fund, Hale House, earthquake victims, and others.

[FN82]. For more information about the history of higher education in prison, see Overview of Prison Education Policies, Prison Studies Project, <http://prisonstudiesproject.org/overview-of-prison-education-policies> (last vis-

ited Oct. 22, 2012).

[FN83]. Viktor E. Frankl, *Man's Search for Meaning* (2006).

[FN84]. George L. Jackson, *Blood in My Eye* (1996).

[FN85]. George L. Jackson, *Soledad Brother* (1970).

[FN86]. See generally Goffman, *supra* note 20.

[FN87]. During my incarceration, I was mainly employed as a teacher's aide or clerk earning between \$6.25 and \$7.75 per week. During the last two years of my incarceration, I worked as a clerk in the mess hall (kitchen staff) and earned \$0.42 per hour.

[FN88]. For more information about our organization, Citizens Against Recidivism, Inc., visit [www.citizensinc.org](http://www.citizensinc.org).  
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# **BEHIND THE ELEVENTH DOOR**



## **Solitary Confinement of Individuals with Mental Illness in Oregon's State Penitentiary Behavioral Health Unit**

**An Investigative Report by Disability Rights Oregon**



DISABILITY RIGHTS OREGON

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Disability Rights Oregon is the Protection and Advocacy System for Oregon.

*Cover photo:* Entrance to Section 1 of the Behavioral Health Unit at Oregon State Penitentiary. Photo © Oregon Department of Corrections

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## I. INTRODUCTION

As the federally designated Protection and Advocacy System for Oregon, Disability Rights Oregon (DRO) is charged with protecting the legal rights of individuals with disabilities in our state.

DRO first became aware of problems at the Behavioral Health Unit (BHU) of the Oregon State Penitentiary (OSP) in May of 2014 when two prisoners contacted us. They complained that they were being kept in their cells for 23 hours a day and that prisoners on the unit were routinely being punished for self-injury and other symptoms and behaviors driven by their mental illness.

DRO receives many complaints from prisoners across the state, but the BHU complaints sparked particular concern because they were unusual in their consistency and level of detail. Additionally, the complaints focused on aspects of incarceration that we assumed would have been better addressed in a specialized unit that was designed to provide a therapeutic and safe environment for prisoners with serious mental illness.

In August, we contacted Oregon Department of Corrections (ODOC) Director Colette Peters to convey our concerns and request information that would allow us to assess the situation at the BHU. We asserted our legal authority to investigate under law and our Memorandum of Understanding with ODOC, and invited them to meet with us and explore potential solutions.

Since then, ODOC and the Assistant Attorney General who represents the department have met with us on multiple occasions. They have assisted our investigation by providing access to BHU prisoners and have allowed us to visit and observe the unit as needed. ODOC also agreed to waive fees associated with collecting and providing requested records, documents, and videotapes. That level of cooperation has allowed us to thoroughly investigate conditions at the BHU. Our report is written to explain what we have learned about the BHU and, where appropriate, make recommendations for changes.

**To complete our investigation, we relied on the following sources of information:**

1. Interviews of 19 BHU prisoners,
2. Approximately 4,500 pages medical and other records contained in the files of seven prisoners whose situations were particularly alarming to us,
3. Videotapes of seven “suit ups” or cell extractions that involved the use or potential use of force against prisoners at the BHU,
4. Unusual Incident Reports (UIRs) related to the videotaped prisoners,
5. Written ODOC policies that define some of the procedures and practices at the BHU,
6. Records provided by ODOC that document BHU practices,
7. Interviews with eight ODOC mental health employees and contractors,
8. Three monitoring visits to the unit.

As part of that cooperative effort, we provided ODOC with a draft copy of our report and have considered the Department’s subsequent comments and suggestions for changes and corrections. We have incorporated that input into the report where we judged it appropriate. In light of ODOC’s suggestion that the report might be improved with input from correctional staff, we will seek to interview past and current BHU correctional officers who are willing to speak with us. If this source of information alters our conclusions or findings in a significant way, we may issue a supplementary report.

This report does not identify any former or current ODOC staff by name. We have written our report in a manner that, whenever possible, does not include information that might allow these individuals to be identified. To protect our clients’ confidentiality, we have used pseudonyms to describe individual prisoners.

## II. EXECUTIVE SUMMARY

The corrections system has become the nation's largest provider of mental health services. The Oregon Department of Corrections (ODOC) has determined that more than half of Oregon's prison population has been diagnosed with a mental illness. Many of the prisoners who are most profoundly impacted by their mental illnesses are held in solitary confinement in the Behavioral Health Unit (BHU) at the Oregon State Penitentiary. These men spend months and sometimes years in an approximately 6 x 10 foot cell, with no natural light, no access to the outdoors or fresh air, and very limited opportunities to speak with other people. While ODOC policy requires these prisoners to be offered regular opportunities to shower and "go to rec,"<sup>1</sup> our investigation revealed that few BHU prisoners are actually able to access these opportunities more than once or twice a week. Stated more simply, BHU prisoners are subjected to long periods of solitary confinement.

The stress, angst, and boredom of solitary confinement are extremely harmful to an individual's mental health. As one court concluded: "the record shows, what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total."<sup>2</sup> For individuals with serious mental illness, solitary confinement is widely acknowledged to be detrimental and clinically contraindicated. The American Bar Association, the American Psychiatric Association, and the United Nations oppose solitary confinement for people with mental illness. Beginning with the U.S. Supreme Court in 1890<sup>3</sup> and continuing in recent years, courts across the country have decried the practice. By 1995, a

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<sup>1</sup> "Rec" in the BHU is solitary recreation in a small, walled area with a ceiling partially open to the sky. The rec areas contain an exercise bike, and some contain a punching bag.

<sup>2</sup> *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7<sup>th</sup> Cir. 1988).

<sup>3</sup> *In re Medley*, 134 U.S. 160, 180 (1890) ("[a] considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service.")



federal judge compared placing an individual with a serious mental illness in solitary confinement to putting an asthmatic in a place with little air to breathe.<sup>4</sup> In recent years, this problem is being addressed across the country. Some of our recommendations are modeled after a 2014 settlement with the state of Arizona.<sup>5</sup>

The desperation and exacerbation of symptoms resulting from isolation can significantly decrease a person's ability to conform his actions to rules and behavioral norms, thus creating a cycle of lashing out and increased penalties that further reduce mental health. That sort of cycle is not only a disaster for the prisoners who cannot escape it; it is an endless source of danger for the correctional officers who have to maintain order in an already difficult environment.

Originally, the BHU was designed to break this cycle by better addressing the unmet mental health needs of prisoners with serious mental illness. In recent years, however, clinical staff and mental health treatment have been marginalized in favor of an ever-increasing deference to the safety and convenience of correctional staff. This shift has created an environment in which individuals are deprived of basic human rights.

BHU prisoners and the past and present BHU mental health employees who spoke with us were consistent in their belief that many BHU prisoners have been subjected to the practical equivalent of torture during their often very long stays in the unit. The conditions that they describe undermine the health and well-being of the prisoners. In addition, they expose ODOC to legal liability and jeopardize utility of the unit within the ODOC system.

We have learned that there are many serious problems at the BHU, but have focused on identifying a limited set of primary concerns that must be corrected if the BHU is to fulfill its mission and meet constitutional standards of care.

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<sup>4</sup> *Madrid v. Gomez*, 889 F. Supp 1146, 1261 (N.D. Cal 1995) discussing the effect of placing prisoners with serious mental illness in a solitary confinement unit.

<sup>5</sup> [www.aclu.org/news/arizona-agrees-major-improvements-prison-health-care-crucial-limits-solitary-confinement](http://www.aclu.org/news/arizona-agrees-major-improvements-prison-health-care-crucial-limits-solitary-confinement)

**Those three primary concerns are:**

**1. Isolation.**

Most BHU prisoners are out of their cells for one hour per day or less, and many report that this severely affects their ability to cope with life in the BHU.

**2. Lack of access to mental health treatment and services.**

Records and interviews confirm that BHU prisoners are unable to reliably receive timely Mental Health (MH) services when in crisis or undergoing decompensation. Despite the fact that they experience severe mental illness (SMI), most see the psychiatric physician who oversees their mental health two to three times per year in a setting that provides no confidentiality. Many incidents of staff force against BHU prisoners are triggered by the inability of BHU prisoners to access mental health staff or their psychiatric provider.

**3. A culture that promotes unnecessary violence and retaliation by correctional staff.**

The BHU is currently ruled by a culture in which BHU correctional staff consistently override or ignore the advice of mental health professionals. In the absence of empowered and physically present clinical staff, corrections officers handle mental health crises with tasers, pepper spray, riot gear, and restraint chairs. Retaliation against BHU prisoners who have caused problems is common.

**To address these three concerns, we offer the following recommendations:**

- 1. BHU should adopt policies and practices to ensure that every BHU prisoner will be out of his cell for a minimum of five hours per day of structured activity and daily showers and recreation.**

BHU should adopt policies and practices to ensure that every BHU prisoner will be afforded an opportunity to shower and exercise at least twice daily. In the case of any prisoner who declines those opportunities more than three times per week, the BHU treatment team will create a plan to offer those opportunities more effectively.

Structured activities could include jobs, classes, group counseling, or socialization.

- 2. BHU should adopt policies, practices, and resource allocations to ensure that MH staff can regularly observe BHU prisoners and meet with them in a confidential setting as needed.**

BHU should adopt policies, practices, and resource allocations to ensure that MH staff are either housed within the unit or can otherwise access BHU prisoners upon request without waiting for the consent of correctional staff or the availability of a two-man tether transport team.

- 3. BHU should adopt policies and practices that require a 30-minute cool down period prior to forcibly removing a prisoner from his cell or otherwise subjecting him to planned physical**

**force. During that time, policy should require a visit by a Qualified Mental Health Professional (QHMP) or MH provider who will attempt to gain compliance or devise a resolution of the concerns at hand without force.**

BHU should adopt policies and practices that prohibit the planned use of force against any BHU prisoner until the prisoner has been seen by MH staff who determine that there is no way to ensure the safety of the prisoner or others the without the use of force.

The BHU mental health team should review all videotapes of planned force incidents and all Unusual Incident Reports and then convey any recommendations for changes in practice, procedure, or their implementation to the treatment team and the Director of Special Housing at OSP.

### **III. OUR FINDINGS**

#### **A. The BHU today**



**Entrance to Section 1 of the BHU  
Photo © Oregon Department of Corrections**

The pictures of the Behavioral Health Unit that we have included in this report cannot accurately convey what it is like to be there. To see the cells where each BHU prisoner spends an average of 23 hours a day, you walk through other parts of the prison. The hallways and rooms are reminiscent of an aging high school. As you get close to the cell tiers and the last of eleven electronically locked and controlled doors, you begin to hear prisoners randomly screaming, talking to themselves, and rhythmically banging walls and metal. You pass underneath a glassed-in control tower where clipboards, face shields, and radios are hung. You then wait to go through one of three heavy, metal mesh doors that are controlled by the tower. After that, it's about a 40 foot walk across a deserted floor to a two-level tier of cells. The feeling that you get as you get closer to the cells is

that you are seeing conditions from a past century when mental illness was primarily “treated” through a combination of warehousing and isolation.



**Empty cell in Section 2 of the BHU  
Photo © Oregon Department of Corrections**

The cells in the BHU are about 6 feet wide and 10 feet deep. Each has a single prisoner’s last name over its top and contains a thin mattress on a concrete platform. There is a stainless steel plumbing unit with a sink on top of the toilet at the back wall. Officers have a clear line of sight to the toilet from the front of the cell. Correctional officers and prisoners address each other by last names. Those prisoners who were interested enough in our visits to stand and look out of their cells were hard to see through cell fronts that consist of metal pierced by holes that are about the size of pencil eraser. Many cells are additionally covered by sheets of Lexan™, a hard, translucent and yellowish plastic that reduces the prisoners to blurry shadows even if you are directly in front of them and a few inches away. To speak with a prisoner in one of these cells and be heard, you have to bend down and talk through the cuff port, a waist-high slot used to cuff prisoners

before taking them out of their cells, and even then, it is often difficult to hear a prisoner over the din of the unit.

The BHU has no natural lighting and no windows. It is semi-dark even during the middle of the day. It smells of cleaning chemicals, body odor, dirty clothing, and mold. Each of the three units on the BHU contains a small shower at the end of the top tier and a recreation area which is surrounded by two-story high walls on all sides. The ceiling of the recreation area is partially enclosed and partially covered by a grate that is two stories above the floor and the only point of contact with natural light or air that is available to BHU prisoners.

## **B. Creation and original intent of the BHU**

Out of the approximately 7,000 prisoners within the ODOC system who experience mental illness, ODOC has identified approximately 125 individuals whose serious mental illness and behavior are so severe that they require special housing.

The Behavioral Health Unit was created to more safely and humanely house 48 of the most seriously affected prisoners in the state. The prisoners who end up there are frequently individuals whose serious mental illness had previously driven them to extreme forms of self-harm, suicide attempts, or assaults against staff and other prisoners. ODOC acknowledges that when these “problem behaviors” are driven by psychosis, delusional belief systems, trauma, or mental instability, the usual systems of graduated privileges and deterrents employed elsewhere in the prison system are ineffective.

ODOC created the BHU to provide a coordinated system of intensive case management that would provide prisoners with serious mental illness the tools and supports that would eventually allow them to better control behaviors and symptoms. The three key elements of the BHU system of care are: Dialectical Behavior Therapy classes, counseling readily available by Masters’ level Qualified Mental Health Practitioners (QMHPs), and a Treatment Team that promotes the collaborative creation and implementation of an individualized treatment plan that reflects the input of each prisoner, clinicians, and security staff.

### **a) Dialectical Behavior Therapy**

Dialectical Behavior Therapy (DBT) is an offshoot of Cognitive Behavior Therapy. It is one of the few therapeutic treatment models that can claim a somewhat successful track record with individuals who have Borderline Personality Disorders. There is also evidence that DBT can be helpful for individuals who engage in substance abuse and self-harm.

DBT teaches individuals to recognize triggers of problem behaviors and then provides tools that the individual can use to change self-defeating



patterns. The DBT model relies on group classes where individuals who are learning these skills share frustrations and acquired knowledge under the eye of a skilled DBT trainer.

In the BHU, the successful completion of DBT classes is one of the requirements for transitioning out of the unit, and participation is a component of every BHU treatment plan. Participation and progress in learning DBT skills is also a stepping stone toward greater privileges in the BHU.



**Education room where DBT takes place  
Photo © Oregon Department of  
Corrections**

BHU prisoners are scheduled to attend one DBT class per week.

The classes are conducted in a small room where prisoners sit in four phone booth sized metal cages that do not allow them to properly see one another.

**b) Qualified Mental Health Providers (QMHPs)**

Mental health services are provided by a psychiatrist who splits her time with one or more other specialized units and four QMHPs who are assigned to the BHU. The psychiatrist works with a treatment team and is responsible for prescribing and monitoring medications. ODOC has indicated that she meets with BHU prisoners “every couple of weeks” despite the assertions of some prisoners who told us that they saw her only a few times a year. More immediate and routine mental health problems are addressed by the QMHPs. Each QMHP is assigned a roster of individual prisoners and is supposed to meet with those prisoners weekly.

**c) Treatment Team**

The BHU model relies heavily on the treatment team to deal with the problems of each BHU prisoner. The model seeks to create a way to harmonize and mediate the often conflicting perspectives of clinicians and security staff. Typical participants therefore include the unit head, Qualified Mental Health Professionals (QMHPs), and members of the security staff. Most treatment team meetings are convened around the problems of individual prisoners although some of the meetings may address more systemic issues. Behavioral Health Services administrators and treating physicians also attend some meetings. The treatment team creates each BHU prisoner's treatment plan and the model also seeks to secure prisoner participation and "buy in" to those plans. This can mean that prisoners meet with the team to discuss problems and ways to reduce them.

### **C. Extreme isolation and sensory deprivation**

“For these inmates, placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe.”<sup>6</sup>

*Madrid v. Gomez*, 889 F. Supp 1146, 1261 (N.D. Cal 1995)

Despite the good intentions behind the creation of the Behavioral Health Unit, our investigation revealed that it is rare for BHU prisoners to be out of their gloomy cells for more than an hour a day (thus subjecting them to conditions widely defined as solitary confinement,) and that access to mental health care has been drastically curtailed.

Most BHU prisoners told us that they would prefer to be anywhere else in the prison (including Death Row or Disciplinary Segregation) and tried to dull the effects of their isolation in a number of ways, many of which are horrific. We learned that many BHU prisoners cut themselves, taunted one another, or spent the entire day pacing the circumference of their cells. Others banged their fists against cell walls for hours at a time, one to the extent that his cell was re-outfitted to reduce his ability to make noise in that way. Suicide attempts and threats are a commonplace in the BHU.

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<sup>6</sup> The SHU is a specialized housing unit that subjects prisoners to extreme isolation in another state’s prison system.

## Case Study: Elliott Wynan

Like many of the men confined in the BHU, “Elliott Wynan”<sup>7</sup> resorts to self-harm as a desperate strategy to get out of his cell or compel medical or mental health attention. Sometimes the result is a hospital visit or brief respite in the Mental Health Infirmary (MHI), but more often, the security-driven response to his self-harming behaviors is a mixture of physical force and the imposition of further isolation and deprivation.

In the fall of 2013, Mr. Wynan had been placed on suicide watch, and he was desperate to be transferred to the Mental Health Infirmary where he perceived staff to be more sympathetic and expected better access to mental health treatment. He reports that he told correctional staff that he was in crisis and needed to go to MHI many times with little response and no result. Eventually, a correctional officer<sup>8</sup> told him that “you have to get pepper sprayed to go to MHI.” Mr. Wynan took the officer at his word and hung his sheet across the front of his cell.

An ODOC videotape documented the incident that followed. A team of officers in riot gear arrive and order Mr. Wynan to remove his sheet. He refuses and is then simultaneously pepper sprayed through the cuff port and rear of his cell for approximately 20 seconds. Officers then pull Mr. Wynan from his cell and take him to the floor where they pull down his pants and he is injected in the buttocks. A sergeant tells Mr. Wynan that he can shower to remove the pepper spray and will be transferred to the infirmary. Mr. Wynan responds incredulously, “That’s all I wanted in the first place. Why was all of this necessary, man? I’ve been asking for this for a month.”<sup>9</sup>

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<sup>7</sup> To protect our clients’ confidentiality, we have used pseudonyms to describe individual prisoners.

<sup>8</sup> Correctional officers may be referred to as COs, guards, or security staff. For ease of reading, we will refer to them as officers.

<sup>9</sup> Our report includes detailed descriptions of these anticipated force videos because they provide compelling and indisputable evidence of reality of life in the BHU.

DOC typically responds to Mr. Wynan's acts of self-harm and decompensation by placing him on Suicide Close Observation (SCO). This has occurred at least eight times in the past two and a half years. During these SCO periods, he was typically allowed "no possessions" and was issued a Teflon® smock, a Teflon® blanket, and a paper cup and tray. He was not allowed to have eating utensils. Sometimes he refused to wear the smock and records indicate that he was observed to be naked during at least two of the SCO periods. Records also indicate that Mr. Wynan was deprived of his mattress during most of these periods.

Mr. Wynan described one period of SCO during which he was also punitively deprived of toilet paper by a particular officer. He believes that this went on for twelve days until another officer insisted that Mr. Wynan needed to be provided with toilet paper. DRO was unable to confirm the details of this account, but did verify that Mr. Wynan was placed on "dry cell status" (in addition to SCO) twice. Dry cell status is ODOC's tool for dealing with situations in which prisoners swallow potentially harmful items. The water supply to the cell is turned off and personal belongings (including toilet paper) are removed so that medical staff can confirm when and if the harmful item has passed. Per DOC policy, dry cell status should not last more than 72 hours, and toilet paper is to be offered after each bowel movement.<sup>10</sup>

Mr. Wynan's medical records appear to indicate that he was held in "dry cell status" for as many as eighteen consecutive days.

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<sup>10</sup> DOC Policy 40.1.11

## 1. Prisoners cannot reliably access showers and recreation

ODOC policy requires prisoners to be offered the chance to shower and exercise several times per week, but our review of 476 pages of BHU shower and rec logs indicates that very few BHU prisoners reliably access the opportunity to shower and “go to rec.” Daily logs for the three year period between 2011 and summer 2014 establish that the vast majority of



**Shower in Section 2 of the BHU**  
**Photo © Oregon Department of Corrections**

BHU prisoners “refused” recreation for days at a time. For example, of the 39 inmates housed in the BHU on June 4, 2014, only three participated in recreation. Two are marked “n/a” due to cell-in status during which recreation is not offered. One notation is indecipherable and the other 33 are marked with an “R” for “refused.”<sup>11</sup> Shower logs also indicate spotty participation. For example, of the 33 inmates

housed in the BHU on April 12, 2014, 7 or fewer actually showered (records for two are inconclusive.)<sup>12</sup>

Conversations with BHU prisoners suggest that their consistent failure to shower or exercise is not caused by a lack of interest in those activities. They told us that they are not able to access showers and recreation because of how these opportunities are “offered.” Shower and rec invitations begin at 6am. The powerful psychiatric medications that most BHU



**Rec area in Section One of the BHU**  
**Photo © Oregon Department of Corrections**

<sup>11</sup> See Appendix, Exhibit 1.

<sup>12</sup> See Appendix, Exhibit 2.

prisoners receive cause drowsiness so that many of them are asleep and difficult to rouse when the officers walk the tiers to offer showers and rec. Previously, showers and rec were offered twice, once in the morning and once in the afternoon. At some point that changed.<sup>13</sup> Showers and rec are still technically offered twice, but when a prisoner “refuses,” the second offer is usually extended only a few minutes later.<sup>14</sup> In a meeting with DRO, BHU leadership admitted that the second offer is a mere formality. Pursuant to a consistent practice in the BHU, when a prisoner refuses or is nonresponsive to the first request, he is not allowed to accept the second offer. Prisoners and some mental health staff believe that this system was specifically altered to minimize the number of showers and recreation periods that officers would be obliged to provide. ODOC rejected that suggestion. They noted that the unit simply does not have the staffing to provide a shower and recreation for more than twelve prisoners per day. Currently, the BHU houses 43 prisoners. The theoretical availability of 1-2 hours per day out of cell to shower and exercise is not reality for the vast majority of the men held in the BHU.

## **2. Property deprivation**

Prisoners’ property is tightly regulated in the BHU. Property allowances correspond to an individual’s “level.” All BHU prisoners start at a level “A-2.” BHU prisoners who engage in “significant target behaviors” can be further restricted to Level A-1. The treatment team determines when to move and individual prisoner upward through the level system based on good behavior: A-2, B, C, and long term C.

Prisoners at level A-1 may only possess one book or magazine, a pen or crayon, and paper. They are only allowed to purchase envelopes (a maximum of five) and basic hygiene items from canteen. Once prisoners graduate to level A-2, they are allowed “1 pair red shorts, 2 complete sets

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<sup>13</sup> According to an undated BHU Rules list: “Recreation periods will no longer be conducted as AM and PM. They will be run in a wrap-around fashion starting at 6:00am.”

<sup>14</sup> According to some prisoners, there are times when the interval between first and second offers is actually less than a minute.



of clothing,” and a radio. At level B, they are allowed to possess personal photographs. At level C, the final reward is a pair of shoes.

Items as basic as a mattress or a single crayon are not a reliable entitlement in the BHU. Two emails from BHU leadership to staff in February 2014 make this clear:

“If an inmate’s behavior has been egregious enough for management to approved [sic] a move to Section 2, it is appropriate to remove and hold his property until Treatment Team makes a decision in regard to his level.”

“I should have been more specific . . . I mean personal property . . . Please do not automatically confiscate basic property, like their mattress, unless their behavior warrants approval for a deprivation order.”

Another email from 2012 reminds staff that “inmates are generally allowed a writing instrument.” The message continues:

“In our case, at times, we can’t trust inmates with pens so we allow a crayon. Since sometimes crayons are used as a reward I don’t want the two confused. One crayon, as a writing instrument is different than several crayons and a coloring book.”

In this environment of extreme deprivation, therapeutic victories are rare. As one clinical staff member put it: “I can’t change anything that really matters for my clients, so I have to satisfy myself with giving out crayons.”



**View of TV from inside a BHU cell  
Photo © Oregon Department of  
Corrections**

The social isolation, lack of programming, and lack of personal items that might be used as entertainment cause many BHU prisoners to rely heavily on television to pass the time. Each of the three units has one television, located in front of the bottom tier. During the last year or so, even the minimal

entertainment value offered by those often hard-to-see televisions has been drastically reduced in a manner that suggests that the change was intentional.<sup>15</sup> A policy change in 2014 restricted viewing to five channels, despite the fact that none of the prisoners we spoke to expressed any interest in those channels. Prisoners also complained that the selection available on the book cart is no longer refreshed as it used to be. “It’s always the same books that you’ve already read. And it’s like the books you’d find at your grandma’s garage sale.”<sup>16</sup>

### **3. Self-harm**

Poorly addressed mental illness and the pervasive despair of the BHU frequently lead to self-harm. In fact, harming oneself seems to be accepted as a reasonable way to secure attention from the mental health staff. Some men bash their heads against the walls, others obtain razor blades and slice their wrists, and some attempt to hang themselves by creating nooses from their bedsheets.

One BHU prisoner regularly uses staples and Velcro® to cause himself to bleed. He described the impulse to us:

“When I see my blood coming, I feel release. I cut myself every day for one month, filled a cup, every day. After a while I was starting to feel weak, then I stopped. But I’m still doing it. It’s not because I’m crazy.”

He also told us that he had not engaged in self-harm prior to experiencing solitary confinement.

Another young man described, with real bafflement, his compulsion to bash his head against walls. He said head-banging became addictive for him and

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<sup>15</sup> It is also quite possible that the change was instituted to reduce prisoner arguments about what was watched, but the solution adopted meant that the level of boredom and pointlessness was elevated for every prisoner in the BHU.

<sup>16</sup> Mental health staff told us that this change was explained to them as the result of fears about smuggling contraband through the multiple book carts that used to be rolled through the tiers, but they found that explanation unconvincing and suspected that security staff wanted to decrease their responsibilities.

he did it constantly. On one occasion, he described calling to an officer, “I can’t stop hitting the freaking wall with my head,” but he reports that no help was offered and he cannot recall ever speaking to a counselor about the problem.

Mr. Wynan described being so desperate to get out of his cell that he told his counselor, “If you put me back in my cell, I’m going to bash my head in. I’m going to bash my head until blood and brains come out.” The counselor responded that, “If you bash your head they’re going to have to suit up and spray you.” Following this exchange, Mr. Wynan was returned to his cell and began to bash his head against the wall. He reports that he was then sprayed with pepper spray. In one of the numerous accounts of head-banging in Mr. Wynan’s medical records, he is reported to have stated: “I am going to bang my head against the wall. I want to be sent to the hospital.” A nurse who described “moderate swelling to forehead with bleeding cut,” concluded that it was “attention-seeking behavior” and scheduled him for sick call the following morning.

## **Case Study: David Logan**

With the exception of a period during which “David Logan” was transferred to federal prison for about a year and a half in 2013, he has been in the BHU since 2011. In the BHU, he has been tased and pepper sprayed many times and has been placed on close suicide watch repeatedly. These sorts of events were frequently triggered when Mr. Logan swallowed metal objects during long periods of desperation and mental health decompensation. On at least one of those occasions, surgery was required to remove objects that Mr. Logan had swallowed. Other object-swallowing incidents resulted in dry cell restrictions during which he was placed in a cell without operational plumbing so that his stools could be monitored to confirm that the objects had passed through his GI tract. Mr. Logan has experienced a few periods of relative calm and well-being in the BHU, usually when he had had access to art materials, but he has always engaged in self-destructive acts that have universally failed to win him a transfer out of the BHU. His longest periods of apparent stabilization and relatively good mental health took place after his return from federal prison in August of 2014, at least suggesting that the improvement may have been the result of better access to mental health care and reduced levels of isolation that he experienced while in federal custody.

In September of 2012, Mr. Logan swallowed objects attached to a string that he believed would allow him to “fish for things in his intestines.” A few days later, he told a mental health staff member that “I cannot take the noise and having nothing day after day, year after year in the BHU.” He later explained the swallowed objects as a means to “pull his guts out and end his ‘life in a box.’” The counselor noted that “he has frequent decompensating periods even when complying with treatment.”

In October of 2012, Mr. Logan broke off and swallowed the sprinkler head in his cell in a new attempt to kill himself or be transferred to another unit in the prison. Following an unfiled removal to a holding cell in the BHU intake area, his subsequent removal from that cell and placement in a restraint chair is documented in a videotape.

The tape begins with a typically short explanation of the intended action in which the leader of a six person (+ 2 nurses) security team explains to the camera operator that it is 8:15 p.m. and that Mr. Logan would be taken out of the holding cell and escorted to a restraint chair because he had cut himself, swallowed objects, and threatened further self-harm. The fact that the team is not dressed in the usual helmets and riot gear may signal that no resistance or danger is expected.

When the team arrives at the cell. Mr. Logan is naked except for a purple towel that is wrapped around his waist and a pair of sandals. He seems calm and offers no objection or resistance while he is put in restraints and his head is covered with a spit sock. He is then escorted to a hallway where he is seated in a restraint chair. His shoes and portable restraints are removed one at a time as his ankles, arms, waist, and shoulders are strapped into the chair so that he cannot move any large part of his body other than his head. After a quick tug by a nurse to check the tightness, the camera is turned off.

When the tape resumes at 8:50, Mr. Logan is still in the chair which has been moved into his completely empty cell, and the door has been opened. The spit sock is no longer on his head. An officer checks the tightness of the straps. Mr. Logan continues to appear quite calm. He says that he is alright except for being cold. The officer promises to “check with LT” about that and the tape is turned off again. It resumes at 9:25 p.m. when the security check is combined with a medical check during which two nurses record vitals while an officer holds a spitshield in front of Mr. Logan’s face. He again complains “I’m freezing,” and asks for something to keep him warm and is again promised that “I’ll check with the LT about that and see what we can do.”

By the 10:25 p.m. security check, Mr. Logan is covered with a smock and tells the CO’s that “if you guys ever decide to let me out, I’ll go right to sleep.” Recorded medical and security checks continue every 20 to 45 minutes and Mr. Logan continues to complain of being cold. He also continues to request that he be released from the chair. During one of the checks, he confirms that the string attached to the objects he swallowed is

still in him. At the end of the 11:45 p.m. medical check, he asks the nurse to mark down that his body temperature is “ten below normal,” but there is no decipherable response. After another check during which Mr. Logan argues that he is long past any desire to hurt himself or anyone else, the tape records Mr. Logan being removed from the chair after it has been wheeled out of his cell. He is placed in portable restraints and attached to a tether after the team leader notes that he has been compliant and has been told that he will be returned to the chair if he threatens to harm himself or anyone else. He is returned to his cell at 1:52 a.m., almost six hours after being placed in the restraint chair. He trades the towel for a smock and a mattress is brought into his otherwise empty cell. He is told that he will be given a blanket and the tape ends.

#### 4. Section 2

*“When I was housed over there behind glass, I often suffered from severe panic attacks that made me feel like I was drowning. I felt like tearing the skin off my chest just so I could breathe. But I couldn’t do that so I would tear off all my clothes and scream at the top of my lungs.” - BHU Prisoner*

The level of isolation that is experienced throughout the BHU is hard to fathom and intensely harmful for the mentally ill prisoners who live there, sometimes for years at a time. The situation is even worse for the prisoners who are sent to Section 2. In theory, Section 2 is intended to 1) provide a short-term way to stabilize BHU prisoners who have experienced serious difficulties in the unit, and 2) a place where prisoners who are new on the unit can be observed and evaluated. BHU prisoners universally see Section 2 as a specialized punishment unit within the BHU. For instance, Section 2 prisoners are not allowed to have batteries and therefore cannot hear the audio feed of the single TV that serves their cells. If they are moved out of their cells, they are in restraints and on a tether manned by one of three COs who are required to conduct escorts. They are allowed far fewer possessions than other BHU prisoners and their meals are served on paper trays. This is the section in which prisoners are likely to be deprived of clothing, bedding, writing utensils, pictures, and other personal belongings.

Although it is supposed to be a short-term step toward better conditions and a lower level of restrictions on one of the other sections, many BHU prisoners have lived in Section 2 for more than a year. This occurs when they are unable to recover enough control of their behavior to meet the requirements for moving to another part of the BHU, a difficult task for individuals who are often so desperate to escape their reality that they attempt suicide or seriously injure themselves.

Robert Wynan was confined to Section 2 for almost three and a half years. Mr. Wynan and BHU clinical staff quite consistently describe the negative impacts of BHU conditions on his mental health, especially those that that he experiences when housed in Section 2. He is distressed at being surrounded by loud, disruptive prisoners who he feels are hostile towards



him. His counselor noted that Mr. Wynan is fearful and anxious, concluding that he “appears to be experiencing increased paranoia in response to both the hostile nature of the unit as well as the sedating effects of recently prescribed medications.” Other symptoms, including visual and auditory hallucinations, are also aggravated by the environment. In the words of one member of the BHU clinical staff, the BHU is “an emotionally chaotic environment.”

A member of the BHU clinical staff explained to DRO that she would like to move him out of Section 2 and out of the BHU altogether. In her words, “he can never make it in the BHU. He’s too amped up by the other prisoners.” She has succeeded in arranging short-term stints in the Mental Health Infirmery (MHI), but due to the skewed balance of power between clinical and security staff, she lacks the authority to move him to a more clinically appropriate setting.

During his interview with DRO, Mr. Wynan described feeling desperate to get out of his cell. “I pace all day,” he said. “Sometimes I bang my head against the wall all day. I have to get my anger out.” He explained to us that he told his prescribing clinician, “No one can see when I am depressed because I am always so happy to get out of my cell. Back in, though, I just feel hopeless and want to die.”

Mr. Wynan’s records (and his own account) describe numerous, increasingly desperate attempts to get out of his small, stifling cell in Section 2: he threatens suicide, he threatens staff, he “sheets up,” he acts out, he harms himself by swallowing objects, he throws bodily fluids. He would prefer anything, even disciplinary segregation, over his seemingly eternal confinement in Section 2. These actions have sometimes resulted in cell extractions and temporary removal from the unit, but at a terrible cost to Mr. Wynan: his original release date of 2017 has been extended to 2035 because of convictions for offenses committed while in prison. After 3 ½ years in Section 2, he has finally been moved to another section of the BHU, but there is no indication that he will ever be allowed to leave the unit.

## **5. No limits on the length of confinement**

The BHU was created to provide a more effective way to address the persistent behavioral problems of prisoners with serious mental illness than was available in punishment-based segregated housing units at OSP.<sup>17</sup> Because those units are specifically operated to deliver concentrated measures of punishment and reduced privileges to curb and deter dangerous behavior, the time that a prisoner spends in those units is regulated and limited. In the BHU, where the ostensible focus is treatment rather than punishment, time is not limited.

Nevertheless, access to the mental health treatment that might equip a BHU prisoner to survive in a less restrictive unit of the prison has dwindled since the BHU opened. Compounding that effect, the level of restriction and isolation in the BHU has increased. Now, most prisoners and clinical staff report that conditions in the BHU are as harsh if not harsher than those in the disciplinary segregation units, especially for prisoners in Section 2 of the BHU. In fact, prisoners who are moved from general population to segregation and punishment units can also spend 23 hours a day in their cells, but most spend about four to six months under that level of restriction. In contrast, prisoners with serious mental illness often languish in solitary confinement for years at a time in the BHU. Even after completing the Dialectical Behavior Therapy (DBT) program, the major prerequisite for transition out of the BHU, many prisoners are subjected to isolation and sensory deprivation in the BHU for far longer than they would have been in the disciplinary segregation units.

## **6. Some effects of prolonged isolation**

“[T]he record shows, what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total.”

*Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988).

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<sup>17</sup> Those units are the Disciplinary Segregation Unit (DSU) and the Intensive Management Unit (IMU.)

“[The fact that] prolonged isolation from social and environmental stimulation increases the risk of developing mental illness does not strike this Court as rocket science.”

*McClary v. Kelly*, 4 F.Supp. 2d 195 208 (W.D.N.Y. 1998).



**Inside a Section 2 BHU cell**  
**Photo © Oregon Department of Corrections**

Prisoners in the BHU experience an extreme form of isolation. That is not altogether surprising: the physical space occupied by BHU was originally designed as an Intensive Management Unit (IMU) where unmanageable prisoners were sent as a form of punishment to gain compliance and more controllable behavior. One of the principal components of that punishment was solitary confinement. Though it has been repurposed as a placement for prisoners with serious mental illness, BHU prisoners and MH staff report that the current BHU has retained or reintroduced many IMU practices.

Under the widely accepted definition of 22-23 hours of cell time per day, it is indisputable that prisoners in the BHU experience solitary confinement.<sup>18</sup>

There is a large body of scholarly articles, studies, court cases and settlement agreements that address the harmful effects of confining prisoners to their cells for long periods without any opportunity to socialize with other people.<sup>19</sup> Clinical studies have established that confining a person to a cell for all but an hour or two each day can cause serious and lasting psychological harm and exacerbate already existing mental illness.<sup>20</sup> Summarizing the clinical research in an amicus brief to the U.S. Supreme Court, leading mental health experts concluded: “[n]o study of the effects of solitary or supermax-like confinement that lasted longer than 60 days failed to find evidence of negative psychological effects.”<sup>21</sup>

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<sup>18</sup> To its credit, ODOC has acknowledged the problem and has recently undertaken some initial steps to reduce the effect of excessive time that some ODOC prisoners spend in the cells. Thus far, those efforts have not reached the BHU.

<sup>19</sup> See ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS No. 23-2.8(a) (2010) (“No prisoner diagnosed with serious mental illness should be placed in long-term segregated housing”); American Psychiatric Association, *Position Statement on Segregation of Prisoners with Mental Illness* (2012) (“Prolonged segregation of adult inmates, with rare exception, should be avoided due to the potential for harm to such inmates. If an inmate with serious mental illness is placed in segregation, out-of-cell structured therapeutic activities (i.e., mental health/psychiatric treatment) in appropriate programming space and adequate unstructured out-of-cell time should be permitted.”); Interim Rep. of the Spec. Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, U.N. Doc A/66/268 at 221 (Aug. 5, 2011) (“given their diminished capacity and that solitary confinement often results in severe exacerbation of a previously existing mental condition . . . its imposition, of any duration, on person with mental disabilities if cruel, inhuman or degrading treatment”).

<sup>20</sup> See Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCH. L. 104, 105 (2010); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J. L. & POL’Y 325, 335-36 (2006); Terry Kupers, *Prison and the Decimation of Pro-Social Life Skills*, in THE TRAUMA OF PSYCHOLOGICAL TORTURE, 127, 131, 135 (Almerindo E. Ojeda ed., 2008).

<sup>21</sup> Brief of *Amici Curiae* Professors and Practitioners of Psychology and Psychiatry, *Wilkinson v. Austin*, 545 U.S. 209 (2005) (No. 04-4995)

The impact of isolation in the BHU is such that even the smallest simulations of normal social contacts are precious to the prisoners. We were surprised that many of the prisoners we spoke to complained that the QMHPs no longer sat in front of the tier to play word or card games with interested prisoners. This involved no more than a sympathetic person encouraging people serving long prison sentences to participate in children's games such as hangman. Its loss was nevertheless a serious degradation of life in the BHU.

#### **D. No reliable access to mental health care**

*“MH is supposed to talk to inmates before the suit up thing, but usually MH doesn’t come. You have to do something extreme to get to see MH.” - BHU Prisoner*

*“Now the guards are the ones who generally deal with a mental health crisis. Counselors are not available until hours or days later.”  
- BHU Prisoner*

There is at least conflicting evidence to indicate that the BHU delivered a useful level of access to mental health services to prisoners during the initial year or two of operation. However, our investigation revealed that timely access to effective mental health care has not been available for BHU prisoners during subsequent years. Virtually every BHU prisoner who spoke with us cited an inability to access mental health services as a major and constant frustration. Inability to access mental services was also a near universal precipitating element in cell extractions and other incidents of force deployed against BHU prisoners. Tellingly, inadequate access to MH services was reported not only by the prisoners who had been the subjects of the incidents, but by other prisoners in the unit who witnessed and described incidents to us.

Both the BHU prisoners and the mental health staff who are assigned to help them would almost universally prefer to be in any other unit of the prison. When asked about the theory that prisoners might fake mental illness in order to be placed in the BHU, a member of the clinical staff who has worked with BHU prisoners scoffed: “Nobody would lie to stay in BHU; everyone wants out.” As another member of the mental health staff put it, “Everyone on the unit wants to leave.” Mental health staff on the unit have a high rate of turnover; most QMHPs work at the BHU for two years or less and transfer out as soon as there are other openings. BHU inmates do not have the same ability to change their situation and some have been in the BHU for more than three years even though they would prefer to be anywhere else, including Death Row or disciplinary segregation.

## **Case Study: Lincoln Stevens**

An incident involving “Lincoln Stevens” in the spring of 2014 illustrates a set of events that were triggered by inability to access care during a mental health crisis. After repeated requests for crisis mental health care produced no response, Mr. Stevens sheeted up his cell and cut his arm so deeply that it bled unstoppably. Despite the fact that the continuing blood loss was potentially life threatening, what followed was an incredibly slow-moving ordeal that did not end until many hours later when Mr. Stevens was strapped into a restraint chair after being transported to a hospital and returned to the BHU without treatment.

During interviews, three neighboring prisoners confirmed that prior to cutting himself, Mr. Stevens had been calling repeatedly to staff. His tone was described as desperate and pleading. He said he was hearing voices, feeling panicked, and needed to talk to BHS staff. Officers told Mr. Stevens that there was no one available. (“Ain’t gonna happen.”) Mr. Stevens recalls saying that he felt like hurting himself and asking “Isn’t there anyone on call?”

Alone and escalating in his cell, Mr. Stevens eventually sliced his arm deeply in seven places. An officer was stationed outside Mr. Stevens’ cell but was unable to see inside because Mr. Stevens had sheeted up. The prisoner in the adjacent cell knew Mr. Stevens well and sensed that something was wrong. He eventually convinced Mr. Stevens to acknowledge being cut badly enough that the floor of his cell was covered in blood.

Mr. Stevens’ neighbor called to the officer on tier to radio for medical help. The officer did call for help, but according to his report, it took 35 more minutes for anyone else to arrive. At that point, Mr. Stevens submitted to handcuffs and a tether and was removed from his cell. Video footage shows seven very wide cuts across his forearm that were bleeding profusely. He was taken to the infirmary where nurses were not allowed to remove restraints that hindered their efforts to stop the bleeding. Over many minutes, they went through their entire supply of gauze pads but



could not “contain the blood.” After unsuccessful attempts to jerry-rig something to apply enough pressure to stop the bleeding, the nurses photographed the injuries and decided that there was no choice but to send him to an outside hospital.

Although Mr. Stevens was still bleeding uncontrollably and repeatedly soaked through the pads applied to his wounds, a great deal of time passed while security staff walked through a number of procedures associated with a transport out of the prison. These included tethering and escorting Mr. Stevens to a holding cell and then re-clothing him in a uniform that identified him as a prisoner in transport. More time passed while security staff tried to arrange for an escort vehicle to accompany the van that would transport Mr. Stevens to the hospital. The tape also recorded a discussion of who was next in line to receive the overtime pay that was attached to the assignment of accompanying Mr. Stevens to the hospital. Another recorded exchange explored who was authorized to handle a taser during transport.

Long before the van actually left for the hospital, Mr. Stevens’ agitation and distress had risen to the point that he was resistant to every element of the transport process. What transpired at the hospital is not recorded on the videotape, but according to reports of the security staff who took Mr. Stevens to the hospital, he refused to cooperate with hospital staff. On that basis, the accompanying officers determined that he was too volatile to receive treatment. They brought Mr. Stevens back to the prison where his wounds were finally bandaged at 11pm, approximately 3 ½ hours after he had cut himself. According to the ODOC incident report, after his wounds were attended to well enough to stop the bleeding, Mr. Stevens said, “If you put me in a smock I am going to bite myself.” The report continues, “I [Lieutenant] informed Prisoner Stevens that he was placed on Suicide Watch and that he was going to be in a smock. Prisoner Stevens responded, ‘You better just put me in the restraint chair.’”

Interviews with staff and prisoners, and review of ODOC mental health treatment logs reveal ongoing problems with access to routine and crisis mental health care. The most commonly raised explanations for inadequate access to MH care in the BHU are explained below.

## **1. Physical and logistical issues**

### **a) Lack of office space for Mental Health staff**

The physical layout of the unit creates a huge and persistent access problem for MH staff. QMHPs do not have office space within the BHU building even though they are the front line MH staff who are expected to deal with mental health crises. Clinical staff cannot enter the building that houses the BHU without radioing a control officer who remotely unlocks the doors. Once inside the building, they must again be electronically passed by the tower officer through locked gates to reach the cell tiers. They are thus unable to see or hear what is happening on the unit during large parts of their workdays when they do an ever-expanding amount of paperwork in their remote office cubicles.

### **b) Confidentiality**

Another problem related to the limitations of the physical layout of the unit is that there is no confidential space in which MH staff can meet or speak with BHU prisoners. This means that prisoners who are in crisis must discuss their problems within earshot of officers and/or other prisoners. The lack of a confidential space exacerbates the prevalent fears among BHU prisoners that officers and other prisoners are conspiring against them. A number of the prisoners we spoke to reported an understandable fear that officers would use their confidential mental health information to tease or extort them.

### c) Staffing

QMHPs and other MH staff told us consistently that there were not enough of them to respond to full blown crises, let alone act proactively to recognize and defuse escalating situations. Current rules require that all BHU prisoners are transported by two officers. Most are also required to be tethered (hands cuffed behind their backs and attached to a kind of leash) and additionally controlled by a third officer before they can be moved out of their cells. There are many times when the number of officers on the unit is simply not adequate to escort prisoners to scheduled activities. For instance, (and as discussed elsewhere in this report,) ODOC has explained to us that it is physically impossible to escort every BHU prisoner to scheduled showers and rec periods and that the maximum number of showers available on any given day is twelve. The problem is presumably worse when there is a crisis that creates additional demands for escorts.

Lower staffing levels at night and over the weekends<sup>22</sup> means that prisoners who experience MH crises during those periods are not seen by MH staff in time to defuse problems that then escalate into cell extractions or other incidents of force. One of the few long-term mental health clinicians on the BHU reported a belief that violence-prone officers seek out a weekend schedule so that they can control the unit with less interference from clinical staff.

## 2. Balance of power

*“If you protest about CO treatment of inmates, you can wait for 30 minutes in the rain to get into the unit. It’s a hostile work environment.” - BHU Clinician*

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<sup>22</sup> No MH staff member is scheduled to be on duty between 8:30 pm and 6:30 am on any day of the week. On weekdays and depending on the time of day, one or two of the four QMHPs who cover the BHU is on duty. Individual 9 and 10 hour shifts start as early as 6:30 am and end between 5 p.m. and 8 p.m. The BHU’s prescribing provider is available three days a week between 10 a.m. and 8:30 p.m.. The MH unit director is on duty between 7:30 a.m. and 4 p.m. on weekdays. A contractor who teaches DBT skills is in the BHU on two weekdays from 7 a.m. to 5 p.m. and 7 a.m. to 8 p.m.

An unhealthy shift in the balance of power between correctional staff and mental health staff was one of the primary concerns raised by the individuals who triggered our investigation. Nearly all of the staff and prisoners we spoke to during the course of our investigation saw changes in the balance of power between security and treatment perspectives as a strong and troubling factor in the overall operation and culture of the unit. We encountered a wide spectrum of opinions about how, when, or why this balance had shifted; but there was broad agreement that it had indeed shifted. There was also broad agreement that security and correctional concerns had become the dominant drivers of practices at the BHU and that this was a change from earlier times when treatment issues played a more substantive role.

One result of the architectural deficiencies and staffing constraints described above is that security staff have become gatekeepers; they control clinical staff's access to their clients. One clinician told us that his supervisor had warned: "Don't upset security. If you do, you can't do your job."

**a) "Slow-Playing"**

A number of current and past MH staff reported to us that security staff purposely impeded access to their clients as a way to communicate their authority. One clinician described the implicit message of correctional staff to the mental health staff as "you are guests and you are lucky to even be here," and "if you want some cooperation and get let in doors or get to see your people, you should not be speaking up about this sort of thing."

Mental health staff reported that their requests to have clients brought to appointments were often met with a series of excuses such as "we don't have a second officer," or "he was acting out today." MH staff believe that officers employ stalling tactics and excuses when they are unhappy about complaints by clinical staff or perceive clinical staff as too soft-hearted. Another clinician reported that officers have slowly (and intentionally) increased the duration of daily count and meal periods as a way to decrease the amount of time during which patients can be seen for

treatment needs. The prevalence of this sort of activity by officers was such that the MH staff have adopted the term “slow-playing” as a universally understood and short-hand way of referring to it.

**b) Security staff dominate treatment team decisions**

Clinical staff consistently complained that security concerns were given precedence at treatment team meetings. Clinical input was sometimes ignored or suppressed. It was more often the case, however, that treatment concerns were given a polite hearing before being subordinated to the concerns of the correctional staff. Several past or present members of the BHU MH staff told us that this change in the power dynamics of the unit’s operation created an atmosphere in which they became reluctant to express their true feelings. Every member of MH staff who spoke with us clearly understood the risks of working in a prison with dangerous individuals and considered safety and order first priorities. However, at some point within the last two years, they told us that the reach of those primary security concerns was extended beyond the point where there was any real possibility of individualized treatment decisions or consideration of patients’ clinical needs.

For instance, prisoners in the BHU can theoretically move through a system of graduated privileges as incentives for good behavior and progress in treatment. One of the primary privileges that is awarded once a prisoner has graduated from levels A and B to C, is “day room.” Day room privileges entitle a prisoner to stand in front of his cell, walk on the tier, or sit in a plastic chair outside of his cell for one hour per week. Entitlement to this minimal luxury is a frequent point of contention between security and clinical staff. Clinical staff reported invariable pushback from officers regarding moving prisoners through the level system and noted that even when officers consented to a level C designation, they often successfully objected to the “day room” privilege that should have accompanied that transition.

Another example that was raised by both prisoners and MH staff was a decision to prohibit anyone housed in Section 2 from possessing batteries. This change was adopted after a Section 2 prisoner was able start a fire in

his cell with a battery. Without batteries, prisoners cannot listen to music or hear the audio feed of the TV that some had previously watched for eight or more hours a day. The loss of TV and music had real impact on the already precarious mental health of many BHU prisoners who use them to help drown out internal voices that are common symptoms of some forms of mental illness (e.g. bi polar disorder and many forms of schizophrenia). An ODOC psychiatrist made the same point to us by stating that “the worst thing you could do to a psychotic person is have TV with no sound.” The unit’s MH staff saw the decision to remove all batteries from the entire section as an unnecessarily harsh solution that caused new problems. They believed that battery problem could be addressed by other means with little risk of another fire, but were overruled by security staff with little concern for the problems that this action would create for the most troubled prisoners in the BHU.

Finally, clinical staff no longer have a role in determining the level of restraint and supervision that a particular prisoner requires when out of his cell. During the earlier history of the BHU, treatment teams made these decisions on an individualized basis. After security staff assumed increased control over the operation of the unit, clinical staff lost any power to raise individual circumstances and treatment needs when determining the level of security during escort. Now, the majority of BHU prisoners (those with A or B security designations) are required to be cuffed, tethered, and escorted by a three-person team of officers whenever they are moved out of their cells. The tethers and three-person escort teams are humiliating and impair an individual’s ability to envision any potential for normal human interactions.<sup>23</sup>

### **3. Corrections Officers lack the tools to handle mental health crises**

In the absence of a consistent clinical staff presence on the unit, the BHU’s primary strategy for responding to mental health crises depends on the decisions of corrections officers who rely on a limited set of security tools.

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<sup>23</sup> The impact of these requirements on access to care is discussed elsewhere in this report.

That strategy is in stark contrast to the verbal de-escalation strategies that are now widely recognized as more effective interventions to ensure safety while avoiding potentially traumatizing forms of restraint. In the BHU, crisis intervention still means riot gear, tasers, pepper spray, and a restraint chair.



## **E. A culture of violence and retaliation**

*"I don't give a f\*\*k. Just shut up. I'm not here to serve you man. Shut up and do your time."* - BHU Correction Officer (as reported by a prisoner)

*"Every time. They tell you if you don't take your meds, we're gonna' suit up, tase you, mace you, take away your property, and then put you back in your room butt naked."*- BHU Prisoner

Our investigation revealed consistent evidence that prisoners in the unit are routinely subjected to physical and psychological violence by correctional staff. In some instances, these measures were employed to reduce what seemed to be relatively remote risks. In others, it seemed that excessive force and forms of psychological torment were used by correctional staff to repay prisoners for what the officers saw as unnecessary work and/or threats to their own safety and dignity. We also saw convincing evidence that some BHU officers had become adept at using procedures that were designed to protect prisoners (such as suicide prevention precautions) as implements of punishment and retaliation.

The question of how much force can be legitimately deployed against prisoners in the BHU is not a simple one. Although the unit houses prisoners with serious mental illness who need and are entitled to humane conditions and treatment, it is also true that many BHU prisoners have committed violent acts before and during their incarceration. Sometimes force is required to prevent a prisoner from harming himself or someone else.

That said, we discovered that force is the default response to many recurring problem behaviors in the BHU. The violent culture of the unit allows and promotes physical and psychological force in response to minimal or contrived provocations by mentally ill prisoners. It disguises subtle forms of retaliation and verbal aggression as accountability and is so pervasive and consistent that it has engendered a specialized vocabulary that is shared by everyone who lives or works there. Specialized rituals, rules, and language have evolved to trigger and describe violence against

the prisoners who live in the BHU. For example, BHU prisoners who are unable to elicit a timely response to requests for MH attention have been taught that they can achieve that objective through a variety of actions that have been described elsewhere in this report. They can “sheet up” their cells by covering them with bedding; refuse a direct order (e.g. refuse to pass back a food tray through the cell slot); refuse to take ordered medications; directly harm themselves enough to require medical attention; throw bodily fluids at an officer, state a desire to commit suicide, or “pop a sprinkler.” Almost every recorded use of force that we reviewed began with a refusal to “back up to the cuff port and submit to restraints.”

Any of these actions produces a reaction by correctional staff, usually a “suit up” in which a team of 4-6 officers comes to a prisoner’s cell to threaten and/or use force to remove the prisoner from his cell. This sort of scenario allows prisoners to force a response by their jailers, but at an obvious and high cost that many BHU prisoners seem willing to accept. This prisoner-triggered suit up process therefore threatens to reverse the power dynamic of guard and prisoner, unless the officers can further elevate the cost to the prisoner who has forced them to act in response to his demands. The officers who are required to man these suit-up teams are undoubtedly and understandably frustrated at the inconvenience and demands of the process. It is therefore perhaps no surprise that various hidden forms of retaliation against prisoners often follow these incidents. The ability of frustrated officers to use excessive force is theoretically limited because the suit-ups are videotaped, but we have learned that the prison environment provides almost limitless ways for officers to exact a price for challenging their control.<sup>24</sup>

The videotapes of cell extractions and related planned use of force incidents are, just like the actions of the prisoners who are their subjects, heavily ritualized. The tapes begin with on-camera jargon-laced explanations of the reason for the suit-up (e.g. “inmate X is refusing a direct order to submit to restraints,”) a statement on whether use of the taser or

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<sup>24</sup> We learned that these videotapes are not reviewed by mental health staff. None of the MH staff we spoke with had seen one, although all agreed that joint security/mental health staff review would be a good idea.

OC spray (another name for pepper spray) has been authorized, and introductions of each team member that resemble the pre-game portion of an NFL football game. The officers are dressed in face shields, black riot gear, plastic gloves, and towels that are wrapped around their necks and stuffed into a semi-rigid vest. They wear full gas masks when there is a possibility of using OC spray.<sup>25</sup>

Due to the regularity of these events, both officers and prisoners seem to accept the use of tasers and OC spray as routine precursors to cell extractions. In the videos we reviewed, tasers were used both prior to entry and during the time that the team worked to apply restraints.<sup>26</sup> Despite violence and risk suggested by the gear and weapons, the tone of the videos is flat and mundane. They consistently convey a sense that each of the incidents we saw was a type of event that had become a routine part of life for BHU correctional staff and prisoners. In fact, in one of the videos we reviewed, another cell extraction can be heard occurring simultaneously. BHU prisoners have actually developed a practice of counting to track the number of seconds that they can hear the clicking of a taser or the hiss of OC spray. They keep records.

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<sup>25</sup> The teams typically include one CO who is responsible for each of the following duties: restraints, taser or OC spray, shield, control 1, and control 2. The shield is a torso-sized rectangular plastic shield with two handles that is used as a sort of battering ram as the team enters a cell. The shield officer pushes a prisoner backwards into a wall or onto the floor with his own weight and that of others behind him if necessary. In this way, a prisoner is flattened against a hard surface and so left unable to extend arms to strike at the team. Control officers follow to quickly grab and hold the arms and legs of prisoners after they are flattened or knocked down by the shield. The restraint officer then puts on handcuffs and/or shackles.

<sup>26</sup> OC spray was used only before entry to reduce its secondary effect on the extraction team.

### **Case Study: Ryan Hays**

The videotape of “Ryan Hays” forced removal from his cell is a good example of the BHU culture. The videotaped explanation for the July 2014 planned use of force against Mr. Hays is that he has refused to leave his cell to be electronically scanned for weapons or contraband that might be hidden in his body. The scanning procedure is effected by placing a prisoner in a \$9,700 apparatus called a BOSS chair that resembles a large boxy throne. The leader of the extraction team explains that all prisoners who are placed in Section 2 are scanned in the BOSS chair, a requirement that had been purportedly delayed for Mr. Hays because “he had become agitated.”

Rather than consent to restraints for a second time in one day, Mr. Hays “sheeted up” his cell to force a suit-up. However, when the team arrived, he agreed to pull down his mattress and submit to restraints, but only at the last possible moment as the red dot of the taser guide light was visible on his body. The tape makes it clear that he has forced the suit up and successfully removed any justification for using the taser. He is laughing, and his pleasure at having achieved this result is evident.

As the incident continues, the audio description of the camera operator notes that “inmate is beginning to resist,” as Mr. Hays is being cuffed through the slot in his Lexan™ covered cell. Despite many viewings of the tape, we can see no sign of resistance by Mr. Hays. His expression is calm, his shoulders are relaxed and his hands are invisible behind the bodies of the officers. Nevertheless, as soon as he clears the cell door and is within reach of the team members gathered around the door, he is immediately slammed to the floor by someone who grabs his head and pushes down hard. His body is then obscured by the bodies of the officers who repeat “stop resisting” over and over until he is brought up to his knees and his head is covered with a spit sock.

Mr. Hays is then placed on the BOSS chair and finally returned to his cell, still naked except for the spit sock over his head. The tape resumes when

the team leader reviews the incident in the hallway and confirms that no one was injured. He explains that Mr. Hays “was getting a little frisky and has really long fingernails” before “he started resisting and assumed a fighting stance and we took him to the ground.”

Nearly every incident that we heard about from BHU prisoners or were subsequently able to review contained similar vignettes during which multiple officers yelled at immobilized prisoners to stop resisting while they (the prisoners) were under a swarm of armored bodies and/or a plastic shield designed to pin them to the floor.

## **1. Suicide Precautions have become a form of punishment in the BHU**

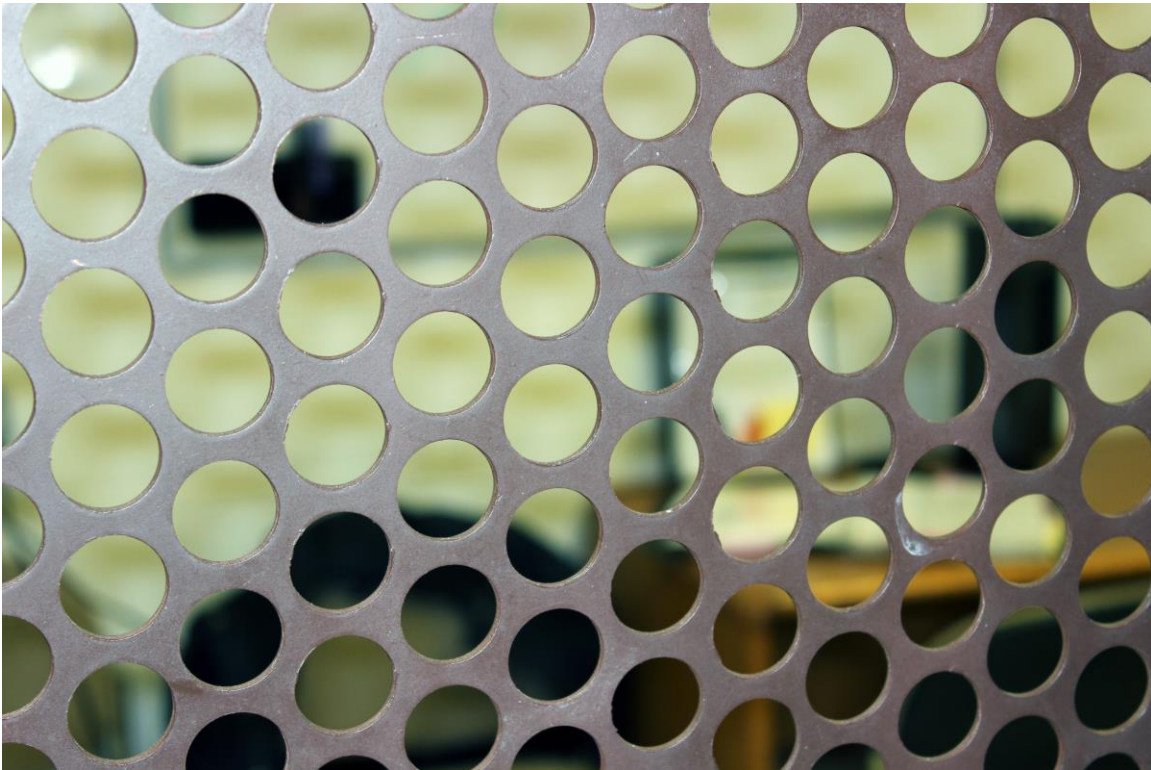
The correctional officers have developed other ritualized actions that are used to “educate” prisoners about the cost of continually requesting MH attention or showing disrespect for their authority over every aspect of life in the BHU. One of those tools is the punitive use of suicide precautions. Although suicide prevention precautions on the BHU were presumably crafted to ensure the safety of prisoners, those “protections” now strongly resemble other forms of deprivation that are imposed on prisoners for disciplinary reasons.

ODOC rules require officers and mental health staff to implement precautions if a prisoner presents a risk of suicide.<sup>27</sup> These precautions require removal of items that “pose a threat to self-harm. . . based on the instruction from a mental health provider or a registered nurse . . . in consultation with a mental health provider.” In the BHU, that assessment has been replaced by a near universal removal of all items regardless of their potential to be harmful. Our review indicates that BHU security does not consult in a meaningful way with mental health staff about whether particular items could pose a danger. Instead, they generally deprive a prisoner on suicide watch of clothing, bedding and all personal belongings

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<sup>27</sup> Suicide Watch is for high risk situations and requires constant monitoring. Suicide Close Observation (SCO) is for moderate risks and requires observation at least every 15 minutes. OAR 291-076-0030.

including items such photographs and letters from family. He is then issued a Teflon® smock and a Teflon® blanket. Mattresses are frequently removed as well. Reports by staff and prisoners and review of seven individual medical records confirm that this extreme and unthinking level of deprivation is the norm in the BHU and that BHU prisoners view it as punishment.



**View from inside cell in education room  
Photo © Oregon Department of Corrections**

Our investigation also revealed that suicide restrictions are sometimes imposed where there is no suspected risk of suicide. Several current and former BHU mental health counselors reported to DRO that security staff have pressured clinicians to impose Suicide Close Observation (SCO) as a consequence for prisoner behavior that inconveniences security. One counselor said that MH staff would benefit from “coaching” about how to explain to security officers that SCO should not be used as a punishment. Another clinician reported that pressure to use suicide watch punitively was “the final straw” that prompted a decision to seek another job out of the BHU. This occurred when the clinician was able to successfully calm

down a prisoner experiencing a mental health crisis so that the prisoner no longer presented a risk of suicide or self-harm. Nevertheless, the officer who had brought the prisoner to the clinician insisted that the clinician place the prisoner on suicide watch. The officer told the clinician that if this did not happen, the prisoner would receive a “write up” for a disciplinary infraction. The clear implication was that the prisoner’s behavior had inconvenienced the officer and would therefore have to result in a consequence.

## **2. Forced medications**

*“They do shots on Monday and Friday and meds by pill every day. When they come to do shots, it’s a goon squad. A lady comes around. ‘You’re not going to take meds? OK, I’m going to make you. If you don’t take your meds we’re going to come back and taser you.’ This happens all the time.” - BHU Prisoner*

The Department of Corrections has adopted an administrative process that (after receiving a second opinion and offering an opportunity for a hearing) allows a treating psychiatrist to place a patient on an involuntary medication order.<sup>28</sup> Under such an order, ODOC staff can use force to compel the prisoner to take medications. The prisoners we interviewed, however, reported a disturbing degree of violence used in administering forced medications. It is a common practice in the BHU to taser or pepper spray a “non-compliant patient,” drag him onto the tier or into a hallway and pull down his pants so that a shot can be administered. On at least one occasion, this was done to a prisoner who was determined to be “refusing medications” while he was asleep or too medicated to respond.

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<sup>28</sup> OAR 291-064-0070 through OAR 291-064-0140.

## **Case Study: Caleb Freeman**

“Caleb Freeman” was transferred to the BHU in 2011 and has been there with the exception of brief periods in the Mental Health Infirmary (MHI) and Disciplinary Segregation Unit (DSU) ever since. Like most BHU prisoners, Mr. Freeman has taken a number of medications to control symptoms of mental illness for the entire time he has been in the unit.

During the two times that we spoke with Mr. Freeman, he seemed groggy and confused and his hair and clothing were littered with tiny gray bits of bedding or paper. He recalled an incident during which he had been tased and extracted from his cell by a riot-suited security team. He could not clearly remember whether he had been sleeping or was partially asleep with a blanket over his head when this happened, but he did tell us that he spent most of his days with his head under a blanket to partially block out the constant noise and chaos that is life in the BHU. (This was also how we found him at about 10 a.m. on the first morning that we spoke to him during a tier walk and how other prisoners described him to us.)

When trying to describe an incident that occurred in the fall of 2013,<sup>29</sup> Mr. Freeman remembered only that he was startled by what turned out to be a taser strike while under his blanket. He could not recall many details other than someone may have said “time for a shot,” although he was not able to be sure that this did not occur during some other incident. He remembers falling off of his bed and being crushed under the shield and the weight of an unknown number of officers. The taser did not hurt him badly (it apparently did not fully penetrate his blanket to embed in his skin), but it did startle and frighten him awake. He remembers that officers kept yelling “Stop Resisting” while he repeated that he was not resisting. They eventually flipped him over on his stomach and he was choked from behind until lifted and walked out onto tier where he got a shot and was then returned to his cell.

An ODOC video tracks well with Mr. Freeman’s unsure account in most

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<sup>29</sup> Mr. Freeman, like many BHU prisoners, finds it very difficult to accurately remember when events occurred, but his records clarified the timing of the incident that he described to us.



respects. The extraction team leader's explanation of the reason for assembling the team fails to note whether Mr. Freeman had actively refused medication or simply failed to respond to commands while in the sort of stupor that appears to be his usual state. Instead, the team leader stated that "the Inmate is refusing to submit to restraints to receive his involuntary medication injection," that health service had been notified and were on scene to administer an injection, and that the team had received authorization to use a taser.

The video shows clearly that Mr. Freeman was wrapped tightly in a blanket with his head scrunched underneath it when the team arrived at his cell. There was no sign that he was awake or aware of his surroundings while one of the team members opened the cuff port and repeated loudly through it, "You will be tased if you do not back up to the port and submit to restraints." The laser guide light of the taser fell on the blanket at approximately Mr. Freeman's neck or shoulder, and the discharge of the taser cartridge was audible as he yelled and rolled back and forth before falling off his mattress. Taser clicking sounds indicated that it was discharged for about seven seconds while Mr. Freeman was crushed against the floor and officers yelled, "Stop resisting, or you'll get it again." His response is not clear enough to make out. The officers then asked for the shield to be removed from Mr. Freeman's chest so that they could get at his arms.

After being taken out of his cell, his pants were pulled down and he was given a shot in the buttock. Another nearby laughing prisoner can be heard cackling that, "I thought there wasn't gonna be a full moon today." During this incident, officers from another cell extraction team elsewhere on the tier can be heard yelling to another prisoner that, "You will be tased if you do not submit to restraints."

Medical records suggest that Mr. Freeman's bouts of agitation, psychosis, and lethargy may have well been the result of overmedication. For much of the time he has been in the BHU, Mr. Freeman's medications have included

varying dosages of as many as eight powerful psychotropic medications at a time.<sup>30</sup>

That theory is supported by records that show Mr. Freeman's mental health and behavior both deteriorated following the 2013 incident. Records from approximately one month later indicate that he had expressed a desire to hit his head on the wall and was claiming that "he is God, able to breathe fire, read minds." The acuity level of his mental illness was raised to severe. He stopped showering or cleaning anything in his cell. By February of 2014, Mr. Freeman was described as lethargic and it was noted that he slept underneath a blanket for much of every day.

### **3. Retaliation**

Prisoners reported to us that a handful of BHU officers have found a myriad of ways to punish prisoners who are seen as litigious or troublesome. One prisoner reported that his complaints about an officer resulted in threats to put him in the rec yard with another prisoner who was widely known to be extremely dangerous. Another reported that his hand was pinned in the cuff-port while an officer repeatedly smashed his fingers with his shield because he (the prisoner) had complained about the unfair confiscation of his coffee stash. That assault was confirmed by two neighboring prisoners. Others complained that officers would "sneak by" their cells during early morning rounds to deny shower opportunities. Frequent and unjustified searches of cells were cited as another retaliatory tool.

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<sup>30</sup> For instance, records indicate that on 3/6/14, Mr. Freeman's medication regimen included Prolixin, Geodon, Paxil, Trazadone, Amitriptyline, Tegretol, Propanalol, and Benadryl. In the period surrounding the 9/27/13 incident, he was receiving Prolixin, Geodon, Zyprexa, Celexa, Thorazine, Lithium, Propanalol, and Benadryl. Some of these may be unsafe when taken in combination.

### **Case Study: Franklin Smith**

“Franklin Smith’s” story illustrates how hidden forms of retaliation can set the stage for escalation and excessive force. Records indicate that Mr. Smith was housed in a number of locations in OSP since his arrival there in early 2009 and that he lived in the BHU continuously between September 2013 and early 2015.<sup>31</sup> BHU mental health staff described him as highly impacted by the conditions there, writing that he reported hearing voices behind the walls of his cell and that he was particularly troubled by the Lexan™ covering his cell front. Mr. Smith dealt with his angst at the BHU conditions by persistently filing complaints.

According to Mr. Smith, one of the COs who had been a subject of his complaints had repeatedly punished him in a number of unofficial ways that included scrambling his meals. This was accomplished by turning his plastic-wrapped covered food trays upside down and shaking them so that the food in the divided compartments would mix together into a disgusting mess. The officer would then smile, turn the tray right side up, and slide his work through the slot of the cell.

Records indicate that by May 27, 2014, the day of the incident, Mr. Smith had been complaining about this problem for more than a month. When he received another scrambled meal on that day, he broke from the usual sequence of events and refused to slide the tray containing his ruined meal back through the slot at the end of mealtime. Mr. Smith said he would not return his tray until the lieutenant came to the cell to see what had been done to his meal. Following a number of direct orders to return the tray, an extraction team was assembled to remove the Mr. Smith from his cell and recover the tray.

As was the case in each of the videotaped incidents that we viewed, the team leader’s explanation of the reason for the cell extraction is extremely brief and does not refer to any of the setting events or history behind Mr.

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<sup>31</sup> Mr. Smith was transferred to another ODOC prison a few months after we began our investigation.

Smith's final refusal to obey an order: "This will be a forced move with force authorized after inmate refused a direct order to back up and submit to cuffs for a move to cell 10."

The video records Mr. Smith telling the team leader that he was willing to return his tray and would do so as soon as the lieutenant came to see what had been done to his food. He can also be heard to say that he did not want to be forcibly extracted by the seven-man team that was at his cell for that purpose, but was resigned to that outcome. He states:

"I understand that the taser will be deployed and would love to back up as soon as the lieutenant comes and looks at this tray. As soon as that happens I'll back up and cuff up. I would love to cuff up. I'm a 52 year old fat man with injuries. I don't want this."

He ends by saying "Do what you gotta do." He then raises his mattress as a temporary shield against the taser barbs that are coming. The door is opened and Mr. Smith is instantly smashed into the back wall of the cell by the shield and then dropped to the floor. He is then under a pile of bodies and is presumably grabbed by the control officers. Although it is hard to see much of what is happening on the floor, the video records multiple CO commands to "Stop Resisting." During this time, the almost continuous clicking of a taser is heard for approximately 40 seconds.

Mr. Smith eventually is heard to say, "I stopped. What do you want me to do?" As he is led out of his cell, he can be heard yelling to a neighbor to find out how long he "rode the lightning." His neighbor reports that his 40-second ride was the record.

During the ensuing minutes, Mr. Smith is taken to hallway, stripped naked and placed face down on the floor. He is cursorily examined by a nurse who asks him if he's OK while the taser barbs are removed. His obesity and obvious poor physical condition require him to be assisted to sit up when he is ordered to do so. The casual tone of conversation between a man who had just been tased for the better part of a minute before being crushed to the floor by a squad of heavily armored men confirms that the BHU has become a place in which force and violence are the accepted and

expected responses to any non-conforming behavior.

The Unusual Incident Report (UIR) that documents the incident notes that Mr. Smith was charged \$22.95 for the cost of the taser cartridge, \$12.00 for a pair of red shorts, and \$1.01 for the underwear that officers cut from his body.<sup>32</sup>

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<sup>32</sup> See Appendix, Exhibit 3.

## IV. CONCLUSION

Our investigation revealed that the BHU may have once provided constitutionally adequate mental health care for the seriously mental ill prisoners who live there, but that it no longer does. For some time, BHU prisoners have not been provided with any practical possibility of being out of their cells for more than one hour a day. They are thus forced to live in solitary confinement for months or years without adequate access to the care that would allow them to avoid repeated cycles of psychological isolation, decompensation, and punishment. Those repeated cycles endanger everyone who lives or works in the unit.

Although the causal history of this state of affairs may be quite complex, our investigation made it clear to us that three interrelated and fundamental elements drive avoidable cycles of punishment and psychological decompensations in the BHU. They are:

1. **Excessive isolation,**
2. **Inadequate access to timely mental health care, and**
3. **A pervasive culture of violence and retribution that exacerbates the harm of the inadequate access to mental health care and isolation.**

The reasons for these problems are beyond the scope of our investigation, although they may be relevant in discussions about how to return the BHU to its original mission. DRO has begun those discussions with ODOC and we remain hopeful that further negotiations will be productive for all concerned parties. We believe that our investigation has contributed to that process by exposing and confirming serious problems that must be solved if the BHU is to serve a useful purpose. To reach that result, ODOC will need to implement the following reforms:

BHU prisoners must be allowed to spend more hours out of their cells in an environment where they can relate to other human beings face to face.

The BHU must be reconfigured (or moved to a new building) to ensure that mental health professionals are on site with the capacity to see prisoners proactively, confidentially, and as needed.

Finally, the BHU's operating culture must be rebalanced to end the routine use of unnecessary force and retaliation against prisoners with serious mental illness. This can only be accomplished if therapeutic concerns are permanently accorded a significant role in decisions about prisoner care and conditions in the BHU.

## **V. OTHER ISSUES**

Our investigation revealed a number of concerns that are beyond its scope. Those issues suggest the need for additional investigation by DRO, ODOC, or another entity. They are:

### **A. Minimal cooperation between MH staff and medical staff in the BHU and other special housing units.**

We learned about several cases in which serious written and oral reports of medical concerns about a BHU prisoner were brushed off by medical staff. One clinician reported that her requests for medical attention for BHU prisoners invariably produced little or no medical response beyond notes indicating that each of the prisoners had refused treatment. Medical staff take the position that MH clinicians should not be concerned with medical problems and should leave the diagnosis and treatment of medical problems to the medical staff. Multiple sources reported to us that in at least one case, a prisoner died because a mental health clinician was unable to convince medical staff of the need to examine and treat the prisoner's deteriorating physical condition. These alarms were ignored for approximately four months before medical staff finally realized the seriousness of the situation and ordered hospitalization. The prisoner died within hours of reaching the hospital.

### **B. Poorly trained nurses in special housing units**

Clinicians reported to us that the nurses who are assigned to BHU and other special housing units have minimal expertise in the care and treatment of individuals with serious mental illness. This problem is compounded by a rotation system that moves nurses out of the BHU before they are able to develop specialized knowledge and skills needed for the effective treatment of individuals with serious mental illness. A mental health provider who treats special housing prisoners told us that she cannot use normal prescribing protocols (such as an "as needed" or "PRN" order) because the nurses who are responsible for administering medications are not able to understand or make basic decisions about



dosage. This means that prescriptions continue to be administered even when there are obvious signs of dosage or side effect problems.

### **C. Important services and opportunities that are available elsewhere in the prison are not available in the BHU.**

We spoke to a BHU prisoner who speaks Spanish and very limited English. He has not been provided an interpreter or language-appropriate services. This means that he cannot understand DBT discussions or written materials, and therefore cannot complete the program to access a higher level of privileges or improve his deteriorating mental health. He is similarly unable to benefit from meetings with his doctor or counselor who do not speak Spanish.

Legal research is an important prisoner activity throughout the prison and prisoners in general population normally have access to a law library. Legal research in the BHU is available for only one prisoner at a time and scheduled appointments are often cancelled because of inadequate staffing for escorts. When BHU prisoners are able to do legal research, it is in a tiny room where they have to ask an officer to print requested materials and hand them through a slot.

### **D. Confidentiality**

Officers who sometimes bear ill will toward individual BHU prisoners frequently participate in treatment team meetings where they learn confidential information that can then be used to retaliate against those prisoners. Similarly, multiple MH providers told us that the cramped space of the BHU means that officers who are not part of a meeting can easily overhear treatment team discussions. It should be noted that these



**BHU staff office**  
**Photo © Oregon Department of**  
**Corrections**

meetings can involve discussions of topics such as known triggers of anger or details of sexual history. More than one BHU prisoner reported to us that confidential information about his psychological condition and history had been used against him by an officer. Even if these beliefs are inaccurate, there is little attention paid to the issue of confidentiality in the BHU and it appears that no one has weighed the benefits of openly shared clinical information and its potential for harm.

APPENDIX

BHU REC LOG

6/4/2014

Cell	Name	SID	Level	Clip	Raz	Shr	Yard #1	Yard #2	Comments	Init.
<del>B81</del>			C	2	2	2	2	2	RA / CI- DSU	
<del>B82</del>			B	2	2	2	2	2	Ad-Seg From SRCI	
<del>B83</del>			B	2	2	2	2	2	RA	
<del>B84</del>			B	2	2	2	2	2	RA	
<del>B85</del>			C	2	2	2	2	2	DSU SO	
<del>B86</del>			C	2	2	2	2	2	DSU SO	
<del>B87</del>			C	2	2	2	2	2	SG / DSU	
<del>B88</del>			B	2	2	2	2	2	RA	
B25										
<del>B26</del>			B	2	2	2	2	2	Ad hold SO	
B27										
<del>B28</del>			B	2	2	2	2	2	From EOCI	
<del>B29</del>			C	2	2	2	2	2	RA DSU	
<del>B30</del>			B	2	2	2	2	2	FROM DSU	
B31										
<del>B82</del>			IMU3	2	2	2	2	2	IMU	
<del>B89</del>			B	2	2	2	2	2	SO	
<del>B90</del>			A-1	2	2	2	2	2	DSU	
<del>B91</del>			A-2	2	2	2	2	2		
<del>B92</del>			A-2	2	2	2	2	2		
<del>B93</del>			A-1	2	2	2	2	2	SO	
<del>B94</del>			A-1	2	2	2	2	2	DSU until 08/27/14	
B15									SO	
<del>B96</del>			B	2	2	2	2	2	From EOCI	
B33										
<del>B34</del>			IMU	2	2	2	2	2	IMU FROM SRCI	
<del>B35</del>			IMU	2	2	2	2	2	SO	
B36										
<del>B37</del>			IMU	2	2	2	2	2	IMU FROM SRCI	
B38										
<del>B39</del>			B	2	2	2	2	2	RA	
B40										
<del>B41</del>			B	2	2	2	2	2		

Exhibit 1

**APPENDIX**

**BHU REC LOG**

6/4/2014

Cell	Name	SID	Level	Clip	Raz	Shr	Yard #1	Yard #2	Comments	Init.
<del>B17</del>	[REDACTED]	[REDACTED]	B	2	<del>2</del>	2	2	2	C1	[Signature]
<del>B18</del>	[REDACTED]	[REDACTED]	B	2	2	2	2	2	B2	[Signature]
<del>B19</del>	[REDACTED]	[REDACTED]	C	2	2	2	2	2	B2	[Signature]
<del>B20</del>	[REDACTED]	[REDACTED]	B	2	2	2	2	2	B1	[Signature]
B21										
<del>B22</del>	[REDACTED]	[REDACTED]	C	2	2	2	2	2	B1	[Signature]
<del>B23</del>	[REDACTED]	[REDACTED]	B	2	2	2	2	2	B2	[Signature]
B24										
<del>B25</del>	[REDACTED]	[REDACTED]	C	2	2	2	2	2	B1	[Signature]
<del>B26</del>	[REDACTED]	[REDACTED]	B	2	<del>2</del>	<del>2</del>	2	2	B1	[Signature]
<del>B27</del>	[REDACTED]	[REDACTED]	C	2	2	2	2	<del>2</del>		[Signature]
<del>B28</del>	[REDACTED]	[REDACTED]	B	2	2	2	2	<del>2</del>		[Signature]
<del>B29</del>	[REDACTED]	[REDACTED]	B	2	2	2	2	2	B2 IMU BHU inmate	[Signature]
<del>B30</del>	[REDACTED]	[REDACTED]	B	2	2	2	2	2	B1	[Signature]
<del>B31</del>	[REDACTED]	[REDACTED]	C	2	2	2	2	2	B1	[Signature]
<del>B32</del>	[REDACTED]	[REDACTED]	C	2	2	<del>2</del>	2	2	B1	[Signature]

**Exhibit 1**

# APPENDIX

## BHU REC LOG

4/12/2014

Cell	Name	SID	Level	Clip	Raz	Shr	Yard #1	Yard #2	Comments	Init.
B01										
B02			C			R	R	R		
B03			C			I/O	R	R		
B04			B				R			
B05			C			I/O	R	R		
B06			C			I/O	R	R	Rec with Cross	
B07			B			R	R	R		
B08										
B25										
B26										
B27			B			I/O	610/635	R		
B28			C				CELL 10	—		
B29			C				CELL 10	—		
B30			C				CELL 10	—	Rec with Johnson	
B31										
B32			IMU3			I/O	645/730	—	IMU	
B09										
B10			A-1			R	R	—		
B11			A-1			R	R	—	4/6/2014	
B12			A-2			R	R	—	From EOCI	
B13			B			R	R	—		
B14			A-2			R	—	—		
B15			A-1			R	—	—		
B16			A-1			R	—	—		
B33										
B34										
B35										
B36										
B37			A-1			R	—	—	IMU BHU inmate	
B38										
B39										
B40										
B41			B			R	R	R		

### Exhibit 2

# APPENDIX

## BHU REC LOG

4/12/2014

Cell	Name	SID	Level	Clip	Raz	Shr	Yard #1	Yard #2	Comments	Init.
B17			B				R	710 / 750		
B18			C				R	R		
B19			C				R	R		
B20										
B21			B				R	R		
B22										
B23			B				R	R		
B24										
B42			C				R	R		
B43			A-1				R	R	Ad hold	
B44			B				R	R		
B45			B				R	R		
B46			B				R	R	FROM DSU	
B47			B				R	R		
B48			C				R	R		
B49			C				R	R		

### Exhibit 2

APPENDIX

Misconduct Report Price List  
6/29/2012

Clothing	Cost	Clothing	Cost	De-Con	Cost	Housing	Cost
T-Shirt (1X)	3.81	Coat (1X)	30.77	Gloves, pair	.14	Elect. Outlet	5.39
T-Shirt (2X)	4.55	Coat (2X)	32.47	Red Bag (sm)	.14	Toilet Brush	1.50
T-Shirt (3X)	5.37	Coat (3X)	32.17	Red Bag (med)	.18	Tier Broom	7.30
T-Shirt (4X)	6.15	Coat (4X)	32.12	Clear Bag (sm)	.14	Blanket	5.49
T-Shirt (5X)	5.87	Coat (5X)	32.19	Clear Bag (lg)	.22	Mattress 24"	123.88
T-Shirt (6X)	5.24	Coat (6X)	32.50	Paper Towel	.05	Mattress 30"	146.36
Dress Shirt (1X)	13.75	Coat (7X)	35.25	Scratch Pad	.76	Sheet	5.64
Dress Shirt (2X)	14.25	Coat (8X)	34.60	Virustat Tbg	.14 oz	Sheet Set	12.92
Dress Shirt (3X)	14.25	Underwear (M)	.78	Enzyme Plus	.14 oz	Pillowcase	1.64
Dress Shirt (4X)	14.25	Underwear (L)	.84	Pine DC	.13 oz	Light Fixture	5.62
Dress Shirt (5X)	15.90	Underwear (1X)	.85	PH Neutral	.10 oz	Mirror	2.50
Sweatshirt (1X)	4.68	Underwear (2X)	.91	Bleach	.40 oz	Bulletin Board	5.07
Sweatshirt (2X)	6.08	Underwear (3X)	1.01	Germicide Handwipes	.07	Storage Drawer	28.50
Sweatshirt (3X)	6.08	Underwear (4X)	1.01			Toilet	349.57
Sweatshirt (4X)	8.58	Socks	.47	<b>Janitorial</b>	<b>Cost</b>	Sink	255.32
Sweatshirt (5X)	8.75	Shoes (6)	3.91	Red Pad	4.10	Sprinkler Head	39.00
Sweatshirt (6X)	8.95	Shoes (7)	3.99	White Pad	4.16	Paint Cell	100.00
Pants (32"-40")	17.50	Shoes (8)	3.99	Natural Pad	4.69	Window Pain 12"	9.00
Pants (42"-48")	20.00	Shoes (9)	4.63	Scrub Pad blue	4.04	Window Pain 17X14"	14.00
Pants (50"-60")	22.50	Shoes (10)	4.80	Strip Pad black	4.15	Window Pain 19x15"	15.00
Red Shorts (M)	8.62	Shoes (11)	4.95	Counter Brush	9.34		
Red Shorts (L)	5.43	Shoes (12)	4.94	Push Broom	9.64		
Red Shorts (1X)	9.64	Shoes (13)	4.93	Broom Handle, tapered	4.33		
Red Shorts (2X)	9.96	Shoes (14)	4.85	Broom Handle, threaded	2.95		
Red Shorts (3X)	10.00	Workboots (6-8)	31.50	Whisk Broom	2.75	<b>Use of Force Tools</b>	
Red Shorts (4X)	12.00	Workboots (9)	31.45	Dust Mop Handle	7.32	MK3 1.5 oz	10.50
		Workboots (10-12)	31.50	Dust Mop Frame 24"	4.48	MK4 3.0 oz	11.50
		Workboots (13)	31.41	Dust Mod Hea 24"	9.41	MK9 16 oz	34.10
		Workboots (14)	28.62	Dust Mop Head 30"	14.93	Deep Freeze	19.95
		Belt	1.60	Wet Mop Handle	7.23	Tazer	22.95
		Stocking Cap	.91	Mop Bucket	54.08		

Miscellaneous	Cost

Exhibit 3



Office of the Inspector General  
U.S. Department of Justice



# The Impact of an Aging Inmate Population on the Federal Bureau of Prisons



# EXECUTIVE SUMMARY

## Introduction

In September 2013, the Federal Bureau of Prisons (BOP) incarcerated 164,566 federal inmates in 119 BOP-managed institutions.<sup>1</sup> According to BOP data, inmates age 50 and older were the fastest growing segment of its inmate population, increasing 25 percent from 24,857 in fiscal year (FY) 2009 to 30,962 in FY 2013.<sup>2</sup> By contrast, during the same period, the population of inmates 49 and younger decreased approximately 1 percent, including an even larger decrease of 29 percent in the youngest inmates (age 29 and younger). Based on BOP cost data, we estimate that the BOP spent approximately \$881 million, or 19 percent of its total budget, to incarcerate aging inmates in FY 2013.<sup>3</sup> The Office of the Inspector General (OIG) conducted this review to assess the aging inmate population's impact on the BOP's inmate management, including costs, health services, staffing, housing, and programming. We also assessed the recidivism of inmates who were age 50 and older at the time of their release.

## Results in Brief

The OIG found that aging inmates are more costly to incarcerate than their younger counterparts due to increased medical needs. We further found that limited institution staff and inadequate staff training affect the BOP's ability to address the needs of aging inmates. The physical infrastructure of BOP institutions also limits the availability of appropriate housing for aging inmates. Further, the BOP does not provide programming opportunities designed specifically to meet the needs of aging inmates. We also determined that aging inmates engage in fewer misconduct incidents while incarcerated and have a lower rate of re-arrest once released; however, BOP policies limit the number of aging inmates who can be considered for early release and, as a result, few are actually released early.

*Aging inmates are more costly to incarcerate, primarily due to their medical needs.* We found that the BOP's aging inmate population contributes to increases in incarceration costs. Aging inmates on average cost 8 percent more per inmate to incarcerate than inmates age 49 and younger (younger inmates). In FY 2013, the average aging inmate cost \$24,538 to incarcerate,

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<sup>1</sup> For this review, we examined sentenced inmates incarcerated in BOP-managed institutions only. We excluded approximately 29,000 inmates who are incarcerated in contract institutions, as well as approximately 14,000 pre-trial inmates.

<sup>2</sup> For the purposes of this review, we define inmates age 50 and older as "aging." For more information, see page 2.

<sup>3</sup> For more information, see Appendix 1.

whereas the average younger inmate cost \$22,676. We found that this cost differential is driven by increased medical needs, including the cost of medication, for aging inmates. BOP institutions with the highest percentages of aging inmates in their population spent five times more per inmate on medical care (\$10,114) than institutions with the lowest percentage of aging inmates (\$1,916). BOP institutions with the highest percentages of aging inmates also spent 14 times more per inmate on medication (\$684) than institutions with the lowest percentage (\$49).

*BOP institutions lack appropriate staffing levels to address the needs of an aging inmate population and provide limited training for this purpose.* Aging inmates often require assistance with activities of daily living, such as dressing and moving around within the institution. However, institution staff is not responsible for ensuring inmates can accomplish these activities. At many institutions, healthy inmates work as companions to aging inmates; but training and oversight of these inmate companions vary among institutions. We further found that the increasing population of aging inmates has resulted in a need for increased trips outside of institutions to address their medical needs but that institutions lack Correctional Officers to staff these trips and have limited medical staff within institutions. As a result, aging inmates experience delays receiving medical care. For example, using BOP data from one institution, we found that the average wait time for inmates, including aging inmates, to be seen by an outside medical specialist for cardiology, neurosurgery, pulmonology, and urology to be 114 days. In addition, we found that while Social Workers are uniquely qualified to address the release preparation needs of aging inmates, such as aftercare planning and ensuring continuity of medical care, the BOP, which employs over 39,000 people, has only 36 Social Workers nationwide for all of its institutions. Institution staff told us they themselves did not receive enough training to identify the signs of aging.

*The physical infrastructure of BOP institutions cannot adequately house aging inmates.* Aging inmates often require lower bunks or handicapped-accessible cells, but overcrowding throughout the BOP system limits these types of living spaces. Aging inmates with limited mobility also encounter difficulties navigating institutions without elevators and with narrow sidewalks or uneven terrain. The BOP has not conducted a nationwide review of the accessibility of its institutions since 1996.

*The BOP does not provide programming opportunities specifically addressing the needs of aging inmates.* BOP programs, which often focus on education and job skills, do not address the needs of aging inmates, many of whom have already obtained an education or do not plan to seek further employment after release. Though BOP institutions can and do design programs, including release preparation programs, to meet the needs of their individual populations, even institutions with high percentages of aging inmates rarely have programs specifically for aging inmates.

*Aging inmates commit less misconduct while incarcerated and have a lower rate of re-arrest once released.* Aging inmates, comprising 19 percent of the BOP's inmate population in FY 2013, represented 10 percent of all the inmate misconduct incidents in that year. Also, studies have concluded that post-release arrests decrease as an individual ages, although BOP does not maintain such data. The OIG conducted a sampling of data and found that 15 percent of aging inmates were re-arrested for a new crime within 3 years of release. Based on our analysis, the rate of recidivism of aging inmates is significantly lower than the 41 percent re-arrest rate that the BOP's research has found for all federal inmates. We further found that most of the aging inmates who were re-arrested already had a documented history of recidivism.

*Aging inmates could be viable candidates for early release, resulting in significant cost savings; but BOP policy strictly limits those who can be considered and, as a result, few have been released.* Over a year ago, the Department concluded that aging inmates are generally less of a public safety threat and the BOP announced an expanded compassionate release policy to include them as part of the Attorney General's "Smart on Crime" initiative. However, the Department significantly limited the number of inmates eligible for this expanded release policy by imposing several eligibility requirements, including that inmates be at least age 65, and we found that only two inmates had been released under this new provision. According to institution staff, it is difficult for aging inmates to meet all of the eligibility requirements of the BOP's new provisions. Our analysis shows that if the BOP reexamined these eligibility requirements its compassionate release program could result in significant cost savings for the BOP, as well as assist in managing the inmate population.

## **Recommendations**

In this report, we make eight recommendations to improve the BOP's management of its aging inmate population. These recommendations include enhancing BOP oversight and training of inmate companions, studying the impact of the aging inmate population on infrastructure, developing programs to address the needs of aging inmates during their incarceration and as they prepare for release, and revising the requirements that limit the availability of compassionate release for these inmates.

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## BACKGROUND

### Introduction

From fiscal year (FY) 2009 to FY 2013, the BOP experienced a shift in the age demographic of its inmate population. During those 5 years, the number of inmates age 50 and older in BOP-managed institutions was the fastest growing segment of the BOP population, increasing by 25 percent, from 24,857 to 30,962. During the same period, the population of inmates 49 and younger decreased approximately 1 percent, including an even larger decrease of 29 percent in the youngest inmates age 29 and younger.

The OIG assessed the impact of an aging inmate population on the BOP's inmate management, including costs, health services, staffing, housing, and programming, between FY 2009 and FY 2013. In this background section, we define the BOP's aging inmate population and discuss the demographics and trends of this population. In addition, we outline the new compassionate release provisions related to aging inmates. Finally, we discuss the similar challenges faced by state correctional systems and the different methods they use to address the growing aging inmate population.

### *Defining the BOP's Aging Inmate Population*

The BOP does not establish a specific age at which an inmate is considered "aging."<sup>4</sup> For the purposes of this report, we define inmates age 50 and older as aging.<sup>5</sup> Our definition is based on several factors including studies, state programs and policies, as well as the opinions of BOP officials and institution staff. In a 2004 report, the BOP's National Institute of Corrections (NIC) defined inmates age 50 and older as aging.<sup>6</sup> The NIC further reported that seven state correctional agencies considered inmates age 50 and older to be aging.<sup>7</sup> Several studies, including one published by the *American Journal of Public Health*, state that an inmate's physiological age averages 10–15 years older than his or her chronological age due to the combination of stresses associated with incarceration and the conditions that

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<sup>4</sup> When we asked BOP staff how they defined aging, their responses ranged from age 40 to age 78.

<sup>5</sup> Throughout this report, we will use the term "aging inmates" to refer to inmates age 50 and older and the term "younger inmates" to refer to inmates age 49 and younger.

<sup>6</sup> The NIC is an agency within the BOP. The NIC provides training, technical assistance, information services, and policy and program development assistance to federal, state, and local correctional agencies.

<sup>7</sup> The NIC surveyed correctional systems in all 50 states, the District of Columbia, U.S. territories, and Canada and found that seven states (Alaska, Florida, Idaho, New Mexico, North Carolina, Ohio, and West Virginia) and Canada defined inmates as aging at age 50.

he or she may have been exposed to prior to incarceration.<sup>8</sup> During our review, BOP officials and staff agreed that the combination of these factors expedites the aging process. A Clinical Director told us that because most aging inmates have preexisting conditions and are sicker than the general population, they appear to be older than their actual age.

The BOP's aging inmate population made up 19 percent of the BOP's overall population in FY 2013

Aging inmates made up 16 percent of the BOP's total population in FY 2009 and increased to 19 percent of the BOP's total population in FY 2013. Table 1 presents the total number of sentenced BOP inmates, the number of younger inmates, and the number of aging inmates from FY 2009 through FY 2013.<sup>9</sup>

**Table 1**  
**Total Sentenced Inmate Population by Age**

<b>Fiscal Year</b>	<b>Sentenced Inmates</b>	<b>Aging Inmates (50 and older)</b>	<b>Younger Inmates (49 and younger)</b>
2009	159,189	24,857	134,332
2010	159,660	26,221	133,439
2011	165,797	28,239	137,558
2012	164,257	29,332	134,925
2013	164,566	30,962	133,604

Source: BOP population snapshots.

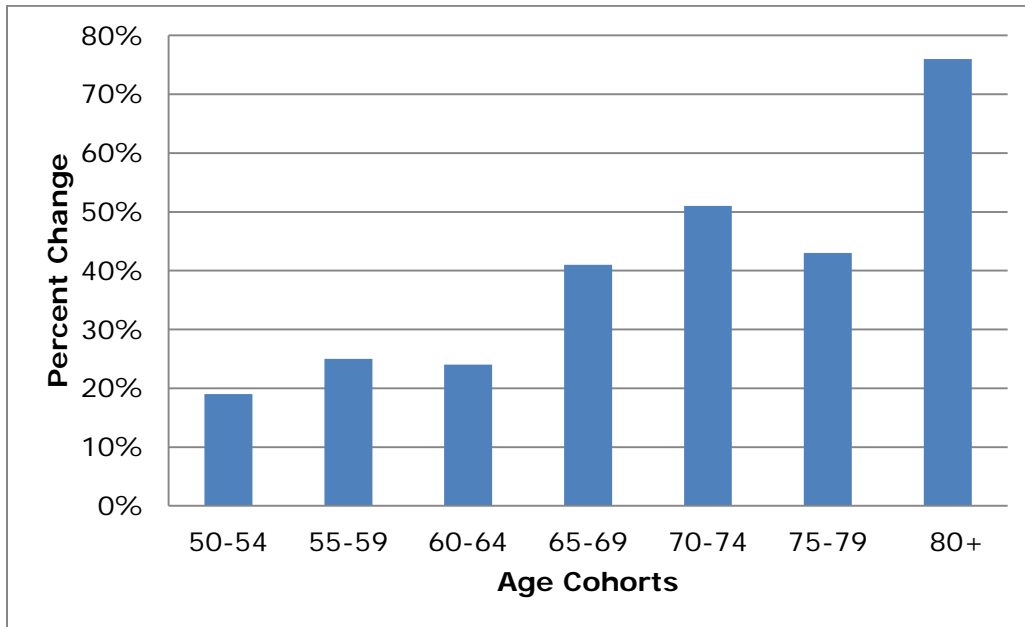
According to BOP data, not only are the numbers of aging inmates increasing, they are generally increasing at a faster rate in older age groups. Specifically, the number of inmates age 65 to 69 increased 41 percent; inmates age 70 to 74 increased 51 percent; inmates age 75 to 79 increased 43 percent; and inmates age 80 and over increased 76 percent. Nevertheless, inmates age 65 and older represented only 14 percent of the aging inmate population in FY 2013, while inmates age 50 to 64 represented 86 percent of the 30,962 aging inmates. Figure 1 shows the increase in the number of aging inmates, distributed in 5-year increments, from FY 2009 through FY 2013.

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<sup>8</sup> B. Williams, et al., "Aging in Correctional Custody: Setting a Policy Agenda for Older Prisoner Health Care," *American Journal of Public Health* 102, no. 8 (August 2012): 1475–1481, p. 3.

<sup>9</sup> For this review, we examined sentenced inmates incarcerated in BOP-managed institutions only. We excluded approximately 29,000 inmates who are incarcerated in contract institutions, as well as approximately 14,000 pre-trial inmates.

**Figure 1**  
**Percent Change in Population of Aging Inmates from FY 2009 to FY 2013**



Source: BOP population snapshots.

Elimination of parole, use of mandatory minimum sentences, increases in average sentence length over the past 3 decades, and an increase in white collar offenders and sex offenders, among other things, contribute to the aging inmate population

Research indicates that the growth in the aging inmate population can be attributed to sentencing reforms beginning in the late 1980s, including the elimination of federal parole and the introduction of mandatory minimums and determinate sentences.<sup>10</sup> BOP staff and management officials agreed that these sentencing reforms contributed to longer sentences, leading to an increase in aging inmates. In addition to the increase in the aging inmate population, there has also been a 9 percent increase in the number of younger inmates who will be age 50 and older when they are ultimately released.<sup>11</sup> (See Table 2 below.)

<sup>10</sup> Nathan James, "The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options," *Congressional Research Service*, April 15, 2014.

<sup>11</sup> We based our analysis on each inmate's release date as of the date we received BOP data. We did not include younger inmates with life sentences, death sentences, or those inmates who did not have release dates.

**Table 2**  
**Number of Younger Inmates Who Will Be Age 50 and Older at Release**

Fiscal Year	Number of Younger Inmates
2009	19,385
2010	19,790
2011	20,488
2012	20,761
2013	21,221
Percent Change	9%

Source: BOP population snapshots.

The growth of the aging inmate population can also be attributed to the increase in the number of aging offenders who are first-time white collar or sex offenders.<sup>12</sup> From FY 2009 to FY 2013, the BOP experienced a 28 percent increase (7,944 to 10,153) in the number of first-time, aging offenders. Further, the number of aging inmates incarcerated for fraud, bribery, or extortion offenses increased by 43 percent and the number of aging inmates incarcerated for sex offenses increased by 77 percent. White collar offenders and sex offenders made up approximately 24 percent of the aging inmate population in FY 2013. Conversely, these offenders made up less than 10 percent of the younger inmate population.

Aging inmates make up a disproportionate share of the inmate population in institutions providing higher levels of medical care

In 2002, the BOP implemented a system that assigned care levels to inmates based on the inmate's medical needs and to institutions based on the resources available to provide care. Under this system, the BOP assigns each inmate a care level from 1 to 4 based on documented medical history, with Care Level 1 being the healthiest inmates and Care Level 4 being inmates with the most significant medical conditions. The BOP also assigns each institution a care level from 1 to 4, based on the institution's level of medical staffing and resources. Inmates are designated to an institution with a corresponding care level.<sup>13</sup> (See Table 3 below.)

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<sup>12</sup> BOP data also indicated that 17,995 of the 30,962 (58 percent) aging inmates in FY 2013 were sentenced at age 50 and older and 7,351 (41 percent) of those sentenced at 50 and older were first-time offenders.

<sup>13</sup> For more information about the BOP's care level system, see DOJ, OIG, *The Federal Bureau of Prisons' Efforts to Manage Inmate Health Care*.



**Table 3**

**Description of the BOP's Care Levels**

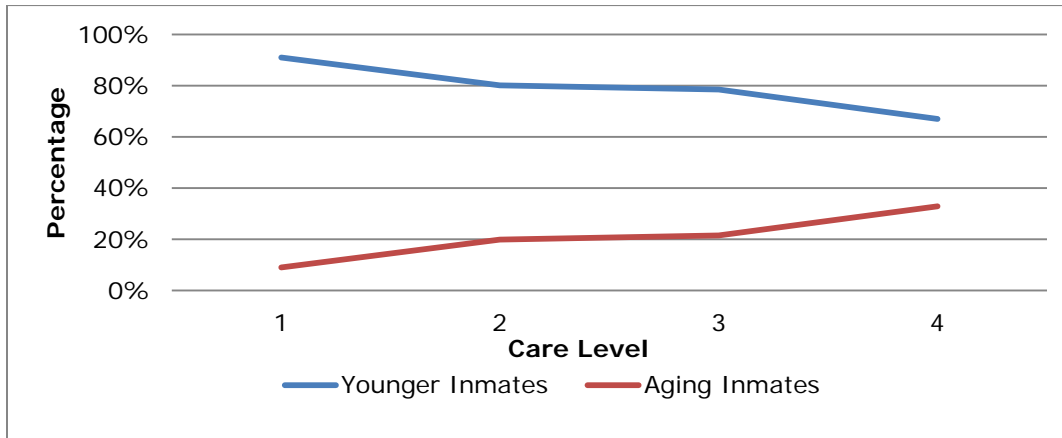
Care Level	Description
1	Inmates who are younger than 70, with limited medical needs requiring clinical contact no more than once every 6 months
2	Inmates who are stable outpatients, with chronic illnesses requiring clinical contact every 3 months
3	Inmates who are fragile outpatients, with conditions requiring daily to monthly clinical contact
4	Inmates requiring inpatient care: Care Level 4 institutions are BOP medical centers.

Source: U.S. Department of Justice (DOJ), OIG, *The Federal Bureau of Prisons' Efforts to Manage Inmate Health Care*, Audit Report 08-08 (February 2008).

According to BOP data, in FY 2013 aging inmates made up a disproportionate share of the inmates housed in Care Level 3 and 4 institutions. Specifically, aging inmates made up 21 percent of the population of Care Level 3 institutions and 33 percent of the population of Care Level 4 institutions, compared to only 19 percent of the overall inmate population.<sup>14</sup> Figure 2 illustrates the proportion of aging inmates assigned to each care level.

**Figure 2**

**Percentage of Aging Inmates Assigned to Each Care Level, FY 2013**



Source: BOP population snapshots.

<sup>14</sup> Care Level 4 institutions also house cadre inmates who have work assignments and are primarily made up of healthier, non-Care Level 4 inmates.

*BOP Program Statement 5050.49 (Compassionate Release)*

The increase of the aging inmate population adversely affects crowding levels, particularly in minimum security, low security, and medical institutions. At the end of FY 2013, the BOP as a whole was 34 percent over capacity, with minimum security institutions at 19 percent over capacity, low security institutions at 32 percent over capacity, and medical centers at 16 percent over capacity.<sup>15</sup> According to BOP data, aging inmates made up 26 percent of the population of minimum-security institutions, 23 percent of the population of low-security institutions, and 33 percent of the population of medical centers.

In the *Sentencing Reform Act of 1984*, Congress authorized the BOP Director to request that a federal judge reduce an inmate's sentence based on "extraordinary and compelling" circumstances. Under the statute, the request can be based on either medical or nonmedical conditions that could not reasonably have been foreseen by the judge at the time of sentencing. The BOP has issued regulations and a Program Statement entitled "Compassionate Release" to implement this authority. In April 2013, the OIG released a report that found significant problems with the management of the BOP's compassionate release program and that an effectively managed program would help the BOP better manage its inmate population and result in cost savings. We also found, in considering the impact of the compassionate release program on public safety, a recidivism rate of 3.5 percent for inmates released through the program. By comparison, the general recidivism rate for federal inmates has been estimated as high as 41 percent.

In August 2013, following the release of our review, the BOP implemented new provisions to its Compassionate Release Program Statement making inmates at least age 65 eligible for consideration for both medical and nonmedical reasons.<sup>16</sup> One provision applies to inmates sentenced for an offense that occurred on or after November 1, 1987, who are age 70 years or older at the time of consideration for release and who have served 30 years or more of their sentence of imprisonment. A second provision applies to inmates:

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<sup>15</sup> Over-capacity level is based on our analysis of the BOP's FY 2013 population snapshot, combined with information about each institution's security level as reported on the BOP's website. Our analysis excluded detention centers and contract institutions. The BOP's Long Range Capacity Plan, which includes all institutions, reports that at the end of FY 2013 the BOP as a whole was 36 percent overcrowded. At the end of FY 2014, the BOP reported that its inmate population had dropped slightly from the year before. However, for this report we examined population data only through FY 2013.

<sup>16</sup> See BOP, *Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. § 3582(c)(1)(A) and 4205(g)*, Program Statement 5050.49 (August 12, 2013).

1. age 65 and older,
2. suffering from chronic or serious medical conditions related to the aging process,
3. experiencing deteriorating mental or physical health that substantially diminishes their ability to function in a correctional facility,
4. for whom conventional treatment promises no substantial improvement to their mental or physical condition, and
5. who have served at least 50 percent of their sentence.

A third provision applies to inmates who are age 65 and older and have served the greater of 10 years or 75 percent of their sentence. An inmate's medical condition is not evaluated under the first or third provisions. To determine whether inmates applying under any of the three provisions are suitable for compassionate release, the BOP further evaluates each inmate in light of several factors, including but not limited to the nature and circumstance of the inmate's offense, criminal history, input from victims, age at the time of offense and sentencing, release plans, and whether release would minimize the severity of the offense.

*States have begun addressing the challenges the of the aging inmate population*

State correctional systems are also facing an increase in aging inmate populations. Specifically, according to a 2014 report, the number of inmates age 55 and older in state and federal institutions increased 204 percent between 1999 and 2012.<sup>17</sup> State correctional systems have also experienced a substantial increase in healthcare costs. According to the report, correctional healthcare spending rose in 41 states by a median of 13 percent during the 5-year period from FY 2007 to FY 2011. The report indicates that states generally incurred higher inmate healthcare spending where aging inmates represented a larger proportion of the inmate population. For example, the median healthcare spending per inmate in the 10 states with the highest percentage of inmates age 55 and older averaged \$7,142, while the 10 states with the lowest percentage of these inmates averaged \$5,196 per inmate. Later in this report, we provide a similar analysis based on BOP institutions with the highest and lowest percentage of aging inmates.

To address the growth of aging inmate populations, at least 15 states have provisions that would allow for the consideration of early release for

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<sup>17</sup> Pew Charitable Trusts and the John D. and Catherine T. MacArthur Foundation, "State Prison Health Care Spending," July 8, 2014, <http://www.pewtrusts.org/en/research-and-analysis/reports/2014/07/08/state-prison-health-care-spending> (accessed April 9, 2015). The report did not break out the increase between state and federal institutions.

aging inmates, but with varying eligibility requirements.<sup>18</sup> Some states restrict eligibility to aging inmates with physically or mentally debilitating conditions, while other states open eligibility to all aging inmates who meet age and time served requirements. Outside of early release considerations, several states have developed separate housing units or institutions for aging inmates, including housing units dedicated to older inmates with chronic health problems. For example, the Florida Department of Corrections has several institutions with units designed specifically for aging inmates, including one dedicated for inmates age 50 and older. States have also recognized the need for different programming for aging inmates, including one program in Nevada designed for inmates age 55 and older to enhance their overall health through daily activities.

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<sup>18</sup> Tina Chiu, "It's About Time: Aging Prisoners, Increasing Costs, and Geriatric Release," *VERA Institute of Justice*, April 2010.

## PURPOSE, SCOPE, AND METHODOLOGY

### Purpose

Our review examined the BOP's aging inmate population by assessing the population's impact on incarceration costs, health services, staffing, housing, and programming. We also determined the recidivism rate of aging inmates released from BOP custody.

### Scope and Methodology

Our review analyzed BOP inmate population and cost data, as well as BOP policies and programs from FY 2009 through FY 2013. Our review focused on federal offenders incarcerated in the 119 institutions operated by the BOP during our scope years. We excluded inmates housed in private correctional institutions, contract community corrections centers, and contract state and local institutions from our analysis. We also excluded inmates who were in pre-trial detention.

Our fieldwork, conducted from February 2014 through September 2014, included interviews, data collection and analyses, and document reviews. We interviewed BOP officials, including the Assistant Directors responsible for eight Central Office divisions.<sup>19</sup> We conducted 13 site visits to BOP institutions, including 5 institutions through video teleconferences and 8 institutions in person. For each site visit, we interviewed institution officials and staff. For those institutions that we visited in person, we also interviewed inmates, toured housing units, and observed the physical landscapes. Our site visits encompassed BOP institutions representing all security levels, including minimum-, low-, medium-, and high-security institutions, as well as administrative security institutions such as federal medical centers and detention centers. A detailed description of the methodology of our review is in Appendix 1.

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<sup>19</sup> The BOP's Central Office is located in Washington, D.C. We interviewed the Assistant Directors of the Administration; Human Resource Management; Health Services; Information, Policy, and Public Affairs; Reentry Services; Correctional Programs; and Industries, Education and Vocational Training Divisions. We also interviewed the General Counsel.

## RESULTS OF THE REVIEW

### **Aging inmates are more costly to incarcerate, primarily due to their medical needs**

According to BOP officials and staff, an aging inmate population's most significant impact is on medical costs. From fiscal year (FY) 2009 to FY 2013, the BOP's spending on inmate healthcare increased by 29 percent, according to BOP data. In FY 2009, the BOP spent \$854 million of its \$5.5 billion budget (16 percent) to provide medical care for its inmate population. By FY 2013, medical costs increased to \$1.1 billion, representing 17 percent of the BOP's \$6.5 billion budget that year. While the BOP states that it cannot determine the specific medical costs associated with individual inmates, we found that aging inmates, as a group, are more expensive to incarcerate than younger inmates, primarily due to their medical needs. We also found that medical costs are increasing at a rate higher than the BOP's total budget, especially at institutions housing more aging inmates, and are driven by medications and medical trips outside of institutions. Finally, we found aging inmates are receiving more medical services, both within BOP institutions and from outside healthcare providers.

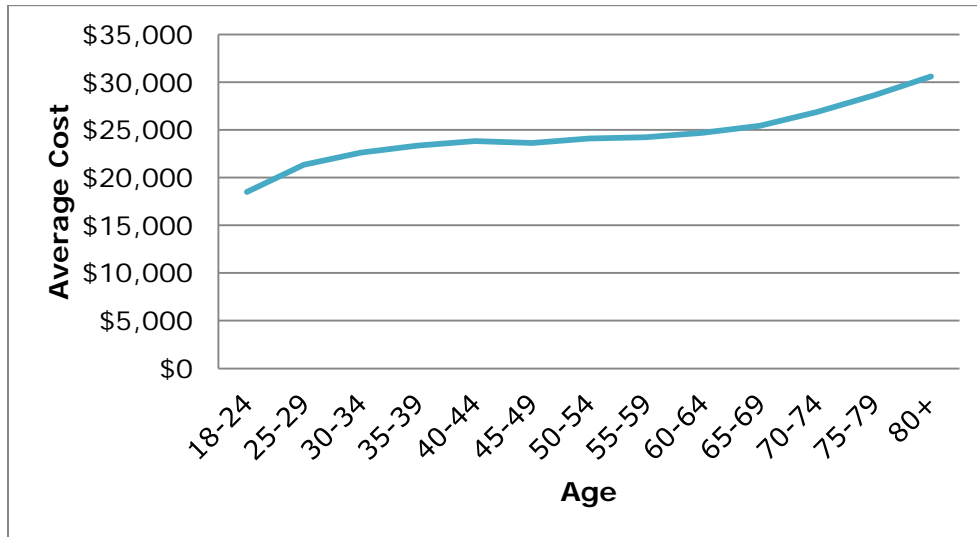
Using BOP inmate population and cost data, we estimated costs per inmate based on security level and the number of days incarcerated within a fiscal year.<sup>20</sup> We found that an aging inmate, on average, costs 8 percent more to incarcerate than a younger inmate. For example, in FY 2013, the average aging inmate cost \$24,538 to incarcerate, whereas the average younger inmate cost \$22,676. We also found that average cost per inmate rises with age, with the 8,831 inmates age 18 to 24 costing an average of \$18,505 each and the 157 inmates age 80 and older costing an average of \$30,609 each. While the aging inmate population represents only 19 percent of the BOP's total population, the costs to incarcerate them are increasing at a faster rate than for younger inmates. For example, the cost of incarcerating aging inmates grew 23 percent, from \$715 million in FY 2010 to \$881 million in FY 2013, while the cost of incarcerating younger inmates grew 3 percent, from \$3.5 billion to \$3.6 billion over the same period. (See Figure 3 below for the average annual cost per inmate in FY 2013.)

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<sup>20</sup> The BOP determines the average cost to incarcerate inmates by the type of institution where an inmate is housed, such as a low-security institution or a federal medical center, not by the specific cost to incarcerate each inmate. Therefore, we calculated the number of days served by each inmate in each fiscal year and applied the cost of the type of institution where that inmate was housed. See Appendix 1 for more details on our analysis.

**Figure 3**

**Average Annual Cost per Inmate by Age, FY 2013**



Source: BOP population and daily cost data.

According to the BOP's Assistant Director for Health Services and Medical Director, inmates in their fifties and sixties place the greatest burden on the BOP because their numbers are increasing and many of them have significant health problems stemming from years of substance abuse. Similarly, BOP officials and staff at each institution we visited said the most significant impact of aging inmates on the BOP is the cost associated with addressing their increased medical needs. For example, a Health Services Administrator of an institution where aging inmates were 27 percent of the population told us that her institution's medical budget increased from \$3 million to \$9 million in FY 2012 alone due to the aging inmate population. Aging inmates we interviewed also acknowledged their impact on the BOP's medical costs. One aging inmate told us that he has had two heart attacks, two strokes, open-heart surgery, cancer, and has diabetes. He told us that it must cost the BOP "a fortune" to keep him incarcerated. We discuss the impact aging inmates have on BOP institutions' medical costs, as well as factors that drive increased medical costs for aging inmates, below.

*Healthcare spending per inmate is greater at institutions with the highest percentage of aging inmates*

Using BOP population and medical cost data, we calculated medical spending per inmate within each institution and found that the BOP's healthcare spending coincides with the percentage of aging inmates at an institution.<sup>21</sup> Specifically, we found that the five institutions with the highest percentage of aging inmates spend significantly more per inmate on medical costs than the five institutions with the lowest percentage of aging inmates (see Table 4).<sup>22</sup>

**Table 4**  
**Medical Spending per Inmate at Institutions with the Five Highest and Lowest Percentages of Aging Inmates**

<b>FY 2009</b>	<b>Percentage of Aging Inmates</b>	<b>Cost Per Inmate</b>	<b>FY 2013</b>	<b>Percentage of Aging Inmates</b>	<b>Cost Per Inmate</b>
Highest	27%	\$6,528	Highest	31%	\$10,114
Lowest	5%	\$2,110	Lowest	7%	\$1,916

Source: BOP medical spending data.

As Table 4 shows, in FY 2009, institutions with the highest percentage of aging inmates spent on average \$6,528 per inmate on medical costs while institutions with the lowest percentage of aging inmates averaged \$2,110 per inmate. The same pattern of spending emerged in FY 2013, when institutions with the highest percentage of aging inmates spent on average \$10,114 per inmate while institutions with the lowest percentage of aging inmates spent \$1,916 per inmate.

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<sup>21</sup> According to the BOP, there is no direct way to associate medical care provided with the costs incurred for each inmate because its electronic medical records system and financial management system are not connected. The BOP's Assistant Director for Administration told us that the BOP does not track costs by inmate because its accounting system tracks spending by program area only.

<sup>22</sup> We excluded BOP medical centers, detention centers, and correctional complexes from this analysis. We excluded correctional complexes because spending data is reported in the aggregate instead of separately for each institution within the complex. For example, one correctional complex spent \$99 million on medical care in FY 2013 but we could not determine how much was specifically spent by a medical center and each of three other institutions within the complex. Because we excluded these institution types, our cost estimates of spending per inmate are lower. See Appendix 1 for additional details.



*Institutions with the highest percentage of aging inmates spend more per inmate on medical care provided both inside and outside BOP institutions*

All BOP institutions operate ambulatory clinics that incur medical expenses for inmate care provided inside the institution. If an inmate has a medical condition that becomes emergent, escalates, or requires further examination or diagnosis from a specialist, the inmate may be transported outside the institution for services. We found that medical costs incurred for care provided both inside and outside institutions account for 86 percent of the BOP's medical costs each year.<sup>23</sup> According to the BOP, costs for medical services provided inside all BOP institutions increased 19 percent, from \$413 million in FY 2009 to \$493 million in FY 2013. Costs for medical services provided outside BOP institutions (often in private or public hospitals) increased even more sharply, rising 31 percent, from \$320 million in FY 2009 to \$420 million in FY 2013.

We also found that costs for medical services provided both inside and outside institutions increased at a higher rate at institutions with the highest percentage of aging inmates when compared to institutions with the lowest percentage of aging inmates. For example, in FY 2009, institutions with the highest percentage of aging inmates spent about four times as much on medical care provided outside of institutions than those with the lowest percentage of aging inmates. By FY 2013, the gap widened even more significantly, with institutions with the highest percentage of aging inmates spending on average over 10 times more on outside medical care than institutions with the lowest percentage of aging inmates. (See Table 5 below.)

**Table 5**

**Average Cost Per Inmate for Medical Services Provided Inside and Outside Institutions with the Highest and Lowest Percentages of Aging Inmates**

<b>FY 2009</b>	<b>Percentage of Aging Inmates</b>	<b>Inside Services</b>	<b>Outside Services</b>	<b>FY 2013</b>	<b>Percentage of Aging Inmates</b>	<b>Inside Services</b>	<b>Outside Services</b>
Highest	27%	\$2,551	\$2,826	Highest	31%	\$3,436	\$5,751
Lowest	5%	\$1,244	\$658	Lowest	7%	\$1,224	\$563

Source: BOP medical spending data.

<sup>23</sup> Medical costs also include salaries for U.S. Public Health Service employees, who staff many institution medical clinics; medical transport costs; and costs of handling unforeseen medical events at institutions. These costs, when combined with inside and outside medical services, total the BOP's medical budget. See Appendix 1 for additional details.

Institution staff also told us that aging inmates incur more medical costs due to increased visits to medical clinics inside the institution and medical trips outside the institution. For example, a Warden told us that aging inmates are more likely to be chronic care patients seen more frequently by healthcare services.<sup>24</sup> Aging inmates also told us they are receiving more medical services. For example, a different aging inmate from the one referenced above told us he gets two shots per day, requires dialysis, and has a number of ailments including congestive heart failure, diabetes, sleep apnea, cataracts, and Hepatitis C. In addition to medical care provided inside the institution to treat his medical conditions, every 6 months he receives outside medical care for his heart. Below, we discuss two specific factors that we found drive increased medical costs associated with an aging inmate population: medication costs and staff overtime to meet inmate medical needs.

#### **Budgetary Impact of Hepatitis C Treatment**

According to the BOP, as medication costs continue to increase, they will place even greater pressure on the BOP's budget in the future. For example, institution staff told us about treatments recently approved by the Food and Drug Administration (FDA) regarding Hepatitis C, a condition that is particularly prevalent among aging inmates. Approximately 12,000 inmates have Hepatitis C, and 47 percent of those are aging inmates. Medical staff at a BOP medical center told us that while they did not yet know the cost of the new Hepatitis C medication at the time of our interview, they anticipated costs to be "astronomical" because Hepatitis C is one of the most common infectious diseases in the inmate population. The BOP reports that former treatments cost \$6,600 per patient, while the treatment recently approved by the FDA will cost an additional \$20,000 to \$40,000 per patient.

Source: BOP FY 2015 congressional budget justification.

#### *Medications and staff overtime to meet inmate medical needs are significant drivers of increasing medical costs*

Due to their medical needs and chronic health problems, aging inmates require more medications and are substantially driving up the BOP's medical costs. We found that the BOP's spending on medications increased 32 percent, from \$62 million in FY 2009 to \$82 million in FY 2013. We also found that the BOP's spending on medications was higher, and increased faster, at institutions with the highest percentage of aging inmates. The BOP's Assistant Director for Health Services and Medical Director told us that medication for inmates requiring chronic care is one of the BOP's major healthcare cost drivers. A Warden also said that a high percentage of aging inmates are being treated for chronic medical conditions and that medications drive the costs to care for these inmates. By contrast, medication costs were lower and increased more slowly at institutions with

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<sup>24</sup> The BOP schedules inmates with ongoing medical problems for frequent appointments with BOP medical staff to reassess their status and renew their prescriptions.

the lowest percentage of aging inmates. For example, in FY 2013 institutions with the highest percentage of aging inmates spent an average of \$684 per inmate on medications, or about 14 times more than those with the lowest percentage of aging inmates, which spent an average of \$49 per inmate on medications in FY 2013.

Institution staff also told us that aging inmates with chronic conditions require treatment from specialists outside the institution and that overtime paid to Correctional Officers who escort inmates to such appointments is a significant budget item. According to BOP data, in FY 2013, in addition to paying for outside medical care, the BOP spent \$53 million in overtime to transport inmates to outside medical care, a 17 percent increase from the \$46 million spent in FY 2009. As one example, an Associate Warden said overtime costs associated with transporting aging inmates to outside medical appointments and hospitalizations were “phenomenal” and that his institution was over its allotted overtime budget less than half way through the fiscal year for this reason.

*Aging inmates disproportionately require catastrophic medical care*

In May 2012, the BOP Assistant Director for Health Services and Medical Director issued to all institutions a memorandum on “Catastrophic Case Management”; it defined catastrophic medical cases as those where the estimated or actual cost of outside medical care for an inmate housed in a nonmedical BOP institution exceeds \$35,000 for a single medical event and provided guidance on how to track and monitor these cases.<sup>25</sup> We analyzed catastrophic care data from one BOP region between FY 2009 and FY 2013 and found that while only 18 percent of the inmates in this region were aging inmates during this period, 59 percent of the catastrophic medical cases involved aging inmates (see Table 6). Moreover, because the aging inmate population in this region was about four times smaller than the younger inmate population, the probability of an aging inmate having a catastrophic medical issue was about eight times higher than for a younger inmate.

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<sup>25</sup> As of FY 2012, all BOP regions adopted a catastrophic case management system designed to track and monitor cases and to measure the fiscal and clinical outcomes of care. While beyond the scope of this review, we learned that the BOP’s six regions do not consistently track catastrophic medical cases and that the BOP’s Central Office does not process or analyze that data to better understand the impact of catastrophic healthcare events on budget and decision-making. Due to the inconsistency of regional tracking, we were able to analyze catastrophic case spending in only one region. See Appendix 1 for details.

**Table 6**

**Catastrophic Cases in One BOP Region, FY 2009 to FY 2013**

<b>Age</b>	<b>FY 2009</b>	<b>FY 2010</b>	<b>FY 2011</b>	<b>FY 2012</b>	<b>FY 2013</b>	<b>Total</b>
Cases Involving Younger Inmates	53	58	70	60	79	<b>320</b>
Cases Involving Aging Inmates	58	76	104	104	126	<b>468</b>
<b>Total</b>	<b>111</b>	<b>134</b>	<b>174</b>	<b>164</b>	<b>205</b>	<b>788</b>
Percent of Aging Inmates in this Region	16%	17%	18%	18%	19%	<b>18%</b>
Percent of Catastrophic Cases Involving Aging Inmates	51%	57%	60%	63%	61%	<b>59%</b>

Source: BOP catastrophic case data.

We also found that during this time, this region spent \$71 million on catastrophic medical care, 60 percent (\$45 million) of which was spent on aging inmates. Based on our review of available data, we found that aging inmates received catastrophic medical services for a variety of medical conditions, particularly heart and lung conditions. Services from this region included treatment of clogged arteries, heart failure, cardiovascular issues, respiratory failure, lung disease, and cellulitis. Finally, while the costs associated with catastrophic care cases must all exceed at least \$35,000, we found cases with significantly more costs. For example, the most expensive case from this region involved over \$850,000 spent for an aging inmate who was treated for complicated coronary artery disease.

In addition, we found that the increase in catastrophic medical cases in this region was not limited to Care Level 3 institutions, which, as described above, are specifically intended to care for outpatient inmates with medical conditions that require daily to monthly outpatient clinical contact. For example, a Care Level 2 institution, which incarcerates inmates who are stable outpatients and typically require clinical contact only every 3 months, accounted for 30 percent of the region's catastrophic medical cases in FY 2013. Aging inmates comprised 62 percent of this institution's catastrophic medical cases, even though they represented only 27 percent of its population.

**BOP institutions lack appropriate staffing levels to address the needs of an aging inmate population and provide limited training for this purpose**

As described above, the increasing aging inmate population has resulted in an increase in trips outside of institutions to address their medical needs. We found that institutions lack Correctional Officers to staff these trips and have limited medical staff within institutions to address aging

inmates' medical needs. As a result, aging inmates experience delays in receiving medical care. In addition, the needs of aging inmates differ from their younger counterparts, including the need for increased assistance with activities of daily living. According to BOP staff, however, staff is not responsible for ensuring inmates can accomplish these activities. We found that, instead, institutions rely on local inmate companion programs in which healthy inmates provide assistance for aging or disabled inmates. Further, aging inmates, specifically those with unique medical needs, also require advanced release preparation. We found that Social Workers are uniquely qualified and trained to address these needs, yet few institutions have them. Finally, we found that institution staff has limited training to identify signs of aging in inmate conduct, which can be mistakenly viewed as reflecting disciplinary issues rather than signs that the inmate needs medical or mental health care.

*Understaffed health services units limit access to medical care and contribute to delays for aging inmates*

Aging inmates have an increased need for health services; but, according to BOP officials, staff, and inmates, institutions lack adequate health services staff to address these needs.<sup>26</sup> For example, the Clinical Director of a medical center told us that only 80 percent of that institution's health services positions are staffed and that the vacancies limit the number of inmates, including aging inmates, the institution can treat.<sup>27</sup> A Case Manager at a nonmedical institution told us that the institution was "over a thousand inmates behind" in servicing those enrolled in chronic care clinics. An aging inmate told us that the health services staff at his institution is "inundated" with requests for care and that, while they work hard, they can only do so much. Aging inmates at numerous institutions also told us that limited health services staff sometimes resulted in long waiting periods for care.<sup>28</sup> For example, an aging inmate told us that he requested dentures in

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<sup>26</sup> BOP officials told us that hiring health service staff is difficult. According to the Assistant Director for Human Resources, it is difficult to hire medical staff in urban areas because the BOP cannot offer doctors and nurses salaries and benefits that are comparable to those offered by private employers. Although the salaries and benefits are more competitive in rural areas, the BOP is challenged with finding medical staff willing to live in remote areas. The BOP uses some incentives such as periodically increasing employee pay, paying relocation expenses, and offering to pay a portion of student loans. Nevertheless, as of August 2014, only 84 percent of the BOP's medical doctor positions were filled, which is below the BOP's goal of 90 percent.

<sup>27</sup> This medical center had two physician vacancies, two mid-level practitioner vacancies, and several nurse vacancies open at the time of our fieldwork.

<sup>28</sup> The BOP's Assistant Director for Health Services and Medical Director told us that in November 2014 the BOP launched a survey of inmates in all BOP institutions to assess inmates' access to healthcare. He told us that once the survey is complete, the Health Services Division will analyze the results by institution. For institutions where inmates report delays in receiving care, the BOP will try to determine the underlying causes of delay at each institution in order to develop potential responses.

2010 and had yet to receive them.<sup>29</sup> He said this makes it extremely hard to eat because he cannot chew food.

Additionally, the lack of an adequate number of health services staff increases the need for outside care. A Case Manager told us that the lack of health services staff at his institution has led to more emergency trips to hospitals outside the institution because the institution does not have a Physician Assistant to address medical needs. We also found that trips to outside medical providers are often limited by the availability of Correctional Officers to escort inmates. According to BOP policy, correctional staff is required to escort inmates to outside medical appointments.<sup>30</sup> The limited availability of Correctional Officers restricts aging inmates' access to medical care outside the institutions, and institution staff told us that, as a result, there are waitlists to send inmates to outside medical specialists.

Using BOP data from one institution, we found that the average wait time for inmates, including aging inmates, to be seen by an outside medical specialist for cardiology, neurosurgery, pulmonology, and urology to be 114 days. The wait time at this institution increased to 256 days for those inmates waiting to see outside specialists for additional or routine appointments.<sup>31</sup> The Assistant Health Services Administrator at this institution told us that there was no doctor at the institution and, while staff used to be able to send inmates on 10 medical trips per day, the institution now has the staff to provide only 6 planned trips and 2 emergency trips per day. We found similar difficulties staffing outside medical trips at other institutions. The Associate Warden at one institution told us his staff can accommodate 6 trips to outside medical specialists per day, even though the inmate population requires 8 to 10 trips per day. We also noted that outside medical trips depend on appointment availability and that, while an institution may be able to provide the necessary number of medical trips per week, specialists in the community must also be available and willing to see an inmate.

We additionally found that the management of outside medical care waitlists affects the medical care provided to aging inmates. Specifically, we were provided examples of inmate appointments not being rescheduled when canceled, being rescheduled when the appointment had already taken place,

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<sup>29</sup> Inmates with dental problems, such as abscesses, that could cause harm if left untreated, receive priority for dental appointments. The BOP's Assistant Director for Health Services and Medical Director told us that the BOP has also initiated a National Dental Waiting List so that inmates awaiting dental care do not fall back to the end of the list if they are transferred to a different institution.

<sup>30</sup> BOP, *Escorted Trips*, Program Statement 5538.06 (August 29, 2014).

<sup>31</sup> Only one institution tracked waitlist times, and we requested this data from the BOP. Based on the data available to us, we could not determine how much of the delay in receiving outside medical care is due to limited staffing and how much is due to limited availability of appointments with specialists.

or not being scheduled at all. A Health Services Administrator told us that inmates who are on waitlists for outside medical care can “fall through the cracks” if their appointments are canceled and not rescheduled. An aging inmate told us that he was sent outside the institution for a medical appointment and 2 months later was rescheduled for the same medical need. When he brought the issue to the Clinical Director, he was told that it was just an appointment reminder. However, the inmate told us that he believes staff did not realize he had already been seen. Another aging inmate told us that at the time of our interview he had been waiting 2 years to be taken outside his institution for an examination to receive eyeglasses and had resorted to using a magnifying glass in the meantime.

*The availability and purpose of inmate companion programs used to help aging inmates accomplish their activities of daily living vary by institution*

All inmates are expected to perform activities of daily living, including dressing, cleaning their cells, and moving around within the institution. However, staff told us that aging inmates often cannot perform these activities on their own because of their medical conditions and staff is not responsible for ensuring inmates can accomplish these activities. Some institutions we visited have established local inmate companion programs to address the increasing number of aging inmates who need assistance with these activities. These programs utilize healthier inmates to provide support to inmates, including aging inmates, who experience difficulty functioning in a correctional environment.

Institution staff we interviewed found their local inmate companion programs beneficial to both aging inmates and staff. For example, a Health Services Administrator described to us an aging inmate with dementia and Alzheimer’s disease who needed increased resources and attention. In this case, an inmate companion served as staff’s “eyes and ears,” alerting them to changes in the inmate’s behavior. A Counselor told us he does not know how he would manage the unit without the assistance of inmate companions. However, not all institutions have inmate companion programs. At one institution without an inmate companion program, an Assistant Health Services Administrator told us that aging inmates typically pair with a friend or cellmate for assistance. A Health Services Administrator at another institution said that inmates who cannot perform their activities of daily living and require daily or weekly assistance beyond what the inmate companions there are trained to provide are referred for transfer to an institution that can meet their needs.<sup>32</sup>

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<sup>32</sup> Inmates needing a medical transfer had been waiting for an average of 1–2 months in October 2014. We further discuss issues regarding transfers for medical reasons below.

Also, the implementation of inmate companion programs varies by institution, particularly between nonmedical institutions and medical centers. For example, medical centers had local policies and position descriptions establishing expectations for inmate companions. Inmate companions at one medical center are expected to work in contact with bodily fluids and to help care for inmates suffering from chronic and acute diseases. They also provide assistance with moving inmates within an institution, feeding, answering patient call lights, and changing diapers. However, at nonmedical institutions, including those with high percentages of aging inmates, inmate companion programs have no policies or job descriptions. Instead, inmate companions are often referred to as “wheelchair pushers” because their primary responsibility is to help inmates confined to a wheelchair travel within an institution. Staff at two institutions we visited said they use inmate companions only as part of their institution’s suicide prevention programs. An Associate Warden told us that each of the eight institutions where he has worked implemented its local inmate companion program differently. We found other differences between how institutions implement inmate companion programs, including:

- *Training:* At some institutions we visited, inmate companions are provided training on medical safety standards, confidentiality, listening skills, and job expectations. However, training at other institutions is less extensive. For example, at one institution where inmate companions are utilized as wheelchair pushers, inmate companions complete 1 day of training on wheelchair ergonomics and safety precautions. At another institution, there is no formal training for wheelchair pushers.
- *Selection:* Each institution we visited that had an inmate companion program selected inmates who were considered responsible and had few misconduct incidents. Institutions with more robust programs also require inmate companions to meet specific selection criteria, such as having passed a General Education Development (GED) test.
- *Compensation:* At institutions we visited, inmate companion pay varied based on companions’ levels of responsibility. For example, a Counselor at an institution where inmate companions have more responsibility told us that most companions are paid \$40 a month. A Case Manager at an institution where inmates have less responsibility told us that companions are paid \$5 to \$7 a month.
- *Oversight:* One institution with a local inmate companion policy developed a committee of nursing staff and selected inmate companion representatives to oversee the program. The committee reviews inmate companion assignments, develops plans of care, and identifies training needs. At another institution, where the program



does not operate out of the health services or nursing departments, unit teams informally manage the inmate companions.<sup>33</sup>

According to institution staff and inmates, despite the benefits of and need for inmate companion programs, aging inmates face risks when these programs are inconsistently implemented. An aging inmate told us that most inmate companions really try to help, but sometimes companions take advantage of aging inmates. For example, a Supervisor of Education told us about an inmate who had an inmate companion who was threatening the inmate's wife and forcing her to send money in return for the inmate's protection. The inmate told the Supervisor that it had been going on for a long time but that he had been unable to tell institution staff because the companion accompanied him everywhere, including to personal meetings with staff. Institution officials and staff said that the inmate companion program should be a standardized national program, with a program statement establishing policies that hold inmate companions accountable for their responsibilities. At one institution with program guidelines, inmate companions are expected to sign the guidelines, acknowledging they will abide by program rules. If a companion violates any of the guidelines, the inmate companion committee conducts a misconduct review. Without the protections or oversight of national guidelines, however, each institution can run the program inconsistently.

*Social Workers are uniquely qualified and trained to address the needs of aging inmates, particularly with release planning, but few institutions have Social Workers*

We found that Social Workers are a great benefit for aging inmates. While Case Managers, Counselors, Social Workers, and other institution staff work in concert to prepare inmates for release, only Social Workers have extensive training in addressing the unique needs of aging inmates. Licensed Social Workers can proficiently help with aftercare planning, resource brokering, and medical continuity of care during reentry. A Social Worker told us that they help aging inmates with accessing medical services and equipment in the community upon release.

However, relatively few institutions have Social Workers. Specifically, as of November 2014, there were only 36 Social Workers throughout all of the BOP's institutions. A Social Worker told us that at her institution there are approximately 1,000 inmates for every Social Worker. Another Social Worker told us that because there are so few Social Workers, he has to prioritize the inmates he helps based on their more difficult problems and

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<sup>33</sup> The unit teams consist of a Unit Manager, Case Managers, Correctional Counselors, Unit Secretaries, Correctional Officers, an Education Advisor, and a Psychologist who work with all inmates assigned to live in a particular housing unit. The unit team directly observes an inmate's behavior and can make recommendations in programming areas.

greater reentry needs, limiting his ability to assist all inmates, including aging inmates.<sup>34</sup> Although the BOP employs six Regional Social Workers to assist institutions that do not have a Social Worker, they are limited in availability because each of them is responsible for between 15 and 17 institutions. We reviewed the BOP's Community Release Planning Guidelines for Social Work and found that it did not define any duties for regional Social Workers that were distinct from the duties for institution Social Workers. BOP institution staff told us that regional Social Workers provide resources so that institution staff can work with individual inmates.

We also found that the lack of availability of Social Workers within BOP institutions hinders the BOP's ability to effectively prepare aging inmates to reenter society because other BOP staff do not have the training unique to Social Workers. A Case Manager at an institution with Social Workers told us that she relies on Social Workers because they know things she does not, such as the "ins and outs" of applying for Social Security benefits. A Case Management Coordinator at an institution without Social Workers said that he has to try to find resources on the internet to assist aging inmates in applying for Social Security. Staff at institutions without a Social Worker also told us about the benefits a Social Worker would bring to their institution, including addressing issues related to halfway house placement, explaining eligibility for benefits to many uninformed or confused aging inmates before they are released, and removing some of the burdens placed on Case Managers.

Recognizing the benefit that Social Workers play in helping inmates prepare for release, the BOP recently approved and budgeted for the hiring of seven additional Social Workers to be assigned to 5 correctional complexes, 1 medical center, and 1 female institution.

*Institution staff is not adequately trained to identify the signs of aging, which mistakenly can be viewed as reflecting disciplinary issues rather than a need for medical or mental healthcare*

The BOP provides brief, limited training for institution staff on recognizing the signs of aging in its Annual Refresher Training, which states that the significant increase in aging inmates requires staff to contend with increased mobility issues, terminal illness, and cognitive impairments. The training includes ways staff can be aware of changes in aging inmates and provide increased monitoring to help with inmates' cognitive and physical deterioration. The training further elaborates on aging inmates'

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<sup>34</sup> In October 2014, the BOP released Community Release Planning Guidelines for Social Work (Guidelines) to assist inmates in identifying necessary community resources for release planning. While these Guidelines identify Social Workers as a resource for inmate release planning, Social Workers are currently available only at Care level 3 and 4 institutions, making their availability to Care level 1 and 2 inmates limited.

vulnerabilities, such as being forgetful, losing track of time, taking longer to complete tasks, not being able to follow directives, and having increased physical stress. The training also informs participants that aging inmates will require time and understanding to acclimate to an institutional environment. However, the Annual Refresher Training Instructor Guide states that training on signs of aging as well as medical emergencies can be completed in 30 minutes.

The Assistant Director for Human Resources told us that the BOP currently trains all staff to meet the local needs of its population and that, as a result, staff at Care Level 3 and 4 institutions should be able to recognize mobility issues and make necessary accommodations. However, we found that inmates in Care Level 2 institutions also have mobility issues that would require staff to recognize and accommodate those and other health issues in aging inmates. For example, an anemic, wheelchair-bound aging inmate at a Care Level 2 institution told us that he was disciplined several times for pushing himself inside a building to wait for his medication rather than waiting outside, including in cold weather, to receive it.

In March 2010, the BOP's National Institute of Corrections (NIC) released a training video on aging inmates, aimed at officials running state and local institutions, which said that the most critical step institutions could take to address an aging inmate population is staff training. According to the video, training is important to help staff understand that aging inmates may have a medical reason that explains behavior that would otherwise be subject to discipline, such as an aging inmate who is in the wrong place because he has dementia. Institution staff with whom we spoke agreed that this type of training at the BOP would be helpful and provided us examples. A Case Manager described to us how she once asked an inmate several questions and received strange responses. She said she thought the inmate was trying to "fool her," but she later learned that the inmate had medical conditions that prevented him from responding. She said training on how to recognize behaviors resulting from dementia or other debilitating conditions would be helpful. A Social Worker also said staff should be trained to understand the behaviors associated with dementia. The Assistant Director for the Health Services Division and Medical Director said that the BOP has started to put more into annual training regarding officer sensitivity but that the BOP should permanently incorporate training specifically for the care of aging inmates across the institutions.

### **The physical infrastructure of BOP institutions cannot adequately house aging inmates**

The BOP's mission includes confining federal offenders in controlled environments that are safe, humane, cost-efficient, and appropriately secure. However, the BOP's ability to confine its aging inmate population is insufficient due to overcrowding in its institutions, as well as problems with

their internal and external infrastructures. Lower bunks, essential for accommodating aging inmates with mobility limitations or medical conditions, is limited by the overcrowding of BOP institutions. As a result, institutions do not always have enough lower bunks as well as handicapped-accessible cells and bathrooms, and others cannot accommodate the number of inmates with mobility devices that require elevators. Further, aging inmates cannot consistently navigate the narrow sidewalks and uneven terrain at some institutions. Staff and inmates told us that separate housing units, or entire institutions, would be more appropriate to house aging inmates.

*Lower bunks are limited due to the overcrowding of BOP institutions*

According to BOP staff and officials, aging inmates generally require lower bunks because of their physical limitations and risk of falling. However, BOP institutions are consistently overcrowded, limiting the number of available lower bunks.<sup>35</sup> Several officials and staff told us that their institution has run out of lower bunks for aging inmates. We found that the lack of sufficient lower bunks affects aging inmates in several ways.

First, the lack of lower bunks may prevent or delay aging inmates from receiving lower bunks. Consequently, aging inmates may be housed in upper bunks until a lower bunk becomes available. For example, a Warden told us that aging inmates are sometimes assigned to an upper bunk out of necessity, which could be a problem for aging inmates because climbing into an upper bunk is not always easy. During our visits to BOP institutions, we observed upper bunks that did not have ladders or steps, which required inmates to climb on desks, chairs, or makeshift pedestals to access the upper bunks.

Second, the lack of lower bunks has forced institutions to retrofit other space to create additional lower bunks. A Supervisor of Education told us that her institution was unable to accommodate all of the inmates who needed lower bunks. As a result, the institution had to add beds to a room not originally intended for housing. We also found that institutions modified or added lower bunks within existing housing cells to accommodate aging inmates and inmates with mobility limitations, including retrofitting two-man cells or “cubes” to hold three inmates. A Case Manager told us that while many three-man cells are composed of one double bunk and one single bunk, her institution created some triple-level bunk beds in which both the middle and bottom bunks are considered “lower bunks.” She also told us she observed inmates with histories of seizures and high blood pressure receiving middle bunks, which she said could create a liability for the BOP if the inmates were to fall.

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<sup>35</sup> In FY 2013, the BOP as a whole operated at 36 percent over capacity and aging inmates represented the fastest growing segment of the BOP’s population.

Finally, the lack of lower bunks requires staff to regularly reassign lower bunks by prioritizing and reorganizing bed assignments, which sometimes creates tension among the inmates being moved. Specifically, institution staff told us that managing lower bunks can be a very difficult, time-consuming endeavor and that it often takes a collaborative effort between inmates and staff from other units to accommodate aging inmates. A Counselor told us that trying to find a lower bunk is comparable to “finding a needle in a haystack.” Moreover, accommodating aging inmates with lower bunks has repercussions. Staff from institutions across all security levels described to us situations in which moving a younger inmate to an upper bunk to accommodate an aging inmate created tension or animosity within the housing unit. In one case, a Counselor told us that the tension from assigning a younger inmate from a lower to an upper bunk led to an assault.

To help manage lower bunks, institution medical staff issues lower bunk passes to those inmates who meet criteria in a memorandum issued in June 2012 by the Assistant Director of the BOP’s Health Services Division. The memorandum, entitled “Lower Bunk Criteria,” standardizes the assignment of lower bunks across the BOP by providing specific medical criteria for institution medical staff to consider before assigning a lower bunk.<sup>36</sup> However, several nonmedical institution staff told us that lower bunk passes are given to inmates who do not need them. One Counselor said that there is a disconnect between medical and nonmedical staff concerning inmates’ needs for lower bunk passes. We found that other institutions faced similar circumstances and issued lower-bunk passes exceeding the availability of lower bunks. A Health Services Administrator told us that his institution was operating at maximum lower-bunk capacity at all times and provided us with a document that showed 452 inmates had lower bunk passes at that time while the institution had only 444 lower bunks.

*Overcrowding also limits the BOP’s ability to move aging inmates to the institutions that best address their medical needs*

The BOP primarily utilizes its Care Level 3 and 4 institutions to house inmates with the most significant medical issues. The BOP’s Care Level 3 institutions treat inmates with medical conditions that require daily to monthly outpatient clinical contact. These inmates may also require assistance in some activities of daily living. But, we found that inmates needing a transfer to a Care Level 3 institution may be temporarily housed in

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<sup>36</sup> The memorandum identifies a range of specific medical conditions for which a lower bunk pass is recommended, including but not limited to orthopedic conditions, neurological conditions, blood-clotting problems, balance problems, pregnancy, and obesity. The memorandum does not specify at what age an inmate should receive a lower bunk. However, staff told us they attempt to assign lower bunks to inmates by age, which varied by institution. At one institution, the Health Services Administrator stated that he always places inmates over the age of 70 on lower bunks. A Counselor at a different institution said that the majority of inmates over the age of 55 are in lower bunks.

the receiving institution's Special Housing Unit while waiting for an available bed.<sup>37</sup> A Medical Designator in the BOP's Office of Medical Designations and Transportation told us that when an inmate is being transferred due to medical needs, the BOP may decide to transfer the inmate as quickly as possible, even if that means the inmate has to be assigned to the Special Housing Unit until a bunk in the general population becomes available. An Assistant Health Services Administrator and a Case Manager at a Care Level 3 institution confirmed that their institution has sometimes placed aging inmates in their institution's Special Housing Unit until a bunk became available elsewhere in the institution.

Access to the BOP's Care Level 4 institutions, which comprise the BOP's six medical centers, is determined, in part, by the availability of bed space, and we found that transfers to these institutions are often difficult to complete in light of overcrowding. Inmates waiting for transfer to a BOP medical center must remain in their institution's general population until a bed becomes available or their condition worsens. A Health Services Administrator told us that inmates waiting for transfer place a huge strain on staff because his institution does not have an infirmary. A Case Manager told us that space is at a premium at the medical centers and if an inmate's condition is not an emergency most inmates will wait 2–3 months for a transfer. We asked the BOP for all data on pending medical transfers and found that in October 2014 two inmates awaiting an emergency transfer had been waiting on average 11 days, inmates awaiting a routine urgent transfer had been waiting an average of 31 days, and inmates awaiting a routine transfer had been waiting an average of 57 days.<sup>38</sup> If an inmate's condition worsens, he is sent to a local hospital at government expense until the BOP's Office of Medical Designations and Transportation can approve his transfer to a medical center.

A Medical Designator in the Office of Medical Designations and Transportation said that institution staff is always inquiring about the wait period for transfer, often requesting that inmates be transferred sooner. However, because transfers depend on the availability of bed space, inmates are placed in a queue and have to wait for a bed to become available in a BOP medical center. A Health Services Administrator at a medical center told us that one of her biggest concerns is delaying care for inmates who need to

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<sup>37</sup> A Special Housing Unit is a separate unit used to segregate inmates in administrative detention status or disciplinary segregation status from the rest of the inmate population. Inmates can be in administrative detention status for a variety of reasons, including a pending transfer to another institution or a need for protection from the general population. Inmates in disciplinary segregation status are being punished for violating institution rules. See 28 C.F.R. §§ 541.20–541.24.

<sup>38</sup> Routine urgent transfers occur for medical conditions such as operative wound care and dialysis. Routine transfers occur for medical concerns such as poor medication compliance or for further evaluation pending surgery approval.

transfer to her institution but cannot do so because there are no available beds.

*Institutions have difficulty accommodating inmates requiring handicapped-accessible facilities*

All BOP institutions are required to comply with the *Architectural Barriers Act of 1968*, which requires that public buildings and infrastructure be accessible to individuals with disabilities, including handicapped-accessible hallways, doors, and cells.<sup>39</sup> The specific guideline addressing institutions and cells states that “accessible cells or rooms should be dispersed among different levels of security, housing categories, and holding classifications to facilitate access.” Officials from the BOP’s Administrative Division said each institution is built to meet all accessibility standards that were in place at the time of its construction, with newer institutions being more accessible than older institutions. However, the Deputy Chief from the BOP’s Design and Construction Branch told us that some BOP institutions were built over a century ago and many continue to have accessibility difficulties even after retrofitting and renovation. A Case Manager at a medical center told us that the institution is old and that many of the units cannot house wheelchair inmates because they do not have wide enough doors. Also, BOP officials and staff told us that the infrastructure of more recently built institutions was not designed to handle the number of aging and handicapped inmates who are housed in these institutions.

The BOP’s care level system has led to higher concentrations of aging inmates in institutions with higher care levels and more inmates needing handicapped-accessible infrastructure than the institutions were designed to handle. During our visits to BOP institutions, we found a number of infrastructure difficulties that limit the BOP’s ability to provide appropriate accommodations to house aging inmates, particularly those with physical disabilities. Institution staff expressed similar concerns regarding the accessibility of housing units. Due to housing limitations, inmates using wheelchairs and walkers are often housed together, creating cells with very limited space. In one case, a Social Worker observed a cell that housed two wheelchair inmates together where the wheelchairs had to be placed outside the room because the cell could not accommodate both wheelchairs. We were also told that when multiple inmates with physical disabilities are housed in the same unit their wait time for the limited number of accessible showers and bathrooms increases. An aging inmate told us that his unit houses approximately 160 inmates, with only one handicapped-accessible toilet. A second inmate in the same unit confirmed that, as a result, he often sees wheelchair-bound inmates waiting in line for that toilet because the rest of the toilet stalls are too narrow to accommodate wheelchairs.

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<sup>39</sup> 42 U.S.C. §§ 4151–4157.

We found that institutions also have difficulty accommodating the growing number of aging inmates who need elevators. A Case Manager told us that many units could not house aging inmates with mobility issues, particularly those who require a wheelchair, because the units lack elevators. In these cases, inmates with mobility issues are housed in the same unit, increasing the use of elevators to that unit. Staff at several institutions said that as a result, a common problem is frequent elevator outages, which may take days to be repaired. A Social Worker told us that she observed inmates walking down stairs with walkers because elevators were broken. We found that some institutions had handicapped-accessible cells and lower bunks that could be accessed only by stairs, and therefore aging inmates who may need the additional space provided in handicapped cells have to climb stairs to reach the larger cells or be placed in a regular-size cell within the general housing unit. At one institution we visited, staff and inmates told us that aging inmates with mobility issues sometimes have to walk up stairs to the second floor to access their lower bunk. One inmate told us that sometimes inmates with walkers remain assigned to an upstairs housing unit for weeks until space becomes available on the bottom floor. Staff from another institution told us that their institution was not handicapped accessible because inmates have to navigate steps in order to reach their cells. Inmates who cannot climb stairs cannot be housed at the institution and must be transferred to a nearby BOP institution.

Institutions have the authority to pay for their own maintenance and small renovation projects. We found that one institution had to retrofit education space to create a wheelchair repair shop due to the number of wheelchair-bound inmates. However, an institution cannot spend more than \$10,000 of its own funding on renovations and larger projects have to be coordinated with their regional office or the BOP's Central Office. The Chief of the BOP's Facilities Programs told us that institutions rarely submit proposals to the BOP's Central Office for major renovations to make housing units more accessible.

We also found that from 1994 to 1996 the BOP inspected all institutions to evaluate their accessibility for inmates with mobility impairments and funded recommended renovations based on those inspections. For example, an inspection in one institution found that the medical and dental areas were accessible only by stairs. As a result, the institution had an elevator installed in that area to make it accessible for inmates with mobility issues. The Chief of the BOP's Facilities Program stated that all high-priority and some of the medium-priority renovations were completed but that renovations funded by the Central Office stopped prior to addressing the lowest priorities. We were also told that the BOP has not conducted another BOP-wide review of the accessibility of all institutions since 1996.



*External infrastructure, including narrow sidewalks and uneven terrain, present difficult and sometimes unsafe conditions for aging inmates to navigate*

We found that the conditions of the external infrastructure of some institutions, such as uneven terrain or narrow sidewalks, makes it difficult and sometimes unsafe for aging inmates, particularly those with mobility issues, to move within the premises. A Clinical Director said some housing units are far from the cafeteria, on uneven terrain, and become dangerous in snow or inclement weather. In addition, a Counselor told us that the visiting room at his institution is at the top of a hill and wheelchair-bound inmates have to use a service road to access the visiting room, rather than the stairs the other inmates can use. Further, many of the handicapped inmates at this institution are located at the bottom of a hill because that is where the only handicapped-accessible units are located. An inmate at this institution also told us that the sidewalks are narrow and do not allow enough space to accommodate inmates in a wheelchair.<sup>40</sup> Additionally, a Warden at another institution told us that the housing units at his institution are on a hill, which makes it harder for aging inmates in wheelchairs and walkers to move about. He said that while the institution was built less than 20 years ago, it was not built to accommodate the number of aging inmates in wheelchairs and walkers currently housed there. To address challenges associated with an institution's external infrastructure, we found that in some cases institution staff would move aging inmates to housing units that are closer to common areas to shorten walking distances. However, as described above, bed space and accessible areas are often limited and not all aging inmates can be placed in accessible areas.

*According to BOP staff and officials, separate units, or entire institutions, would be more appropriate to house aging inmates*

The BOP does not provide specialized housing units based on age. Some staff told us that the current system of having housing units contain a mix of ages enables aging inmates to mentor younger inmates and that the presence of aging inmates in general improves the behavior of the entire inmate population. The BOP operates a number of segregated or specialized housing units, including units for inmates under administrative detention or disciplinary segregation and units to provide programming and treatment for sex offenders, drug offenders, and inmates diagnosed with mental health conditions. The BOP's Assistant Director for Health Services and Medical Director told us that BOP officials have discussed the possibility of similarly housing aging inmates together. However, he said that doing so would

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<sup>40</sup> During our visit to this institution, staff showed us how wheelchairs take up nearly the entire width of sidewalk and explained that not only was this unsafe for inmates in wheelchairs, it was also problematic for other inmates since they are not permitted to walk on the grass.

require “a real trade-off” because it would require the BOP to house many aging inmates farther away from their families.<sup>41</sup>

However, other staff and inmates provided several reasons why separate units, or entire institutions, would be more appropriate to accommodate the increasing population of aging inmates. For example, and as described above, the internal and external infrastructures of institutions often limits the BOP’s ability to safely confine its aging inmate population. A Unit Manager suggested that given the number of aging inmates at his institution, the BOP should retrofit an entire building dedicated to accommodating aging inmates who need lower bunks that are strategically located in areas easily accessible to certain institution services, such as healthcare. A Clinical Director told us that the BOP should create a separate institution for aging inmates with an “aging-friendly infrastructure” in a location that has flat terrain. Additionally, a Counselor told us that having aging-inmate units with dedicated, round-the-clock nursing support could cut down on medical costs because a nurse could consistently help with their chronic health issues. The Assistant Director for the Administration Division said that requests for geriatric units and institutions have been made before, and that he would “love” to have these units if it did not require costly construction.

In addition, BOP officials and staff told us that separate housing units or institutions would provide safer housing for aging inmates who may be more susceptible to being victimized by younger inmates. While we were told that younger inmates often respect aging inmates, we were also told that younger inmates sometimes victimize aging inmates.<sup>42</sup> For example, a Unit Manager in a Care Level 3 institution told us that his institution receives aging inmates directly from a BOP medical center and houses them in the general population. He said this is an unsafe practice because they are vulnerable to being victimized when surrounded by younger inmates.

### **The BOP does not provide programming opportunities specifically addressing the needs of aging inmates**

All BOP institutions offer programs and activities for inmates to further their education, obtain vocational and occupational training, practice their religion, enhance interpersonal and life skills, and participate in recreation

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<sup>41</sup> The BOP considers incarceration close to family members an important aspect of an inmate’s rehabilitation and therefore attempts to place inmates in institutions that are within 500 miles of the release area, especially when an inmate is within 36 months of release.

<sup>42</sup> We requested data from the BOP on incidents where aging inmates were victimized by younger inmates, but we were informed that the BOP does not keep statistics in this manner.

and leisure activities.<sup>43</sup> However, there are no programs, and limited activities, that specifically address the needs of aging inmates, many of whom have already obtained an education or do not plan to seek further employment once released. Aging inmates who want to participate in programs face obstacles, including having already completed all the programs available at an institution. Institution officials and staff told us that the lack of programming and activities specifically designed for aging inmates makes them more likely to be idle and not participate in any activities or programs at all. Finally, general release preparation programs do not address the unique release programming needs of aging inmates.

*There are no programs, and limited activities, specifically designed or appropriate for aging inmates*

All BOP institutions are required to provide GED classes, as well as English as a Second Language, Adult Continuing Education, and parenting classes, and to have a library.<sup>44</sup> The BOP also offers programs with standardized curricula in multiple institutions for residential and nonresidential drug treatment, psychological treatment, occupational education classes that teach trade skills, and work through Federal Prison Industries, or UNICOR.<sup>45</sup> In addition, institutions have the flexibility to develop local programs.

At the outset of our review, the BOP told us that there are no programs specifically designed for the needs of aging inmates but that aging inmates participate in standardized programs and local programs. The Assistant Director of Correctional Programs said there are no programs set aside for inmates of a particular age and that everything is based on inmate need rather than age. A Supervisor of Education also told us there are no age-specific programs but there are activities such as music appreciation and

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<sup>43</sup> Programs are formal educational opportunities, with start and end dates, required attendance, a curriculum, and measurable achievement standards. Activities are less formal events, including one-time events and sports or game tournaments, in which inmates can participate for recreation.

<sup>44</sup> Detention centers, metropolitan correctional centers, and the Oklahoma City Federal Transfer Center are exempted from providing programs beyond these minimal requirements. Additionally, satellite camps (minimum-security camps next to a larger, higher-security institution) are exempt but more programs are available at the higher-security institutions to which the camps are attached.

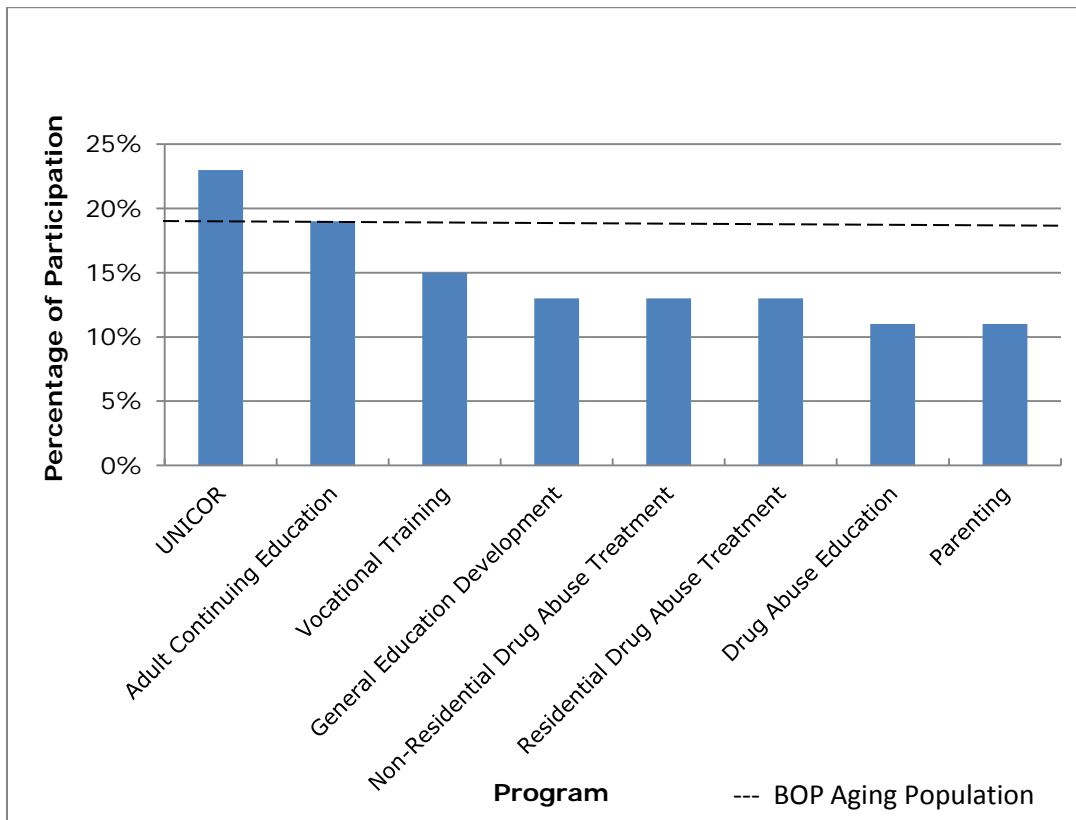
<sup>45</sup> Federal Prison Industries, commonly referred to by its trade name UNICOR, is a wholly owned government corporation whose mission is to employ and provide job skills training to the greatest practicable number of BOP inmates and produce market-priced quality goods and services for sale to the federal government with minimal impact on private business and labor. See [http://www.bop.gov/inmates/custody\\_and\\_care/unicor.jsp](http://www.bop.gov/inmates/custody_and_care/unicor.jsp). See also DOJ, OIG, *Audit of the Management of Federal Prison Industries and Efforts To Create Work Opportunities for Federal Inmates*, Audit Report 13-35 (September 2013), <http://www.justice.gov/oig/reports/2013/a1335.pdf> (accessed April 9, 2015).

exercise courses that aging inmates gravitate toward. We reviewed the BOP's Directory of National Programs and found that the BOP has 18 standardized programs but none specifically addressing the needs of aging inmates. Finally, when we asked BOP officials and staff whether aging inmates had different needs than younger inmates, they cited different physical needs but did not cite different programming needs related to age.

Institution staff told us that they frequently recommend the BOP's standard parenting class to aging inmates because many of them have adult children and grandchildren. However, we found that this program had one of the lowest rates of aging inmate participation. According to BOP data, only 11 percent of inmates who participated in the parenting program in FY 2013 were aging inmates. Overall, we found that aging inmates participated in only two of the BOP's eight largest standardized programs at rates equal to or higher than their percentage of the overall BOP population. (See Figure 4 below.)

**Figure 4**

**Aging Inmate Participation in the BOP's Largest Programs, FY 2013**



Note: The figure includes only those programs that had more than 10,000 inmate participants in FY 2013. Adult Continuing Education was the largest program, with 71,235 participants, including 13,693 aging inmates.

Source: BOP program participation data.

BOP officials and institution staff also suggested local health and wellness programs for their aging inmates because aging inmates often have health concerns. We were unable to evaluate aging inmate participation in these programs because inmate participation in local programs is tracked only at the local level and we were told that the programs offered vary by institution.

Although BOP officials and staff told us that programs do not focus on inmate age, we found one that the BOP created exclusively for younger inmates. The Bureau Rehabilitation and Values Enhancement (BRAVE) program is designed for medium-security male inmates who are 32 or younger, have a sentence of at least 60 months, and are beginning their first federal sentence. The BOP describes the program as helping inmates adjust to incarceration and reducing their incidents of misconduct. In FY 2013, not more than 2,580 inmates met the criteria for the BRAVE program.<sup>46</sup> Meanwhile, in FY 2013, there were 30,962 aging inmates for whom no specific programs existed.

*While institutions have the flexibility to create programs that could address aging inmates' needs, few have such programs*

According to the BOP, each institution can assess where its inmates' interests lie and offer programs and activities that appeal to the interests and needs of its population. However, despite having the flexibility to develop and offer local institution programs, we found that even institutions with a high percentage of aging inmates did little to identify the unique programming needs of aging inmates who already have an education or job skills and to provide programs to address their unique needs. A Supervisor of Education said that age has a big impact on the types of programs inmates participate in because aging inmates are less likely to participate in physically demanding activities. Staff at the institutions we visited told us that their institutions could do more for the aging inmates and that if programs for aging inmates were offered, those inmates would be more interested in participating. For example, a Reentry Coordinator told us his institution held a health fair for inmates of all ages and found it was popular with aging inmates because it gave them the opportunity to learn about age-related diseases. A Case Manager suggested to us that the BOP should survey its aging inmates to determine what additional programming they would like to see. Other staff said the BOP should implement programs similar to those offered at nursing homes or community senior centers, such as disease awareness and therapy. Aging inmates described to us a number of additional programs that would meet their needs, including a wider variety of

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<sup>46</sup> We could not determine from BOP data how many inmates were serving their first federal sentence, but we could determine that there were 2,580 medium-security male inmates age 32 or younger who began serving sentences of 60 months or more during FY 2013. BRAVE is offered at two institutions.

computer classes, wellness classes on prolonging physical and mental health, foreign languages, college preparation or similar academic courses to keep their minds sharp, singing, and quilting.

### *Aging inmates who want to participate in programs face obstacles*

We found that even when aging inmates are interested in participating in programs, their ability to participate can be hindered by a lack of programs that are new to them. Aging inmates at institutions we visited told us that the number of programs available was limited and rarely changed. Inmates at different institutions said that they participated in more programs at the beginning of their incarceration but had completed everything of interest to them after a few years, or that their institutions never offered programs that interested them.

We also found that aging inmates might not participate in programs to avoid revealing their vulnerabilities or limitations to younger inmates. One Warden told us that some aging inmates ask to be exempt from GED classes because they do not want other inmates to discover they cannot read. An aging inmate at a different institution agreed, saying that she had seen inmates become discouraged and embarrassed in the GED classes because they were so far behind academically.

Further, the Assistant Director for the Industries, Education and Vocational Training Division told us that the BOP has the responsibility to accommodate aging inmates' physical needs so that their participation in programs is not limited. Some aging inmates have physical limitations that make program participation more difficult, and so some institutions have devised alternatives to facilitate program participation. For example, an Assistant Supervisor of Education told us that her institution had begun providing books from a local library as a substitute to attending classes for aging inmates who cannot physically leave their units.

### *Activities designed specifically for aging inmates are limited*

BOP institutions are required to provide recreational activities for inmates to pursue in their free time. Institution staff told us they often recommended art, music, and hobby classes for aging inmates. Some of the aging inmates we spoke with participated in these and other low-impact activities such as reading in the library, playing cards or other games, and exercise such as walking on the track. However, in other cases, aging inmates who may want to participate in more physical activities cannot keep up with younger inmates. Overall, we found that a few of the institutions we visited considered age when designing activities, mainly by creating athletic leagues with varying age cutoffs to increase opportunities for aging inmates to participate. One institution we visited established a basketball league for inmates age 35 and older, while a second institution has a league for inmates

age 40 and older, and a third institution has a league for inmates age 50 and older. However, not all institutions offered age-specific athletic leagues. Beyond athletic leagues, only 1 of 13 institutions we visited offered an activity designed specifically for aging inmates: an aerobics and nutrition class for inmates age 65 and older, which was held at a BOP institution with one of the highest percentages of aging inmates.

Due in part to the lack of programming and activities designed specifically for aging inmates, idling is a common sight in BOP institutions, according to institution officials and staff. However, one inmate told us that aging inmates do not idle by choice, but rather because there is nothing for them to do. Another inmate said that the aging inmates who idle seem to deteriorate mentally and become depressed.

*The BOP does not address the specific release needs of aging inmates*

Aging inmates often have different release needs than do younger inmates. We found that the BOP's release preparation program focuses on workforce reentry and does not address the unique circumstances, such as finding new healthcare providers or collecting Social Security benefits, which apply to aging inmates. We also found that aging inmates' increased healthcare needs can make transitioning into home confinement difficult.<sup>47</sup>

Pre-release programs do not address the unique needs of aging inmates

The BOP implements a release preparation program in all institutions to prepare inmates to reenter the community and the workforce in particular.<sup>48</sup> Each institution designates a staff member to determine the release needs of the institution's population and coordinate a release preparation program. The program consists of six core topics: health and nutrition, employment, personal finance, community resources, release procedures, and personal development, with each institution developing its own program to address each core topic.

We found that institutions we visited provide release preparation information to every inmate on the same six core topics rather than tailoring the information to individual inmates or categories of inmates. For example, one of the six core topics in the release preparation program focuses on employment. However, release preparation programs do not consistently

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<sup>47</sup> The BOP's Home Confinement Program allows federal inmates to live at home and work at gainful employment while remaining in official detention status. To participate, inmates must be within the last 6 months or 10 percent of their sentence.

<sup>48</sup> BOP, *Release Preparation Program*, Program Statement 5325.07 (December 31, 2007). The OIG is currently reviewing the BOP's implementation of this program. See <http://www.justice.gov/oig/ongoing/bop.htm> (accessed April 9, 2015).

include assistance for those aging inmates who will not be employed after release. We found that programs that did include assistance for those aging inmates briefly discussed accessing Social Security or Veterans benefits, but did not include community reintegration. A Supervisor of Education told us that institutions have the responsibility to prepare inmates to rejoin their communities; but if an inmate's role in that community will be as a retired person, his or her needs will greatly differ from someone reentering the workforce.

Aging inmates told us that the information provided in release preparation programs was not helpful for them and that topics that would be helpful for their release were not discussed. For example, one inmate told us, "You have what they call core programs, such as learning to save money, learning to buy a house, and learning to bring up a family. I'm 67 and I have two houses. And I still have to [take these] programs? . . . [Aging inmates] don't need to take that. We've already accomplished that." Another inmate said that he worries about being released after retirement age and would like to have programs that prepare him for that future. "What's going to happen when I step out at 70? Because if I live to be 70, I'm going to reenter society when I'm past the working age. So how will I survive? . . . What do I do with my medical issues? How am I going to provide for myself if there's no family support?"

Institution staff described to us several ways in which they believed BOP release preparation programs could be adapted to address aging inmates' needs. For example, a Social Worker suggested that the BOP tailor life skills programs for different age cohorts so that younger inmates could learn how to search for jobs and live independently while aging inmates could learn how to apply for Social Security benefits and find assisted living communities. Institution staff also suggested that aging inmates be provided with updated information on life skills, such as online banking, and on health situations that people encounter as they age, such as managing blood pressure.

Insufficient support and access to medical care may limit the placement of aging inmates on home confinement

The BOP has the authority to assign inmates to home confinement for up to the final 6 months of their sentences.<sup>49</sup> Although the population of aging inmates placed on home confinement is relatively small, aging inmates placed on home confinement increased 258 percent, from 161 to 577 inmates, from FY 2009 through FY 2013.<sup>50</sup> Institution staff told us that

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<sup>49</sup> BOP, *Home Confinement*, Program Statement 7320.01 (September 6, 1995).

<sup>50</sup> During this time, the total number of inmates placed on home confinement increased 323 percent, from 382 inmates in FY 2009 to 1,616 inmates in FY 2013.



home confinement is a good option for many aging inmates. Specifically, institution staff said that as long as an inmate has the resources to pay for medical care, home confinement offers more flexibility in addressing his or her medical needs.<sup>51</sup>

However, we were told that there are a number of obstacles, particularly concerning access to medical care, that limit the BOP's ability to place aging inmates on home confinement. A Social Worker told us of an aging inmate with dementia who was released from a medical center into home confinement. The inmate returned just days later because he did not have sufficient support to live in his home. Subsequently, the inmate had to serve the remainder of his sentence in the medical center's inpatient unit because his dementia could not be managed in the general population. Institution staff also expressed liability concerns because the BOP remains ultimately responsible for an inmate's medical care while the inmate is on home confinement. The Assistant Director for Health Services and Medical Director said that the BOP has an obligation to link inmates being released to home confinement with healthcare providers in their communities but after that connection is made it is ultimately up to the inmate to visit the provider for care. He further said that inmates on home confinement are eligible to enroll in Medicaid, Medicare, or private insurance and that BOP Social Workers can help facilitate this enrollment.<sup>52</sup>

### **Aging inmates commit less misconduct while incarcerated and have a lower rate of re-arrest once released**

Based on BOP data and feedback from officials and staff, we determined that aging inmates engage in fewer disciplinary problems during their incarceration. For example, aging inmates have been sanctioned for disproportionately fewer misconduct incidents compared to younger inmates during their incarceration. Also, in considering the impact that releasing aging inmates has on public safety, aging inmates have a lower rate of re-arrest in comparison to younger inmates and the rate of re-arrest decreases with age. Those aging inmates who are re-arrested often have a

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<sup>51</sup> Unlike inmates in institutions, inmates on home confinement do not have to wait for an institution to schedule a trip for an outside medical appointment. Additionally, inmates on home confinement do not have to adhere to halfway house rules on employment and check-in hours, making their schedules more flexible for arranging medical appointments. Finally, home confinement may be more appropriate than halfway houses for aging inmates who will be retired since the primary purpose of halfway houses is to support inmates seeking employment.

<sup>52</sup> The Assistant Director of the Reentry Division said that institution staff focuses on enrollment in benefits programs, in lieu of employment skills, for aging inmates who may not be seeking employment. She further said that Medicaid enrollment is particularly challenging because, although no one can receive Medicaid benefits while in an institution, the rules vary from state to state regarding eligibility for benefits and whether inmates can submit their Medicaid applications while they are still in an institution or only after release.

history of criminal behavior and are most commonly arrested for drug offenses.

*Aging inmates engage in fewer misconduct incidents while incarcerated compared to younger inmates*

According to BOP data, 53,885 inmates engaged in misconduct incidents consisting of violations of institution rules at least once during FY 2013. We found that aging inmates represented about 10 percent (5,621) of these misconduct incidents, while accounting for 19 percent of the BOP's total population during that period. Further, the misconduct of aging inmates was typically of lower severity. According to BOP data, 67 percent of aging inmates' misconduct was of moderate or low severity compared to 60 percent of younger inmates' misconduct.<sup>53</sup>

This data is consistent with what we were told by BOP officials and institution staff. In general, they said that aging inmates are less likely than younger inmates to violate institution rules. The Director of the BOP's Office of Research and Evaluation stated that age is one of the biggest predictors of misconduct, and that inmates tend to "age out" of misconduct as they get older. Further, if aging inmates engaged in misconduct incidents, it was usually for less serious infractions that did not demonstrate violent or aggressive behavior. For example, a Social Worker told us that an aging inmate with dementia engaged in a misconduct incident by not standing up during the daily inmate count. Another Case Manager said that if aging inmates engage in misconduct incidents it is more likely to be for refusing to participate in programs, often because they are not motivated. As discussed below, we found similar trends in our analysis of aging inmates who were re-arrested after release from BOP custody.

*Aging inmates have a lower rate of recidivism compared to younger inmates*

At the outset of this review, the BOP told us they were unaware of any entity with comprehensive data on recidivism, including data on the recidivism of inmates age 50 and older. BOP research from over 20 years ago found that aging inmates have a lower rate of re-arrest than younger inmates do. Specifically, a 1994 BOP study of inmates released in 1987 found that 15 percent of inmates age 55 and older released from its custody were re-arrested for either a new crime or a probation violation within 3 years of release, as compared to 57 percent of inmates age 25 and younger who were re-arrested. This study also found that 41 percent of federal inmates of all ages were re-arrested for either a new crime or a

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<sup>53</sup> Moderate-severity misconduct incidents, which include incidents of refusing to obey an order, refusing to work, or refusing to accept a program assignment, were the most common level of violation for inmates of all ages.

probation violation within 3 years.<sup>54</sup> The Department's Bureau of Justice Statistics (BJS) released a study in 2014 about recidivism rates for state inmates which also showed that recidivism rates were lower for older inmates than for younger inmates; but the study did not specifically break out recidivism rates for inmates over age 50. The BJS studied inmates released from 30 state correctional systems in 2005 and reported that 60 percent of inmates age 40 and older were re-arrested for a new crime or probation violation within 3 years, while inmates under age 30 had recidivism rates exceeding 70 percent within 3 years (with 76 percent of released inmates age 24 or younger re-arrested within 3 years). The BJS includes both re-arrests for new crimes and re-arrests for probation violations, and we could not separate the two categories.<sup>55</sup>

In light of this absence of data on recidivism rates for aging inmates, the OIG undertook its own analysis. The Federal Bureau of Investigation's (FBI) Criminal Justice Information Services Division provided us with criminal history records of all 37,271 aging inmates who were released from BOP custody between FY 2006 and FY 2010.<sup>56</sup> We based our analysis on a randomly selected sample of 381 inmates released during this period.

We reviewed the criminal history of these 381 aging inmates and found that 58 (15 percent) were re-arrested for new crimes within 3 years of their release. We also found that the re-arrest of aging inmates within our sample generally declined with age. For example, 34 of 181 released inmates (19 percent) age 50 to 54 were re-arrested for a new crime compared to no re-arrests for released inmates age 70 and older. See Table 7.

**Table 7**  
**Re-Arrest Rate of Aging Inmates Released Between FY 2006 and FY 2010**

Age Cohort	Total	Re-Arrested for New Crime	Percentage
50-54	181	34	19%
55-59	99	16	16%

<sup>54</sup> BOP, *Recidivism Among Federal Prisoners Released in 1987* (August 4, 1994), p. 3, [http://www.bop.gov/resources/research\\_projects/published\\_reports/recidivism/orepprecid87.pdf](http://www.bop.gov/resources/research_projects/published_reports/recidivism/orepprecid87.pdf) (accessed April 9, 2015).

<sup>55</sup> See BJS, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* (April 2014), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4987> (accessed April 9, 2015). In its report, BJS cautions against making direct comparisons between recidivism statistics published at different times for a number of reasons, including that criminal record histories have become more comprehensive and reliable in recent years.

<sup>56</sup> We analyzed aging inmates released between FY 2006 and FY 2010 to ensure that every inmate in our sample had been released for at least 3 years. See Appendix 1 for more details.

Age Cohort	Total	Re-Arrested for New Crime	Percentage
60–64	64	5	8%
65–69	27	3	11%
70–74	9	0	0%
75+	1	0	0%
<b>Total</b>	<b>381</b>	<b>58</b>	<b>15%</b>

Source: FBI data.

In addition to those who were re-arrested for new crimes, we found that 28 of 381 aging inmates (7 percent) in our sample were re-arrested for probation violations. In total, 23 percent of inmates age 50 and older were re-arrested within 3 years of their release from BOP custody for either new crimes or probation violations.

*Aging inmates were most frequently re-arrested for drug offenses and for offenses similar to those that resulted in their prior incarceration*

Aging inmates who were re-arrested were most commonly charged with drug offenses (41 percent), followed by violent offenses (17 percent) and immigration offenses (16 percent).<sup>57</sup> See Table 8.

**Table 8**  
**Re-Arrest Offense of Aging Inmates**

Type of Offense	Number Re-Arrested	Percentage
Drugs	24	41%
Violent Offense	10	17%
Immigration	9	16%
Burglary/Larceny	5	9%
Miscellaneous	4	7%
Court	3	5%
Counterfeiting/Embezzlement	2	3%
Sex Offenses	1	2%

Note: Miscellaneous offenses are those that do not fit into any of the other categories and include driving under the influence and driving with a suspended license.

Source: FBI data.

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<sup>57</sup> Violent offenses include offenses defined in BOP, *Categorization of Offenses*, Program Statement 5162.05 (March 16, 2009). Violent offenses also include simple assault, battery, corporal injury, and robbery that are not included in Program Statement 5162.05. See the Appendix for more details about how we categorized offenses.

We also found similarities between aging inmates' criminal history and the offenses for which they were re-arrested. On average, 45 percent of aging inmates were re-arrested for crimes similar to those that led to their previous incarceration. For example, 58 percent of aging inmates who were re-arrested for drug offenses and 78 percent who were re-arrested for immigration violations were previously incarcerated for similar crimes.

Finally, we found that only 8 of the 58 (14 percent) aging inmates in our sample who were re-arrested had been first-time offenders at the time they were released from the BOP. The remaining 50 aging inmates in our sample who were re-arrested were already recidivists at the time they were released from the BOP. Therefore, 86 percent of aging inmates in our sample who recidivated were already known recidivists.

**Aging inmates could be viable candidates for early release, resulting in significant cost savings; but new BOP policy strictly limits those who can be considered and as a result, few have been released**

In April 2013, the OIG released a report that found significant problems with the management of the BOP's compassionate release program, and that an effectively managed program would help the BOP better manage its inmate population and result in cost savings. Among other issues, the OIG found that the policy was being applied only to inmates with terminal medical illnesses who had less than 12 months to live. On August 12, 2013, the Attorney General announced expanded provisions for inmates age 65 and older to seek compassionate release as part of the Department's "Smart on Crime" initiative, which was implemented to, among other things, address concerns about unfair sentencing disparities, and reduce overcrowded institutions.<sup>58</sup> That same day, the BOP revised its compassionate release policy to expand the eligibility provisions for elderly inmates for medical and nonmedical reasons.<sup>59</sup> In announcing the revised policy, the Department said that the BOP would generally consider for compassionate release inmates age 65 and older who had not committed violent crimes and had served significant portions of their sentences.

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<sup>58</sup> In the *Sentencing Reform Act of 1984*, Congress authorized the BOP Director to request that a federal judge reduce an inmate's sentence for "extraordinary and compelling" circumstances. The statute permits requests based on either medical or nonmedical reasons that could not reasonably have been foreseen by the judge at the time of sentencing. The BOP issued regulations and a Program Statement entitled *Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. § 3582(c)(1)(A) and 4205(g)*, Program Statement 5050.49 (August 12, 2013), to implement this authority.

<sup>59</sup> The program statement establishes eligibility provisions for "elderly" inmates. For the purposes of our review, we refer to inmates who requested compassionate release under these provisions as "aging inmates" because each provision falls within our definition of an aging inmate.

*Few aging inmates are eligible for early release consideration under the new BOP policy*

Following the release of our compassionate release report in 2013, Department and BOP officials formed a working group to expand the use of compassionate release by identifying inmates who do not present a threat to the community and who present a minimal risk of recidivism.<sup>60</sup> The working group determined that inmates age 65 and older could be appropriate candidates for compassionate release, and the BOP revised its program statement to include three new provisions under which these inmates could request compassionate release. The BOP based its revisions to the compassionate release program on provisions that had already been established by the *Violent Crime Control and Law Enforcement Act of 1994*, the United States Sentencing Guidelines, and the *Second Chance Act of 2007*. These provisions, however, already existed at the time of the BOP's earlier compassionate release policy, and none had resulted in the release of many BOP inmates.

The first new eligibility provision applies to inmates who are age 70 and older and have served 30 years or more of their sentence for an offense that was committed on or after November 1, 1987 (referred to as "new law" elderly inmates).<sup>61</sup> Therefore, no inmate will be eligible for compassionate release consideration under these provisions until at least November 1, 2017.<sup>62</sup> As a result, no inmate has yet to be released under this provision. Moreover, we determined that just 18 inmates would likely be eligible for consideration under this provision in the first year after November 1, 2017.

The second new eligibility provision applies to inmates:

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<sup>60</sup> DOJ, OIG, *The Federal Bureau of Prisons' Compassionate Release Program*, Evaluation and Investigations Division Report I-2013-006 (April 2013). The working group consisted of representatives from the Office of the Attorney General, the Office of the Deputy Attorney General, the Executive Office for United States Attorneys, the Office of Legal Policy, three U.S. Attorneys' Offices, and the BOP.

<sup>61</sup> 18 U.S.C. 3582(c)(1)(A)(ii) states that upon motion of the BOP Director, a federal judge may reduce an inmate's sentence if the inmate is age 70 or older; has served at least 30 years in prison, pursuant to a sentence imposed under 18 U.S.C. § 3559(c), for the offense or offenses for which the defendant is currently imprisoned; and the BOP Director has determined that the defendant is not a danger to the safety of any other person or the community, as provided under 18 U.S.C. § 3142(g). The BOP's provisions do not require inmates to be serving a sentence imposed under 18 U.S.C. § 3559(c), which mandates a life sentence for a defendant convicted of a third serious violent felony or a second serious violent felony plus a serious drug felony. Because 18 U.S.C. § 3559(c) was passed in 1994, inmates would not have served the minimum 30 years until 2024.

<sup>62</sup> The BOP General Counsel said that, even though the provision would not be effective for several years, the BOP included it when revising the program statement in 2013 so that it would not need to resubmit the program statement to the union for negotiation shortly after it had been revised.

1. age 65 and older,
2. suffering from chronic or serious medical conditions related to the aging process,
3. experiencing deteriorating mental or physical health that substantially diminishes their ability to function in a correctional facility,
4. for whom conventional treatment promises no substantial improvement to their mental or physical condition, and
5. who have served at least 50 percent of their sentence.

Officials with the BOP's Office of General Counsel told us that the Department's working group chose 65 as the eligibility age after considering several factors, such as when inmates become eligible for federal benefits and how their health compares to aging individuals who are not in prison. The working group also decided that inmates should serve a minimum of 50 percent of the sentence to justify the resources that the Department spent to prosecute the inmate. The BOP's General Counsel said that the medical provisions were based on the United States Sentencing Guidelines (USSG) definition of the term "extraordinary and compelling reasons."<sup>63</sup> However, we note that, unlike the new BOP policy, the USSG policy statement applies to inmates of all ages, not just those age 65 and older, and it does not require inmates to have served a minimum percentage of their sentence. According to BOP data, as of September 2013, there were 2,204 inmates age 65 and older who had served at least 50 percent of their sentence.

Finally, the third new eligibility provision applies to inmates without medical conditions who are age 65 and older and who have served the greater of 10 years or 75 percent of their sentences. The BOP's General Counsel told us that the provisions were based on the Elderly and Family Reunification for Certain Non-Violent Offenders Pilot Program (pilot program) created as part of the *Second Chance Act of 2007*.<sup>64</sup> In a report to Congress

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<sup>63</sup> The USSG defines "extraordinary and compelling reasons" to include: (1) a terminal illness; (2) a permanent physical or medical condition, or deteriorating physical or mental health because of the aging process, that substantially diminishes the inmate's ability to provide self-care and for which conventional treatment promises no substantial improvement; (3) the death or incapacitation of the only relative capable of caring for the inmate's minor child; and (4) any other circumstance that the BOP Director finds to be extraordinary and compelling. USSG § 1B1.13 (Policy Statement), Application Notes, Note 1.

<sup>64</sup> The *Second Chance Act* directed the BOP to conduct the pilot program during FYs 2009 and 2010 to determine the effectiveness of placing eligible elderly inmates on home detention until the end of their sentences. The Act excluded inmates with a life sentence; a history of violence, espionage, sex offenses, or acts in connection with terrorism; or a history of escape or attempted escape. The statute also required the BOP to determine that eligible inmates were not at substantial risk of recidivating or endangering the public.

after the conclusion of the pilot program in September 2010, the BOP recommended that the pilot program not be made permanent for a number of reasons, including that few inmates were eligible under the provisions.<sup>65</sup> Specifically, the BOP reported that there were relatively few inmates over the age of 65 in its population (approximately 4,000 at that time) and that many were already at an advanced age when they committed the crime for which they were incarcerated. As a result, the eligibility provisions precluded consideration of the vast majority of these inmates. The BOP reported that 71 of 855 inmates (8 percent) who requested to participate in the pilot program were ultimately placed on home detention, while 750 inmates of the 855 inmates (88 percent) were ineligible because they did not meet the provisions.<sup>66</sup> The BOP's Central Office did not approve the transfer of the remaining 32 inmates to home detention because the BOP determined the inmates were a risk for recidivism or endangering the public. According to BOP data, as of September 2013, there were 529 inmates age 65 and older who had served the greater of 10 years or 75 percent of their sentence.

*Few inmates age 65 and older were released under the new compassionate release policy*

In our 2013 review of the BOP's compassionate release program, we found that from 2006 through 2011, 24 inmates on average were released from BOP custody each year.<sup>67</sup> Since the BOP expanded the compassionate release program in August 2013 to include inmates age 65 and older as part of the Department's Smart on Crime initiative, only two inmates were released under the new age 65 and older eligibility provisions (see Table 9). By contrast, 83 inmates were released under the provisions in the new policy not tied to age.

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<sup>65</sup> The report to Congress also concluded that the pilot program did not result in any cost savings. However, the Government Accountability Office questioned the BOP's cost estimates, concluding that the BOP could not determine the actual cost of monitoring inmates who were on home detention. See U.S. Government Accountability Office, *Federal Bureau of Prisons: Methods for Estimating Incarceration and Community Corrections Costs and Results of the Elderly Offender Pilot*, GAO-12-807R (July 27, 2012), pp. 2, 15–16. The BOP told us that as of February 2013 it requires all entities bidding on contracts for halfway houses and home detention to separate the costs of those two services.

<sup>66</sup> Seventy-three inmates were deemed eligible for the pilot program, but two were not placed on home detention. One inmate died before he could be placed on home detention. The second inmate's placement was denied because staff from community corrections and U.S. Probation and Pre-trial Services were unable to perform the necessary home visits and therefore unable to provide adequate supervision.

<sup>67</sup> DOJ, OIG, *The Federal Bureau of Prisons' Compassionate Release Program*.



**Table 9**  
**Compassionate Release Requests,**  
**August 12, 2013, through September 12, 2014**

	<b>Requests by Inmates</b>	<b>Requests Approved by Institutions</b>	<b>Requests Approved by the BOP Director</b>	<b>Released</b>
All Provisions	<b>2,621</b>	<b>320</b>	<b>111</b>	<b>85</b>
"New Law" Elderly Inmates	52	12	0	0
Elderly Inmates with Medical Conditions	203	33	0	0
Elderly Inmates without Medical Conditions	93	19	3	2

Notes: Included in the "All Provisions" row are requests for compassionate release made under the three provisions available to inmates age 65 and older, as well as the provisions available to inmates of all ages such as the provision for inmates with a terminal or debilitating medical condition.

Some requests by inmates were still pending a decision by institutions as of September 12, 2014. Additionally, some requests approved by institutions were still pending a decision by the BOP's Central Office as of September 12, 2014. Finally, although the BOP Director can approve the requests, the sentencing court makes the ultimate decision as to whether an inmate is released.

Source: BOP.

As shown in Table 9, since the new provisions went into effect, inmates made 2,621 requests for compassionate release, but only 348 requests (13 percent) were made under the new eligibility provisions for inmates age 65 and older. The remaining 2,273 requests (87 percent) were made under eligibility provisions available to inmates of all ages, including those with a terminal illness.

*The new eligibility provisions for inmates age 65 and older are unclear*

In our 2013 review of the BOP's compassionate release program, we found that the BOP failed to provide institution staff with adequate guidance regarding appropriate requests for compassionate release. As part of this review, BOP officials and staff told us that the eligibility provisions for inmates age 65 and older are unclear. For example, the BOP's revised program statement includes eligibility for an inmate age 65 and older under the medical or nonmedical provisions. However, institution staff said that determining whether an inmate age 65 and older qualifies under the medical or nonmedical provisions is difficult. The BOP's Assistant Director for Health Services and Medical Director, who told us he was not consulted on the development of the provisions, including the medical provisions, described

the provisions as “vague.” The BOP’s General Counsel told us that the BOP is aware of the need to include more clarification regarding the different medical provisions. The BOP held in-person training for all institution-level compassionate release coordinators in December 2014 to answer the coordinators’ questions and better ensure consistent implementation of the program statement across institutions. The BOP also issued an Operations Memorandum in March 2015 that provided more-specific examples of medical conditions and problems with activities of daily living that make an aging inmate eligible for compassionate release under the medical provisions.

Institution staff also found the nonmedical eligibility provision confusing. The program statement says that inmates age 65 and older without medical conditions must serve the greater of 10 years or 75 percent of their sentence to be eligible to apply for compassionate release. A Case Manager told us that when he contacted the BOP’s Office of General Counsel to clarify the provision, he was told that the Office of General Counsel interprets the provision to mean an inmate must serve *both* a minimum of 10 years *and* 75 percent of the sentence. As a result, only elderly inmates who receive sentences in excess of 10 years are eligible to seek early release under this provision. The BOP’s General Counsel confirmed that this is the BOP’s interpretation of the provision and told us that while the BOP received a lot of questions regarding this provision when the program statement was first released and that it does need to be clarified, the BOP has not discussed making any changes to the program statement itself.

In general, BOP officials and staff we interviewed did not believe that the existing aging inmate provisions would significantly reduce the size of the BOP’s aging inmate population. For example, a Warden told us that laws and policies are sometimes written with good intentions; but if policymakers do not do the homework in advance, the result will be a policy that sounds good but does not accomplish much. He added, “I think that’s what this [the aging inmate provisions] is going to pan out to be too. There is always a thin line between being compassionate to the elderly and protecting society. When you have that thin line, you normally write in provisions that start excluding a lot of people from consideration.”

*The BOP’s compassionate release program could be more effective in assisting the BOP in managing its aging inmates, which would result in significant cost savings*

In announcing the Smart on Crime initiative, the Attorney General stated that revisions to the BOP’s compassionate release policy would help the Department use its limited resources to incarcerate those who pose the greatest threat. As we outlined previously, aging inmates commit fewer and less-severe misconduct incidents while incarcerated than do younger inmates and have a lower rate of re-arrest once released. The BOP General Counsel told us that the Department’s working group to expand the use of

compassionate release concluded that aging inmates do not pose a significant public safety threat.

We found that the BOP's compassionate release program could have a greater impact on overcrowding and incarceration costs if the BOP revised the inmate age provisions to align with the NIC's recommended definition of an "aging" inmate as age 50 or above. We found that the BOP does not define the term "aging" or "elderly" inmate.<sup>68</sup> Rather, as stated above, the BOP requires inmates to be at least 65 years old to request compassionate release under the new provisions. However, the NIC, a Department agency within the BOP, has recommended since 1992 that correctional agencies nationwide define aging inmates as starting at age 50.<sup>69</sup> The NIC based its recommendation on aging inmates' pre-incarceration lifestyles and limited pre-incarceration access to medical care, two factors BOP institution staff commonly cited to us when they described their own views of aging inmates. The NIC continued to recommend that correctional agencies define aging inmates starting at age 50 in a 2010 online training seminar concerning the management of aging inmates.<sup>70</sup>

Our analysis of BOP data shows that if the BOP revised the age provisions in its compassionate release policy from age 65 and older to age 50 and older, consistent with the NIC's recommendation, the potential pool of candidates for compassionate release would increase more than sevenfold, from 4,384 inmates age 65 and older to 30,962 inmates age 50 and older, based on FY 2013 population data. Our analysis also shows that the current age provision of 65 and older will not enable the BOP to effectively address its overcrowding issues in BOP institutions because that age group, while growing, constitutes only 3 percent of the BOP's total inmate population.

We found that lowering the eligibility provision to age 50 and older could assist the BOP in addressing its overcrowding issues, particularly in its minimum- and low-security institutions where more aging inmates are incarcerated. For example, at the end of FY 2013, BOP minimum- and low-security institutions had a population of 71,679 inmates and were operating at 27 percent over capacity. In order to eliminate over-capacity in these

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<sup>68</sup> When we asked BOP staff how they defined these terms, their responses ranged from age 40 to age 78.

<sup>69</sup> DOJ, NIC, *An Administrative Overview of the Older Inmate* (1992). The NIC provides training, technical assistance, information services, and policy and program development assistance to federal, state, and local correctional agencies. The NIC also provides leadership to influence correctional policies, practices, and operations nationwide in areas of emerging interest and concern to correctional executives and practitioners as well as public policymakers.

<sup>70</sup> See DOJ, NIC, *Effectively Managing Aging and Geriatric Offenders*, Satellite/Internet Broadcast, March 11, 2010, <http://nicic.gov/library/024363> (accessed April 9, 2015). However, we note that, while the NIC is part of the BOP, no BOP employees participated in the broadcast.

institutions, the BOP would have to reduce its minimum- and low-security population by about 15,000 inmates. We found that inmates age 65 and older represented only 4 percent (2,755 inmates) of the BOP's minimum- and low-security inmate population, whereas inmates age 50 and older represent 24 percent (17,482 inmates) of the BOP's total minimum- and low-security inmate population. If a modest 5 percent (874 of 17,482 inmates) of this larger group of aging inmates was determined to be appropriate for compassionate release and were released from BOP custody, the BOP could reduce overcrowding in its minimum- and low-security institutions by 2 percent.<sup>71</sup> In comparison, the BOP would have to release 32 percent of minimum- and low-security inmates age 65 and older (874 of 2,755) to reduce overcrowding in its minimum- and low-security institutions by the same amount.

Based on BOP cost data, we estimate that the BOP spent approximately \$881 million, or 19 percent of its total budget, to incarcerate aging inmates in FY 2013.<sup>72</sup> We found that lowering the threshold age from age 65 to age 50 in the revised compassionate release program, coupled with a modest 5 percent release rate for only those aging inmates in minimum- or low-security institutions or medical centers, could reduce incarceration costs by approximately \$28 million per year. Specifically, we estimate that it cost the BOP approximately \$438 million to incarcerate inmates age 50 and older in minimum- and low-security institutions in FY 2013. The early release of 5 percent (874) of these inmates could save the BOP over \$21 million in incarceration costs per year. Also, as previously noted, aging inmates represent one-third of the population at the BOP's six medical centers, which, at \$59,000 per inmate per year, are the BOP's highest-cost institutions. If 5 percent of aging inmates housed in the BOP's medical centers (112 of 2,246 inmates) were released, the BOP could potentially save an additional \$7 million in 1 year.<sup>73</sup>

Finally, we found that revising the time-served provision in the new compassionate release program statement for inmates age 65 and older without medical conditions would also increase the potential pool of candidates for compassionate release. The BOP's eligibility provisions for these inmates require them to serve the greater of 10 years or 75 percent of their sentence. As noted above, the BOP's Office of General Counsel

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<sup>71</sup> For this analysis, we considered only the age of the inmates, not the percentage of sentence served.

<sup>72</sup> Using BOP population snapshots and per capita costs, we calculated the costs of BOP's aging inmates based on the number of days served within a fiscal year and designated institution security level. For more information, see Appendix 1.

<sup>73</sup> We did not consider the cost impact of compassionate release for aging inmates at medium- and high-security institutions because aging inmates represent a smaller portion of the population at those security levels and their potential release would have less of an impact on overcrowding.

interprets these provisions to mean that an inmate must have served *both* 10 years *and* at least 75 percent of his or her sentence. We found this provision excludes almost half of the BOP's aging inmate population because many sentences are too short for the inmate to be eligible for compassionate release. In FY 2013, this policy excluded from consideration 45 percent of the 4,384 BOP inmates who were age 65 and older because they were serving sentences of 10 years or less.<sup>74</sup> We have concerns because Department leadership says the compassionate release policy is designed to address prison overcrowding by providing for early release of aging inmates who did not commit violent crimes and who pose no threat to public safety. Yet this policy as written prohibits early release consideration for nearly half of the BOP's aging inmate population who are likely to be the best candidates for early release. These ineligible inmates who received a shorter sentence are more likely to have committed a less serious offense, and present less danger to the public, than those inmates who are eligible because they received sentences of imprisonment in excess of 10 years.

We believe the BOP should consider whether to revise this provision to eliminate the 10-year minimum time served requirement so that all of the BOP's aging inmates could be eligible for compassionate release consideration once they had served 75 percent of their sentences, including those aging inmates who committed less serious crimes and received shorter sentences and therefore may be most worthy of early release consideration. The BOP's General Counsel told us that these provisions might be "really limiting" and that it may be better if inmates just met one of the time served requirements.<sup>75</sup>

We note that not all aging inmates age 50 and older will be appropriate for compassionate release. For each compassionate release request, the BOP evaluates many other factors, including the nature and circumstances of the inmate's offense, criminal history, the inmate's release plans, and whether release would minimize the severity of the punishment. Nonetheless, the BOP has already determined that aging inmates are a low public safety risk. We believe that reevaluating the compassionate release eligibility provisions for aging inmates could substantially increase the pool of eligible inmates. Within that larger pool of eligible aging inmates, we believe the BOP could further identify more aging inmates whose offenses, criminal histories, and release plans also make them suitable candidates for

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<sup>74</sup> Moreover, because inmates are eligible to earn good conduct time credit under 18 U.S.C. § 3624(b), which equates to about 87 percent of their sentences under BOP policy, elderly inmates who earned all of their good conduct time credit (and therefore would likely be the best candidates for early release) would need to be serving a sentence in excess of 11 years in order to actually serve at least 10 years in prison. Due to good time credit, we found that 48 percent of BOP inmates age 65 and older were likely to be released before they had served 10 years in prison.

<sup>75</sup> The BOP's General Counsel also said that any changes to the eligibility criteria would require coordination with the Department and then negotiations with the BOP's union.

compassionate release, resulting in reduced overcrowding and additional cost savings to the BOP.

## CONCLUSION AND RECOMMENDATIONS

We concluded that a growing aging inmate population has an adverse impact on the BOP's ability to provide a safe, humane, cost-efficient, and appropriately secure environment for aging inmates and to assist aging inmates reentering the community. Although the BOP has revised its compassionate release policy to expand consideration for early release to aging inmates, which could help mitigate the effects of a growing aging inmate population, few aging inmates have been released under it. Several aspects of the BOP's inmate management, including costs, housing, and programming, are affected by an aging inmate population that is growing more quickly than the rest of the BOP's inmate population.

First, aging inmates are more costly to incarcerate than their younger counterparts. According to our analysis of BOP data, an aging inmate costs 8 percent more to incarcerate than a younger inmate due in large part to increased medical needs. Further, aging inmates represent one-third of the population at the BOP's six medical centers, which at \$59,000 per inmate per year are the BOP's highest-cost institutions. In FY 2013, the BOP spent \$1.1 billion of its \$6.5 billion budget (17 percent) on health services. In that same year, institutions with the highest percentage of aging inmates spent an average of \$10,114 per inmate on medical costs, while institutions with the lowest percentage of aging inmates spent an average of \$1,916 per inmate. The continuing increase in the aging inmate population will drive even greater increases in medical spending, especially at institutions with the highest percentages of aging inmates.

Second, BOP institutions lack appropriate staffing levels and offer limited training to address the needs of an aging inmate population. Some institutions have established local inmate companion programs to assist aging inmates with the activities of daily living. However, we found that these programs lack consistent oversight and that implementation varies by institution. We believe the BOP should develop a standardized program to ensure consistency in the implementation of the companion program, as well as set clear program expectations for companions in order to reduce the risk of victimization of aging inmates. We also believe the BOP should implement more training to help staff recognize and respond to the signs of aging. If institution staff is appropriately trained, the inmates' underlying medical needs could be met with care instead of disciplinary action.

Third, the BOP cannot sufficiently house aging inmates at all institutions because of limitations in physical infrastructure. Specifically, overcrowding of BOP institutions results in an inadequate number of lower bunks needed to accommodate aging inmates with limited mobility. Overcrowding also restricts the BOP's ability to move aging inmates to institutions, including its medical centers, that can best address aging inmates' medical needs. Institutions, including those with higher care levels or a high percentage of aging inmates, lack sufficient handicapped-accessible

cells and bathrooms and have difficulty accommodating the number of inmates who need elevators. As a result, aging inmates may be placed in compromising and sometimes unsafe situations due to limitations in institutions' physical infrastructure. The BOP has not evaluated all institutions' accessibility for inmates with mobility impairments since 1996. We believe that, due to the growing aging inmate population, the BOP should reexamine the accessibility of all of its institutions to accommodate the large number of aging inmates with mobility needs. BOP staff and officials told us that separate units, or entire institutions, might be more appropriate to house aging inmates. Units designated specifically for aging inmates, supplemented with medical staff, could help the BOP provide aging inmates more efficient medical care, as well as identify unique programming needs.

Fourth, the programming opportunities to help aging inmates reenter the community are inadequate. There are no standardized programs specifically designed for aging inmates. While institutions have the flexibility to create local programs or activities to address the needs of their population, few have such programs or activities for aging inmates, including those institutions with high percentages of such inmates. As a result, aging inmates either participate in programs that may not meet their needs or are left idle, not participating in any activities. The BOP's release preparation program does not address the unique release needs of aging inmates, including those aging inmates who do not plan to seek employment after release or require assistance with continuity of medical care. The BOP should consider developing programs specifically tailored for aging inmates and enhance its release preparation program to address the unique needs commonly associated with the release of aging inmates.

Fifth, many aging inmates could be viable candidates for early release. We found that aging inmates have fewer misconduct incidents while incarcerated and a lower rate of re-arrest after release. Our analysis concluded that aging inmates comprised 10 percent of all BOP misconduct incidents in FY 2013, while accounting for 19 percent of the entire population. Based on our research and discussions with BOP officials and staff, we consider the rate of misconduct by aging inmates during incarceration to be relatively low compared to younger inmates. In addition, we found that only 15 percent of a sample of aging inmates released from BOP custody was re-arrested for a new crime within 3 years. Based on studies by the BOP and the BJS, we also consider the rate of re-arrest for aging inmates to be relatively low compared to the re-arrest rates of younger inmates. Therefore, while individual cases will vary, aging inmates are generally less of a threat during incarceration and less likely to be a threat to society once released.

Finally, we found that the BOP's revised eligibility provisions for inmates age 65 and older to request compassionate release have not been effective in achieving the Department's goals. In August 2013, the Attorney General announced expanded provisions for inmates age 65 and older to



seek compassionate release as part of the Department's Smart on Crime initiative. While a Department working group determined that inmates age 65 and older could be appropriate candidates for compassionate release, and the BOP revised its program statement to include three new provisions under which these inmates could apply, these provisions are based on existing statutes, which previously resulted in few inmates released from BOP custody. Because of the limitations in the revised provisions, we found that only two aging inmates have been released since the BOP revised the compassionate release policy. While we found that the BOP's eligibility provisions for aging inmates to request compassionate release are currently ineffective, our analysis shows that the BOP could more fully achieve the outcomes the Department seeks by using its existing authority to further revise its eligibility provisions. Expanding the eligibility provisions, such as lowering the age requirement to age 50 and revising the time served provisions for those aging inmates without a medical condition, would increase the pool of potential candidates for compassionate release and further assist the BOP in reducing overcrowding and could save the Department millions of dollars.

## **Recommendations**

To ensure the BOP continues to provide safe, humane, and cost-efficient care within its institutions and to further assist the BOP in managing its aging inmate population, reducing overcrowding, and reducing incarceration costs, we recommend that the BOP:

1. Develop national guidelines for the availability and purpose of inmate companion programs.
2. Consider the feasibility of placing additional Social Workers in more institutions, particularly those with larger populations of aging inmates.
3. Provide all staff training to identify signs of aging and assist in communicating with aging inmates.
4. Reexamine the accessibility and the physical infrastructure of all of its institutions to accommodate the large number of aging inmates with mobility needs.
5. Study the feasibility of creating units, institutions, or other structures specifically for aging inmates in those institutions with high concentrations of aging inmates.
6. Systematically identify programming needs of aging inmates and develop programs and activities to meet those needs.

7. Develop sections in release preparation courses that address the post-incarceration medical care and retirement needs of aging inmates.
8. Consider revising its compassionate release policy to facilitate the release of appropriate aging inmates, including by lowering the age requirement and eliminating the minimum 10 years served requirement.

## APPENDIX 1: EXPANDED METHODOLOGY

### Data Analysis

#### *Medical Spending by Institution*

The BOP provided total medical obligations for all BOP-operated institutions from fiscal year (FY) 2009 to 2013. To calculate each institution's medical rate per inmate, we used the population data obtained from the BOP's SENTRY case management system.<sup>76</sup> We then divided the medical obligations by the total population at each institution to determine the average annual medical rate per inmate.

We compared the medical rates per inmate of institutions with the highest and lowest percentage of aging inmates. Medical centers were excluded from our analysis because their populations tend to have higher medical rates for inmates of all ages. Detention centers were excluded because the population data sets do not include pre-trial inmates. Last, we also excluded correctional complexes because medical spending was only reported for the complex as a whole, not for each institution within it. Therefore, we could not determine which institution within a complex was influencing overall medical costs.

#### *Medical Spending Inside and Outside the Institution*

The BOP provided data on medical obligations inside and outside the institutions, including medical airlifts, public health service obligations, and unforeseen medical services that, when combined, totaled the BOP's entire medical obligations. The OIG analyzed only medical obligations for expenses incurred inside and outside the institutions. We sorted the sub-object codes based on expenses inside or outside the institution to determine which codes had the highest rates of spending. We excluded sub-object codes such as administrative pay, Federal Health Benefits, and Retirement, and analyzed codes such as contract services, pharmaceuticals, medical hospital services, overtime, and night differential.<sup>77</sup> We analyzed the sub-object codes with high rates of spending at the institutions with the highest and lowest

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<sup>76</sup> SENTRY is the BOP's primary mission support database. The system collects, maintains, and tracks critical inmate information, including inmate location, medical history, behavior history, and release data. Inmate deaths are also entered into SENTRY, but there is no code to determine whether deceased inmates were awaiting compassionate release consideration.

<sup>77</sup> A night differential is compensated payment above the basic rate for regularly scheduled night work as a non-wage employee. These costs were incurred outside the institution for matters such as escorting inmates to medical appointments and guarding inmates at local hospitals.

percentage of aging inmates. When comparing institutions based on its percentage of aging inmates, as explained above, we excluded detention centers, medical centers, and all federal correctional complexes.

### *The BOP's Catastrophic Cases*

The BOP provided national data on catastrophic care costs incurred by each of the six regions from FY 2009 to 2013. We received data for all six regions, however data from five of the regions was too inconsistent to analyze. Three regions did not consistently provide the BOP register number of inmates who received care from FY 2009 to FY 2013. Without a register number, inmate age could not be determined. One region did not consistently report data from medical centers, and the other region did not report data until FY 2012, with the most consistent data in FY 2013. The data we received was also incomplete until FY 2012 and could not be analyzed for trends. Therefore, we isolated one region to determine the impact of catastrophic cases on the BOP's medical obligations and there was no margin for comparison.

Using the BOP register number provided in each inmate's catastrophic case and the population snapshots provided by the BOP, we determined each inmate's age. If age was not available in the snapshot, we used the register number to search for the inmate in the BOP's inmate locator and calculated age depending on the fiscal year during which the inmate received care.<sup>78</sup> Once inmates were categorized by age, we grouped the data in 5-year age increments (under 24, 25–29, . . . 80+), and then into the two broader categories "under 50" and "50 and above." Using these categories, we calculated the costs of catastrophic cases for each fiscal year.

### *Total Costs and Average Cost by Age Cohort*

The BOP provided snapshots of its populations near the end of each fiscal year from 2009 to 2013: FY 2009 – September 28, 2009; FY 2010 – September 25, 2010; FY 2011 – September 23, 2011; FY 2012 – September 28, 2012; and FY 2013 – September 28, 2013. The population for each fiscal year represents the number of inmates incarcerated at the time of the snapshot dates. The snapshots included an inmate's register number, name, age, sex, date of birth, citizenship, nature of offense, criminal history points, sentence start date, sentence length, pre-release date, security level, institution location, institution start date, public safety variables, and management variables.<sup>79</sup> The BOP also provided daily and annual costs for each security classification for each fiscal year. The

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<sup>78</sup> The BOP's Inmate Locator can be found here: <http://www.bop.gov/inmateloc/>.

<sup>79</sup> When we discuss inmates with no criminal history in the Background section of this report, we are referring to inmates who have zero criminal history points.

documents provided the average cost of an inmate at each security classification, which we used to calculate our cost estimates.

Since the snapshots represented the population only as of that date, it did not include inmates who were either released prior to or incarcerated after the snapshot date. For example, the FY 2010 snapshot would not have included an inmate who was released prior to September 25, 2010, or an inmate who had entered the BOP after September 25, 2010. To improve our estimates by including those who have served before and after the snapshot dates, we combined inmates from the snapshots of other fiscal years into the snapshot we were analyzing. For example, for FY 2010, we used the prior fiscal year snapshot (FY 2009) to add all inmates released prior to September 25, 2010, into our FY 2010 estimates. Also, we used the preceding fiscal year snapshot (FY 2011) to include inmates with a sentence start date after September 25, 2010, but before October 1, 2010, for our FY 2010 estimates. We included both of these additions to include all inmates who served at least portion of their sentence in FY 2010 but were not included in the original FY 2010 snapshot. All duplicates in a snapshot were deleted. However, since we did not request snapshots from FY 2008 and FY 2014, we could not include inmates who may have been incarcerated prior to or after the snapshots for FY 2009 and FY 2013.

To determine the total cost and average cost based on age and institution security classification, we used the eight per capita cost categories reported by the BOP each year: high, medium, low, minimum, administrative, complex, detention center, and medical center. Each inmate was assigned the cost category for the institution where he or she was incarcerated at the time of the snapshot. Further, we designated minimum-security inmates incarcerated in the minimum security camps attached to standalone institutions (not part of a complex) as minimum security. We then calculated the number of days served for each inmate within each fiscal year using the institution start date and the last day of the fiscal year. If an inmate is projected to be released prior to the end of the fiscal year, we used the projected release date instead. Because a small percentage (less than 2 percent) did not include an institution start date but were designated to an institution, we used the sentence start date as a substitute. We multiplied the number of days served for each inmate by the average daily cost based on security classifications provided by the BOP to find the cost of each inmate.

To calculate average cost by age, we grouped inmates based on age cohorts: under 24, 25–29, 30–34 . . . 75–79, and 80 and older. We then added the cost for each inmate within each age cohort to find the total cost. We divided the total cost in each age cohort by the total number of inmates in each age cohort to find the average cost. We followed similar procedures to find total and average cost at each security classification.

## *Recidivism of Aging Inmates*

We received data from the FBI of all 36,682 federal inmates age 50 and older released from BOP institutions from FY 2006 through FY 2010. The data included any reported arrest from any jurisdiction until the end of FY 2013. From the 36,682 inmates in the data set, we chose a random sample of 381 inmates. The sample size was selected by using a confidence level of 95 percent and a margin of error of 5 percent. For each inmate in our sample, we reviewed the criminal history and considered a recidivist any inmate who was re-arrested for a new crime within 3 years after release. We separately counted the number of these inmates who were re-arrested for a probation or parole violation.

For inmates re-arrested for a new crime, we categorized their re-arrest offense based on the description provided in the criminal history. With the exception of the violent offense category, we used the offense categories in SENTRY. Our violent offense category includes offenses that fit under the BOP's homicide/aggravated assault category, as well as offenses like simple assault, battery, robbery, and corporal injury due to the use of force on a victim.

## **Interviews**

We conducted 169 interviews during this review. We interviewed Central Office officials, including the Assistant Directors responsible for eight Central Office Divisions; the Director of the Office of Research and Evaluation; a Senior Counsel in the Office of General Counsel; five staff responsible for overseeing construction and maintenance of BOP institutions; seven staff responsible for the BOP budget; the Chief of the Designation and Sentence Computation Center; a Medical Designator in the Office of Medical Designations and Transportation; and a Deputy Chief in the Industries, Education, and Vocational Training Division.<sup>80</sup>

We visited eight institutions in person, and another five via video teleconference, for a total of 13 institutions. During those visits, we interviewed 10 Wardens, 5 Associate Wardens, 7 Health Services Administrators, 4 Assistant Health Services Administrators, 4 Clinical Directors, 1 Director of Nursing, 1 Chief of Psychology, 1 Chief Social Worker, 6 Social Workers, 7 Supervisors of Education, 2 Assistant Supervisors of Education, 1 Reentry Affairs Coordinator, 4 Case Management Coordinators, 1 Deputy Case Management Coordinator, 5 Unit Managers, 23 Case

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<sup>80</sup> We interviewed the Assistant Directors of the Administration; Human Resource Management; Health Services; Information, Policy, and Public Affairs; Reentry Services; Correctional Programs; and Industries, Education and Vocational Training Divisions, as well as the General Counsel. We did not interview the Assistant Director of the Program Review Division or the Acting Assistant Director of the National Institute of Corrections.

Managers, and 23 Counselors. We also interviewed 6 inmates per institution at the 8 institutions we visited in person, totaling 48 inmates.

## **Site Visits**

The team conducted site visits to eight institutions: Federal Correctional Institution (FCI) Butner Low, FCI Butner Medium I and Camp, Federal Medical Center (FMC) Butner, United States Penitentiary (USP) Hazelton, FCI Morgantown, FCI Cumberland, Federal Detention Center (FDC) Philadelphia, and Metropolitan Correctional Center (MCC) New York. We selected the Butner institutions because they had the highest percentage of aging inmates in the BOP. We selected USP Hazelton, FCI Morgantown, and FCI Cumberland because the institutions follow the same growing aging inmate trend and to interview officials, staff, and inmates at every security level. Last, the team visited two detention centers, FDC Philadelphia and MCC New York, to assess the effects the aging inmate trend has on the BOP's detention centers.

### *Inmate Interview Selection*

During our site visits, the team interviewed inmates who were randomly selected based only on our definition of aging inmates as age 50 and older. The BOP provided a snapshot of all inmates age 50 and older at the end of FY 2013, which the team used to randomly select inmates. If an inmate was not available at the time of the interview, the team substituted a different inmate from a backup list that was also randomly selected.

### *Video Teleconferences*

The team conducted video teleconferencing with five institutions: FCI Fort Worth, FMC Lexington, FMC Carswell, Federal Correctional Complex Forrest City, and FCI Seagoville. We selected these five institutions because they had a combination of a high number and a high percentage of aging inmates in their populations, excluding FCI Butner Low and FMC Butner, in FY 2013.

## APPENDIX 2: THE BOP'S RESPONSE TO THE DRAFT REPORT



U.S. Department of Justice

Federal Bureau of Prisons


Office of the Director

Washington, DC 20534

April 27, 2015

MEMORANDUM FOR NINA S. PELLETIER  
ASSISTANT INSPECTOR GENERAL  
EVALUATION AND INSPECTION

FROM:

  
Charles E. Samuels, Jr.  
Director  
Federal Bureau of Prisons

SUBJECT:

Response to the Office of Inspector General's (OIG)  
Draft Audit Report: Review of the Impact of an Aging  
Inmate Population on the Federal Bureau of Prisons,  
Assignment Number A-2013-008

The Bureau of Prisons (Bureau) appreciates the opportunity to respond to the open recommendations from the draft report entitled, Review of the Impact of an Aging Inmate Population on the Federal Bureau of Prisons.

Please find the Bureau's response to the recommendations below:

**Recommendation #1:** Develop national guidelines for the availability and purpose of inmate companion programs.

**Initial Response:** The Bureau agrees with the recommendation and will establish national inmate companion guidelines.

**Recommendation #2:** Consider the feasibility of placing additional Social Workers in more institutions, particularly those with larger populations of aging inmates.



**Initial Response:** The Bureau agrees with the recommendation and has requested funding and will initiate the action once funding is received. We request this recommendation be closed.

**Recommendation #3:** Provide all staff training to identify signs of aging and assist in communicating with aging inmates.

**Initial Response:** The Bureau agrees with the recommendation. The Bureau's Learning and Career Development Branch will work with the Health Services Division to develop curriculum to teach employees to identify signs of aging and assist in communicating with aging inmates.

**Recommendation #4:** Reexamine the accessibility and the physical infrastructure of all of its institutions to accommodate the large number of aging inmates with mobility needs.

**Initial Response:** The Bureau agrees with the recommendation to examine the accessibility and physical infrastructure of its institutions to gather baseline information to help inform the goals of the multi division task force as discussed below in the Bureau's response to recommendation #5. The Bureau will survey all institutions to gather information on current accessibility such as: the numbers of handicap accessible cells, showers, toilets, and other infrastructure issues affecting inmates with mobility needs.

**Recommendation #5:** Study the feasibility of creating units, institutions, or other structures specifically for aging inmates in those institutions with high concentrations of aging inmates.

**Initial Response:** The Bureau agrees with the recommendation. The Bureau will create a multi-division task force to study the feasibility of creating units specifically for aging inmates in those institutions with high concentrations of aging inmates.

**Recommendation #6:** Systematically identify programming needs of aging inmates and develop programs and activities to meet those needs.

**Initial Response:** The Bureau agrees with the recommendation and will identify programming needs of aging inmates and develop programs and activities to meet those needs. As program needs are identified and new programs developed, these programs will be incorporated into the Bureau's Inmate Model Programs Catalog or national policy.

**Recommendation #7:** Develop sections in release preparation courses that address the post-incarceration medical care and retirement needs of aging inmates.

**Initial Response:** The Bureau agrees with the recommendation. The Bureau will identify and develop programs which will assist aging inmates as they transition back to the community.

**Recommendation #8:** Consider revising its compassionate release policy to facilitate the release of appropriate aging inmates, including by lowering the age requirement and eliminating the minimum 10 years served requirement.

**Initial Response:** The Bureau agrees that the criteria concerning elderly offenders should be further considered and evaluated before any final determinations are made. The Bureau intends to raise the issue with relevant stakeholders for further discussion, and in relation to any future updates made to the relevant policy statement. As the recommendation only calls for the consideration of new criteria (rather than the adoption of new standards), we request this recommendation be closed.

If you have any questions regarding this response, please contact Sara M. Revell, Assistant Director, Program Review Division, at (202) 353-2302.

### APPENDIX 3: OIG ANALYSIS OF THE BOP'S RESPONSE

The Office of the Inspector General (OIG) provided a draft of this report to the Federal Bureau of Prisons (BOP) for comment. The BOP's response is included in Appendix 2. The OIG analysis of the BOP's response and actions necessary to close the recommendations are discussed below.

**Recommendation 1:** Develop national guidelines for the availability and purpose of inmate companion programs.

**Status:** Resolved.

**BOP Response:** The BOP concurred with the recommendation, stating that it will develop national inmate companion guidelines.

**OIG Analysis:** The BOP's actions are responsive to the recommendation. Please provide a copy of the national inmate companion guidelines, including guidance describing how inmate companions will be selected, trained, paid, and overseen by institution staff, by July 31, 2015.

**Recommendation 2:** Consider the feasibility of placing additional Social Workers in more institutions, particularly those with larger populations of aging inmates.

**Status:** Resolved.

**BOP Response:** The BOP concurred with the recommendation, stating that it had requested additional funding and would initiate further action upon receipt of that funding.

**OIG Analysis:** The BOP's actions are responsive to the recommendation. Please provide information about the number of Social Workers to be hired, their institution placement, and information about how the BOP factored the aging inmate population into its decisions about which institutions should receive additional Social Workers, by July 31, 2015.

**Recommendation 3:** Provide all staff training to identify signs of aging and assist in communicating with aging inmates.

**Status:** Resolved.

**BOP Response:** The BOP concurred with the recommendation, stating that the Health Services Division and the Learning and Career Development Branch would jointly develop a training curriculum to teach employees to identify signs of aging and assist in communicating with aging inmates.

**OIG Analysis:** The BOP's actions are responsive to the recommendation. Please provide a copy of the training materials provided to BOP staff and a description of how training was implemented by July 31, 2015.

**Recommendation 4:** Reexamine the accessibility and the physical infrastructure of all of its institutions to accommodate the large number of aging inmates with mobility needs.

**Status:** Resolved.

**BOP Response:** The BOP concurred with the recommendation, stating that it would survey all institutions to gather information on current accessibility, such as the number of handicapped-accessible cells, showers, toilets, and other infrastructure issues affecting inmates with mobility needs. The BOP further stated that it will use the baseline information gathered in the survey to inform the goals of a multi-division task force that will study the feasibility of creating units for aging inmates (see the BOP's response to Recommendation 5).

**OIG Analysis:** The BOP's actions are responsive to the recommendation. Please provide the results of the BOP's study, to include its assessment of the accessibility of lower bunks, external infrastructure, and handicapped-accessible cells, showers, and toilets, by July 31, 2015.

**Recommendation 5:** Study the feasibility of creating units, institutions, or other structures specifically for aging inmates in those institutions with high concentrations of aging inmates.

**Status:** Resolved.

**BOP Response:** The BOP concurred with the recommendation, stating that it would create a multi-division task force to study the feasibility of creating units specifically for aging inmates in those institutions with high concentrations of aging inmates.

**OIG Analysis:** The BOP's actions are responsive to the recommendation. Please provide meeting minutes and the results of the task force's deliberation, including the institutions that the task force studied, by July 31, 2015.

**Recommendation 6:** Systematically identify programming needs of aging inmates and develop programs and activities to meet those needs.

**Status:** Resolved.

**BOP Response:** The BOP concurred with the recommendation, stating that it would identify programming needs of aging inmates, develop

programs and activities to meet those needs, and incorporate those programs into the BOP's Inmate Model Programs Catalog or national policy.

**OIG Analysis:** The BOP's actions are responsive to the recommendation. Please describe the programming needs identified and provide copies of program curricula and activities developed in response to those needs, as well as copies of any national policies updated as a result, by July 31, 2015.

**Recommendation 7:** Develop sections in release preparation courses that address the post-incarceration medical care and retirement needs of aging inmates.

**Status:** Resolved.

**BOP Response:** The BOP concurred with the recommendation, stating that it would identify and develop programs to assist aging inmates in transitioning back into the community.

**OIG Analysis:** The BOP's actions are responsive to the recommendation. As noted in the report, the BOP's current release preparation does not address the needs of aging inmates who are retired or not seeking employment upon release. Further, aging inmates' increased medical needs makes continuity of medical care upon release a pressing concern. Please provide copies of program curricula developed to address aging inmates' release needs, specifically including programs for inmates not reentering the workforce and addressing continuity of medical care, by July 31, 2015.

**Recommendation 8:** Consider revising its compassionate release policy to facilitate the release of appropriate aging inmates, including by lowering the age requirement and eliminating the minimum 10 years served requirement.

**Status:** Resolved.

**BOP Response:** The BOP concurred with the recommendation, stating that the criteria concerning aging inmates should be further evaluated. The BOP stated that it plans to raise the issue with relevant stakeholders for further discussion and in relation to future policy updates.

**OIG Analysis:** The BOP's actions are partially responsive to the recommendation. As noted in the report, the existing provisions for aging inmates are ineffective in part because the minimum age provision restricts eligibility to only a small portion of the aging inmate population and the minimum time served provisions restrict eligibility even further. Please provide minutes of meetings between the BOP and other relevant stakeholders to discuss this topic, copies of BOP data or other BOP

information reviewed by the BOP and the other stakeholders in the course of their deliberations, and the results of the deliberations, by July 31, 2015.

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Psychology, Public Policy, and Law  
August, 2010

Article

**\*284 PRISON RAPE AND PSYCHOLOGICAL SEQUELAE: A CALL FOR RESEARCH**

Tess M. S. Neal, Carl B. Clements [FN1]

The University of Alabama

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Prison rape is a pervasive and serious problem affecting many male inmates in U.S. prisons. We review the literature on prison rape prevalence, victimization risk factors, and the psychological and non-psychological sequelae of prison rape. We address several areas of inquiry needed to guide research and facilitate solutions to the problem of prison rape, especially given the context and intent of the Prison Rape Elimination Act (PREA) passed in 2003 by the U.S. Congress. Mental health correlates remain to be studied; for example, the complex postrape symptoms of prison rape survivors do not appear to be captured by current diagnostic nomenclature. To date, psychology has been largely silent on the issue of prison rape but may have much to offer in terms of describing and treating the psychological impact of victimization, documenting the personal and situational risk and protective factors associated with prison rape, and in designing programs and policy to reduce prison rape.

*Keywords:* **prison rape, PTSD, PREA, sexual assault, male rape**

The existence of prison rape in male prisons in the United States is a serious problem with pervasive and devastating consequences (Dumond, 2000). The mental health correlates of sexual trauma are complex, and for many victims, the pattern of symptom development may not be fully encompassed by existing official diagnostic categories (Cockrum, 2009). Given the physical and psychological trauma many victims experience, it is particularly important to sharply reduce sexual assault in prisons. Such assaults are not only criminal in nature but also are crimes that take place in a facility created, funded, and operated by the state, which bears the responsibility of keeping its wards from predictable and preventable harm (Wolff, Shi, Blitz, & Siegel, 2007). The U.S. Supreme Court first recognized the problem of prison rape in *Farmer v. Brennan* (1994), unanimously holding that the Eighth Amendment's ban against cruel and unusual punishment would be violated if prison guards acted with "deliberate indifference" and "ignor[ed] a substantial risk of serious harm" to the inmate, noting that sexual abuse is "not part of the penalty that criminal offenders pay for their offenses against society" (511 U.S. 825). The problem became so prevalent and alarming that in 2003 the U.S. Congress passed the Prison Rape Elimination Act (PREA) to identify, prevent, prosecute, and respond to prison sexual violence in correctional facilities.

**\*285 Prevalence**

Reliable estimates of the prevalence of prison rape are not easy to obtain. In both community settings and in prison, official underreporting is often assumed, particularly as women in the community and men in prison may

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experience shame, guilt, and fear of social stigma and retaliation. Rape has been described as the most underreported of violent crimes (Rennison, 2001) and thus is a barrier to effective justice policy and reasonable victim restitution (Beck & Harrison, 2007). Gathering reliable information about a topic as sensitive as having experienced sexual coercion in prison presents a special challenge to researchers (Jenness, Maxson, Sumner, & Matsuda, 2010). Anonymous victimization surveys, typically considered the most trustworthy window into actual prevalence, may be subject to response inflation reflecting inmates who have experienced sexual assault disproportionately choosing to participate in the survey. Conversely, and more likely, using "official reports" or conducting face-to-face interviews with prisoners on such a sensitive topic will fail to identify many victims reluctant to disclose their experiences, thereby artificially deflating prevalence estimates. Further, the operational definition of "sexual coercion" influences the data obtained (Gaes & Goldberg, 2004). For example, some studies have included unwanted touching of genitals, buttocks, and breasts, an inclusion that increases the rates of reported victimization compared to studies that included only forced sex. Future research should use a standardized definition of prison rape, such as that put forth by PREA (2003), which defines rape as:

The carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person, a) forcibly or against that person's will; b) not forcibly or against the person's will, where the victim is incapable of giving consent because of his or her youth or his or her temporary or permanent mental or physical incapacity; or c) achieved through the exploitation of the fear or threat of physical violence or bodily injury (§ 15609).

Overall, research has shown that a minority of inmates are targeted for sexual threats and assaults; estimates range from less than 1% to 21% (Gaes & Goldberg, 2004; Hensley, Koscheski, & Tewksbury, 2005; Moster, & Jeglic, 2009; National Prison Rape Elimination Commission, 2009; Struckman-Johnson & Struckman-Johnson, 2000; Wolff & Shi, 2009). One of the earliest attempts to document prevalence using a fairly rigorous standard of corroboration was Davis (1968), who reported a 5% victimization rate. Given the increased prison crowding and escalating tensions in the last four decades, the figure seems conservative for current times. One in 10 is a more realistic figure based on the series reported by Struckman-Johnson and colleagues (Struckman-Johnson, Struckman-Johnson, Rucker, Bumby, & Donaldson, 1996), and this figure may increase in settings with gang prevalence and racial tensions. Too, prevalence rates do not account for multiple victimizations, occurring in perhaps as many as two thirds of rape victims, which as described later in this paper, make the problem and its negative impact far greater.

Factors associated with rape in male prisons, defined by the threats, violence, power and control issues, as well as racial tension found in facilities for men, may not extend to female facilities (O'Donnell, 2004). It appears that different issues contribute to sexual assaults in female and male facilities; because there are many more men than women in prison, and more written about rape in men's prisons, this article will focus primarily on the experience of incarcerated men.

### **Factors That Increase the Likelihood of Victimization**

Several risk factors have been identified for increased likelihood of male sexual victimization while imprisoned in U.S. facilities. Wolff et al. (2007) argued that risk factors for sexual victimization in prison can be treated as "markers" in the way that medical problems are conceptualized. Marking an individual as "above average" in their risk for a particular problem simply means that additional steps are necessary to manage their potential risks--to ignore these risks in the medical community would be negligent and would raise questions of

medical malpractice. The prison system is not lacking evidence for these markers; however, there is currently no requirement to implement remedies to effectively manage such risks. The following is a brief literature review outlining what is known about sexual victimization risk factors for males in prison.

An overarching risk factor is perceived vulnerability (Dumond, 2003). Characteristics that increase the probability of being victimized include young age (Chonco, 1989; Man & Cronan, 2001; Tewksbury, 1989; Wolff et al., 2007), small stature (Man & Cronan, 2001; Tewksbury, 1989), feminine characteristics (Chonco, 1989; Man & Cronan, 2001), belonging to the middle or upper class (Man & Cronan, 2001), having a homosexual or bisexual orientation (Hensley et al., 2005; Hensley, Tewksbury, & Castle, 2003; Struckman-Johnson et al., 1996), higher level of education (Wolff et al., 2007), prior sexual victimization (Sparks, 1981; Wolff et al., 2007), being perceived as weak or fearful (Chonco, 1989), being an immigrant (National Prison Rape Elimination Commission, 2009), being in prison for the first time (Chonco, 1989; Man & Cronan, 2001), having committed a nonviolent offense (Man & Cronan, 2001), and having committed a sexual offense (Man & Cronan, 2001; Struckman-Johnson et al., 1996). Having a mental illness also has been found to be an important predictor for future victimization, with increased risk for inmates with prior treatment for depression, anxiety, posttraumatic stress disorder (PTSD), schizophrenia, and bipolar disorder (Wolff et al., 2007).

Race also appears to be a salient risk factor associated with prison sexual assault in the United States (Knowles, 1999; Struckman-Johnson & Struckman-Johnson, 2000). Specifically, White inmates are disproportionately more likely to be threatened with and to become victims of sexual assault than members of other races, and Black inmates are disproportionately more likely to become the perpetrators of sexual assault than members of other races (Hensley et al., 2003; Knowles, 1999; Man & Cronan, 2001).

In addition to personal characteristics that raise the risk of individual victimization, institutional and social climate factors have been identified that increase assault likelihood. For example, sexual assaults are more frequent in facilities with greater opportunity; prisons with barracks housing, inadequate security, and overcrowding place inmates at increased risk (Struckman-Johnson & Struckman-Johnson, 2000). Overcrowding of prisons has indeed been an increasingly larger problem as the number of people sentenced and length of prison sentences have \*287 been increasing every single year since the 1980s (Human Rights Watch, 2006). Although it is likely that overcrowding has contributed to sexual assaults in prisons, it may not be causally linked. Overcrowding may contribute indirectly to sexual assaults by decreasing the level of supervision and security provided per inmate, having multiple people sharing cells, and increasing stress in the institution due to the overcrowding.

Classification schemes could well take risk factors for victimization into account for both cell matching and cell blocking placements. As one obvious example, parity in cell matching could occur where those inmates likely of being victimized are not housed with an inmate likely of becoming a sexual aggressor (Man & Cronan, 2001). A survey asking inmates and prison staff to suggest ways to prevent assault found that the most frequently mentioned solution was to segregate the vulnerable inmates from sexual predators (Struckman-Johnson et al., 1996). Because risk of victimization is a continuous rather than categorical variable, a potential cost-effective strategy for placement and supervision would be to develop risk profiles that take into account an individual's conjoint multiple-risk indicators and to project their relative likelihood of becoming victimized. Developing a nuanced risk profile system would be difficult to accomplish given the wide variation across facilities; however, finding a valid model remains an aspirational goal (Wolff et al., 2007).

Correctional staff may consider sexual coercion to be part of the prison culture, and guards who neglect or

even facilitate inmate-on-inmate or staff-on-inmate assaults are rarely punished (Knowles, 1999; Man & Cronan, 2001; Young, 2007). Some prison staff may use the fear of sexual exploitation or may actually facilitate sexual exploitation as a method for controlling prisoners (De-Braux, 2006; O'Donnell, 2004). A series of cases suggest some prison officials have condoned sexual assault. For instance, the 7th U.S. Circuit Court found that deliberate indifference could be inferred in two separate cases: from prison officials setting up inmates to be sexually attacked by other prisoners as a form of discipline (*McGill v. Duckworth*, 1991), and when prison officials rejected an inmate's plea for help and called him a "faggot" (*Anderson v. Romero*, 1995). Findings of deliberate indifference were also noted by the 9th Circuit Court in *Redman v. County of San Diego* (1991) based on prison guards' failure to intervene while watching a rape in progress. In *Trammell v. Davis* (2000), the same Court rejected senior prison officials' immunity claims when they failed to take action after hearing of improper sexual contact between guards and prisoners. In sum, an atmosphere of indifference has been held to exacerbate the likelihood of sexual assault.

### Nonpsychological Sequelae of Prison Rape

More than half of all sexual assaults in prisons result in physical injury to the victim (National Prison Rape Elimination Commission, 2009; Wolff & Shi, 2009). Wolff and Shi (2009) found that prisoners who were assaulted by other prisoners were more likely than those assaulted by correctional staff to be physically injured (70% and 50%, respectively). Victims of sexual assaults by other prisoners were also more likely to be rendered unconscious or to sustain internal injuries than those assaulted by correctional staff. About 25% of serious \*288 injuries documented--generally injuries to the anus or throat-- were caused by forced penetration. Many of the other injuries were bruises, cuts, and scratches. Medical attention was required for about a third of the assault victims, and one fifth of those requiring medical attention required hospitalization outside the prison (Wolff & Shi, 2009).

A second serious consequence of prison rape involves the risk of contracting a sexually transmitted infection. Imprisoned men are affected by higher rates of HIV infection than are men in the general U.S. population (DeBaux, 2006; Graham, Treadwell, & Braithwaite, 2008; Pinkerton, Galletly, & Seal, 2007). Other sexually transmitted infections are concentrated in prison facilities, and practices that increase the likelihood of infection raises the specter that people sentenced to serve time are also exposed to an increased risk of contracting infections and diseases--an unwelcome potentiality that is not part of one's sentence (O'Donnell, 2004). Ninety-five percent of the prison population is released from custody at some point, and prisoners who contract HIV/AIDS or other infections while incarcerated become a burden to society through medical costs and may represent a threat to the general welfare of society (Vetstein, 1997).

Sexual assaults in prisons are considered a contributing factor in increased institutional violence (Struckman-Johnson & Struckman-Johnson, 2000). Prison rape undermines the safety of the prison environment; some prisoners may manage the threat of rape by fighting or attacking other inmates and others may join gangs for protection, both of which increase the likelihood of violent confrontation (O'Donnell, 2004). There is ample evidence that some offender-victims ultimately become aggressors as a means of forestalling further attacks (Chonco, 1989) or to seek revenge (Cotton & Groth, 1982). Victims of prison rape, who may have been nonviolent offenders when they were sentenced, might very well become angry and vengeful people capable of violence against the society they hold responsible for their emasculation, humiliation, and in some cases, contraction of a sexually transmitted infection or other serious medical consequence (Human Rights Watch, 2006; Knowles, 1999; O'Donnell, 2004).

### Psychological Sequelae of Prison Rape

Sexual victimization in prison may carry serious and long-lasting implications, with potentially devastating physiological, social, and psychological components (Lockwood, 1980). Many rapes are violent, bloody, and physically traumatic to victims (Human Rights Watch, 2006). Gang rapes are often characterized by extreme abuse and may be particularly traumatic (Human Rights Watch, 2006). In addition, the threat and reality of contracting HIV/AIDS has added a new dimension of physical and psychological terror for victims (Knowles, 1999). Loss of social status in the prison facility, labeling, stigmatization, and further victimization are other potential consequences for victims (Dumond, 2000).

Somatic problems, interrupted eating and sleeping patterns, minor mood swings, and fears specific to the circumstances of the assault are common reactions in male rape victims (Knowles, 1999; Wolff & Shi, 2009). Victims are also at increased risk for depression (Cooper & Berwick, 2001; Hochstetler, Murphy, & Simons, 2004; Wolff & Shi, 2009) and suicidality (Blaauw, 2005); \*289 those who face repeated victimization and develop learned patterns of helplessness and fear may see suicide as their only viable option (Dumond, 2000). Post-Traumatic Stress Disorder (PTSD) Survivors of sexual assault in **prison** may also be more at risk for developing (Dumond, 2000).

PTSD is the primary trauma-related diagnosis included in the *Diagnostic and Statistical Manual of Mental Disorders* (4th ed., text revision, *DSM-IV-TR*; American Psychiatric Association, 2000). Diagnostic criteria for PTSD include having experienced, witnessed, or been confronted with an event or events that involved threatened or actual death or serious injury, or a threat to the physical integrity to the self or others and a response involving intense fear, helplessness, or horror, in addition to a re-experiencing of the traumatic event, avoidance of reminders of the trauma, and numbing of general responsiveness.

PTSD was originally conceptualized to address the psychological trauma of veterans returning from the Vietnam War but has been recognized as having broad applications to various traumas (Boeschen, Sales, & Koss, 1998). There are actually now more rape survivors classified as meeting diagnostic criteria for PTSD than any other trauma group (Boeschen et al., 1998). It should be noted that multiple victimization is associated with increased risk for PTSD (Kilpatrick, 2007), which may be particularly relevant for victims of rape in **prisons** who are subjected to repeated sexual assaults.

The strongest predictors of PTSD symptoms in victims of sexual assault are negative social reactions and avoidance coping (Ullman, Townsend, Filipas, & Starzynski, 2007). The link between victim-self blame and PTSD symptoms may be partially due to the effect of negative social reactions from others (Ullman et al., 2007). There is a widespread belief in prisons that a "real man" could not be forced into something so degrading against his will, and thus the victim must have wanted the assault (Young, 2007).

Society is essentially silent on the issue of male/male rape largely because sexual activity between two men is often interpreted to be indicative of homosexuality (Sivakumaran, 2005). The prevalence of homophobia may result in the victim of the rape being "tainted" by homosexuality, regardless of how coerced the victim may have been, which likely contributes to the stigma victims feel. In the prison setting, this cycle may be particularly true, where the male who has been raped is symbolically emasculated and is at risk for further victimization based on his perceived vulnerability. The victim likely receives negative social reaction from others and may in fact be perceived as homosexual. The perceived loss of one's masculinity and the accompanying humiliation may be psychologically destructive for many male victims.

The diagnosis of PTSD for rape survivors does not encompass all of the postrape symptoms empirically identified for female victims, including the depression, anger, sexual dysfunction, guilt, humiliation, and disruption of the core belief systems about the self and others common to many victims (Atkeson, Calhoun, Resick, & Ellis, 1982; Boesch et al., 1998). This may be true for male victims of prison rape but empirical research identifying the postrape symptoms of these victims is lacking. The postrape symptoms of prison rape survivors may be even more complex and pervasive than those of other types of sexual assaults based on the fact that many victims are repeatedly assaulted, experience negative social reactions from the prison community, including many staff, and may be perceived as homosexual. The humiliation and perceived loss of one's masculinity, as well as the extensive victim blaming found in **prisons** could perpetuate the negative psychological effects, possibly increasing the risk of developing **PTSD**.

Most of the research for the treatment of rape-related mental health trauma has been conducted with female victims of sexual assaults who are nonoffenders and reside in the community. Results from this body of work may help inform treatments for prison rape survivors. Kilpatrick (2007) recommended secondary prevention strategies (e.g., psychosocial and pharmacological treatments) be implemented within short temporal proximity to the trauma (i.e., within 4 weeks) to mitigate the trajectory of trauma-related mental health difficulties for women who survive sexual assaults. He reported that for female nonoffender victims of sexual assault or rape, brief cognitive and/or behavioral protocols have received empirical support and provide greater improvement in functioning and decreased levels of depression, anxiety, substance abuse, and PTSD compared to supportive counseling. Specific treatments for PTSD for these victims that were included in his short review of the literature included exposure therapy, cognitive therapy, anxiety management training, and psychoeducation. He also briefly reviewed the literature on pharmacological interventions, concluding that although these interventions (i.e., Propranolol and Selective Serotonin Reuptake Inhibitors [SSRIs]) have been shown to reduce symptoms, the reduction was less than was seen from the cognitive-behavioral intervention trials. Research is needed to identify whether these treatments are appropriate for male victims of prison rape.

As noted, the mental health correlates of being a victim of prison rape are not well understood and lack diagnostic specificity. Therefore, applying rape-trauma treatment developed for female victims who reside in the community to male prison rape victims without modification may be misguided. Therefore, much work remains to be done to identify treatments that are empirically supported for male survivors of prison rape. Dumond and Dumond (2007) argued that the provision of mental health and rape-crisis advocacy services has been recognized as essential for victims of sexual assault. They argued that the treatments should be trauma informed, individually tailored (e.g., understanding the specific experiences of the victim based on their gender and sexual orientation), culturally sensitive, of sufficient duration to adequately treat the victim, practice- and evidence-based, and holistic, with members of the health care team working together for the victim.

### **Prison Rape and Civil Litigation**

The failure to deter rape or to respond affirmatively to a victim's physical and psychological trauma puts correctional systems at risk for legal damages. An inmate who is sexually assaulted or raped in prison, where the staff can be shown to have acted with "deliberate indifference," may well have grounds to file a civil claim. The standard set by the U.S. Supreme Court in prison rape litigation (*Farmer v. Brennan*, 1994) clearly opens this avenue of redress. Man and Cronan (2001) suggested litigation against prison officials who condone or fail to prevent sexual assault as a practical solution for survivors. In such an event, both the deliberate indifference and the psychological sequelae of having experienced the sexual assault in prison should be recognized. To inform



the likely trajectory of \*291 prison rape litigation with attention to psychological sequelae, one may look to the history of rape litigation cases, in which most of the victims have been women. Historically, in criminal trials, the credibility and veracity of the victim's claims of sexual assault were subjected to as much scrutiny as the defendant's culpability (Boeschen et al., 1998).

The victim-blaming prevalent in penal facilities (e.g., a real man could not be forced into such a degrading situation) finds historical parallels in cases of women pursuing litigation. The stereotype that a chaste and "good" woman would do anything to resist being raped (including die) and would immediately report the incident led to the myth that women victims likely behaved in ways to encourage the sexual attack (Boeschen et al., 1998). This blame-attribution bias may be compounded by a general lack of empathy for victims who are also offenders. Research by Clements, Brannen, Kirkley, Gordon, and Church (2006) suggested that although potential jurors may have appropriate levels of concern for victims of violence and rape, they have much lower regard for victims seen as blameworthy--a status that includes being incarcerated. Public attitudes toward inmate victims of rape also are reflected in the social acceptability of prison rape humor; jokes are often heard on late-night television and comedy shows, sometimes in movies, and even on TV commercials (Young, 2007).

Common law historically required women who claimed to have been raped to provide independent corroborating evidence of her version of events as well as evidence that she had done everything in her power to resist the assault. Moreover, courts also allowed testimony about the victim's sexual history to be introduced (Boeschen et al., 1998). In the 1970s and 1980s, rape shield laws were passed to provide some level of protection to victims. These laws lowered or eliminated proof of resistance, redefined consent, redefined rape to make it gender neutral, focused on the perpetrator, and limited the cross-examination of the victims' sexual histories (Fisher, 1989). These rape shield laws are applicable to survivors of prison rape as well, particularly given that the definition of rape has been redefined in a gender-neutral way.

An additional effort to combat rape myths in rape allegation cases was to utilize expert testimony on the effects of rape on victims, including testimony about rape trauma syndrome (RTS) and PTSD. RTS was developed in the 1970s to describe the experience of rape survivors, but it is no longer considered scientifically legitimate or appropriate for use in forensic settings. RTS lacked empirical support and never achieved symptom reliability required for inclusion in the *DSM-IV-TR* (Boeschen et al., 1998). Even though RTS was not found to be a sufficiently valid construct, the introduction of RTS into the literature prompted researchers to examine reactions to sexual assault. Such studies confirmed a number of symptoms identified under the RTS umbrella, namely, higher rates of depression, anxiety, fear, and social and sexual problems (Boeschen et al., 1998).

Expert psychological testimony in **prison** rape cases may be offered within the boundaries of current knowledge of **PTSD** (Federal Rules of Evidence, 2006). Given that **PTSD** remains the primary trauma-related diagnosis in the *DSM-IV-TR*, it may represent the best option for diagnosing the cluster of trauma-induced symptoms **prison** rape survivors manifest. However, because PTSD imperfectly captures the traumatic reaction many survivors experience, additional research \*292 is needed on the complexity of postrape symptoms. In addition to clinical testimony, experts with knowledge of correctional systems could offer testimony as to the institutional context--both in terms of prevention and deterrence efforts (i.e., the deliberate indifference question) as well as the adequacy of the facility's treatment response.

### **Prison Rape: A Sociocultural Formulation**

Criminologists have proposed the existence of a prison rape subculture in the United States (Knowles, 1999;

Man & Cronan, 2001; O'Donnell, 2004) and have further postulated a relation between the rape subculture and the nature and extent of the traumatic consequences of sexual victimization. The importance of power and control to one's personal sense of masculinity has been theorized as the bedrock of sexual assaults in male prisons (Knowles, 1999; Man & Cronan, 2001). The culture within penal institutions is such that inmates are stripped of "normal" power and control; that is, they can no longer provide for a family or make choices consistent with their masculinity. In reaction to this stripping of one's power, a prison subculture is hypothesized to exist in which hypermasculinity, aggressiveness, intimidation, and dominance are important (Knowles, 1999). Feminist theory argues that one's sense of masculinity develops in relation to constructions of femininity, and that by distancing oneself from femininity and maintaining a hierarchy of power, men devalue femininity and assert their masculinity (Man & Cronan, 2001). Man and Cronan (2001) also claimed that in this subculture, raping another man is taken as evidence of hypermasculinity--defeating an opponent even more powerful than a woman as well as emasculating the victim and forcing him to take the role of a woman.

The theory holds that the primary goal of the aggressor is for conquest, dominance, and humiliation--to assert one's masculinity rather than for sexual release (Knowles, 1999). As such, the aggressor typically does not consider himself to be homosexual nor does he believe the act to have homosexual implications. Rather, he achieves masculine status through display of physical strength and dominance (Knowles, 1999). Consistent with this view, researchers noted that the language used in the United States to identify the roles of the victim (e.g., "punk," "queen," "kid," "girls," "fags," "pansies," "fairies") and the aggressor (e.g., "top men," "wolves," "jockey," "gorilla," "booty bandit," "player") is nonsexual, indicating that domination and power rather than sex are the primary motives (O'Donnell, 2004). Even the rape itself is described as "turning [the victim] out" rather than "rape" (Knowles, 1999).

At the bottom of the social hierarchy in prisons are the "punks"--usually heterosexual males who submit to sexual acts, generally after initial resistance followed by escalation of force (Man & Cronan, 2001). These inmates are turned into punks after being victimized (often through gang rape) or other means including intimidation or threats. Once an inmate is raped, he becomes an immediate target for other potential aggressors because he is perceived as weak and vulnerable (Man & Cronan, 2001). Often, the victim may be required to provide for the perpetrator's needs in return for some protection (e.g., to avoid being gang raped; O'Donnell, 2004). Punks are the victims of the most violent **\*293** sexual assaults in prisons, and are forced to perform emasculating tasks for their "owners," including satisfying their owner's sexual appetite, being forced to use a female name, and completing various chores for the aggressor. The owner sometimes sells oral or anal sex from his punk to other inmates in exchange for money, cigarettes, or other perks (Human Rights Watch, 2006; Man & Cronan, 2001).

The hypothesized prison rape subculture is also consistent with so-called rape mythology, typically ascribed to men in their assessment of women victims. Rape "myths" are stereotyped, prejudicial, and inaccurate perceptions of sexual violence leading to victim blaming and other attitudes that hinder the detention and prosecution of sexual assault perpetrators (Ward, 1995). According to Blackburn, Mullings, and Marquart (2008), acceptance of rape myths decreased empathy for, and perhaps even initiated the attribution of responsibility to victims of sexual assault. Negative attitudes towards women (and presumably "weak" men) as well as rape myth acceptance leads to blaming victims and to more favorable perceptions of the rapist (Weidner & Griffitt, 1983).

Some support for an existing subculture of prison rape and adherence to rape-supportive beliefs has been documented. Fowler (2008) concluded that the "zero tolerance" policy announced in PREA (2003) posed a problem because of the inconsistencies in definitions of prison rape between those involved in the prison culture and citizens in the community. Based on her survey of inmates' and correctional staff definitions of rape, she theor-

ized that inmate adjustment to prison life is related to the way they interpret rape. Common rape-supportive beliefs led inmates to excuse perpetrators, blame victims, and prevent inmates from accepting the legal definition of sexual assault in such situations. Inmates' definitions of sexual assault had a significant impact on the relation between rape-supportive beliefs and attitudes about postassault medical treatment, sexually transmitted infection testing, disclosures to helping professionals, and official reporting of the assault. Inmates whose definitions of sexual assault were more consistent with community views rather than the prison subculture views were more likely to indicate seeking postassault medical treatment, testing, and disclosure were appropriate methods of behaving after an assault.

Moster and Jeglic (2009) surveyed prison wardens and found some discrepancies in what they defined as prison rape as well. The researchers included 10 vignettes of prison rape in their questionnaire, six of which clearly met the definition of rape as put forth by PREA (2003). These six vignettes, which PREA required by law should be treated with zero tolerance, were interpreted by a significant portion of wardens to be nonrape situations. For instance, only 66.7% of the wardens interpreted the vignette "An inmate is asked for sex by another inmate in exchange for protection" as prison rape or sexual assault. Without a common understanding of the definition of prison rape, the zero tolerance policy required by the law is unlikely to be enforced. The recent assertion by the National Prison Rape Elimination Commission (2009) that "corrections administrators can create a culture within facilities that promotes safety instead of one that tolerates abuse" (p. 5), reflects its finding of all-too-prevalent acceptance of rape as an inevitable part of the prison environment.

### **\*294 The Evolution of National Standards**

As part of the PREA of 2003, Congress established a National Prison Rape Elimination Commission to "study the causes and consequences of sexual abuse in confinement and to develop standards for correctional facilities nationwide" (National Prison Rape Elimination Commission, 2009, p. 1). Although the Commission has addressed far-reaching policies beyond the scope of this paper, the goals of "preventing sexual abuse and also to better respond to victims and hold perpetrators accountable" (p. 1) mesh well with the clinical, community, and social policy aims and expertise of professional and scientific psychology.

We find it interesting that the Commission found widely divergent attention and success rates across and within state prison systems as they asserted, "Protection from sexual abuse should not depend on where someone is incarcerated or supervised; it should be the baseline everywhere" (p. 2). The Commission also criticized the lack of internal monitoring within correctional facilities of prevalence rates and of the myriad of factors that are hypothesized to promote or deter prison rape. Because such variation exists, it is feasible to study the differences across systems and facilities to determine risk profiles of institutions as well as the earlier-noted individual victimization factors that put inmates at risk. Not limiting the focus to individuals is consistent with the systems-level analysis called for by Clements et al. (2007) in their review of policy and institutional factors that impede the mission of corrections and the work of correctional psychologists.

The National Prison Rape Elimination Commission (2009) put forth nine principal findings and correlated recommendations, some of which we reference below in our call for research. Of note, a major recommendation is for funding via the National Institute of Justice for research on sexual abuse in correctional facilities.

### **A Call for Research**



Based on the literature reviewed in this paper, we believe the following are important areas for psychological research to address.

1. Risk assessment victimization protocols must be developed, researched, compared, and disseminated. Only a few correctional systems currently screen systematically for victimization potential (National Prison Rape Elimination Commission, 2009). The risk criteria noted in the literature provide a good starting point.

2. Consistent with the interactionist perspective on correctional research noted by Clements and McLearn (2003), locating person by environment combinations that reduce victimization is critical. Not all inmates identified as vulnerable require the same level of protection. Matching schemes provide an advance over all-or-none responses and will ultimately be more cost effective. Classification and housing protocols can be devised to maximize safety without sacrificing access to rehabilitative and other constructive programs.

**\*295** 3. Definitional problems and measurement techniques should be addressed. A standardized definition of sexual assault would allow for results of separate studies to be compared with one another. We recommend the definition put forth by PREA (2003) be adopted by researchers. Attention should also be paid to methods for gathering data (e.g., How will questions about victimization be asked? Will anonymous self-reports be employed, or will face-to-face interviews be conducted? How might these methods affect results? How might third-party presence affect endorsement rates? What policies can be adopted that help ensure responsiveness to victims and protection from retaliation?). For a recent California investigation of inmate self-report data and interviewer effects, see Jenness et al. (2010).

4. The impact of prison rape on development of mental health problems remains to be adequately addressed. For example, the different types of victimization (e.g., repeated vs. single incidents, gang rape vs. individual rapes, threatened force vs. the use of actual force, being a punk who is owned vs. other victim typologies) need to be researched to identify mental health correlates for treatment. There is some suggestion that men who experience rape in prison may be at increased risk for suicide compared to other populations, possibly even those who have experienced rape in the community.

5. How does the postrape symptom cluster present for most victims? Symptoms may be even more complex and pervasive than those of other types of sexual assaults. Research is critically needed to identify and describe these symptom patterns. Clinicians who treat prison rape victims should be systematically surveyed to accumulate prevalence and symptom severity data. Current diagnostic nomenclature may not capture the variability in symptoms displayed by these victims. Is PTSD an appropriate diagnosis for victims of this kind of trauma? If so, what are the rates of PTSD for these victims? If not, what is the symptom complex for this kind of trauma and how prevalent is the symptom cluster in these victims?

6. The National Prison Rape Elimination Commission (2009) concluded few victims receive the kind of treatment and support believed to minimize the trauma of abuse. Appropriate and effective treatments should be developed. In addition to emergent care for those who report or are identified by staff with obvious physical trauma, what provisions for follow-up and long-term treatment are needed? To this point, research for the treatment of rape-related mental health trauma has been conducted with female nonoffender sexual assault victims who reside in the community (Foa & Rothbaum, 2001; Koss, 1993). How will effective treatment for male victims of rape in prison differ? Empirical support must be garnered for proposed treatments. What kind of training is offered or should be offered to staff delivering such treatment (e.g., to creators)? As yet, few guidelines or **\*296** empirical demonstrations of the necessary treatment and traitor characteristics exist.

7. Courtroom dynamics in these atypical cases (e.g., when a male prison rape survivor is a plaintiff

filing suit against prison officials) need to be examined. Public biases should be identified so that they can be countered with informative testimony to dispel them. Investigations using the diagnosis of **PTSD** in these circumstances should be initiated to learn more about how jurors respond to the traumatic aspects of **prison** rape victimization. As research uncovers more accurate descriptions of the psychological sequelae of such victimization, researchers should examine how jurors respond to these new descriptions in a courtroom setting.

8. It appears that prison rape in the United States is a much more serious problem than it is in other countries. This fact calls for comparative analysis of systems to look for correlates of victimization rates. What is it about the U.S. prison system that exacerbates the problem of prison rape? Some would argue that inordinately high incarceration rates (Mauer, 1999), and policies that capture more persons with mental disorders (Abramsky & Ross, 2003; Kupers, 1999) is part of the systemic problem. Can these conditions be reversed?

9. In the United States, how accurate is the description of the theorized prison rape subculture as put forth by criminologists? If the subculture exists as hypothesized, what elements are associated with the devastating psychological impact on victims? What might be done to change or eliminate such a subculture in our prisons? What is the evidence within institutions indicating adherence to the zero tolerance policy so strongly mandated by the PREA (2003)? What would surveys reveal about staff and inmate perceptions of the rape culture or environment, perhaps at baseline and after systemic changes have been implemented?

10. All of these recommendations should be extended to juvenile facilities. As noted by the National Prison Rape Elimination Commission (2009) and confirmed in a recent Bureau of Justice Statistics report (Beck, Harrison, & Guerino, 2010), the proportion of sexual abuse of youth in juvenile facilities equals or exceeds that of adults. Similarly, rates of abuse range widely, with youth in some locations reporting rates of 30% within a 12-month period. This extensive report also contains helpful information on survey questions and sexual contact definitions. As with adult counterparts, issues of youth-at-risk, institutional culture and context factors, psychological symptom patterns of victims, and treatment effectiveness should be addressed.

### Conclusions

The existence of prison rape in male prisons in the United States is a serious problem. Criminologists have attended to the problem of prison rape (as evidenced by the reference list for this paper); however, this review details a \*297 significant gap in psychological knowledge by highlighting how little attention psychology has paid to the issue. We have much to offer and should turn our attention toward researching prison rape and how it can be eliminated.

We believe prison rape may be a qualitatively different type of sexual assault than has been researched in the psychological literature to this point. Features of this phenomenon that set it apart from other sexual assaults include the gender of the victims, the social context within which it occurs, the motivation of the perpetrator, and the effects of victimization. Few empirical studies have been undertaken since the passing of PREA in 2003; however, the area is ripe for research. In addition to improving the knowledge base of prison rape victimization, study of prison rape might add to our understanding of sexual assault in general.

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## Article

**\*257 THE TRAUMA OF THE INCARCERATION EXPERIENCE**

Mika'il DeVeaux [FN1]

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## Introduction

In 2010, I ceased being counted as a member of the United States correctional population. In that year, I was discharged from correctional supervision after serving thirty-two years of a life sentence; twenty-five of those years were spent in several of New York State's maximum-security prisons, and seven on parole. [FN2] This Article reflects my perspective as a formerly incarcerated person, as a doctoral student whose work relates to incarceration, as an adjunct professor at colleges in New York City, and as a director of a nonprofit organization that provides basic support services to men and women returning from prison. This Article will argue that the experience of being incarcerated is traumatic. I will draw additional support for that argument from my personal experience. Although there is much debate about the psychological effects of incarceration, literature describing prison as a site of trauma is still uncommon. [FN3]

The experience of being locked in a cage has a psychological effect upon everyone made to endure it. No one leaves unscarred. The experiences are hard to describe. When I review my experiences, I often feel like a deer caught in oncoming headlights; I seem to stand still and stare. In this Article, I intend to provide an overview of the psychological effects of incarceration, to offer the reader a discussion about the notion of trauma as I have come to know it, to suggest why it is important from a public safety point of view to take note of these considerations, and to conclude with some discussion of my personal experiences that support and confirm my argument.

**\*258 I. Psychological Effects of Incarceration**

Reports regarding the consequences of incarceration vary greatly. Some researchers report findings of psychological harm, while many others do not. [FN4] Researchers have questioned the validity of studies on the prison experience due to inadequately robust research designs. For example, following reviews of a large number of studies related to the psychological harms that result from incarceration, some researchers found faulty research designs, questionable sampling techniques, and other methodological problems. [FN5] These factors have led several researchers to conduct studies, in which they ultimately concluded that the psychological effects of incarceration were not substantial, even when the population studied had spent time in solitary confinement. [FN6]

In contrast, a body of literature concludes that the psychological effect of incarceration is substantial, [FN7]



even among those experiencing relatively short-term confinement in a jail [FN8] or refugee and detention incarceration. [FN9] \*259 Indeed, the prison experience is unlike any other. Sociologist Donald Clemmer [FN10] noted in his classic book, *The Prison Community*, [FN11] that the prison experience is neither normal nor natural, and constitutes one of the more degrading experiences a person might endure. [FN12] People in prison are likely to report that their adaptations to the constant scrutiny of guards and the lack of privacy are psychologically debilitating. [FN13] Some literature suggests that people in prison experience mental deterioration and apathy, endure personality changes, and become uncertain about their identities. [FN14] Several researchers found that people in prison may be diagnosed with posttraumatic stress disorders, as well as other psychiatric disorders, such as panic attacks, depression, and paranoia; [FN15] subsequently, these prisoners find social adjustment and social integration difficult upon release. [FN16] Other researchers found that the incarceration experience promotes a sense of helplessness, greater dependence, and introversion and may impair one's decision-making ability. [FN17] This psychological suffering is compounded by the knowledge of violence, the witnessing of violence, or the experience of violence, all too common during incarceration. [FN18] Some assert that the psychological effects of incarceration, developed during confinement, are likely to endure for some time following release. [FN19]

\*260 Some researchers argue that the psychological pain of incarceration is not inadvertent but inflicted by design. [FN20] Author Gresham Sykes characterizes these psychologically damaging experiences as “deprivations or frustrations,” and suggests that some of these frustrations “appear as a serious attack on the personality, as a ‘threat to the life goals of the individual, to his defensive system, to his self-esteem, or to his feelings of security.’” [FN21] Thus, in addition to tangible and easily identified forms of punishment, incarceration may inflict more subtle emotional and psychological punishment. [FN22] Sykes suggests these forms of punishment result from deprivations caused by a loss of liberty, material impoverishment, personal inadequacy, loss of heterosexual relationships, loss of autonomy, and loss of personal security. [FN23] Moreover, Sykes suggests that the emotional and psychological forms of punishment “of prison life today might be viewed as punishments which the free community deliberately inflicts on the offender for violating the law” or “as the unplanned . . . concomitants of confining large groups of criminals for prolonged periods.” [FN24]

A prison experiment in the early 1970s attests to the psychological damage caused by the experience of incarceration. [FN25] During the Stanford Prison Experiment, a group of college students were randomly assigned roles as guards or as prisoners and then placed in a prison-like environment. Because the prisoner subjects experienced such intense psychological pain in the simulated environment, the researchers terminated the experiment after six days--eight days ahead of schedule. A number of the student prisoners experienced “acute psychological trauma and breakdowns”; some pleaded for release from the environment because of “intense pains” and five were released due to the “extreme emotional depression, crying, rage, and acute anxiety” they suffered during their brief, mock incarceration. [FN26] In one instance,\*261 the Stanford professors observed that a student prisoner “developed a ‘psychosomatic rash which covered portions of his body.’” [FN27] Researchers concluded that “adjusting” to prison life would be difficult for anyone. [FN28] The experience “can create habits of thinking and acting that are extremely dysfunctional” and permanently change those made to endure it. [FN29]

#### A. Trauma

The origins of the word “trauma” lie in the Greek word for wound, *traumat*. [FN30] Trauma is an event in which there is physical harm, the self is wounded, or when a person who directly experiences, witnesses, or learns about a violent event is “damaged” by it. [FN31] Indeed, even the apprehension of a violent event is par-

ticularly stressful when the event involves a family member or close friend. [FN32] Today, researchers writing about trauma rely on the Diagnostic and Statistical Manual of Mental Disorders (4th ed.) for differential diagnosis of the phenomenon. [FN33] Often used interchangeably with posttraumatic stress disorder, which is a psychiatric diagnosis, trauma is a subjective experience. [FN34]

There are two types of trauma. [FN35] Type I Trauma is a level of injury, pain, or shock derived from a rare unanticipated single event, while Type II Trauma is the injury, pain, or shock that results from anticipated, ongoing, or multiple incidents over time. [FN36] Edwin F. Renaud warns that the experience of an event alone does not lead to the diagnosis. [FN37] Rather, he observed that symptoms after the event will trigger diagnosis. [FN38] It is only when a person is \*262 rendered helpless or is overwhelmed by an event that the results may be said to constitute trauma. [FN39] This distinction is important because various individuals are likely to experience a singular event differently. [FN40]

The traumatic experience of incarceration is likely to be varied and to produce both negative and positive psychological results post-release among the formerly incarcerated, [FN41] in some ways similar to repatriated prisoners of war. [FN42] An experience, without more, does not make an event traumatic. [FN43] The conceptualization of trauma is created by the relationship between the event, the individual involved, and her reaction to it. [FN44] When seeking to characterize an event, researchers have often made assumptions about the nature of the event and largely ignored the subjective component or unique perspective of the individual experiencing it. [FN45] Professor Andrew Rasmussen and his colleagues argue that researchers often impose their own beliefs about an experience based upon their assumption about its effect, without ever asking those that have undergone the experience about their interpretations of it. [FN46]

Studies about the traumatic experiences of Black males explore these confounding individual and social factors, though such studies still have not been developed thoroughly and the topic is difficult to subject to rigorous scientific methods. These studies typically focus on incidences that occur in the community prior to prison such as physical assaults, sexual assault or molestation, shootings, stabbings, or other problems associated with living in the inner city. [FN47] Some researchers focus on historical and cultural trauma related to the collective memory of Black people about slavery or the psychological effects of living in a race-conscious society. [FN48] Although these \*263 ideas may be popular and have been advanced by public figures, these discussions are not well developed; they lack any reference to the Diagnostic and Statistical Manual of Mental Disorders and are difficult to study using rigorous research methods. [FN49]

#### B. A Concern Related to Public Safety

By the end of 2010, more than seven million adults in the United States were under correctional supervision. [FN50] This represents about one in every thirty-three adults in the United States's resident population. [FN51] Since the 1970s, the number of people confined to residential correctional facilities (a jail or prison) in the United States has increased by approximately 700%, from an estimated 300,000 to more than two million. [FN52] Today, the United States incarcerates more people per capita than any other country in the world. [FN53]

Incarceration in America disproportionately affects people of color. Among all people currently confined to a state or federal prison, two out of three are persons of color. [FN54] Incarceration rates for Black non-Hispanic male adults are seven times that of White non-Hispanic males. [FN55] Hispanic men are nearly three times as likely to be incarcerated as White men. [FN56] Similarly, Black and Hispanic women are more likely to be in-

carcerated than their \*264 White counterparts. [FN57] My experiences are rooted in New York State where similar trends have been found. As of January 1, 2011, among the 56,315 people incarcerated in New York prisons, nearly four out of five (78%) were persons of color. [FN58]

Most of those incarcerated are released. [FN59] The unprecedented number of people being released from prison, and the rate at which the release is occurring, makes reentry a pressing contemporary social problem. At least 95% of all people incarcerated in state facilities return to the community. [FN60] An even larger percentage of those who spend time in county and city jails return. In 2008, more than 735,000 returned to the community, declining somewhat in 2009 to 729,295. [FN61] In 2009, an average of 1,998 people were released from state or federal prison every day; this number does not include those released from county or city jails. [FN62] The condition of people returning to their communities should be of great public concern because the environment in which people are confined affects the psychological condition in which they return. [FN63] I found the prison experience traumatic because of the \*265 assaults and murders I witnessed while incarcerated, because of the constant threat of violence, because of the number of suicides that took place, and because I felt utterly helpless about the degree to which I could protect myself. I found the experience extremely stressful--during my incarceration, I was tense and always on guard because the threat of violence was real and ever present. In this piece, I will relate only a few examples of what I endured to show that prison is indeed a site of trauma and that, as a result, we should be more concerned about the conditions inside correctional facilities and the state in which the formerly incarcerated reenter society.

## II. The Incarceration Experience

During the twenty-five years I spent in prison, I was incarcerated in several of New York State's maximum-security prisons. Today, they are like my alma maters: Sing Sing, Comstock, Green Haven, Auburn, Clinton, Sullivan, Attica, and Eastern New York State Prison. The shock of being sentenced following my jury trial took my breath away. In 1979, at the age of twenty-three, I was convicted of violating New York State's Criminal Procedure Law 125.25--murder in the second degree--and was given an indeterminate sentence with a minimum of twenty-five years and a maximum term of life to be served in a New York State prison. At twenty-three years old, a twenty-five-year minimum sentence was more time than I had been alive. Twenty-five years was a lifespan--my lifespan. I was stunned by it--stunned after hearing the numbers, stunned after learning that the maximum term was life. I had a hard time adjusting to the idea of twenty-five years to life. It was unimaginable. I never positively adjusted to the idea of being in prison.

I remain haunted by the memories and images of violence--violence I experienced, violence I witnessed, and violence that I heard or learned about. I can still see the murders I witnessed. I still see the image of a person being hit at the base of his skull with a baseball bat on a warm, sunny afternoon during recreation hours. The entire scene plays like a silent movie. He is smashed in the back of his head, crumbles, and falls to the ground. While he lays helpless on the ground, his head is smashed again and again until the sight of blood seems to satisfy his attacker. I watch as the perpetrator then calmly returns the baseball bat to the location where he had retrieved it and just walks away as if nothing had happened, while others entering the yard area walk around the lifeless body.

I can still see the rapid hammering motions of a hand plunging an ice pick-like object into the back of another person standing with his hands in his pockets. Perhaps he died as he was falling to the ground. The stabs were so powerful that the victim fell face forward, like the ground was preparing \*266 to embrace him with open

arms. His hands were still in both of his pockets. No one rushed to his aid as he lay face down in the dirt. Instead, he was like a pebble that had fallen in a pond of people. The crowd backed away, like a hole in the middle of a circle growing larger and larger. I wrote a poem about this event because of the impression it made on me. It began, “somebody died today . . .”--a nameless body with a hood covering a head, face down in a pool of blood.

I can recall two men engaged in a fistfight after one of them had been stabbed in the neck with a “homemade” knife. What made this fight more memorable than others was that one of the men fought while the handle of the knife protruded from his neck on one end, while the point of the blade showed on the other. The image still makes me gasp in awe; it was incredibly mad. I can only describe it as mad. I can still recall these attacks like they just happened a moment ago.

Even so, not all of the violence in my incarceration experience was physical. It also included verbal abuse. I can still hear a prison guard saying, “get in the cage, nigger,” with a stinging voice that continues to slice through time. I remember the threats of being told by the guards, “one of these days . . .” I remember being asked by the guards if I wanted to be a martyr and pretending that I did not know what the word meant. Violence permeated the prison atmosphere. I lived in a constant state of paranoia. The rampant possibility of violence reminded me of a dark side I had previously thought only existed in nightmares and stories told to errant youth to frighten them into silence or obedience. Although I had been arrested before, I had never lived in a cell for longer than a few hours prior to my incarceration. A few hours in a jail cell are not the same as being in a jail or prison cell for days on end. [FN64]

I began my twenty-five-year incarceration in the Westchester County Jail located in Valhalla, New York. Although not yet convicted of a crime, jail residents are often mistreated by guards and subject to violations of their constitutional rights. I recall being very afraid when I first entered the Westchester County Jail. I was afraid of being raped. This possibility of being raped dominated my mind because horror stories about rape are prevalent among people who have not gone to jail or prison. Moreover, before my incarceration, men I knew who had gone to prison had spoken of rape as the customary fate of the young and inexperienced. Even today, rape is such a part of prison folklore that it has been reenacted in popular movies like *Midnight Cowboy* and *The Shawshank Redemption*. I was so frightened by the \*267 possibility that I remember yelling out, “nobody is going to fuck me,” while brandishing two makeshift ice picks during a gathering in a common room. I was terrified and tried to escape from the jail mainly because of my fears. Rather than having drugs brought into the prison, a common occurrence facilitated by guards and visitors, I arranged for a diamond cutter to be smuggled into the jail. My escape plot failed because my in-house couriers were caught bringing the diamond cutters into the jail and subsequently directed the authorities to me. Afterwards, I was sent to the maximum-security section of the jail to live in isolation from the general population in order to deter any further escape attempts.

Isolation did not help my mental state. More than anything else, I recall feeling sad and depressed. I felt caged, alone, and helpless. Nothing was familiar. Even in isolation, I had a physical fight with a peer housed in the same unit of cells. At that time, we were the only two people housed in that five-cell unit. We fought because he would not stop yelling when no one was around. It never occurred to me that he might be mentally ill. I could not bear the quiet, and I could not tolerate his screaming and yelling at the guards when none were present. I thought he was just trying to frighten me. He did frighten me. I thought he yelled because he knew I did not like it. I just wanted him to be quiet.

While it is difficult for me to substantiate the negative experiences with guards that I endured during my

time at Westchester County Jail in 1978, recent reports have found conditions substantially similar to those I experienced. For example, in November 2009, the Department of Justice Civil Rights Division and the United States Attorney's Office for the Southern District of New York published a set of findings from their investigation of the Westchester County Jail, which had begun in 2008. In part, the report found that detainees were not afforded adequate protection from harm perpetrated by staff at the facility. [FN65] More specifically, investigators found that detainees were routinely subjected to excessive force when lesser forms of intervention were appropriate. Their review found evidence of officers

shoving inmates aggressively into fixed objects when less injurious tactical holds could be safely employed . . . routinely applying needlessly painful escort techniques (bent wrist locks while apparently applying intense pressure) . . . routinely employing crowd control contaminants (MK-9 in a 16 ounce canister) when they are tactically contraindicated rather than utilizing an equally effective personal size canister (MK-4 in a three ounce canister) . . . disregard[ing] some inmates' mental impairments in use of force incidents, which appears to greatly heighten the volatility of a given situation. Indeed, they utilize threatening and aggressive verbal \*268 strategies, which tend to escalate rather than de-escalate a potentially volatile situation. [FN66]

The report also found that officials at the Westchester County Jail failed to provide adequate protection from infectious disease, proper access to dental care, and provisions for adequate mental health care. [FN67] The report detailed the use of force by officials to administer involuntarily medication, "including the use of chemical agents," [FN68] noted inadequate documentation of force incidents, and a lack of acceptable grievance procedures for complaints and/or allegations made by detainees. [FN69] These behaviors and practices implicate jail guards and others from whom detainees expect protection. Unfortunately, the conditions exposed at the Westchester County Jail are not isolated. The United States Justice Department filed reports finding problematic conditions at the Baltimore City Detention Center, the Cook County Jail in Illinois, the Dallas County Jail in Texas, the Grant County Detention Center in Kentucky, and other jails and detention centers around the country. [FN70]

#### A. Sing Sing Prison

I remained in the Westchester County Jail for about nine months. I was brought to the jail in October 1978 and was transferred to Sing Sing Prison in August 1979 after being convicted at trial by a jury. At that time, there were about 20,000 people confined within New York State's prisons system. [FN71] Being transferred from a New York City jail was referred to as "going up north" or "going on a boat" because all of New York State's prisons were north of New York City and because in the early days of the State's prison system, new arrivals at Sing Sing Prison may have gone up the Hudson River to Sing Sing Prison by boat.

Sing Sing Prison, now known as Ossining Correctional Facility, housed over 2,000 people in 1979, though its capacity was only around 1,800. [FN72] \*269 Today, following the closing of one of the prison's buildings--the "Tappan" building--the facility generally houses between 1,600 and 1,800 men. [FN73] Besides its ominous appearance, the shockingly large number of people crowded in its cell blocks, the crowds in the prison's mess halls during meals, and the hundreds of inmates that populated its recreation yards, for me the most memorable thing about Sing Sing was the noise inside its housing units. I was housed in both the A-Block and the B-Block. Sing Sing includes open cellblock galleries (nothing is enclosed), and those housed within the galleries talked, screamed, yelled, and cried at each other and at the guards during nearly every hour of the day and night. A guard who worked at the prison described the scene thusly:



A-block, probably the largest freestanding cellblock in the world, is 588 feet long, twelve feet shy of two football fields. There are some 684 inmates, more than the entire population of many prisons. You can hear them-- an encompassing, overwhelming cacophony of radios, of heavy gates slamming, of shouts and whistles and running footsteps--but, oddly at first, you can't see a single incarcerated soul. All you see are the bars that form the narrow fronts of their cells, extending four stories up and so far into the distance on the left and right that they melt into an illusion of solidity. And when you start walking down the gallery, eighty-eight cells long, and begin to make eye contact . . . a sense grows of the human dimensions of this colony . . .

A-block and B-block are . . . very similar in structure, except B-block is twenty cells shorter (sixty-eight) and one story taller (five). . . . [E]ach structure is made up of two almost separate components. One is the all-metal interior, containing the [cells of] inmates; it's painted gray, and looks as though it could have been welded in a shipyard. The other is comprised of the exterior walls and roof, a brick-and-concrete shell that fits over the cells like a dish over a stick of butter. One does not touch the other . . . . A series of tall, barred windows run down either side of the shell. [FN74]

I also remember the pigeons and the cats that lived there and roamed the galleries. The pigeons were fed bread or rice, and would congregate in front of the cells out of which these and other food items were thrown. The cats were cared for--they were the pets of some of the residents who resided on the flats (bottom tiers).

Sing Sing was "prison," the kind of prison that served as a set for Hollywood movies. Sing Sing was the prison that provided images for \*270 United States folklore about prison and prison life. Popular movies depicting Sing Sing include *The Big House* (1930), *Angels With Dirty Faces* (1938), *20,000 Years at Sing Sing* (1932), *Castle on the Hudson* (1940), *Analyze This* (1999), and others. The conditions were dangerous, there were health hazards, and the sounds were maddening for those housed there and for those who worked there as well.

Drugs were rampant. Along with the use of drugs in prison and the money they generated came violence. I typically learned of cases of violence after the fact. In one instance, I learned that a bounty had been placed on a victim in the amount of one carton of cigarettes. In prison, cigarettes serve as currency when cash is not available. Of course, the guards were involved. [FN75] Although I was aware of violence at Sing Sing during my first visit, I did not see or participate in any violent acts. I was afraid. I knew nothing of prison life, its codes, or its rules. I was concerned about my safety and about staying alive.

I had been previously considered "in transit," but finally, at Sing Sing, I received my prison number and the process of institutionalization began. [FN76] Getting my number was a memorable event. The number was how I would be identified from that day forward. It was my number that was shouted over PA systems when I was being summoned. If mail was sent to me but did not include my number, it was returned. I no longer existed. I no longer had a name worth remembering. I had become Inmate 79A2747. This numbering was part of the process to strip me of my humanity, my dignity, and my self-respect. And it was hard getting used to being identified that way. I began my journey as Mr. DeVeaux, and I wanted to remain him. I resisted becoming Inmate 79A2747.

Before being shipped further north, there was nothing for me to do between August and October of 1979 during my stay at Sing Sing. I knew I would be "shipped" to Clinton Dannamora (as it was called), some thirty-three miles from the Canadian border, to really start my "bid." In transit, I was not allowed to participate in any programs. I went to the recreation yard when let out of my cell, to the mess hall for meals, to the bathhouse to

bathe, and to religious services. There was nothing else I was permitted to do.

**\*271 B. Clinton Dannamora**

Clinton Correctional Facility is the largest prison in the State of New York. It houses over 2,500 men. [FN77] In 1979, I knew it as Clinton Dannamora and as Dannamora Prison, mainly because it sat in the middle of the town from which it took its name. It is also known as “Little Siberia” or “Siberia” because it is about thirty or so miles from the Canadian border and because those from New York City find the winters extremely harsh. I remember a January during my time there that recorded at least twenty days with temperatures below zero. It was a cold place. It snowed in the late spring and early fall.

More than the temperature, Clinton is infamous for its culture of violence. I was introduced to that culture on a cold October night in 1979--my first night there. Everyone leaving Sing Sing for Clinton knew that his life was in danger. As soon as the bus carrying us to Clinton stopped, a Hispanic passenger was singled out, interrogated about his behavior at Sing Sing, slapped, kicked, and thrown off of the bus into the snow by the guards. That set the tone. As each person exited the bus, he was asked to state his name and his number. As noted earlier, each of us had been numbered like cattle or chattel slaves. The expectation was that we would go along with this demotion from human to animal. We were all asked to say “Sir” at the end of each response. I did not--perhaps because I did not hear the request or because I was trying not to be intimidated. When my turn came to get off of the bus, I was singled out, called a smartass nigger, and told to get at the end of the line for refusing to say “Sir.” When all were lined up before being escorted to the housing unit, we were told that we would be killed if we stepped out of line, and that Clinton was not like Sing Sing or Rikers Island, a large New York City jail. Once inside the housing area, I was attacked by three officers. Fortunately, I was only roughed up. I was unable to fight them off because they were large men compared to me. I weighed in at 145 pounds and stood about six feet tall. Each of them was well over 200 pounds and towered over me. I was told that I would be killed if I did not watch my step. When the opportunity presented itself, I called home to complain, not realizing that I could not be helped; I was more than 400 miles from home. [FN78]

**\*272 C. Special Housing Units**

During my first three years in prison (1979-1982), I watched my step. I had already been beaten by guards. I saw people murdered. I saw people get assaulted. I heard stories about people being assaulted by guards. These are rarely public spectacles, possibly due to fear that the conduct of guards might incite the incarcerated to come to each other's aid if they witnessed one of their own being assaulted by a guard or guards. Perhaps because of my good conduct, I was eventually transferred from Clinton to Green Haven Prison. People in prison do not have a right to be moved from prison to prison. Requests are made, but transfer is entirely left to the discretion of the prison authorities. Transfers are often made for “security” reasons. That is, someone incarcerated may have known enemies, may be embroiled in gang rivalries, or may be deemed a threat to the prison because of his ability to “rile-up” others.

Between 1982 and 1983, I spent fifteen months in Special Housing Units (SHUs) located in Green Haven State Prison, Auburn State Prison, and Attica State Prison. People in prison refer to SHUs as “the Box.” The public knows of these places as solitary confinement. I was admitted to an SHU following a disturbance involving guards and Muslim worshippers at the end of Ramadan, the Muslim month of fasting. The event was sparked by a worshipper assaulting a prison sergeant whom he believed was responsible for locking and/or for-

cing Friday worshippers into the prayer area and preventing them from going to the recreation yard at the conclusion of their services. The sergeant responded by assaulting the Friday worshipper and was aided by fellow officers before other inmates joined the worshipper. I was one of the worshippers that participated in the brief melee that followed the assault of the prison guard and was later identified after the dust settled.

Before being sentenced to time in the Box, I had long heard stories about the beating and murders that took place there at the hands of prison guards. Going to the Box was like going to prison inside of a prison. During the early part of my incarceration, threats of the Box had accented the fears I developed of prison. They were not unwarranted. In my experience, Attica's was the most notorious Box, and thus made a lasting impression on me. I was there when people housed in the Box were beaten, gassed, had their cells tossed in a "search for weapons," had their clothes taken, and were placed in stripped cells (cells with nothing except a mattress and a blanket, if that). Before coming out of the cell for any reason, a person's \*273 hands had to be extended behind his back, out of the feeding hole, and cuffed. Once the doors were opened, feet had to be cuffed with ankle bracelets, particularly if one was leaving the unit. And then there was the noise in the Box--the yelling, the conversation at all hours of the night, the exchange of chess moves from games played in separate cells, and the counting of jumping jacks, push-ups, or sit-ups as men exercised together in separate cells. These efforts were designed to counter the idleness, lack of programs, and dearth of anything to read.

Except for instances in which individuals are placed in administrative segregation for their own protection, all segregation units are used for disciplinary confinement. The conditions, however, are the same. Disciplinary confinement includes twenty-three- to twenty-four-hour per day lockdown. "Most SHU cells have bars on the front or back of the cell; others are far more isolating, with three concrete walls and a thick metal door." [FN79] Often, if officers sought to teach someone in the Box a lesson or further punish them for some rule violation or some other pretense, he might be subjected to loss of recreation (thirty to sixty minutes), loss of showers (which were only permitted three times a week), imposition of a restricted diet (usually cabbage and bread), or just ignored. I was there when individuals in SHUs stored human waste in cups to throw on officers, when officers were spat on, and when officers were assaulted. These tactics were the only ways by which individuals in the SHUs could fight back; they had no other options. Everyone suffered as a result of the stench and their behavior. It was at this time that some cells were enclosed with Plexiglas to limit individuals' ability to throw things at guards.

The guards did not let these or any other assaults go unanswered. I witnessed the gassing of cells. Guards would spray substances into cells from aerosol cans that made cell inhabitants gasp for air and their skin burn until the cell doors were opened and four to six guards rushed in to drag the person out. These incidents were alarming because while in a cell on the gallery, I could hear the sounds as events were unfolding. And when I could not see, I somehow knew the actions accompanying each sound. These incidents were frightening because being "dragged out" meant that a person was dragged out of a cell feet first, with their head trailing behind on the floor, and often being beaten while being moved. I can still remember the screams, the wailing, the cursing, and the anger. These events were alarming because all who witnessed them unfold could feel the humiliation and shame. We in the cells were utterly powerless and could face a similar fate. There was nothing I could do, nothing anyone could do, except hope to get out of there alive. The possibility of being beaten was all too real. Whom could I tell? Who would listen? Who would care?

\*274 The experiences of solitary confinement have been well-documented. The Correctional Association noted that:



Like animals in a cage, inmates are “cell-fed” through feed-up slots in thick metal doors. Most facilities initially limit showers to just three a week. . . . Visits are conducted behind Plexiglas or mesh-wire barriers and limited to one visit a week. Whenever prisoners leave their cells, they are mechanically restrained with handcuffs and a waist chain, and leg irons if they are considered seriously violent or escape-prone. Some inmates remain handcuffed throughout their visits (thus, they cannot embrace or hold hands with their visitors) and sometimes during their one hour of recreation.

The psychological effects of punitive isolation are well documented . . . . [C]onditions in lockdown can cause such symptoms as perceptual distortions and hallucinations, massive free-floating anxiety, acute confusional states, delusional ideas and violent or self-destructive outbursts, hyper-responsivity to external stimuli, difficulties with thinking, concentration and memory, overt paranoia, and panic attacks. [FN80]

Today, I know that I am fortunate to be alive; but while incarcerated, I could only think of surviving day to day. I also knew that I could not spend the remainder of my twenty-five-year sentence in the Box. I would go crazy. That is all I knew. I would go crazy if I did not get out of that situation, but somehow I did.

#### D. Happy Nap

I spent the last fourteen years of my incarceration at Eastern New York Correctional Facility. Eastern opened its doors in 1900 as Eastern New York Prison and began operating as a maximum-security prison in 1973. I was housed there between 1989 and 2003, the longest time I stayed at any one prison. Approaching the prison from the highway, one sees in the distance a massive, castle-like, red brick-colored structure with a green metal roof. The face of the prison is picturesque, sitting in front of lush hills. For those familiar with the prison, the structure feels strangely out of place.

Eastern New York Correctional Facility has several names. In addition to its formal designation, guards, staff, and those housed there and elsewhere in the New York State Prison system refer to it using one of three tags: Eastern, Nap, or Happy Nap. Eastern was called Happy Nap because there was a time when it was considered the jewel of the state; people around the \*275 state wanted to be housed at Nap. Not only were there academic and vocational programs not found at other prisons--a braille program, a graduate program, and a computer lab, among others--but Nap could also boast of things like pizza parties, pastry parties, dinners, and “chicken drive-bys,” [FN81] which were unthinkable in other prisons. These programs were some of the privileges doled out to counter the effects of the incarceration experience, and to reward compliance or an individual's agreement to be an inmate. These things led to Nap being called Happy Nap. It was a place where a person could just do his time and socialize with whomever he wanted without the usual stress and violence that people housed in maximum-security prison come to expect. For some, it was difficult adjusting to this peace. I was transferred to Eastern to attend State University of New York college programs just before President Clinton's Crime Bill eliminated the Pell Grants that paid tuition costs for higher education programs in prison. [FN82]

It became clear to me that the conditions imposed within the prison environment, along with all the processes of institutionalization, are meant to break those entering the system. As a result of the books I read regarding the prison experiences of others, including *Man's Search for Meaning*, [FN83] *Blood in My Eye*, [FN84] and *Soledad Brother*, [FN85] it was during this time that I became acutely aware of the psychological effects that prison was having on me. I was forming a prison identity, rather than resisting becoming a prisoner. I was in prison, but being a “prisoner” was neither who I was nor who I wanted to be. I wanted to resist, but was hard-pressed to figure out what it was I was resisting. I wanted to grow, but grow into what? Even now, the thought

of twenty-five years in prison is frightening. Prisons are institutions that have a life of their own, but the life is an abnormal one. It is a life filled with deprivations, with isolation, with fantasy and imagination, and with hanging on to what was, despite little preparation for what is to come. We were not able to prepare for the future in prison or, for those fortunate to make it out of prison alive, for leaving prison and transitioning. I was becoming an adult in prison. I was making a life for myself with little reason to ponder what life could be like after prison. The possibility of dying in prison was an ever-present reality; I had been sentenced to twenty-five years to life. But somehow, I had to force myself to think about the prospect of leaving prison and to prepare for it. Prepare to die while preparing to live.

### \*276 III. Conclusion

Living in prison is what I imagine living in suspended animation would be like. I imagined my existence as a being on ice, frozen in time. "On ice" carries the connotation of being dead. When sentenced to a term of life in prison, one is considered civilly dead. Knowing that I was perceived as being dead, regardless of how it was phrased, was psychologically disturbing.

Reading Ervin Goffman's book, *Asylums*, [FN86] helped me understand what was happening during my time in incarceration and what has happened since my release. The self that I had constructed prior to prison was assaulted at the beginning of my incarceration. My reactions to the physical and psychological attacks were defensive in nature. I did not know how to be a prisoner, and I was not willing to learn; even so, the socialization process was unavoidable when immersed in that environment. The degradation and humiliation I and others experienced during my reception was intentional and part of the process of institutionalization. Those feelings endured throughout my incarceration in every prison in which I was housed. The denuding was designed to relieve me of my pre-prison personality and identity; it was an effort of will-breaking, mind-bending, and a contest to get me to conform. I questioned the guards about their actions--something that those believing themselves to be authority figures were not accustomed to experiencing, especially when coming from someone whom they did not view as their equal.

In response to a question I raised in Clinton, I was asked if I wanted to be a martyr. In Attica, I was told, "yours is not to question, to reason, or to ask why, but to merely comply." In both instances, I was punished for my odd behavior. In Eastern, I was told that I did not think of myself as an inmate because I was not humble enough, though I was respectful and polite. I was assaulted so that I could be made into an inmate. Every encounter with people from the outside world, whether visitors or other guests, was followed by acts of humiliation, which included being stripped naked and made to expose every body cavity, running my fingers through my hair, and showing the bottoms of my feet. Unlike the process of institutionalization when I came to prison, there was no corresponding process to prepare me for the time when I would be released. Having been released, I still know of no process designed to repair the damage done. I know of no debriefing. I know of no stand down procedure. All that was provided, and all that is still currently provided, was a "good-bye" and "get out." Those fortunate enough to leave, as I have been, must discover how to rebuild their lives on their own.

Upon my release, I was helped by the support network I maintained during my incarceration. I had the support of my parents and I had the support of my wife. I nurtured the connections I made with professors who \*277 taught in prison before college programs were eliminated. I also managed to keep in contact with one childhood friend whom I had known since elementary school. These contacts and supports provided me a soft landing. I had a place to live. I had food to eat. I had money saved from the prison wages I was paid during my

incarceration to buy clothing. [FN87] I was able to find employment. I had people who forgave and continued to love me for me.

I am in transition. I am still processing my prison experience. I am still thinking about what happened. I want to move on with my life and not be defined by a lone event or a single experience. I have neither visited a mental health professional for an assessment, nor have I had the desire to do so. What would I say? I feel for those I left behind because they have no idea what it is like to feel like a stranger at home, or what it is like to hear people talk about people in prison as if they are not human. What sustains me now is thinking about how I might help those who do make it home. The not-for-profit organization I cofounded with my wife is just one way in which I help. Among the things we do is say, "Welcome home. Welcome home." [FN88]

[FN1]. Executive Director of Citizens Against Recidivism, Inc. and Lecturer in Sociology, City University of New York. Wanda Best-DeVeaux is to be thanked for her contributions to the work of Citizens Against Recidivism, Inc. and for her invaluable insights. A special thanks to Jemel Amin Derbali. The author is also grateful for the comments on earlier editions by editors at the Harvard Civil Rights-Civil Liberties Law Review. Finally, special mention and prayers go out to the men and women behind our nation's prison walls and those who have gotten out, who seek to make amends, and move on with their lives; their spirits fueled this writing.

[FN2]. People under correctional supervision include those confined to residential correctional facilities (jails or prisons) and those who are supervised in the community (on probation or parole).

[FN3]. Sheryl Pimlott Kubiak, The Effects of **PTSD** on Treatment Adherence, Drug Relapse, and Criminal Recidivism in a Sample of Incarcerated Men and Women, 14 Res. on Soc. Work Prac. 424, 424 (2004) ("Rarely is trauma discussed in relation to incarceration--either the effect of incarceration on those with trauma histories, **prison** as a site of new trauma, or the effect of trauma-related disorders on recidivism.").

[FN4]. See e.g., Victoria R. DeRosia, Living Inside Prison Walls: Adjustment Behavior 8 (1998); John Howard Soc'y of Alta., Effects Of Long Term Incarceration 15 (1999); Ivan Zinger, The Psychological Effects of 60 Days in Administrative Segregation 2-9 (Dec. 1998) (unpublished Ph.D. dissertation, Carleton University) (on file with Dissertation Abstracts International, 1999).

[FN5]. See James Bonta & Paul Gendreau, Reexamining the Cruel and Unusual Punishment of Prison Life, 14 Law & Hum. Behav. 347, 348-49 (1990); Zinger, *supra* note 4, at 9-26.

[FN6]. Lee H. Bukstel & Peter R. Kilmann, Psychological Effects of Imprisonment on Confined Individuals, 88 Psychol. Bull. 469, 469 (1980); see also J. Goethals, Study on the Psychological Effects of Long-Term Imprisonment Overview and Evaluation (1980); Timothy J. Flanagan, Dealing With Long-Term Confinement: Adaptive Strategies and Perspectives Among Long-Term Prisoners, 8 Crim. Just. & Behav. 201,201-203 (1981) ("Early views of the impact of serving time in prison depict a process of systematic destruction of the person... [T] his deterministic view is simplistic....").

[FN7]. See, e.g., Mary Bosworth, Explaining U.S. Imprisonment (2010); Facing the Limits of the Law (Erik Claes et al. eds., 2009); Craig Haney, Reforming Punishment: Psychological Limits to the Pains of Imprisonment 161-62 (2006); Adrian Grounds, Psychological Consequences of Wrongful Conviction and Imprisonment, 46 Can. J. Criminology & Crim. Just. 165, 165 (2004); Adrian Grounds & Ruth Jamieson, No Sense of an End-

ing: Researching the Experience of Imprisonment and Release Among Republican Ex-Prisoners, 7 *Theoretical Criminology* 347, 347 (2003); Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-prison Adjustment*, in *Prisoners Once Removed: The Impact of Incarceration and Reentry on Children, Families, and Communities* 33, 33 (Jeremy Travis & Michelle Wauh eds., 2003) [hereinafter Haney, *The Psychological Impact of Incarceration*]; Lorna A. Rhodes, *Pathological Effects of the Supermaximum Prison*, 95 *Am. J. Pub. Health* 1692, 1692 (2005); Clara Geaney, *That's Life: An Examination of the Direct Consequences of Life-Sentence Imprisonment for Adult Males Within the Irish Prison System* 29 (2008) (unpublished M.A. thesis, Dublin Institute of Technology) (on file with Dublin Institute of Technology Library) (“Psychiatric care provision in prisons is severely lacking and as a result many prisoners are developing mental health problems which may not have existed prior to incarceration, and for those with a psychiatric diagnosis, the experience has been shown to worsen their condition.”) (citing Claire Hamilton, *The Presumption of Innocence and Irish Criminal Law: “Whittling the Golden Thread”* (2007); Paul Mahony, *Prison Policy in Ireland - Criminal Justice Versus Social Justice* (2000)).

[FN8]. Hans Toch, *Men in Crisis: Human Breakdowns in Prison* 149 (2007).

[FN9]. Jude McCulloch & Sharon Pickering, *The Violence of Refugee Incarceration*, in *The Violence of Incarceration* 225, 225 (Phil Scraton & Jude McCulloch eds., 2009).

[FN10]. Donald Clemmer was a pioneer whose work focused on the psychological effects of prison life. His work extended more than three decades and included a directorship at the District of Columbia Department of Corrections and in varying capacities in Illinois prisons, the federal penitentiary in Atlanta, and the Federal Bureau of Prisons. For more information about Donald Clemmer, see Nicolle Parsons-Pollard, Clemmer, Donald, in 1 *Encyclopedia of Prisons & Correctional Facilities* 137, 137-38 (Mary Bosworth ed., 2005).

[FN11]. Donald Clemmer, *The Prison Community* (1940).

[FN12]. Samuel G. Kling, *The Prison Community*, 54 *Harv. L. Rev.* 722, 722 (1941).

[FN13]. *Facing the Limits of the Law*, supra note 7; see also Terry A. Kupers, *Prison and the Decimation of Pro-Social Life Skills*, in *The Trauma of Psychological Torture* 127, 129 (E. Almerindo Ojeda ed., 2008).

[FN14]. See Rhodes, supra note 7, at 1692.

[FN15]. See, e.g., *Grounds*, supra note 7, at 169; Geaney, supra note 7, at 4.

[FN16]. See *Grounds & Jamieson*, supra note 7, at 347.

[FN17]. Richard A. Schill & David K. Marcus, *Incarceration and Learned Helplessness*, 42 *Int'l J. Offender Therapy & Comp. Criminology* 224 (1998).

[FN18]. Joycelyn M. Pollock, *Prisons: Today and Tomorrow* (2d ed. 2006); Shelley Johnson Listwan et al., *How To Prevent Prisoner Reentry Programs From Failing: Insights From Evidence-Based Corrections*, 70 *Fed. Probation* 19, 23 (2006); William J. Morgan, Jr., *Major Causes of Institutional Violence*, *Am. Jails*, Nov.-Dec. 2009, at 62 (2009); Steven Patrick, *Differences in Inmate-Inmate and Inmate-Staff Altercations: Examples from a Medium Security Prison*, 35 *Soc. Sci. J.* 253, 253 (1998); Rebecca Trammell, *A Qualitative Approach to Understanding the Connection between Race, Gender and Prison Violence* 1 (2006) (unpublished conference paper, American Sociological Association Conference), available at [http://citation.allacademic.com/meta/p\\_mla\\_apa\\_](http://citation.allacademic.com/meta/p_mla_apa_)

research\_citation/1/0/3/2/4/pages103246/p103246-1.php.

[FN19]. See, e.g., Clemmer, *supra* note 11, at 315; Haney, *supra* note 7, at 13; Kling, *supra* note 12, at 723.

[FN20]. See, e.g., Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* 14 (1961); Derek R. Brookes, *The Possibility of a Correctional Ethic*, in *Discretion, Community, and Correctional Ethics* 39 (John Kleinig & Margaret Leland Smith eds., 2001).

[FN21]. Gresham M. Sykes, *The Society of Captives: A Study of a Maximum Security Prison* 64 (1958) (citing Abraham H. Maslow, *Deprivation, Threat, and Frustration*, in *Readings in Social Psychology* 364, 366 (Theodore M. Newcomb & Eugene L. Hartley eds., 1947)).

[FN22]. Jesenia Pizarro & Vanja M.K. Stenius, *Supermax Prisons: Their Rise, Current Practices and Effects on Inmates*, in *Corrections: A Text/Reader* 238, 242-44 (Mary Stohr et al. eds., 2009).

[FN23]. Sykes, *supra* note 21, at 64.

[FN24]. *Id.* It has also been argued that “the [psychological] pains of imprisonment are not an accidental or unintended by-product of the institution, but are an essential component of what the prison is designed to do ....” Brookes, *supra* note 20, at 40.

[FN25]. See generally Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-Five Years After the Stanford Prison Experiment*, 53 *Am. Psychologist* 709 (1998); Anders Kaye, *Does Situationist Psychology Have Radical Implications for Criminal Responsibility?*, 59 *Ala. L. Rev.* 611 (2008); Philip G. Zimbardo, *On the Ethics of Intervention in Human Psychological Research: With Special Reference to the Stanford Prison Experiment*, 2 *Cognition* 243 (1973).

[FN26]. Haney & Zimbardo, *supra* note 25, at 709; Kaye, *supra* note 25, at 623.

[FN27]. Kaye, *supra* note 25, at 623 (citing Craig Haney et al., *Interpersonal Dynamics in a Simulated Prison*, 1 *Int'l J. Criminology & Penology* 69, 81 (1973)).

[FN28]. Haney, *The Psychological Impact of Incarceration*, *supra* note 7, at 37.

[FN29]. *Id.* at 37-38.

[FN30]. Laurence J. Kirmayer et al., *Understanding Trauma: Integrating Biological, Clinical, and Cultural Perspectives* 5 (2007).

[FN31]. *Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders Text Revision* 463-64 (4th ed. 2000); Bruce Carruth & Patricia Burke, *Psychological Trauma and Addiction Treatment*, 8 *J. Chemical Dependency Treatment* 1, 2-6 (2006); Barbara Davis, *Psychodynamic Psychotherapies and the Treatment of Co-Occurring Psychological Trauma and Addiction*, 8 *J. Chemical Dependency Treatment* 41, 43-45 (2006).

[FN32]. See *Am. Psychiatric Ass'n*, *supra* note 31, at 463.

[FN33]. See, e.g., Carolyn M. Aldwin, *Stress, Coping, and Development: An Integrative Perspective* 211 (2d ed. 2007); Shelley Johnson Listwan et al., *Victimization, Social Support, and Psychological Well-Being: A Study of Recently Released Prisoners*, 37 *Crim. Just. & Behav.* 1140, 1141 (2010).



[FN34]. Aida Alayarian, Trauma, Torture and Dissociation: A Psychoanalytic View 57-89 (2011); Edwin F. Renaud, Posttraumatic Stress Disorder: An Overview of Theory, Treatment, and Forensic Practice Considerations, in *Forensic Nursing: A Handbook for Practice* 197, 198 (Rita M. Hammer et al. eds., 2d ed. 2013).

[FN35]. Christopher Raoul Carranza & Jane R. Dill, Banishing Night Terrors and Nightmares: A Breakthrough Program to Heal the Traumas That Shatter Peaceful Sleep 166-67 (2004).

[FN36]. Id.

[FN37]. Renaud, *supra* note 34, at 199.

[FN38]. Id.

[FN39]. Id. at 200.

[FN40]. Id. at 198.

[FN41]. Brookes, *supra* note 20; Haney, *The Psychological Impact of Incarceration*, *supra* note 7.

[FN42]. See William H. Sledge et al., Self-Concept Changes Related to War Captivity, 37 *Archives Gen. Psychiatry* 430 (1980).

[FN43]. Victoria M. Follette & Aditi Vijay, Mindfulness for Trauma and Posttraumatic Stress Disorder, in *Clinical Handbook of Mindfulness* 299, 301 (Fabrizio Didonna ed., 2009).

[FN44]. Id.

[FN45]. Andrew Rasmussen et al., The Subjective Experience of Trauma and Subsequent PTSD in a Sample of Undocumented Immigrants, 195 *J. Nervous & Mental Disease* 137, 137 (2007).

[FN46]. Id.

[FN47]. See, e.g., Christopher B. Booker, "I Will Wear No Chain!": A Social History of African-American Males 205-26 (2000); John A. Rich, *Wrong Place, Wrong Time: Trauma and Violence in the Lives of Young Black Men* (2009); Terrie M. Williams, *Black Pain: It Just Looks Like We're Not Hurting* (2008); John A. Rich & Courtney M. Grey, Pathways to Recurrent Trauma Among Young Black Men: Traumatic Stress, Substance Use, and the "Code of the Street", 95 *Am. J. Pub. Health* 816 (2005).

[FN48]. See, e.g., Juan Battle & Sandra L. Barnes, *Black Sexualities: Probing Powers, Passions, Practices, and Policies* (2010); Priscilla Dass-Brailsford, *A Practical Approach to Trauma: Empowering Interventions* (2007); Ron Eyerman, *Cultural Trauma: Slavery and the Formation of African American Identity* (2001); Kevin Powell, *Black Male Handbook: A Blueprint for Life* (2008); *Re-Centering: Culture and Knowledge in Conflict Resolution Practice* (Mary Adams Trujillo et al. eds., 2008); Kristin N. Williams-Washington, *Historical Trauma*, in *Handbook of African American Health* 31 (Robert L. Hampton et al. eds., 2010).

[FN49]. Tiffany L. Green & William A. Darity, Jr., Under the Skin: Using Theories from Biology and the Social Sciences to Explore the Mechanisms Behind the Black-White Health Gap, 100 *Am. J. Pub. Health* S36, S36-40 (Supp. 2010); see also Barack Obama, *Democratic National Convention Keynote Address* (July 27, 2004), available at <http://www.americanrhetoric.com/speeches/convention2004/barackobama2004dnc.htm>.

[FN50]. Lauren E. Glaze, Bureau of Justice Statistics, *Correctional Populations in the United States, 2010* 1 (2011), available at <http://njs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf>.

[FN51]. *Id.* at 2.

[FN52]. John F. Pfaff, *The Empirics of Prison Growth: A Critical Review and Path Forward*, 98 *J. Crim. L. & Criminology* 547, 547-619 (2008); Glaze, *supra* note 50, at 2 tbl.1. People in residential correctional facilities include those sentenced and confined in a state or federal prison and those in jail, including prisoners awaiting trial or sentencing. *Id.*; see also Michelle Natividad Rodriguez & Maurice Emsellem, Nat'l Emp't Law Project, 65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment (2011); Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 *J. Crim. L. & Criminology* 1213 (2010); Anthony Calabrese, One in 31 Adults in U.S. Corrections System; Overall Population Growth Slows, State of the USA, July 22, 2010, <http://www.stateoftheusa.org/content/locked-up-a-look-at-crime-and.php>.

[FN53]. Roy Walmsley, Int'l Ctr. for Prison Studies, *World Prison Population List 1* (2012), available at <http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf>.

[FN54]. Paul Guerino et al., Bureau of Justice Statistics, *Prisoners in 2010* 26 app. tbl.12 (2011), available at <http://bjs.gov/content/pub/pdf/p10.pdf>.

[FN55]. *Id.* at 7; see also *id.* at 27 app. tbl.14.

[FN56]. *Id.* at 27.

[FN57]. Pollock, *supra* note 18, tbl. 3-2; Solveig Spjeldnes & Sara Goodkind, *Gender Differences and Offender Reentry: A Review of the Literature*, 48 *J. Offender Rehabilitation* 314, 316 (2009).

[FN58]. Dan Bernstein, State of N.Y. Dep't of Corr. Servs., *Under Custody Report: Profile of Inmate Population Under Custody on January 1, 2011* 2-3 (2011), available at [http://www.prisonpolicy.org/scans/nydocs/UnderCustody\\_Report2011.pdf](http://www.prisonpolicy.org/scans/nydocs/UnderCustody_Report2011.pdf).

[FN59]. Richard P. Seiter & Karen R. Kadela, *Prisoner Reentry: What Works, What Does Not, and What is Promising*, 49 *Crime & Delinquency* 360, 366 (2003). Today, reentry of formerly incarcerated people back into society is a social problem.

[FN60]. Timothy Hughes & Doris James Wilson, Bureau of Justice Statistics, *Reentry Trends in the United States* (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/reentry.pdf>.

[FN61]. Heather C. West et al., Bureau of Justice Statistics, *Prisoners in 2009* 4 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf>.

[FN62]. *Id.*

[FN63]. People who reenter the community following long periods of incarceration face many challenges. They often return in the same or worse condition than they were in before entering prison. They are likely to have few marketable skills and are hard to employ. Some suffer from mental illness. A portion of those in prison are HIV-positive or have AIDS. Overall, among people returning from prison and jail, very few have positive social sup-

ports; they have high rates of death by suicide, homicide, or overdoses from drug use. In addition, people released from prison have high rates of recidivism: three in ten reoffend within six months of their release, a rate that increases to two of three within three years after release. *Increasing Public Safety Through Successful Offender Reentry: Evidence-Based and Emerging Practices in Corrections* 7 (M.M. Carter et al. eds., 2007). Many return to prison following violations of conditions of release or commissions of crime; either scenario has a negative impact on public safety. *Id.*; Nicholas C. Larma, *Changes and Challenges for Counseling in the 21st Century*, in 1 *Encyclopedia of Counseling* 116, 116-19 (Frederick T.L. Leong et al. eds., 2008); Hughes & Wilson, *supra* note 60; Patrick A. Langan & David J. Levin, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994* (2002), available at <http://www.bjs.gov/content/pub/pdf/rpr94.pdf>. Finally, when people do return from prison or jail, they tend to be concentrated in areas that are characteristically poor and that provide little economic opportunity. “The key tasks of communities, such as providing a sense of security and pride, a healthy environment for families, jobs, and open exchanges and support, are hampered when large numbers of the population are recycling in and out of correctional facilities and carrying with them the lasting consequences of incarceration.” Ram A. Cnaan et al., *Ex-Prisoners' Re-Entry: An Emerging Frontier and a Social Work Challenge*, 7 *J. Pol. Prac.* 178, 186 (2008).

[FN64]. The differences between jail and prison are technical. Jails are locally owned by a county, a municipality, or a city government. A prison is owned by the state or federal government. Jails are usually situated in close proximity to the place of arrest and the place where persons arrested reside. Prisons are likely to be hundreds of miles away from both, and in the case of the federal government, thousands of miles away. Stays in jail generally follow arrest. Jails house those who are unable to post bail before a case is adjudicated at trial. Prisons house those convicted of a crime.

[FN65]. Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, to The Hon. Andrew J. Spano, Westchester Cnty. Exec. 2 (Nov. 19, 2009), available at [http://www.justice.gov/crt/about/spl/documents/Westchester\\_findlet\\_11-19-09.pdf](http://www.justice.gov/crt/about/spl/documents/Westchester_findlet_11-19-09.pdf).

[FN66]. *Id.* at 8.

[FN67]. *Id.* at 19-27.

[FN68]. *Id.* at 23.

[FN69]. *Id.* at 14, 16. This report acknowledged that people in prison have the right to be protected from the threat of violence or harm from others so confined, and that it is the duty of prison officials to take on that responsibility. However, the report did not include any findings related to violence between people confined to the Westchester County Jail.

[FN70]. See, e.g., Letter from Grace Chung Becker, Acting Assistant Attorney Gen., U.S. Dep't of Justice, to Todd H. Stroger, Cook Cnty. Bd. President, & Thomas Dart, Cook Cnty. Sheriff (July 11, 2008), available at [http://graphics8.nytimes.com/packages/pdf/national/Cook\\_County\\_Jail\\_Findings\\_Letter.pdf](http://graphics8.nytimes.com/packages/pdf/national/Cook_County_Jail_Findings_Letter.pdf).

[FN71]. *Trends in the New York State Correctional System, Perspectives from the New York State Assembly's Committee on Ways & Means* (Occasional Paper 1998), available at <http://assembly.state.ny.us/Reports/WAM/Perspectives/199803/>.

[FN72]. Prison Visiting Project, *Corr. Ass'n of N.Y., Sing Sing Correctional Facility 1* (Apr. 2009), available at



[http://www.correctionalassociation.org/wp-content/uploads/2012/05/sing-sing\\_4-28-09.pdf](http://www.correctionalassociation.org/wp-content/uploads/2012/05/sing-sing_4-28-09.pdf).

[FN73]. *Id.* at 1.

[FN74]. Ted Conover, *Newjack: Guarding Sing Sing* 8-9 (2002).

[FN75]. “Objective” observers suggest that not much has changed, even from an outsider's perspective, since my time there. Following a visit to the prison in April 2009 by staff from the Correctional Association of New York, it was reported that the prison was still plagued by “limitations on access to medical care; verbal harassment and physical confrontation between staff and inmates and among inmates; and gang activity and use of contraband drugs in the prison.” Prison Visiting Project, *supra* note 72, at 2.

[FN76]. See generally Goffman, *supra* note 20.

[FN77]. Population Statistics for Clinton County, Clinton Cnty. Planning Dep't, [http://www.correctionalassociation.org/wp-content/uploads/2012/05/sing-sing\\_4-28-09.pdf](http://www.correctionalassociation.org/wp-content/uploads/2012/05/sing-sing_4-28-09.pdf)//  
[www.clintoncountygov.com/Departments/Planning/population.pdf](http://www.clintoncountygov.com/Departments/Planning/population.pdf) (last visited Oct. 28, 2012).

[FN78]. Rarely do complaints made by the incarcerated make it out of prison. There have been complaints of prisoners being “beaten, handcuffed, thrown down stairs, taken to the prison hospital and beaten again, sometimes in the presence of sergeants and a lieutenant who failed to intervene.” *New York to Pay \$40,000 to Inmate In Brutality Case*, N.Y. Times, Apr. 19, 1996, at B4, available at <http://www.nytimes.com/1996/04/19/nyregion/new-york-to-pay-40000-to-inmate-in-brutality-case.html>. The official culture of violence has not disappeared. Reports show that “inmates at Clinton Correctional Facility have won seven Federal claims of excessive force by correction officers, and the state has settled 10 brutality lawsuits with Clinton inmates rather than defend them in court.” Matthew Purdy, *Brutality Behind Bars--A Special Report; Prison's Violent Culture Enveloping Its Guards*, N.Y. Times, Dec. 19, 1995, at A1, available at <http://www.nytimes.com/1995/12/19/nyregion/brutality-behind-bars-special-report-prison-s-violent-culture-enveloping-its.html?pagewanted=print&src=pm>. At the time, these seventeen closed claims constituted almost half of the thirty-seven successful suits that had been won or settled by Prisoners' Legal Services in the state since 1990. *Id.* Not all violence came from the guards. I witnessed stabbings, murders with baseball bats, fistfights, fights with rocks in socks, and more. More than any other prison, I wanted out of Clinton.

[FN79]. Corr. Ass'n of N.Y., *Lockdown New York: Disciplinary Confinement in New York State Prisons* 9 (2003), available at [http://www.correctionalassociation.org/wp-content/uploads/2012/05/lockdown-new-york\\_report.pdf](http://www.correctionalassociation.org/wp-content/uploads/2012/05/lockdown-new-york_report.pdf).

[FN80]. *Id.* at 7 (citing Decl. by Dr. Stuart Grassian, *Eng v. Coughlin*, 726 F. Supp. 40 (W.D.N.Y. 1989) (No. 80-CV-385S)).

[FN81]. A chicken drive-by is a fundraising activity organized by prison in-house organizations through which people in prison are allowed to purchase fried chicken in the early part of a week and pick it up on Saturday mornings when prison programs are closed. People in prison often raised money to donate to outside causes including the Tomorrow Children's Fund, Hale House, earthquake victims, and others.

[FN82]. For more information about the history of higher education in prison, see Overview of Prison Education Policies, Prison Studies Project, <http://prisonstudiesproject.org/overview-of-prison-education-policies> (last vis-

ited Oct. 22, 2012).

[FN83]. Viktor E. Frankl, *Man's Search for Meaning* (2006).

[FN84]. George L. Jackson, *Blood in My Eye* (1996).

[FN85]. George L. Jackson, *Soledad Brother* (1970).

[FN86]. See generally Goffman, *supra* note 20.

[FN87]. During my incarceration, I was mainly employed as a teacher's aide or clerk earning between \$6.25 and \$7.75 per week. During the last two years of my incarceration, I worked as a clerk in the mess hall (kitchen staff) and earned \$0.42 per hour.

[FN88]. For more information about our organization, Citizens Against Recidivism, Inc., visit [www.citizensinc.org](http://www.citizensinc.org).  
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786 F.Supp.2d 617  
United States District Court,  
E.D. New York.

UNITED STATES of America

v.

Damien BANNISTER, Darrell Bannister,  
Christopher Hall, Cyril McCray, Eric Morris, Roger  
Patrick, James Ross, Derrick Tatum, Indio Tatum,  
Jawara Tatum, and Pedro Torres, Defendants.

No. 10–CR–0053. | April 8, 2011.

### Synopsis

**Background:** Defendants entered guilty pleas to various drug offenses.

**Holdings:** Following initial sentencing, the District Court, Jack B. Weinstein, J., held that:

[1] sentences imposed on defendants convicted of crack cocaine drug conspiracy did not violate equal protection clause;

[2] defendant's five-year sentence for heroin conspiracy was excessive; and

[3] defendant's ten-year sentence for crack cocaine conspiracy was excessive.

Ordered accordingly.

West Headnotes (25)

#### [1] Sentencing and Punishment

➔ Mandatory or advisory

#### Sentencing and Punishment

➔ Necessity

Although the sentencing guidelines are advisory, a sentencing court must still adhere to the requirements of the guidelines provision regarding the statement of reasons for the imposition of a sentence different from a

defendant's calculated guidelines range. 18 U.S.C.A. § 3553(c)(2).

1 Cases that cite this headnote

#### [2] Sentencing and Punishment

➔ Drugs and narcotics

District courts are entitled to reject and vary categorically from the crack cocaine sentencing guidelines based on a policy disagreement with those guidelines, and such discretion may be exercised not only based on characteristics that distinguish a case from the “heartland” of cases contemplated by the guidelines, but also based on general policy considerations that apply even in a mine-run case. U.S.S.G. § 2D1.1(c), 18 U.S.C.A.

1 Cases that cite this headnote

#### [3] Sentencing and Punishment

➔ Drugs and narcotics

A court may substitute the congressional powder/crack sentencing guidelines ratio with a ratio of its own on the basis of policy considerations. U.S.S.G. § 2D1.1(c), 18 U.S.C.A.

Cases that cite this headnote

#### [4] Constitutional Law

➔ Statutes and other written regulations and rules

The two elements for determining whether a superficially neutral law violates the equal protection clause are discriminatory effect and purposeful discrimination. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

#### [5] Constitutional Law

➔ Race, national origin, or ethnicity

In cases involving alleged racial discrimination by a law under the equal protection clause, once a discriminatory purpose and a discriminatory effect are shown, the law is subject to strict scrutiny, requiring the law to be narrowly

tailored to achieve a compelling government interest. [U.S.C.A. Const.Amend. 14.](#)

[Cases that cite this headnote](#)

**[6] Constitutional Law**

🔑 [Equal protection](#)

Under strict scrutiny analysis for a state law challenged under the equal protection clause, the state bears the burden of rebutting a presumption of unconstitutionality. [U.S.C.A. Const.Amend. 14.](#)

[Cases that cite this headnote](#)

**[7] Constitutional Law**

🔑 [Statutes and other written regulations and rules](#)

In a challenge to a state law under the equal protection clause, if both a disparate impact and a discriminatory motive are not shown, in most cases a law is subjected to rational basis review, under which it can be overturned only if it is not rationally related to a legitimate government purpose, and this rational basis for legislative action need only be conceivable by a court, not actually contemplated by lawmakers. [U.S.C.A. Const.Amend. 14.](#)

[Cases that cite this headnote](#)

**[8] Constitutional Law**

🔑 [Creation and classification of offenses](#)

Laws which criminalize voluntary conduct may violate the equal protection clause when they target conduct associated with members of a protected class. [U.S.C.A. Const.Amend. 14.](#)

[Cases that cite this headnote](#)

**[9] Constitutional Law**

🔑 [Intentional or purposeful action requirement](#)

Under equal protection analysis, “discriminatory purpose” implies more than intent as volition or intent as awareness of consequences, and implies that the decision maker selected or reaffirmed a particular course of action at least in part “because of,” not merely “in spite of,” its adverse

effects upon an identifiable group. [U.S.C.A. Const.Amend. 14.](#)

[Cases that cite this headnote](#)

**[10] Constitutional Law**

🔑 [Scope of Doctrine in General](#)

Equal protection clause violations do not depend on but-for causation. [U.S.C.A. Const.Amend. 14.](#)

[Cases that cite this headnote](#)

**[11] Constitutional Law**

🔑 [Statutes and other written regulations and rules](#)

In a challenge to a law under the equal protection clause, a discriminatory purpose of the law need not be clear from the text of the statute, since even a facially neutral provision can result in de jure segregation. [U.S.C.A. Const.Amend. 14.](#)

[Cases that cite this headnote](#)

**[12] Constitutional Law**

🔑 [Statutes and other written regulations and rules](#)

Determining whether invidious discriminatory purpose was a motivating factor in enacting a law, in violation of the equal protection clause, demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. [U.S.C.A. Const.Amend. 14.](#)

[Cases that cite this headnote](#)

**[13] Constitutional Law**

🔑 [Statutes and other written regulations and rules](#)

An initial indicator of the discriminatory intent of a law, in violation of the equal protection clause, is a law's discriminatory impact itself, although such an impact, without more, is seldom dispositive. [U.S.C.A. Const.Amend. 14.](#)

[Cases that cite this headnote](#)

**[14] Constitutional Law**

🔑 Statutes and other written regulations and rules

The foreseeability of the discriminatory impact of a law is an indicator that the law has a discriminatory purpose, in violation of the equal protection clause, especially adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance, and foreseeability is to be determined through an objective reasonable person standard. [U.S.C.A. Const.Amend. 14](#).

[Cases that cite this headnote](#)

**[15] Constitutional Law**

🔑 Statutes and other written regulations and rules

A court analyzing whether a law has a discriminatory purpose, in violation of the equal protection clause, should consider the historical background of the decision to enact the law, particularly if it reveals a series of official actions taken for invidious purposes. [U.S.C.A. Const.Amend. 14](#).

[Cases that cite this headnote](#)

**[16] Constitutional Law**

🔑 Statutes and other written regulations and rules

A court analyzing whether a law has a discriminatory purpose, in violation of the equal protection clause, should consider the specific sequence of events leading up to the challenged decision to enact the law, departures from the normal procedural sequence, and substantive departures, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached, and courts may also consider historical context dating from before the enactment of the law at issue. [U.S.C.A. Const.Amend. 14](#).

[Cases that cite this headnote](#)

**[17] Constitutional Law**

🔑 Sentencing and punishment

**Sentencing and Punishment**

🔑 Drugs and narcotics

Sentences imposed on defendants convicted of crack cocaine drug conspiracy did not violate equal protection clause, despite disparity in Sentencing Guidelines treating quantity of crack cocaine as equivalent of one hundred times as much powder cocaine in determining sentence; although majority of crack cocaine offenders were black and many powder cocaine offenders were white, Congress and Sentencing Commission did not enact ratio with discriminatory intent. [U.S.C.A. Const.Amend. 14](#); [U.S.S.G. § 2D1.1 et seq.](#), 18 U.S.C.A.

[1 Cases that cite this headnote](#)

**[18] Conspiracy**

🔑 Sentence and Punishment

**Sentencing and Punishment**

🔑 Nature, degree, or seriousness of other misconduct

**Sentencing and Punishment**

🔑 Childhood or familial background

**Sentencing and Punishment**

🔑 Remorse, acceptance of responsibility, and cooperation

Sentence of three years' imprisonment for defendant convicted of conspiracy to distribute and possess with intent to distribute cocaine base was appropriate under statutory sentencing factors; non-guideline sentence balanced threat posed by defendant's past crimes of violence with his involvement as street-level dealer, his lack of personal involvement with firearms, his impoverished background in fatherless home, his remorse for his crime, and his desire to reform his life and be good husband to his fiancée and father to his children, and sentence provided ample specific and general deterrence. [18 U.S.C.A. § 3553\(a\)](#); [Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401\(b\)\(1\)\(C\), 406, 21 U.S.C.A. §§ 841\(b\)\(1\)\(C\), 846](#).

[1 Cases that cite this headnote](#)

**[19] Conspiracy**

🔑 [Sentence and Punishment](#)

**Sentencing and Punishment**

🔑 [Nature, degree, or seriousness of other misconduct](#)

**Sentencing and Punishment**

🔑 [Mental illness or disorder](#)

**Sentencing and Punishment**

🔑 [Childhood or familial background](#)

Sentence of five years' imprisonment for defendant convicted of conspiracy to distribute and possess with intent to distribute 100 grams or more of heroin was excessive under statutory sentencing factors, given defendant's troubled upbringing, childhood history of mental illness, brief and low-level involvement in conspiracy, remorse for his crime, lack of personal involvement during conspiracy with firearms, and fact that his criminal history included but a single offense involving violence or threat of violence. 18 U.S.C.A. § 3553(a); Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(b)(1)(B)(i), 406, 21 U.S.C.A. §§ 841(b)(1)(B)(i), 846.

[Cases that cite this headnote](#)

[20] **Conspiracy**

🔑 [Sentence and Punishment](#)

**Sentencing and Punishment**

🔑 [Nature, degree or seriousness of offense](#)

**Sentencing and Punishment**

🔑 [Childhood or familial background](#)

Below-guideline sentence of ten years' imprisonment for defendant convicted of conspiracy to distribute and to possess with intent to distribute one kilogram or more of heroin and fifty grams or more of cocaine base, and possession of firearm in furtherance of drug trafficking crime was appropriate under statutory sentencing factors; although defendant was raised in fatherless home under impoverished conditions, relative stability of his background, his completion of high school, and his work history indicated that he had substantial options beyond criminal activity, and sentence was justified since defendant brazenly used guns during shootouts conducted in residential areas to protect drug operations and

sentence provided ample general and specific deterrence. 18 U.S.C.A. §§ 924(c)(1)(A)(i), 3553(a); Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(b)(1)(A), 406, 21 U.S.C.A. §§ 841(b)(1)(A), 846.

[1 Cases that cite this headnote](#)

[21] **Conspiracy**

🔑 [Sentence and Punishment](#)

**Sentencing and Punishment**

🔑 [Nature, degree, or seriousness of other misconduct](#)

**Sentencing and Punishment**

🔑 [Childhood or familial background](#)

**Sentencing and Punishment**

🔑 [Existing social ties and responsibilities](#)

Mandatory minimum sentence of ten years' imprisonment for defendant convicted of conspiracy to distribute and possess with intent to distribute one kilogram or more of heroin and fifty grams or more of cocaine base was warranted under statutory sentencing factors; although sentence was high in light of defendant's impoverished background in fatherless home, his remorse for his crimes, his age and medical condition, and his desire to be a good father and husband, sentence was warranted given his role in conspiracy, his carrying of guns, and threat to community indicated by his extensive history of violent crimes. 18 U.S.C.A. § 3553(a); Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(b)(1)(A)(i, iii), 406, 21 U.S.C.A. §§ 841(b)(1)(A)(i, iii), 846.

[Cases that cite this headnote](#)

[22] **Conspiracy**

🔑 [Sentence and Punishment](#)

**Sentencing and Punishment**

🔑 [Juvenile record](#)

**Sentencing and Punishment**

🔑 [Childhood or familial background](#)

**Sentencing and Punishment**

🔑 [Remorse, acceptance of responsibility, and cooperation](#)



Mandatory minimum sentence of five years' imprisonment for defendant convicted of conspiracy to distribute and possess with intent to distribute more than 100 grams of heroin was excessive under statutory sentencing factors; defendant had remorse for his crime, had childhood history of abuse and deprivation, became involved in conspiracy at young age, lacked personal involvement with guns, all of his prior offenses were committed while he was minor, and sentence provided enough general and specific deterrence. 18 U.S.C.A. §§ 924(c)(1)(B), 3553(a); Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(b)(1)(B)(i), 406, 21 U.S.C.A. §§ 841(b)(1)(B)(i), 846.

1 Cases that cite this headnote

[23] **Conspiracy**

🔑 Sentence and Punishment

**Sentencing and Punishment**

🔑 Sentence or disposition of co-participant or codefendant

**Sentencing and Punishment**

🔑 Extent of offender's participation

**Sentencing and Punishment**

🔑 Childhood or familial background

**Sentencing and Punishment**

🔑 Existing social ties and responsibilities

Below-guidelines sentence of 15 years' imprisonment for defendant convicted of conspiracy to distribute and possess with intent to distribute one kilogram or more of heroin and fifty grams or more of cocaine base was appropriate under statutory sentencing guidelines, even though defendant's sentence was significantly longer than sentences of any coconspirators; defendant played senior role in conspiracy and sentence below advisory guidelines range was appropriate in light of defendant's criminal history, his impoverished background, his professed desire to lead lawful life, and his desire to provide stable home for his family. 18 U.S.C.A. § 3553(a); Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(b)(1)(A)(iii), 406, 21 U.S.C.A. §§ 841(b)(1)(A)(iii), 846.

2 Cases that cite this headnote

[24] **Conspiracy**

🔑 Sentence and Punishment

**Sentencing and Punishment**

🔑 Extent of offender's participation

**Sentencing and Punishment**

🔑 Factors Related to Offender

Mandatory minimum sentence of five years' imprisonment for defendant convicted of conspiracy to distribute and possess with intent to distribute 100 grams or more of heroin and five grams or more of cocaine base was excessive under statutory sentencing factors in light of defendant's upbringing in atmosphere of physical abuse, his functional illiteracy and apparent learning disability, absence of positive male role model in his childhood, his addiction to drugs and alcohol, his continuing efforts to occupy himself with lawful work, involvement of his uncle in bringing him into conspiracy, his relatively brief involvement as low-level member of conspiracy, his lack of personal involvement with firearms, his lack of involvement as adult in crime of violence, his sincere remorse for crimes, his stated desire to lead honest, healthy, and productive life, and fact that all of his criminal history points stemmed from offenses committed while defendant was minor. 18 U.S.C.A. §§ 924(c)(1)(B), 3553(a); Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), (b)(1)(B), 406, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(B), 846.

Cases that cite this headnote

[25] **Conspiracy**

🔑 Sentence and Punishment

**Sentencing and Punishment**

🔑 Nature, degree or seriousness of offense

**Sentencing and Punishment**

🔑 Factors Related to Offender

Mandatory minimum sentence of 104 months' imprisonment, combined with 16 months already served for prior firearms offense, for defendant convicted of conspiracy to distribute and possess with intent to distribute 50 grams or more

of cocaine base was excessive under statutory sentencing factors in light of defendant's background of deprivation, physical, abuse, and fatherlessness, his learning disability and illiteracy, addiction to drugs and alcohol, limited criminal history, sincere remorse for his crime, efforts to hold lawful employment, commitment to his girlfriend of six years, continuing medical difficulties, and lack of evidence that he engaged in violence against anyone. 18 U.S.C.A. §§ 924(c)(1)(A), 3553(a); Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(A), 846.

[1 Cases that cite this headnote](#)

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**Amended Statement of Reasons  
Pursuant to 18 U.S.C. § 3553(c)(2)**

[JACK B. WEINSTEIN](#), District Judge:

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**\*623 Introduction**

Almost filling the jury box were the defendants—Damien Bannister, Darrell Bannister, Christopher Hall, Cyril McCray, Eric Morris, Roger Patrick, James Ross, Derrick Tatum, Indio Tatum, Jawara Tatum, and Pedro Torres—eleven males, ranging in age from twenty-one to forty-nine, ten African American and one Hispanic. Fully occupying the well of the court were counsel for the defendants, assistant United States attorneys, agents of the Federal Bureau of Investigation, and a phalanx of United States Marshals. Jammed into the gallery were defendants' anxious mothers, girlfriends, other family members, and friends.

The indictment embraced twenty-three counts connected by a conspiracy to sell, and the selling of, crack cocaine and heroin in the hallways of, and the streets surrounding, a public housing project in Brooklyn between September 2007 and January 2010. Guns were carried. The lives of the residents were made miserable by the attendant depravity and violence. These were serious crimes.

The unspoken questions permeating the courtroom were: How did these eleven come to this pass, and what should be done with them if they were convicted, as all of them eventually were, by guilty pleas? Some of the unsatisfactory answers in such all-too-frequent urban tragedies are discussed in the memorandum that follows.

The issue of what should be done about these defendants, and others like them, is central to the law's rationale for the heavy mandatory minimum incarceratory sentences being imposed in this case. For a number of the defendants, they are much heavier than are appropriate. One of our most thoughtful jurists reminds us, “[o]ur resources are misspent, our punishments too severe, our sentences too long.” Justice Anthony M. Kennedy, Address at the American Bar Association Annual Meeting, San Francisco, Ca. (Aug. 9, 2003), *available at* [meetngs. \[abanet.org/webupload/commupload/CR209800/newsletterpubs/Justice\\\_Kennedy\\\_ABA\\\_Speech\\\_Final.pdf\]\(http://abanet.org/webupload/commupload/CR209800/newsletterpubs/Justice\_Kennedy\_ABA\_Speech\_Final.pdf\). \*See also id.\* \(“I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust.”\).](http://</a></p>
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**\*624** As a group, defendants grew up in dysfunctional homes characterized by a combination of poverty, unemployment, undereducation, crime, addiction to drugs and alcohol, physical and emotional abuse, and the absence of an adult male role model. They attended low-functioning public schools with limited resources to help students with their in- and out-of-school difficulties. Most dropped out of school, habitually abused drugs and alcohol from an early age, and found little lawful employment. They became involved in a gang of illegal narcotics distributors, which turned to guns and violence, contributing to the degradation of their community.

While the defendants are before this court because of choices they themselves have made, the limited options available to them are partly the fixed artifacts of history. Their story begins hundreds of years ago with the enslavement of African Americans. It runs through Reconstruction, Jim Crow, northward migration, *de jure* and *de facto* segregation, decades of neglect, and intermittent improvement efforts by government and others.

Protection of the public requires serious terms of incarceration. But enforcement of the harsh mandatory minimum sentences required by Congress imposes longer terms of imprisonment than are necessary. Such long years of incarceration and separation from relatives generally increase the likelihood of further crime by these defendants and their children.

Nevertheless, strong efforts will be made by the Bureau of Prisons to help educate the defendants and provide

occupational training. Drug and alcohol treatment will be made available. Upon their release from prison, the court's probation service will provide strict, day-to-day supervision and assist in attempts to obtain essential jobs.

## I. Facts

### A. Place

#### 1. Bedford–Stuyvesant

The conspirators operated in and around Louis Armstrong Houses, a public housing development in the Bedford–Stuyvesant (“Bed–Stuy”) section of Brooklyn. Bed–Stuy is a large neighborhood in northern Brooklyn bound by Flushing Avenue to the North, Broadway and Saratoga Avenue to the East, Atlantic Avenue to the South, and Classon Avenue to the West. Kenneth T. Jackson, *Encyclopedia of New York* 94 (1995). It is named for two nineteenth-century communities, Bedford and Stuyvesant Heights. The first Europeans to occupy the area were Dutch settlers who bought the land from Native Americans in the seventeenth century and farmed it with the labor of African slaves. It was home to communities of free Blacks as early as the 1830s. From the nineteenth century through the mid-twentieth century, Bedford and Stuyvesant were populated by a fluctuating mix of Dutch, Germans, Scots, Irish, Jews, Italians, and African Americans. *Id.* In the 1940s the area became known as Bedford–Stuyvesant, and subsequently it became home to a majority African American and Afro–Caribbean population. *See id.* at 94–95.

Most of Bed–Stuy's housing stock consists of brownstone and brick row houses. *Id.* at 95. Present also are numerous large housing projects, including some high-rise developments. *See, e.g.,* New York City Hous. Auth., *NYCHA Housing Developments: Lafayette Gardens*, <http://www.nyc.gov/html/nycha/html/developments/bklynlafayette.shtml> (last visited Mar. 14, 2011) (describing a complex of buildings up to twenty stories tall).

Bed–Stuy is the largest African American neighborhood in New York City. Jackson, *supra*, at 95. It is the northernmost \*625 of several predominantly black neighborhoods in Brooklyn lying east of Flatbush Avenue, which roughly bisects the borough. *See Mapping America: Every City, Every Block*, N.Y. Times, <http://projects.nytimes.com/census/2010/explorer> (last visited Mar. 11, 2011) (“*Mapping America*”)

(interactive map indicating racial distribution from 2005 to 2009). Other neighborhoods in this group are Crown Heights, East New York, Brownsville, East Flatbush, Flatlands, and Canarsie. *See id.*; New York City Dep't of City Planning, *New York: A City of Neighborhoods*, <http://www.nyc.gov/html/dcp/html/neighbor/neigh.shtml> (last visited Mar. 20, 2011) (map of New York neighborhoods). Neighborhoods lying west of Flatbush Avenue are primarily White; Hispanics and Asians are distributed throughout the borough. *See Mapping America, supra.*

As of the 2000 census, the population of Bed–Stuy was 77 percent African American, non-Hispanic; 18 percent Hispanic; and less than 2 percent White, non-Hispanic. New York City Dep't of City Planning, *Brooklyn Community District 3 4* (2010), available at <http://www.nyc.gov/html/dcp/pdf/lucds/bk3/profile.pdf> (“*District Report*”). In recent years, increasing numbers of middle-class residents of various races have moved to Bed–Stuy as pockets have become gentrified. Jeff Coplon, *The Tipping of Jefferson Avenue*, N.Y. Mag., May 21, 2005, <http://nymag.com/print/?/nymetro/realestate/neighborhoods/features/11775/>.

In 2000, 63 percent of Bed–Stuy's families with children under the age of eighteen were headed by a female with no husband present. *See District Report, supra*, at 5 (reporting 13,783 such households led by females, 1,671 by males, and 6,520 by both parents). Thirty-three percent of the residents were dependent on some form of government assistance in 2000; by 2009, the number had risen to 45 percent. *Id.* at 1. Employment opportunities in the neighborhood are scarce, due in part to a lack of access to government work force development programs. New York City Dep't of City Planning, *Community District Needs for the Borough of Brooklyn: Fiscal Year 2011 92* (2011) (“*District Needs*”).

Health problems such as HIV/AIDS, [obesity](#), and [asthma](#) plague the neighborhood. *Id.* The infant mortality rate in 2007 was 9.7 deaths per 1,000 births, compared to a national average of 6.75. *District Report, supra*, at 1; Jiaquan Xu, et al., Ctrs. for Disease Control & Prevention, *Deaths: Final Data for 2007*, Nat'l Vital Stat. Rep., May 20, 2010, at 1, available at [http://www.cdc.gov/NCHS/data/nvsr/nvsr58/nvsr58\\_19.pdf](http://www.cdc.gov/NCHS/data/nvsr/nvsr58/nvsr58_19.pdf).

Residents of the seventy-ninth police precinct, in which Louis Armstrong Houses is located, live with a high rate of violent crime. “[Y]oung people and residents are menaced by the rise in gang culture and the proliferation

of guns that are readily available in [Bed–Stuy's] public housing complexes.” *District Needs, supra*, at 92. In 2010, there were twelve murders, twenty-nine rapes, 433 robberies, 422 felonious assaults, 408 burglaries, and 119 automobile thefts in the precinct. New York City Police Dep’t, *CompStat: Report Covering the Week 2/28/2011 Through 3/6/2011*, available at [http://www.nyc.gov/html/nypd/downloads/pdf/crime\\_statistics/cs079pct.pdf](http://www.nyc.gov/html/nypd/downloads/pdf/crime_statistics/cs079pct.pdf). See also Al Baker & Janet Roberts, *New York City Crime Dips but Violent Crime Is Up*, N.Y. Times, Nov. 25, 2010, <http://www.nytimes.com/2010/11/26/nyregion/26crime.html> (reporting that the seventy-ninth was among the three New York City precincts with the highest increases in robbery from 2009 to 2010); Email from Joseph Reek, Inspector, Hous. Bureau, New York City Police Dep’t, Mar. \*626 3, 2011 (on file with court) (“Reek Email”) (reporting three murders, seven rapes, twenty robberies, and seventy-five felonious assaults in Louis Armstrong Houses from 2006 through 2010). Since many crimes in similar areas are unreported because of victims' fear of reprisal, the actual crime rate in the neighborhood is doubtless even higher. Cf. *The Kerner Report: The 1968 Report of the National Advisory Commission on Civil Disorders* 267 (Pantheon 1988) (1968) (“Kerner Report”) (“[O]fficial statistics normally greatly understate actual crime rates because the vast majority of crimes are not reported to the police.”).

## 2. Louis Armstrong Houses

### a. Physical Environment

Louis Armstrong Houses is a public development of two complexes of sixteen buildings, each three, four, or six stories high, administered by the New York City Housing Authority (NYCHA). New York City Hous. Auth., *NYCHA Housing Developments: Armstrong, Louis Houses*, <http://www.nyc.gov/html/nycha/html/developments/bklynarmstrong.shtml> (last visited Mar. 14, 2012) (“Armstrong Home Page”); Email from Anne-Marie Flatley, Dir., Research & Mgmt. Analysis, NYCHA (Feb. 22, 2011) (on file with court) (“Flatley Email 1”). The development is spread over an eleven-block area in central Bed–Stuy bounded by Clifton Place and Herbert Von King Park to the North, Tompkins Avenue to the East, Gates Avenue to the south, and Bedford Avenue to the West. See *Armstrong Home Page*. The two complexes were built between 1970 and 1974 with funding from the federal government's Model Cities program under the names “Bedford Stuyvesant Model Cities Area Sites 3–69A” and “Bedford Stuyvesant Model Cities Area Sites 11–14.” See Flatley Email 1. Their names were changed to Louis Armstrong I and Louis Armstrong II in 1982. *Id.*

Pictured is a portion of Louis Armstrong Houses along Clifton Place between Nostrand and Marcy Avenues.





**\*627 Source: New York City Housing Authority.**

The neighborhood is of medium density and appears not to be overcrowded. The low-rise buildings of Louis Armstrong Houses are scattered among substantial brownstone homes and apartment buildings, blended into good existing housing. Small trees are planted in front of the buildings. Nearby, the large Herbert Von King Park and a community garden are well kept and provide the neighborhood with breathing room. Situated in the park are a baseball field, a playground, handball courts, an amphitheater, and a recreational center. New York City Dep't of Parks & Recreation, *Herbert Von King Park*, <http://www.nycgovparks.org/parks/herbertvonking/highlights/152> (last visited Mar. 14, 2011). The park, established in 1857, is one of the oldest in Brooklyn. It was originally named for Daniel Tompkins, a vice president of the United States and governor of New York. In 1985, it was renamed to honor a Bed-Stuy community leader. *Id.*

Public transportation and local shopping seem acceptable. Streets are clean. Schools, houses of worship, a hospital, and a large outdoor swimming pool are within walking distance. See Google Maps, [www.maps.google.com](http://www.maps.google.com), enter "11216" (last visited Mar. 21, 2011) (interactive map displaying the area surrounding Louis Armstrong Houses). Some of Manhattan's towers are visible.

The project is generally well-maintained, although there is a broken cement stanchion eliminating one basket in the backyard basketball court. The large concrete play

area behind the houses on Clifton Place lacks benches or vegetation.

The aesthetics of the buildings bespeak poverty. Corridors and stairwells are narrow, lined with painted cement blocks and cheap metal railings. Entrances to the apartments and the buildings appear much like those for prison cells.

All in all, children in an integrated, well-motivated, and disciplined family could experience a good childhood here, not much different from those of millions of New Yorkers who lead stable, productive lives. These defendants did not, however, grow up in such families. It was the dangers and impoverishment of their families and peers, combined with the bleak economic prospects facing their community, to which their difficulties can be traced.

#### **b. Residents**

Housed in Louis Armstrong Houses are 2,150 residents in 617 apartments. Armstrong Home Page, *supra*. Seventy-six percent are African American, 17 percent are Hispanic, and 5 percent are White. See NYCHA, *Armstrong I Data Sheet* (Jan. 1, 2010) ("*Armstrong I Data*"); NYCHA, *Armstrong II Data Sheet* (Jan. 1, 2010) ("*Armstrong II Data*"). The average household earns a gross income of \$23,251 and pays \$419 per month in rent. See *id.* Half of all families receive income from employment. Email from Anne-Marie Flatley, Director, Research & Mgmt. Analysis, NYCHA (Mar. 1,

2011) (on file with the court) (“Flatley Email 2”). Seventeen percent receive income from welfare, and 8 percent are listed as receiving “full welfare” benefits. *See Armstrong I Data, supra; Armstrong II Data, supra*. The rest are supported from Social Security benefits, Supplemental Security Income (disability payments), pensions, or other sources. Flatley Email 2.

Data from the 2000 census indicate a high rate of joblessness and poverty and low rates of education in the Louis Armstrong Houses area. The official unemployment rate for residents aged sixteen and over “in the labor force” was 20 percent. \*628 *See District Report* at 17 (reporting 2000 census data for census tracts 243, 251, 263 and 265); *id.* at 6 (map of 2000 census tracts in Bed–Stuy). Forty-nine percent of residents sixteen and over were not in the labor force. *See id.* Their numbers, combined with those of the officially unemployed, amount to a 59 percent jobless rate. *See id.* Thirty-five percent lived below the poverty line. *See id.* at 13, 15 (reporting data for relevant census tracts). This line is an inexact measurement of need, especially in areas with high living expenses, such as New York City. *See Carmen Denavas–Walt, et al., United States Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2009* 20 (2010), available at <http://www.census.gov/prod/2010pubs/p60–238.pdf> (“The official poverty thresholds developed more than 40 years ago do not take into account rising standards of living ... or geographic differences in the cost of living.”). Forty-one percent of residents at least twenty-five years of age in and around Louis Armstrong Houses have not completed high school. *See District Report* at 15 (reporting data for relevant census tracts). Nine percent have graduated from college. *Id.*

Rates of poverty and joblessness are substantially higher, and rates of education lower, in the housing project itself; its residents account for a fraction of the population of the relevant census tracts. *See id.* at 13 (reporting data for relevant census tracts); *Armstrong Home Page, supra*. Rates of poverty and joblessness in the area are likely higher than the 2000 census indicated as a result of the current economic crisis. *See, e.g., Eckholm, supra* (reporting that one in seven United States residents lived in poverty in 2009, the highest rate recorded since 1994).

## B. Conspiracy

Defendants were members of a drug distribution organization called the Clifton Place Crew (“the crew”). The crew controlled the heroin and crack cocaine trade in part of Louis

Armstrong Houses along Clifton Avenue, near the building pictured above. Daily it sold drugs from residences and public spaces in and around the complex. Presentence Investigation Report of Derrick Tatum (“Derrick Tatum PSR”) ¶ 2. The crew membership fluctuated, generally consisting of five to ten men. *Id.* at ¶ 4.

There are no facts in the record concerning the market for illegal drugs in the neighborhood or the identity of those who bought drugs from the crew. There is no indication that they sold to children. No information has been provided concerning the operations of other drug networks with whom the crew may have competed for market share.

### 1. Members of Conspiracy

Members of the crew came from similar deprived backgrounds. They lacked appropriate male models in their homes, they had an inadequate education, and they grew up in an environment of personal abuse, illegal drugs, and general poverty. *See Part IV.B, infra* (detailed histories of defendants in connection with the sentence imposed).

Derrick Tatum established the crew in September 2007. He led it until the arrest of most of its members on January 27, 2010. It was he who selected and supervised conspirators, negotiated major transactions, and determined compensation. *Id.* at ¶¶ 3–7, 10.

Indio Tatum, Derrick Tatum's nephew, joined the conspiracy in late 2007 and was promoted the following summer to serve as Derrick Tatum's top lieutenant. Presentence Investigation Report of Indio Tatum (“Indio Tatum PSR”) ¶ 7. He obtained \*629 heroin and cocaine powder from wholesale suppliers, processed or “cooked” powder cocaine into crack, distributed drugs to dealers in street-ready packages, and collected revenues. *Id.* at ¶ 5. On occasion, Derrick Tatum performed some of these functions himself. Derrick Tatum PSR ¶ 5. The other nine members of the conspiracy served as street-level dealers, working in shifts. Their dates of involvement in the conspiracy were as follows: Damien Bannister, August 2008–January 2010, Presentence Investigation Report of Damien Bannister (“Damien Bannister PSR”) ¶ 6; Darrell Bannister, July–September 2008, Presentence Investigation Report of Darrell Bannister (“Darrell Bannister PSR”) ¶ 6; Christopher Hall, September 2007–January 2010, Presentence Investigation Report of Christopher Hall (“Hall PSR”) ¶ 6; Cyril McCray,



September 2007–January 2010, Presentence Investigation Report of Cyril McCray (“McCray PSR”) ¶ 8; Eric Morris, late 2007–January 2010, Presentence Investigation Report of Eric Morris (“Morris PSR”) ¶ 6; Roger Patrick, August 2008–January 2010, Presentence Investigation Report of Roger Patrick (“Patrick PSR”) ¶ 6; James Ross, June 2008–January 2010, Presentence Investigation Report of James Ross (“Ross PSR”) ¶ 7; Jawara Tatum, September 2009–January 2010, Presentence Investigation Report of Jawara Tatum (“Jawara Tatum PSR”) ¶ 5; and Pedro Torres, August 2008–June 2009, Presentence Investigation Report of Pedro Torres (“Torres PSR”) ¶ 5. Many of the dealers used drugs themselves. *See generally* Part II, *infra*. At least four of them—Cyril McCray, Roger Patrick, Jawara Tatum, and Pedro Torres—lived on Clifton Place near where the crew sold drugs. *See* McCray PSR 2; Patrick PSR 2; Jawara Tatum PSR ¶ 43; Torres PSR 2. Three street-level sellers—Hall, Morris, and Ross—were entrusted occasionally by Derrick and Indio Tatum with picking up bulk quantities of drugs and delivering them to the other dealers, but none of the three held supervisory roles. Hall PSR ¶ 8; Morris PSR ¶ 6; Ross PSR ¶ 7.

Most members of the crew carried or maintained access to guns to defend against robbers and protect their territory from rival drug dealers. Derrick Tatum, Indio Tatum, Hall, McCray, Morris, Ross, and Torres personally possessed guns. Derrick Tatum PSR ¶ 7; Indio Tatum PSR ¶ 10; Hall PSR ¶ 6; McCray PSR ¶ 6; Morris PSR ¶ 7; Ross PSR ¶ 7; Pedro Torres PSR ¶ 5. Damien Bannister, Roger Patrick, and Jawara Tatum did not carry guns but had access to those controlled by the conspiracy. Damien Bannister PSR ¶ 5; Patrick PSR ¶ 6; Jawara Tatum PSR ¶ 6. Darrell Bannister neither carried guns nor had access to them. Darrell Bannister PSR ¶ 6. On one occasion, Hall and Torres were involved in a shootout. Hall PSR ¶ 6; Torres PSR ¶ 6.

Members of the crew stored drugs and guns in nearby residences. They moved them frequently to avoid detection and seizure by police on robbers. Derrick Tatum PSR ¶ 5.

## 2. Investigation of Conspiracy

The New York City Police Department and the Federal Bureau of Investigation jointly investigated the crew from late 2007 to January 2010 using a combination of surveillance, search warrants, and videotaped purchases of drugs and guns. Over seventy-five videotaped purchases were executed, resulting in the seizure of over 100 grams of heroin and

100 grams of crack. Seized from residences linked with the organization were fourteen guns, ammunition, a machete, a police radio scanner, about \$15,000 in cash, and about fifteen “G-packs” of heroin (approximately 75 grams). *Id.* at ¶ 3. A G-pack is a bulk quantity of processed drugs worth about \*630 \$1,000 and packaged into retail quantities. *G Pack*, Urban Dictionary, [http://www.urbandictionary.com/define.php?term=g% 20pack](http://www.urbandictionary.com/define.php?term=g%20pack) (last visited February 23, 2011).

It is estimated that more than 4.5 kilograms of crack and three kilograms of heroin were distributed by the crew over the course of the conspiracy. Derrick Tatum PSR ¶ 9.

Following are notable incidents:

- September 2007: Derrick Tatum founded the crew. *Id.*
- October 23, 2007: Police recovered two loaded pistols, 249 glassines of heroin, and \$1,190 in cash in a vehicle driven by Cyril McCray. McCray PSR ¶ 6. A glassine is a small envelope or bag made of transparent or semi-transparent paper. *See* Webster's Third New International Dictionary 963 (1993).
- Summer 2008: Indio Tatum was promoted as Derrick Tatum's top lieutenant.
- August 31, 2008: Indio Tatum and Derrick Tatum sold a loaded .32 caliber pistol to a confidential informant in a videotaped transaction. Derrick Tatum PSR ¶ 7; Indio Tatum PSR ¶ 8.
- September 2008: Christopher Hall and Pedro Torres were involved in a shootout at a location on Clifton Place where members of the crew regularly sold drugs. Hall fired shots. Torres was shot in the leg, and another individual was shot in the leg and chest. It is not known whether Hall was responsible for any injuries. Hall PSR ¶ 6; Torres PSR ¶ 6.
- December 18, 2008: Eric Morris sold a loaded pistol to a confidential informant. Morris PSR ¶ 7.
- February 16, 2009: Police recovered a pistol and ammunition from Morris's home. *Id.*
- June 30, 2009: Police recovered a loaded gun and thirty-five bags of heroin, about two grams' worth, from an apartment used by Hall. Hall PSR ¶ 6.

- July 9, 2009: Torres was placed in custody after being sentenced for a weapons offense on June 8, 2009. Torres PSR ¶ 22.
- August 9, 2009: Damien Bannister was arrested with forty-eight bags of crack cocaine and ninety glassines of heroin. Damien Bannister PSR ¶ 39–40.
- October 19, 2009: Police recovered a loaded .380 caliber pistol belonging to Indio Tatum from an abandoned vehicle parked on Clifton Place. Indio Tatum PSR ¶ 8.
- January 21, 2010: Damien Bannister was sentenced for the August 9, 2009 drug offense described above. Damien Bannister PSR ¶ 39–40.
- January 26 and 27, 2010: Investigators arrested nine of the eleven defendants in this case. *See, e.g.*, Derrick Tatum PSR ¶ 1. Torres and Damien Bannister were already in custody. Upon arresting Derrick Tatum, investigators recovered approximately \$10,000 in cash. *Id.* at ¶ 8.

### C. History and Sociology

Because the saga of deprivation, isolation, and crime that characterize life in neighborhoods such as Louis Armstrong Houses is relevant to sentences, the history and sociology of such areas are discussed below. *See* Philip J. Cook & Jens Ludwig, *The Economist's Guide to Crime Busting*, Wilson Q., Winter 2011, at 62 (“Most of us choose to abstain from crime in part because we have a lot to lose if we \*631 get caught.... The calculus for an unemployed dropout with readily available criminal options and few licit prospects is likely to be quite different.”).

#### 1. Roots of African American Segregation and Poverty

##### a. Segregation and the Civil Rights Movement

The poverty and *de facto* racial segregation in which defendants have lived have their immediate roots in the nineteenth century, as the American South coped with the economic and social transformations wrought by the Civil War, the abolition of slavery, and the gains made by African Americans during Reconstruction. Under the protection of the federal government, the condition of newly freed African Americans improved. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 29

(2010). Racial oppression returned as the federal government indicated an unwillingness to protect African Americans, troops were withdrawn from southern states, and courts issued decisions validating racial segregation as lawful. *Id.* at 30–35; Lawrence M. Friedman, *A History of American Law* 382 (3d ed. 2005) (“*History*”); Herbert Hill, *Black Labor and the American Legal System: Race, Work, and the Law* 12–14 (1985 Univ. of Wisc. Press) (1977).

The Jim Crow system compelled segregation and oppression of African Americans. In the South they were put to work in quasi-servitude under the sharecropping system. Nicholas Lemann, *The Promised Land: The Great Migration and How It Changed America* 6, 18–20 (1991); Friedman, *History, supra*, at 321. They were prohibited from holding many jobs, particularly in the skilled trades, or from joining labor unions. Hill, *supra*, at 12–25. They were forced to live, work, and conduct their daily business under rules of rigid racial separation. Friedman, *History, supra*, at 383–84. Criminal vagrancy laws were enforced, ensuring that African Americans continued to work for the benefit of White employers. Those who were convicted of crimes were forced to work for little or no pay as prisoners—after leased out by white employers. Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* 7–8 (2008); Alexander, *supra*, at 31. African Americans were further suppressed through a terrorist campaign of lynchings, bombings, and mob violence. Alexander, *supra*, at 30; Lawrence M. Friedman, *Crime and Punishment in American History* 187–91 (1993) (“*Crime*”). *See also* Orlando Patterson, *Black Americans, in Understanding America: The Anatomy of an Exceptional Nation* 385 (Peter H. Schuck & James Q. Wilson, eds., 2008) (describing the Jim Crow period as a “seventy-five year disaster: a vicious system of terror during which some five thousand African Americans were slaughtered, many of them ritually burnt alive”).

The Jim Crow system—*de facto* and *de jure* racial segregation and political and civic disenfranchisement—remained intact for over half a century, due in large part to the complicity of the federal government. *See, e.g.*, Michael G. Long, *Marshalling Justice: The Early Civil Rights Letters of Thurgood Marshall* 72–73 (2011) (criticism by Thurgood Marshall, in a 1940 letter to President Franklin Roosevelt, of the Federal Housing Administration's embrace of racially restrictive covenants and its refusal to insure loans to African Americans buying homes in White areas); *id.* at 74–75 (criticism by Thurgood Marshall, in a 1940 letter to Secretary

of the Navy, Frank Knox, complaining of segregation in the United States military).

Jim Crow was dismantled from the 1940s through the 1960s, as courts and \*632 federal lawmakers began to recognize the necessity of meeting widespread demands of African American citizens for equality. *E.g.*, *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) (holding that state court enforcement of racially restrictive covenants violated the Equal Protection Clause). Resisted by citizens of all backgrounds were attempts by segregationists, through both legal and extralegal channels, to enforce demeaning control. By the mid-1960s, with some school desegregation following *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and with the Voting Rights Act and the Civil Rights Act having been passed, the movement for equal legal rights and equal opportunities began to achieve substantial success. Alexander, *supra*, at 35–38; *see generally* Jack Greenberg, *Crusaders in the Courts: Legal Battles of the Civil Rights Movement* 2004 (recounting the role of the NAACP Legal Defense Fund in civil rights litigation); Jack Greenberg, *Brown v. Board of Education: Witness to a Landmark Decision* (2004) (chronicling the litigation of *Brown* ).

### b. Urbanization and Unemployment

Concurrent with the dismantling of the Jim Crow system was the migration of African Americans from the rural South to urban centers across the United States. Lemann, *supra*, at 6. *See also* Patterson, *supra*, at 381 (“As late as 1940, over a half of the black population was still rural (52.4 percent); within a decade, 62 percent was urban, and by 1960 nearly three in every four.”).

African Americans migrated to northern cities in part to escape racial persecution and in part for jobs. Jackson, *supra*, at 113. The decline of the sharecropping system and the advent of chemical herbicides and the mechanical cotton picker had reduced the demand for farm labor in the South. Lemann, *supra*, at 70. Northern cities offered the lure of well-paying industrial jobs. *Id.*; Patterson, *supra*, at 381. During the 1940s and 1950s, the result of this migration was a far higher standard of living in urban areas than African Americans had experienced in the rural South. William Julius Wilson, *When Work Disappears: The World of the New Urban Poor* 53–54 (1996). *See also id.* at 26–27 (“The traditional American economy featured rapid growth in

productivity and living standards.... In this system plenty of blue-collar jobs were available to workers with little formal education.”).

Economic gains for African Americans in the industrialized North were, however, limited. “[I]n 1939 half of all Negro wage earners in New York were receiving less than \$850 per year.” Robert A. Caro, *The Power Broker: Robert Moses and the Fall of New York* 491 (Vintage ed. 1975) (1974). “40 percent of New York City’s African American population in 1940 remained on relief or dependent on federal funds for temporary work relief.” Jackson, *supra*, at 114. Despite the need for labor to support the war effort, some factories excluded Black workers entirely. *See id.*

Subsequently, unemployment worsened. In the 1950s, the unemployment rate for African Americans in New York City was twice that of Whites. *Id.* In 1965, it was observed that African American unemployment, particularly in northern urban areas, had been at “disaster levels” for thirty-five years, with the exception of the World War II and Korean War years. United States Dep’t of Labor Ofc. of Pol’y Planning & Res., *The Negro Family: The Case for National Action* 20 (photo. reprint 2011) (1965) (emphasis removed). *See also id.* at 26 (“The most conspicuous failure of the American social system in the past 10 years has been its inadequacy in providing jobs for Negro youth. Thus, in January \*633 1965 the unemployment rate for Negro teenagers stood at 29 percent. This problem will now become steadily more serious.”); *Kerner Report, supra*, at 13 (“Between 2 and 2.5 million Negroes—16 to 20 percent of the total Negro population of all central cities—live in squalor and deprivation in ghetto neighborhoods.”); *id.* (“[D]espite continuing economic growth and declining national unemployment rates, the unemployment rate for Negroes in 1967 was more than double that for whites.”).

Unemployment in large cities was cited by the presidentially appointed Kerner Commission as a primary cause of the wave of rioting in African American neighborhoods in the late 1960s. *Kerner Report, supra*, at 1, 24. Other identified causes of disorder included pervasive discrimination and segregation; the exodus of White residents from inner-city areas and in-migration of African Americans; and the frustration of hopes of advancement that had been raised by the Civil Rights Movement. *Id.* at 10.

Conditions worsened after the 1960s. Just as the promise of work in the industrial north brought African Americans

in large numbers to northern cities in the Great Migration, the closing of factories contributed to the partial unraveling of African American communities. *See* Lemann, *supra*, at 201 (“From 1960 to 1994, manufacturing employment increased nationally by 3 per cent but fell in New York, Chicago, Los Angeles, Philadelphia, and Detroit, and later the drop in urban unskilled manufacturing jobs became more precipitous.”); William Julius Wilson, *supra*, at 31 (“The number of employed black males ages 20 to 29 working in manufacturing industries fell dramatically between 1973 and 1987 (from three of every eight to one in five).”).

Much of the new job growth in recent decades has occurred in high-technology fields that are inaccessible to workers with limited education and training. *Id.* at 29. Most jobs for workers with limited skills are not in manufacturing but in the service sector, which hires more women than men. *Id.* at 27. Typically, these jobs are located in suburban or exurban areas far from inner-city neighborhoods, and are sometimes inaccessible by public transportation. *Id.* at 37–41; David Hilfiker, *Urban Injustice: How Ghettos Happen* 9 (2002). *See also* Alfonso Castillo, *MTA Plans to Cut Most of LI Bus Routes*, *Newsday*, Mar. 2, 2011, at 2 (reporting service cuts that would leave certain [low income] neighborhoods with no access to public transportation).

## 2. Government Efforts to Alleviate Poverty and Poor Living Conditions

### a. Public Housing

NYCHA was organized in the 1930s with the hope of “eliminat[ing] the crime, illness, poverty, and moral decay bred by slums[.]” Jackson, *supra*, at 954. The earliest NYCHA housing developments were low-rise buildings provided for families with moderate incomes; the destitute were ineligible. Like the neighborhoods in which they were located, these developments were racially segregated. *Id.*

Building of high-rise housing projects began in 1939. *Id.* Under a slogan of “slum clearance,” blocks of low-income housing in old, poorly maintained tenements were razed and replaced with “superblocks” of high-density buildings with small, cheaply constructed apartments. Nicholas Dagen Bloom, *Public Housing that Worked: New York in the Twentieth Century* 129–132, 142–43 (2008); Caro, *supra*, at 611; Jackson, *supra*, at 954–55. Tenants, particularly African Americans and Puerto Ricans, were evicted with little notice

and little hope of finding decent \*634 housing elsewhere. Caro, *supra*, at 968–976, Jackson, *supra*, at 955. The methods of slum clearance were criticized for uprooting communities and disrupting the fabric of city neighborhoods. *E.g.*, Jane Jacobs, *The Death and Life of Great American Cities* 4, 270–72 (1961).

By the 1960s, after many White, middle-class New Yorkers migrated to suburban areas, housing projects were inhabited mostly by poor African Americans and Hispanics. Jackson, *supra*, at 915; *see also* Bloom, *supra*, at 211 (discussing the increased population of welfare recipients in NYCHA projects during the 1960s); William Julius Wilson, *supra*, at 48 (“Since smaller suburban communities refused to permit the construction of public housing, the units were overwhelmingly concentrated in the overcrowded and deteriorating inner-city ghettos—the poorest and least socially organized sections of the city and the metropolitan area.”).

A significant portion of New York City’s population now lives in housing under the management of NYCHA, the largest public housing system in North America. It serves more than 650,000 people—over 8 percent of city residents. New York City Hous. Auth., *About NYCHA: Fact Sheet*, <http://www.nyc.gov/html/nycha/html/about/factsheet.shtml> (revised May 20, 2010).

### b. Welfare Policy

Noteworthy attempts at improving the lives of those in defendants’ position have been made. Foremost among initiatives to aid poor families was Aid for Families with Dependent Children (AFDC), a federally-funded and state-run program in which low-income families were given money equivalent to 12 percent to 55 percent of poverty-level income for a family of three. Hilfiker, *supra*, at 88. From AFDC’s inception in the 1930s until the 1960s, only about one in three eligible families received welfare; most were widows with children. An increased number of applications for aid, and the higher rate at which applications were accepted, resulted in a dramatic expansion of AFDC in the 1960s; nine out of every ten eligible families received this aid. *Id.* at 78.

In the 1960s, as part of a set of initiatives labeled the War on Poverty, a “community action” program was implemented. Social services were to be delivered to inner-city residents through a decentralized network of federally funded offices.



Lemann, *supra*, at 133; Hilfiker, *supra*, at 77. This system failed to significantly ameliorate poverty conditions. “There is no clear example of a community action agency in a poor neighborhood accomplishing either the original goal of reducing juvenile delinquency or the subsequent goal of reducing poverty.” Lemann, *supra*, at 192. Federal funding was terminated in 1974. Hilfiker, *supra*, at 78.

The federal government launched Model Cities, a program managed by the Department of Housing and Urban Development, in the late 1960s. It “was supposed to spend billions to rehabilitate the ghettos physically and otherwise ... fixing slums up rather than tearing them down.” Lemann, *supra*, at 187. Developed after a pilot community development program launched in Bed-Stuy, it was conceived as an improvement over the community action program. *Id.* at 198. Its primary benefit was not to improve living conditions for residents of impoverished neighborhoods but to provide jobs to those employed in Model Cities programs, many of whom used their newfound economic stability to relocate outside ghetto neighborhoods. *Id.* at 251.

Federal social welfare expenditures were not focused on the poor. Medicare and social security, which delivered benefits to elderly Americans regardless of income, accounted for most federal social \*635 support expenditures. As a result, 75 percent of welfare funding from the mid-1960s through the early 1970s was devoted to the non-poor. Hilfiker, *supra*, at 80. Nor were many steps taken during the War on Poverty to remedy the causes of poverty. There was no attempt to replace welfare with a program designed to move poor people into the mainstream of society by boosting employment. Lemann, *supra*, at 219.

There were a number of enduring legislative achievements, including Medicare, Medicaid, and Head Start, an early intervention program for low-income children. Friedman, *History, supra*, at 508; Lemann, *supra*, at 350. Nevertheless, the perceived failure of some programs prompted many to conclude that any broad attempts by government, particularly the federal government, to remedy poverty were doomed to fail. Lemann, *supra*, at 219. *See also id.* at 344 (“Rhetorically, the war on poverty was made to sound more sweeping than it really was, and so set itself up to seem as if it had ended in defeat when it didn't vanquish all poverty.”). Government intervention did succeed in making a lasting difference benefiting upwardly mobile, middle-class African Americans. Hilfiker, *supra*, at 76 (“[M]any war on poverty

programs were successful by almost any measure.”); Lemann, *supra*, at 201; *id.* at 219 (“The black middle class grew faster during the Great Society period than at any other time in American history.”).

A significant portion of the federal welfare system was overhauled in 1996. AFDC had for years utilized a number of controversial provisions discouraging work or marriage. “Essentially all work income was deducted from [AFDC] benefits, and mothers going to work also lost Medicaid and childcare benefits, making it almost impossible to transition from welfare to work. Since a marriage partner's income was deducted from benefits, it was better to keep the relationship informal and not get married.” Hilfiker, *supra*, at 88. Under the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), enacted in 1996, AFDC was replaced with a new program—Temporary Assistance for Needy Families (TANF). Eligibility for TANF benefits was made contingent on meeting work and work preparation requirements. Recipients were allowed to receive cash assistance for no more than two to five years over their lifetimes; childless individuals were allowed only three months of food stamps every three years. *Id.* at 88–90. PRWORA appears not to have substantially reduced poverty. Forty percent of families who left the welfare rolls had neither work nor other cash assistance. In a three-city study, 93 percent who were dropped from the welfare rolls due to sanctions remained in poverty. *Id.* at 95–96.

Few anti-poverty programs today are targeted at unemployed men. “Many of today's antipoverty programs focus ... on single mothers and their children. Although men obviously play important roles in these families and their communities, they are often excluded or overlooked by efforts to encourage poor mothers to transition from welfare to work or to improve the life-chances of poor children.” Margery Austin Turner & Lynette A. Rawlings, Urban Inst., *Overcoming Concentrated Poverty and Isolation: Lessons from Three HUD Demonstration Initiatives* 33 (2005).

### 3. Economic and Social Conditions of Those in Defendants' Position

The problems associated with poverty, segregation, and lack of jobs for low-income African Americans, particularly males, continue.

**\*636 a. Racial Segregation**

Persistent *de facto* racial segregation remains a fundamental aspect of life for low-income African Americans. “[A]lthough legalized segregation has long been abolished and antiexclusionary laws strictly enforced, the great majority of blacks still live in highly segregated communities.” Patterson, *supra*, at 376.

[A]lmost 60 percent of blacks would have to move to realize a distribution across neighborhoods that reflected their actual proportion of the population.... Both the level of segregation and the extent to which it is changing vary considerably by region. The highest segregation rates in metropolitan areas are surprisingly in the “liberal” regions of the Northeast and Midwest ... [including] New York[.]

*Id.* at 395. Cf. *Kerner Report, supra*, at 13 (stating that in 1960, 86 percent of African Americans would have had to move in order to create an unsegregated population distribution).

To a significant degree, this lack of integration results from the segregated conditions in public housing. William Julius Wilson, *supra*, at 48 (“[P]ublic housing ... has isolated families by race and class for decades, and has therefore contributed to the growing concentration of jobless families in the inner-city ghettos in recent years.”).

**b. Poverty and Unemployment**

The economic situation of low-income, poorly educated African Americans in defendants' position has deteriorated in relation to both poor Whites and middle- and upper-class Blacks. Patterson, *supra*, at 392. While the African American middle class has grown substantially over the past decades, a third of African Americans remain in the lowest economic quintile, compared to about 18 percent of Whites. *Id.* at 390–91 (citing 2006 United States Census figures). Income inequality by race is underscored by disparity within the lowest income quintile; the average Black household in

this category earns \$7,869, compared to \$16,440 for White households. *Id.* at 391.

African Americans from inner-city communities who enjoy economic success are likely to leave their neighborhoods for more affluent communities. Elijah Anderson, *Code of the Street: Decency, Violence, and the Moral Life of the Inner City* 145 (2000) (“Because of all the vice and crime in the neighborhood, those who can leave tend to do so, isolating the very poor and the working poor even more.”). Accord William Julius Wilson, *supra*, at 46. See also Lemann, *supra*, at 347 (“The impressive record of black success in America's cities since the 1960s has been almost entirely bound up with leaving the ghettos rather than improving them[.]”).

Many experts agree that a key cause of poverty among African Americans is unemployment and under-employment. Statistics underestimate unemployment partly because the criminal system and large-scale incarceration result in taking sentenced men like defendants out of the labor market.

The overall rate [of black unemployment and underemployment] has remained twice that of whites from the early 1970s, even while falling to historic lows of under 10 percent in the late 1990s and again in 2006 when it stood at 8.8 percent, compared with the white rate of 3.8 percent. But an increasing proportion of the impoverished are working people who, because of inadequate skills and education, cannot earn enough to rise above the poverty line. And general unemployment rates conceal the exceedingly high youth unemployment rate of 37 percent among young black men. \*637 The true rate ... is even higher because it neglects the substantially lower labor force participation rate among young black men and the astonishingly high proportion of young black men in prison or jail, who are not included in the employment figures.

Patterson, *supra*, at 398.

The blighted hopes of low-income African American families have been exacerbated by the recent economic crisis and its effect on employment. “ ‘The impact is potentially devastating on black families in the city. This has kicked more black families into poverty, families who were clinging to working-class lives.’ ” Ryan Strong & Lore Croghan, *‘Labeled, Judged’ & Can’t Find a Job: Black New Yorkers Hit Hard by Unemployment*, N.Y. Daily News, Dec. 14, 2010, at 4 (quoting Michelle Holder, Cmty. Serv. Soc. of New York). *See also* Erik Eckholm, *Recession Raises Poverty Rate to a 15-Year High*, N.Y. Times, Sept. 16, 2010, <http://www.nytimes.com/2010/09/17/us/17poverty.html> (“The share of [United States] residents in poverty climbed to 14.3 percent in 2009, the highest level recorded since 1994. The rise was steepest for children, with one in five affected.”) (citing data from the United States Census Bureau). *Cf.* Hon. Carolyn Maloney, Chair, U.S. Cong. Joint Econ. Comm., 111th Cong., *Income Equality and the Great Recession 2* (2010), available at [http://jec.senate.gov/public/?a=Files.Serve&File\\_id=91975589-257c-403b-8093-8f3b584a088c](http://jec.senate.gov/public/?a=Files.Serve&File_id=91975589-257c-403b-8093-8f3b584a088c) (“Between 1980 and 2008, [the share of total national income accrued by the wealthiest 1 percent of households] rose from 10.0 percent to 21.0 percent, making the United States ... one of the most unequal countries in the world.”).

For African American men living in New York City, the unemployment rate doubled between 2006 and 2009. The 2009 rate was 17.9 percent, compared to 6.3 percent for White men. Strong & Croghan, *supra*, at 4. For African American men aged 16 to 24, the unemployment rate from January 2009 through June 2010 was 33.5 percent, and the labor force participation rate was 38 percent. Steven Greenhouse, *Study Shows Depth of Unemployment for Blacks in New York*, N.Y. Times, Dec. 13, 2010, <http://economix.blogs.nytimes.com/2010/12/13/study-shows-depth-of-unemployment-for-blacks-in-new-york/>. *See also* Motoko Rich, *Few New Jobs as Jobless Rate Rises to 9.8%*, N.Y. Times, Dec. 3, 2010, <http://www.nytimes.com/2010/12/04/business/economy/04jobs.html?ref=motokorich> (“More than 15 million people are out of work, among them 6.3 million who have been jobless for six months or longer.”).

The cost of joblessness is not merely economic. Its psychological and sociological effects are devastating.

[W]ork is not simply a way to make a living and support one's family. It also constitutes a framework for daily

behavior and patterns of interaction because it imposes disciplines and regularities. Thus, in the absence of regular employment, a person lacks not only a place in which to work and the receipt of regular income but also ... a system of concrete expectations and goals. Regular employment provides the anchor for ... daily life. It determines where you are going to be and when you are going to be there. In the absence of regular employment, life, including family life, becomes less coherent. Persistent unemployment and irregular employment hinder rational planning in daily life, the necessary condition of adaptation to an industrial economy.

William Julius Wilson, *supra*, at 73. *See also id.* at 75 (“The problems associated with the absence of work are most severe \*638 for a jobless family in a low-employment neighborhood because they are more likely to be shared and therefore reinforced by other families in the neighborhood[.]”).

### c. Health Problems

Adverse health effects of life in inner-city neighborhoods were memorialized by the Kerner Commission. “The residents of the racial ghetto are significantly less healthy than most other Americans. They suffer from higher mortality rates, higher incidence of major diseases, and lower availability and utilization of medical services. They also experience higher admission rates to mental hospitals.” *Kerner Report, supra*, at 269. This situation is reflected in the instant case among defendants suffering from [asthma](#), depression, trauma, and deep psychological problems.

Racial disparities in health persist. “Infants born to black women are 1.5 to 3 times more likely to die than infants born to women of other races/ethnicities.” Thomas R. Frieden, Director, Ctrs. for Disease Control & Prevention, *Foreword, Morbidity and Mortality Weekly Report: CDC Health Disparities and Inequalities Report*, Jan. 14, 2011, at 1, available at <http://www.cdc.gov/mmwr/pdf/other/su6001.pdf>. African Americans account for about 45 percent of people diagnosed with HIV in the United States. Ctrs.

for Disease Control and Prevention, *HIV among African Americans* 1 (2010), available at <http://www.cdc.gov/hiv/topics/aa/pdf/aa.pdf> (reporting 2006 data). Blacks also suffer higher rates of heart disease, stroke, high blood pressure, and preventable hospitalizations. Frieden, *supra*, at 1. The asthma rate among African American children is 60 percent higher than the rate for White children. Angela Zimm, *Children Sicker Now than in Past, Harvard Report Says*, Bloomberg, June 26, 2007, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a8jD2znv51pU>.

Difficulties of life in public housing are closely linked to psychological problems, including depression.

Public housing households are some of the poorest households in the United States, and the concentration of problems that many residents experience in addition to high levels of crime—poor nutrition, obesity, low social capital, illiteracy, racial segregation—have been linked to poor mental health, including high levels of depression and other mental illnesses[.]

Caterina G. Roman & Carly Knight, Urban Inst., *An Examination of the Social and Physical Environment of Public Housing in Two Chicago Developments in Transition* 1 (2010), available at <http://www.urban.org/uploadedpdf/412134-chicago-public-housing.pdf>. See also *id.* at 22 (“[E]conomic stressors, which include threats of eviction, not being able to pay bills, or buy food for oneself, [are] associated with depression.”). African Americans are more than four times more likely than Whites to be diagnosed as schizophrenic, apparently due in part to misdiagnosis of depression. Shankar Vedantam, *Racial Disparities Found in Pinpointing Mental Illness*, Wash. Post, June 28, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/27/AR2005062701496.html>.

#### d. Family Structure

A high percentage of African Americans are raised in families headed by single females. “An almost equal number of black families are headed by a single female (44.7 percent) as a married couple (46.5 percent) compared with white families, 82 percent of which are headed by a married couple and only 13 percent by a single woman, or Hispanics, among whom the

rates are 71 and 20 percent, respectively.” Patterson, *supra*, at 402.

\*639 Much of the decline in family structure can be attributed to unemployment and underemployment. Studies have demonstrated a close correlation between the income of young African American men and their likelihood of being married. William Julius Wilson, *supra*, at 95. “As jobs become scarce for young black men, their success as breadwinners and traditional husbands declines. The notion is that with money comes control of the domestic situation.” Anderson, *supra*, at 175. See also Kerner Report, *supra*, at 260 (“If men stay at home without working, their inadequacies constantly confront them and tensions arise between them and their wives and children. [M]any of these men flee from their responsibilities as husbands and fathers[.]”). Men whose joblessness and undereducation make them ill-suited as husbands and fathers are often viewed with mistrust and resentment by women. William Julius Wilson, *supra*, at 98–99.

In the absence of suitable, reliable men, women bear the onus of rearing children and supporting families financially. See Anderson, *supra*, at 58 (quoting a fatherless woman from a low-income neighborhood in Philadelphia) (“ ‘I see all of the weight shifted on the mother. And the mother really has to be strong if she wants her kids to do something in society. It really takes a lot to do it by yourself.’ ”). Cf. William Julius Wilson, *supra*, at 123–24 (discussing the tendency of some employers to view African American women as more dependable than their male counterparts).

The absence of fathers and the prevalence of single-female-headed families gravely impairs the ability of children, particularly boys, to internalize positive values as they mature. “Young men who lack ... [an] effective father figure, both as a role model and as a viable presence in their lives, are often hard-pressed to organize their lives in accordance with his standards, standards handed down from generation to generation[.]” Anderson, *supra*, at 237. See also Michael C. Lu, et al., *Where is the F in MCH? Father Involvement in African American Families*, 20 *Ethnicity & Disease* S2–49, S2–49 (2010) (“[C]hildren growing up in father-absent families are at greater risk for various educational or behavioral problems and poorer developmental outcomes, even after controlling for parental education, income and other factors.”); Kenneth W. Griffin, et al., *Parenting Practices as Predictors of Substance Use, Delinquency, and Aggression Among Urban Minority Youth:*



*Moderating Effects of Family Structure and Gender*, 14 Psych. of Addictive Beh. 174, 174 (2000) (“[R]esearch has shown that youth from single-parent families often have higher rates of problem behaviors including substance use, aggression, school dropout, and teenage pregnancy.”) (citations omitted).

#### e. Undereducation

African American children remaining in ghetto neighborhoods have demonstrated a marked lack of academic preparation relative to students of other racial groups. Boys lag behind Hispanic students and far behind White students in ways that cannot be explained satisfactorily by poverty alone. Trip Gabriel, *Proficiency of Black Students Is Found to Be Far Lower than Expected*, N.Y. Times, Nov. 9, 2010, at A22 (reporting results from a 2010 study by the Council of the Great City Schools). “Only 12 percent of black fourth-grade boys are proficient in reading, compared with 38 percent of white boys, and only 12 percent of black eighth-grade boys are proficient in math, compared with 44 percent of white boys.” *Id.* It has been suggested that the undereducation of many African American \*640 males may result in part from parenting practices. *Id.*

Many African American students attend racially segregated schools. “A half-century after the Court’s decision in *Brown*, approximately 40% of black and Latino students attended schools with 90–100% minority enrollment, and more than one-in-six black children attended schools made up of 99–100% minority students.” Matthew Scutari, Note, “*The Great Equalizer*”: *Making Sense of the Supreme Court’s Equal Protection Jurisprudence in American Public Education and Beyond*, 97 Geo. L.J. 917, 920–21 (2009). Racial integration in schools rose through the 1970s but has fallen steadily since 1988. *Id.* at 921. In New York City, African American students are more likely than White students to attend poorer performing schools. See New York City Indep. Budget Ofc., *Demographics, Performance, Resources: Schools Proposed for Closing Compared with Other Schools* 5 (2011), available at <http://www.ibo.nyc.ny.us/iboreports/schoolclosingjan2011.pdf> (reporting that twenty-five underperforming New York City schools proposed for closing by the New York City Department of Education were 52 percent African American and 3 percent White, while the average city school was 31 percent African American and 14 percent White).

The failures of our school system are demonstrated by our high schools’ unacceptably high dropout rates. In many areas with concentrated populations of low-income families from racial minorities, “up to half of all high school students drop out and up to half of these dropouts are simply idle, neither joining the work force nor seeking further education. Entire communities are thus being shut off from full participation in American society.” Robert Balfanz, *Can the American High School Become an Avenue of Advancement for All?*, 19 Future of Children 17, 31 (2009).

Over the past three decades, high schools have shifted toward a universal college preparation curriculum intended to bolster the nation’s sagging performance relative to other countries. Valerie E. Lee & Douglas D. Ready, *U.S. High School Curriculum: Three Phases of Contemporary Research and Reform*, 19 Future of Children 135, 142, 144–45 (2009); Balfanz, *supra*, at 25. The move to a college preparatory curriculum has coincided with a decrease in the prevalence of vocational and technical training programs to prepare high school students to enter the skilled trades. Balfanz, *supra*, at 26. Today, fewer than 3 percent of high school students attend vocational or technical schools, and the average student earns only 3.5 credits in vocational coursework. *Id.*

A significant campaign to reform urban public schools continues. Numerous initiatives have been pursued: reliance on high-stakes testing to develop data with which to evaluate student progress, school performance, and teacher effectiveness; recruitment of young, highly educated people to become teachers and administrators; de-emphasis of tenure in favor of retention of teachers based on merit; reliance on mathematics and reading, often to the exclusion of science, social studies, physical education, art, and extracurricular activities; longer school days; promotion of parents’ ability to choose schools for their children; creation of quasi-autonomous charter schools, managed and funded to varying degrees by corporations and non-profit organizations; contracting of public school teaching and administration to private companies; the closing of “failing” schools and dismissal of their administrators and faculty; and dividing large neighborhood high schools into small schools, \*641 often organized around a theme. See generally, e.g., Diane Ravitch, *The Death and Life of the Great American School System: How Testing and Choice are Undermining Education* (2010).

There is little evidence to date that these initiatives have worked significant salutary effects for children with histories

like those of the instant defendants. *See id.* at 225–229; Robert J. Samuelson, *School Reform's Meager Results*, Wash. Post, Sept. 6, 2010, [http://www.washingtonpost.com/wp-dyn/content/article/2010/09/05/R2010090502817\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/09/05/R2010090502817_pf.html) (“[N]o one has yet discovered transformative changes in curriculum or pedagogy, especially for inner-city schools, that are ... easily transferable to other schools, where they would predictably produce achievement gains.”); Gabriel, *supra* (quoting Michael Casserly, Council of the Great City Schools) (“ ‘[T]here’s not a lot of research to indicate that [strategies such as opening charter schools, closing underperforming schools, and attempting to boost teacher quality] produce better results.’ ”).

Some school reforms may be jeopardized by reductions in school spending to respond to increasing fiscal pressures. *See* Thomas Kaplan, *As Schools Face Cutbacks, a Debate Over What's Fair*, N.Y. Times, Feb. 14, 2011, <http://www.nytimes.com/2011/02/15/nyregion/15schools.html> (quoting Billy Easton, Alliance for Quality Educ.) (“ ‘The governor’s budget hurts school kids across the board, because the cuts are enormous, and they are much larger in poor districts than rich districts[.]’ ”).

Much school reform is focused on developing advanced skills and increasing college matriculation and graduation rates. Andrew Hacker, *Where Will We Find the Jobs?*, N.Y. Rev. Books, Feb. 24, 2011, <http://www.nybooks.com/articles/archives/2011/feb/24/where-will-we-find-jobs/>; Lawrence Mishel, *The Overselling of Education*, Am. Prospect, Feb. 23, 2011, [http://www.prospect.org/cs/articles?article=the\\_overselling\\_of\\_education](http://www.prospect.org/cs/articles?article=the_overselling_of_education). There is, however, little evidence that a broad increase in college education will foster economic growth or reduce unemployment or income inequality. Mishel, *supra* (“[T]he wages of all college graduates have been flat over the last 10 years, with those for men having markedly declined.... A major increase in the supply of college graduates would ... drive down the wages of all college graduates [.]”); *id.* (“Wage gaps are primarily driven by increased inequalities among workers with similar educations ... rather than by differences across education groups.”).

Many social problems appear to be beyond the reach of educational reforms alone. *Cf.* Joie Tyrell, *Dividing by Three to Multiply Grads*, Newsday, Sept. 27, 2010, at A10 (quoting Prof. Alan Singer, Hofstra Univ.) (“ ‘[School administrators] keep looking for solutions within the schools because no one wants to address the underlying problem of racial isolation

and segregation.... There are no miracle solutions.... Kids will do better in schools when their lives are better.’ ”). It appears that instead of pursuing reforms focused on preparing children for college, “[t]he key challenge is to provide good jobs [.]” Mishel, *supra*.

#### f. Social Values

In place of steady jobs and the values and satisfactions that those jobs inculcate, low-income African Americans in urban neighborhoods are left with an economic desperation that can lead to antisocial behavior. Anderson, *supra*, at 145. “[W]hen jobs disappear and people are left poor, highly concentrated, and hopeless, the way is paved for the underground economy to become ... an unforgiving way of life organized around a code of \*642 violence and predatory activity.” *Id.* at 325.

A high premium is placed upon self-defense and “respect.” Children are conditioned by their families and friends, perhaps more so than in middle-class and wealthy settings, to assert themselves physically to prevent or avenge perceived insults or abuse. *Id.* at 70–71. Generated among many young people is a constant competition for status and physical dominance acted out on street corners and other gathering places. *Id.* at 76–79. Some young males, particularly those who are engaged in crime, present themselves as ready to confront and fight anyone. This may reflect a sort of fatalism, as those without hopes for a long-term, positive future adopt the view that they must accept whatever misfortune may befall them, even death; the outcome is out of their hands. *Id.* at 136. To such young people, momentary gratification is more reliable than future benefits.

Adverse factors in low-income, urban neighborhoods appear to affect boys and girls differently. “[A] boy is under constant pressure to demonstrate his masculinity in destructive ways (chief among them, joining a gang) and doesn’t have a parent of the same sex around, as girls do.” Lemann, *supra*, at 299.

#### g. Prevalence of Crime

For many boys, the cumulative result of poverty, racial segregation, antisocial ethics, and fatherlessness is often crime. “Their career ‘choices’ and their major life changes largely result from, and are coextensive with, their background and the disturbed family systems in which they were raised and/or currently reside. Persons who grew up

in severely distressed households learned strategies that leave them ill-equipped for conventional society.” Bruce D. Johnson, et al., *Crack Distribution and Abuse in New York*, 11 *Crime Prevention Stud.* 19, 26 (2000). Accord Glenn C. Loury, *Crime, Inequality & Social Justice*, Daedalus, Summer 2010, at 136–37 (“The factors that lead young people to crime—the ‘root causes’—have long been known: disorganized childhoods, inadequate educations, child abuse, limited employability, delinquent peers. These are factors that also have long been more prevalent among the poor than the middle classes[.]”).

Lack of male parental guidance is a known, significant contributor to crime.

With the father absent and the mother working, many ghetto children spend the bulk of their times on the streets ... of a crime-ridden, violence-prone and poverty-stricken world. The image of success in this world is not that of the “solid citizen,” the responsible husband and father, but rather that of the “hustler” who promotes his own interests by exploiting others. The dope sellers ... are the “successful” men because their earnings far outstrip those [of] men who try to climb the economic ladder in honest ways.

Young people in the ghetto are acutely conscious of a system which appears to offer rewards to those who illegally exploit others, and failure to those who struggle under traditional responsibilities. Under these circumstances, many adopt exploitation and the “hustle” as a way of life....

Kerner Report, *supra*, at 262. Cf. Michelle Little & Laurence Steinberg, *Psychosocial Correlates of Adolescent Drug Dealing in the Inner City: Potential Roles of Opportunity, Conventional Commitments, and Maturity*, 43 *J. Res. in Crime & Delinq.* 357, 378 (2006) (“[A]dolescents who sold the most drugs were more likely to live in contexts characterized by high physical and social disorder, low parental monitoring, high rates of parental \*643 substance use and abuse, and high levels of peer deviance. These results highlight the converging influence of broader socioeconomic factors[.]”).

The lure of reliable, easy income through the sale of drugs is particularly appealing to many young people living in poverty. Bruce D. Johnson, et al., *supra*, at 41. “For many impoverished young black men of the inner city, the opportunity for dealing drugs is literally just outside

the door.” Anderson, *supra*, at 114. See also Rozanne Marel, et al., *Drug use Trends in New York City*, in Nat'l Inst. on Drug Abuse, 2 *Epidemiological Trends in Drug Abuse: Proceedings of the Community Epidemiology Work Group* 180–82 (2006), available at [http://drugabuse.gov/PDF/CEWG/Vol2\\_106.pdf](http://drugabuse.gov/PDF/CEWG/Vol2_106.pdf) (stating that the street sale of powder cocaine and crack occurs primarily in low-income African American and Hispanic communities, while in other areas drugs are distributed by delivery or from dealers' homes); Xiaoming Li, et al., *Exposure to Drug Trafficking Among Urban, Low-Income African American Children and Adolescents*, 153 *Arch. Pediatrics & Adol. Med.* 161, 161 (1999) (reporting estimate that 6 to 9 percent of nine- to fifteen-year-olds in low-income, urban settings are involved in the drug trade). Drug organizations often recruit from networks of trusted family and friends. Bruce D. Johnson, et al., *supra*, at 32. Young people may also align themselves with gangs in order to avoid ostracism and violence.

At the age of eight or nine, boys ... will begin to receive the attentions of gang recruiters. They are asked to prove their fitness for gang membership by stealing, selling drugs, and ... denouncing the authority of [ ] their mothers ... all of which are signs of their having attained manhood; if they don't join, they are taunted, provoked, and sometimes beaten.

Lemann, *supra*, at 296 (describing gangs in a Chicago public housing development).

Young people are also lured to drug gangs by the dubious promise of economic gain. “[M]any young adults who would prefer to avoid drug sales find that such illicit distribution is the only economic activity available to them. Their participation ... is typically a sporadic and intermittent way to earn some limited income.” Bruce D. Johnson, et al., *supra*, at 41. The primary economic motivation appears to be the hope of attaining the financial rewards enjoyed by upper-level personnel in a drug hierarchy. Steven D. Levitt & Sudhir Alladi Venkatesh, *An Economic Analysis of a Drug-Selling Gang's Finances*, 115 *Q.J. Econ.* 755, 757 (2000). Many work as street-level sellers of drugs in retail quantities, serving a role roughly equivalent to that of a store clerk. Bruce D. Johnson, et al., *supra*, at 29. They work part-time for little compensation and often supplement their income by working in low-skilled jobs for legitimate businesses. Levitt & Venkatesh, *supra*, at 771 (stating that rank-and-file

members in a Chicago drug gang earned below the minimum wage). In part, this is due to the “minimal skill requirements of the job [of drug dealer] and the presence of a ‘reserve army’ of potential replacements[.]” *Id.* at 771. Unable to afford separate residences, rank-and-file members often live with family members. *Id.*

The career of a drug dealer is often short. Dealers often cycle in and out of the drug trade and the legitimate job market. John M. Hagedorn, *Homeboys, Dope Fiends, Legits, and New Jacks*, 32 *Criminology* 197, 205 (1994). For those who do not ascend in a gang's hierarchy, there may be little motivation to remain. *See* Levitt & Venkatesh, *supra*, at 757. Drug \*644 dealers face a high risk of injury or murder, particularly when rival gangs battle for control of the drug market. *Id.* at 784 (observing that the members of a studied gang who were active in the gang continuously over a four-year period had about a 25 percent chance of death). Because of the lack of legally enforceable contracts or property rights in the trade, violence is often a drug organization's only recourse to settling disputes. *Id.* at 780.

#### 4. Victims of Crime

The costs of the crimes engaged in by young people in impoverished communities are borne primarily by their neighbors. “[B]lacks are disproportionately *victims* of crime.... Most crime is neighborhood crime; blacks trapped in ghettos are the most vulnerable people in society. Two blacks are likely to fall victim to robbery, vehicle theft, or aggravated assault for every white; the black homicide rate is more than six times as great as the white rate, and has been so for over fifty years.” Friedman, *Crime, supra*, at 379. *See also* Kerner Report, *supra*, at 267 (“Because most middle-class Americans live in neighborhoods [with low crime rates], they have little comprehension of the sense of insecurity that characterizes the ghetto resident.”); *id.* at 268 (stating that law-abiding residents of ghetto neighborhoods “face much higher probabilities of being victimized than residents of most higher-income areas, including almost all suburbs[.]”).

A 2010 study revealed close racial parity between murder victims and murder suspects in New York City. Victims were 67 percent African American, 25 percent Hispanic, 4 percent White, and 3 percent Asian; suspects were 62 percent African American, 31 percent Hispanic, 4 percent White, and 4 percent Asian. Edgar Sandoval, et al., *Drugs & Guns Are Killing New York*, N.Y. Daily News, Dec. 2, 2010, at 12. *See*

also Clyde Haberman, *In the Bronx, Looking in the Mirror for Blame, and Solutions, on Gun Violence*, N.Y. Times, Sept. 28, 2010, at A25 (“[I]n [a Bronx neighborhood,] as elsewhere in the city, no one is a greater threat to life and limb for young black and Hispanic men than other young black and Hispanic men.”).

Guns are carried for protection as well as aggression, leading to fatalities when a transient conflict flares suddenly into gunfire. The combination of young men and readily available guns is deadly. “Teenagers with guns, especially rapid-fire assault weapons, increase the danger in these neighborhoods. Adolescents are generally less likely to exercise restraint than mature adults are. Armed with deadly weapons, youngsters are tempted to solve temporary problems in a very permanent fashion.” William Julius Wilson, *supra*, at 60–61. *See also id.* at 61 (“The sharp growth in the number of teenage male homicide victims is directly related to the sudden rise in the number of young male killers.”).

Guns and drug violence contribute to a climate of terror.

[R]espondents [to a survey of ghetto residents in Chicago] revealed that the increase in drug trafficking heightened feelings that their neighborhoods had become more dangerous. As a consequence, many residents retreated to the safety of their homes. “More people are dying and being killed,” reported one respondent. “There are many drugs sold here every day. It's unsafe and you can't even go out of your house because of being afraid of being shot.” Another stated, “I stay home a lot. Streets are dangerous. Killings are terrible. Drugs make people crazy.” Similar sentiments were voiced by other residents who felt trapped. One put it this way: \*645 “It's scary to see these people. I'm afraid to go outside.”

William Julius Wilson, *supra*, at 59–60. *See also, e.g.,* Kerner Report, *supra*, at 14 (“Crime rates, consistently higher than in other areas, create a pronounced sense of insecurity.”); Fernanda Santos, *At Sharpton's King Day Forum, a Focus on Gun Violence*, N.Y. Times, Jan. 18, 2011 (quoting Rev. Al Sharpton) (“ ‘Our grandmothers are afraid to go to the corner store.... [T]hat's real life.’ ”). The fear of crime and the culture of violence surrounding it drive some residents, even those who are not involved in crime, to rely on firearms to protect themselves, to settle disputes, or to gain respect from peers. William Julius Wilson, *supra*, at 61.

As a result of the prevalence of crime, residents in impoverished African American neighborhoods often view



police with skepticism, criticizing them for failing to provide sufficient protection. Friedman, *Crime, supra*, at 379. African Americans and Hispanics are disproportionately stopped and frisked by police, frequently with no apparent legal basis. Al Baker & Ray Rivera, *Study Finds Street Stops Unjustified*, N.Y. Times, Oct. 26, 2010, <http://www.nytimes.com/2010/10/27/nyregion/27frisk.html> (reporting that 6.7 percent of discretionary stops made by New York City police in 2009 had no constitutional basis, while 24 percent lacked any record from which constitutionality could be determined). See also Al Baker, *Street Stops by the Police Hit a New High*, N.Y. Times, Feb. 22, 2011, <http://www.nytimes.com/2011/02/23/nyregion/23stop.html> (reporting that 600,601 stops were made by New York City police in 2010, more than in any year since such stops were first counted in 2002). In 2009, guns were discovered in 0.15 percent of all such stops, and 13 percent of stops resulted in arrests. Baker & Rivera, *supra*.

#### D. Anti-Drug Abuse Act of 1986

The Anti-Drug Abuse Act of 1986 (“1986 Act”), by which the penalties bearing on this case were enacted, was passed during an election-year push to respond to what was perceived as a dangerous spread of drugs, particularly crack cocaine. Sentencing provisions concerning crack cocaine have been repeatedly challenged in court on racial disparity grounds and upheld. Amelioration in 2010 by congressional amendment was limited. This punitive scheme is one manifestation of an ongoing pattern of racial disparity in the enactment and enforcement of drug laws continuing to the present.

##### 1. Historical Drug Sentencing Laws

The 1986 Act follows a long tradition of anti-drug laws enacted, at least in part, with discriminatory design. Throughout the twentieth century, drugs have been linked to the racial fears of White Americans. “[Whites in the American] South feared that Negro cocaine users might become oblivious of their prescribed bounds and attack White society.” David Musto, *The American Disease: Origins of Narcotic Control* 7 (1973). Accord James A. Iniciardi, *The War on Drugs II: The Continuing Epic of Heroin, Cocaine, Crack, Crime, AIDS, and Public Policy* 82, 148 (1992).

If cocaine was a spur to violence against whites in the South, as was generally believed by whites, then reaction against its users made sense.

The fear of the cocainized black coincided with the peak of lynchings, legal segregation, and voting laws all designed to remove political and social power from him.... [E]vidence does not suggest that cocaine caused a crime wave [in the early 1900s] but rather that anticipation of black rebellion inspired white alarm. Anecdotes often told of superhuman strength, cunning, \*646 and efficiency resulting from cocaine. One of the most terrifying beliefs about cocaine was that it improved pistol marksmanship.... These fantasies characterized white fear, not the reality of cocaine's effects, and gave one more reason for the repression of blacks.

Musto, *supra*, at 7. Cf. Tom Feiling, *Cocaine: How the White Trade Took over the World* 29 (2009) (quoting Harry J. Anslinger, first head of the United States Bureau of Narcotics (“‘[R]eefeer makes darkies think they’re as good as white men.’ ”)).

The extent of cocaine use by African Americans was over-reported in the early twentieth century. Musto, *supra*, at 7. Forgotten today is its popularity in the late nineteenth century as an over-the-counter tonic, addiction cure, hay fever remedy, and soft drink ingredient for the middle and upper classes. *Id.* at 7; Iniciardi, *supra*, at 6–7. See also *id.* (describing the use and promotion of cocaine by Sigmund Freud and Pope Leo XIII.); Musto, *supra* at 7 (discussing the drug's endorsement by William Hammond, former surgeon general of the United States Army).

Racially motivated prohibition of cocaine a century ago was but one of a series of drug prohibitions in American history prompted in part by fears of and distaste for distinct ethnic or racial minority groups. “Fear that smoking opium facilitated sexual contact between Chinese and white Americans was also a factor in its total prohibition. Chicanos in the Southwest were believed to be incited to violence by smoking marihuana.... Alcohol was associated with immigrants crowding into large and corrupt cities.” Musto, *supra*, at 244–45.

## 2. Congressional Awareness of Racial Disparity

It should have been anticipated that most of those sentenced under the crack laws would be low-income African Americans. Materials inserted in the congressional record stated that “[m]ost of the dealers [of crack] ... are black or Hispanic.” 132 Cong. Rec. S00000–22 (daily ed. June 17, 1986) (statement of Sen. Lawton Chiles) (quoting Paul Blythe, *Buying Rocks Easy*, Palm Beach Post & Evening Times). See also *id.* (“Haitians also comprise a large number of those selling cocaine rocks, authorities said.... Whites rarely sell the cocaine rocks.”); *id.* (“Less than a block from where unsuspecting white retirees play tennis, bands of young black men push their rocks on passing motorists, interested or not.”); 132 Cong. Rec. S00000–22 (daily ed. June 17, 1986) (statement of Sen. Lawton Chiles) (quoting Paul Blythe, *It's Cheap, It's Available and It's Ravaging Society*, Palm Beach Post & Evening Times) (“Even though sellers usually set up shop in primarily black neighborhoods, their customers tend to be white.”); 132 Cong. Rec. S00000–22 (daily ed. June 17, 1986) (statement of Sen. Lawton Chiles) (quoting Paul Blythe, *It Takes All Types*, Palm Beach Post & Evening Times) (“Although police said most dealers are black, cocaine rocks are sold in all types of neighborhoods by all types of people.”); 132 Cong. Rec. S7123–01 (daily ed. June 9, 1986) (statement of Sen. Paula Hawkins) (quoting Tom Morganthau, et al., *Crack and Crime*, Newsweek, June 16, 1986, at 16) (discussing crack house dealers “recruited from poor Haitian and American black kids in New York”); *id.* (quoting Peter McKillop, *An Inferno of Craving, Dealing and Despair*, Newsweek, June 16, 1986, at 18) (describing a “big-shouldered Trinidadian” selling crack).

## 3. Procedural Irregularities in Legislative History

The Anti-Drug Abuse Act of 1986 was enacted with unusual haste. It was passed without many of the formalities that normally \*647 accompany important legislation, such as subcommittee hearings, markups of bills, and amendments passed at the committee level. Testimony of Eric E. Sterling, President, Crim. Justice Pol'y Found., Before U.S. Sent'g Comm'n on Proposed Guideline Amendments for Public Comment 2 (Mar. 22, 1993) (“Sterling Testimony”).

The 1986 Act was expedited through Congress. As a result, its passage left behind a limited legislative record. While many individual members delivered floor

statements about the Act, no committee produced a report analyzing the Act's key provisions.... Apparently because of the heightened concern [arising from media coverage of crack], Congress dispensed with much of the typical deliberative legislative process, including committee hearings.

Of particular relevance to this report, the legislative history does not include any discussion of the 100-to-1 powder cocaine/crack cocaine quantity ratio *per se*.

U.S. Sent'g Comm'n, *Special Report to Congress—Cocaine and Federal Sentencing Policy* 117 (1995), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Drug\\_Topics/199502\\_RtC\\_Cocaine\\_Sentencing\\_Policy/](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/199502_RtC_Cocaine_Sentencing_Policy/) (“1995 U.S.S.C. Report”). Drug quantities triggering mandatory minimum sentences were determined based on anecdotal evidence, not statistical data. Sterling Testimony at 2–3. There was little input into the process from administrative agencies with relative expertise or from the public. *Id.*

## 4. Departures from Established Penal Policy

The newly adopted mandatory minimum sentences for crack cocaine represented a significant departure from explicitly established policy. Statements by lawmakers indicated that Congress intended that five-year mandatory minimums be targeted at “middle-level dealers,” while ten-year sentences be given to “kingpins” and “masterminds.” *E.g.*, 132 Cong. Rec. S. 13741–01 (Sept. 30, 1986) (statement of Sen. Biden).

By setting the quantity thresholds for crack at five and ten grams, however, the legislation imposed unusually harsh punishment on low-level street dealers. “Five grams of crack cocaine is indicative of a retail or street-level dealer rather than a mid-level dealer.” U.S. Sent'g Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 8 (1997) (“1997 U.S.S.C. Report”) at 5. Because the quantity thresholds were set so low, “[f]ully two-thirds of the Federal crack offenders are street-level dealers compared to 29% of the powder cocaine offenders.” Testimony of Alfred Blumstein, Nat'l Consortium on Violence Res., Before the United States Sentencing Comm'n 5 (Nov. 14, 2006) at 5.

A resulting incongruity was that the mandatory minimum sentences for low-level crack dealers, who manufactured or sold the drug at “the lowest levels of the drug distribution

system,” were often harsher than sentences for the higher-level dealers of powder cocaine, the drug from which crack is made. United States Sentencing Comm'n, *Fifteen Years of Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 132 (2004) (“2004 U.S. S.C. Report”). See also *id.* (“High penalties for relatively small amounts of crack cocaine appear to be misdirecting federal law enforcement resources away from serious traffickers and kingpins toward street-level retail dealers[.]”). The anomaly has distorted drug sentencing. “This disparity means that a \*648 major supplier of powder cocaine may receive a shorter sentence than a low-level dealer who buys powder from the supplier but then converts it to crack.” *Kimbrough v. United States*, 552 U.S. 85, 95, 128

S.Ct. 558, 169 L.Ed.2d 481 (2007) (citing 1995 U.S.S.C. Report 193–94).

### 5. Racially Disparate Impact

Overwhelming data, analyses, and judicial findings support the conclusion of a disparate racial impact in the mandatory minimum sentences for crack cocaine. Although the disparity has somewhat narrowed in the past two decades, it remains stark. In 2009, federal crack offenders were 79 percent African American, 10 percent White, and 10 percent Hispanic. See Table A below.

**Table A: Race of Those Sentenced for Federal Crack Offenses**

	1992	2000	2006	2009
White	3.2%	5.6%	8.8%	9.8%
African American	91.4%	84.7%	81.8%	79.0%
Hispanic	5.3%	9.0%	8.4%	10.3%

\* U.S. Sent'g Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy*, 16 (2007); U.S. Sent'g Comm'n, *Overview of Federal Criminal Cases: Fiscal Year 2009 6* (2010) (“2009 Fiscal Year Report”).

Racial disparities exist for powder cocaine offenses as well, but they are less striking. Federal powder offenders were 28

percent African American, 17 percent White, and 53 percent Hispanic. See Table B below.

**Table B: Race of Those Sentenced for Federal Powder Cocaine Offenses**

	1992	2000	2006	2009
White	32.3%	17.8%	14.3%	17.1%
African American	27.2%	30.5%	27.0%	28.0%
Hispanic	39.8%	50.8%	57.5%	53.2%

\* *Id.*

The racial disparity in sentencing bears no apparent relationship to the race of the consumers whose demand for drugs drives their distribution.

While 65% of the persons who have used crack are white, in 1993 they represented only 4% of the federal offenders convicted of trafficking in crack. Eighty-

eight percent of such defendants were black. During the first 18 months of [Federal Sentencing Guidelines] implementation, the sentencing disparity between black and white defendants grew from pre-guideline levels: Blacks on average received sentences over 40% longer than whites.... The Sentencing Commission acknowledges that the heightened crack penalties are a “primary cause of the growing disparity between sentences for Black and White federal defendants.”

*United States v. Armstrong*, 517 U.S. 456, 479–80, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996) (Stevens, J., dissenting) (citations omitted). See also 1997 U.S.S.C. Report, *supra*, at 8. (“[N]early 90 percent of the offenders convicted in federal court for crack cocaine distribution are African–American while the majority of crack cocaine users is white.”).

Invidious racial disparity in crack cocaine sentences has made a substantial contribution to the racial disparity in incarceration generally. “This one sentencing rule contributes more to the differences in average sentencing between African–Americans and White offenders than any possible effect of discrimination.” 2005 U.S.S.C. Report 132. See also Douglas C. McDonald & Kenneth E. Carlson, *Why Did Racial/Ethnic Sentencing Differences in Federal District Courts Grow Larger under the Guidelines?*, 6 Fed. Sent’g Rep. 223, 225 (1994) (stating that the crack sentencing ratio is the primary reason that African \*649 American offenders’ average prison sentences are longer than those of White offenders).

Based upon their experience and the statistics, courts have observed “[t]he overwhelmingly disparate impact that crack cocaine sentences have had on young black men in America.” *United States v. Wideman*, No. 05–10357, 187 Fed.Appx. 758, 760 (9th Cir.2006). See also *United States v. Moore*, 54 F.3d 92, 97 (2d Cir.1995) (“The statistical evidence regarding discriminatory impact is, indeed, irresistible: approximately 88% of defendants charged with crack cocaine-related crimes are Black (the percentage is even higher in some urban areas).”).

There appears to be a disparate racial impact on those sentenced for heroin offenses as well, although it is less dramatic than that for crack cocaine. In 2009, 28 percent of those convicted for federal heroin offenses were African American; 17 percent were White. 2009 Fiscal Year Report at 6 (2009). In per capita terms, considering the universe of total national population, African Americans are about ten times more likely to be convicted of a federal

heroin offense than Whites. See U.S. Census Bureau, *State and County Quick Facts*, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Mar. 20, 2011) (reporting that in 2009, Whites were 79.6 percent of the United States population and African Americans 12.9 percent).

## E. Incarceration Policy

### 1. Mass Incarceration

By any meaningful measurement, the prison population of the United States is extraordinarily high, an “incarceration explosion ... unmatched by any other society in any historical era.” Am. L. Inst., Model Penal Code: Sentencing xx (Tentative Draft No. 2, 2011) (not yet adopted). The American prison population has more than quadrupled in the past three decades, growing from 500,000 in 1980 to 2.3 million in 2010. Steven Hawkins, *Education v. Incarceration*, Am. Prospect, Jan.-Feb. 2011, at A18. “In 2008, the United States reached a new milestone: it incarcerated more than 1 percent of its adult population[.]” Bernard E. Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* 198 (2011) (“*Illusion*”).

Much of the swiftest growth has occurred in the federal system. “Between 2001 and 2008, the federal prison population swelled by 56,000, accounting for more than a quarter of new inmates nationwide. In 2002, for the first time in American history, the federal government was locking up more people than any single state[.]” Robert Perkinson, *Texas Tough: The Rise of America's Prison Empire* 349 (Picador 2010) (2009). See also Hon. William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reforms in the Midst of Inter-Branch Power Struggles* 3 (forthcoming 2011 from J.L. & Pol’y), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1773045](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1773045) (stating that the federal prison population increased 76 percent between 1999 and 2010 resulting in a 37 percent overcapacity). In state prisons, the number of annual prison admissions increased 18 percent between 2000 and 2008. Linh Vuong, et al., *The Extravagance of Imprisonment Revisited*, *Judicature*, Sept.-Oct.2010, at 71.

From 1925 to 1973, about 110 people were incarcerated in the United States for every 100,000 members of the population. Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* 21 (2003). The rate increased



dramatically beginning in the 1970s, as lawmakers and courts responded to high crime rates and \*650 the seeming failure of rehabilitative measures by relying on lengthy sentencing as the primary tool to deter crime and incapacitate criminals. *Id.*; Perkinson, *supra*, at 331–39; James Austin, et al., JFA Inst., *Unlocking America: Why and How to Reduce America's Prison Population* 4 (2007). “From 1980 to 2008, the U.S. incarceration rate climbed from 221 to 762 per 100,000. In the previous five decades ... [it] had been stable at around 100 per 100,000.” Bruce Western & Becky Pettit, *Incarceration and Social Inequality*, Daedalus, Summer 2010, at 9. *See also* Perkinson, *supra*, at 6 (“Between 1965 and 2000, the U.S. prison population swelled by 600 percent[.]”).

The high United States incarceration rate is unparalleled internationally. Our national prison population of 1.6 million people is the world's largest—larger even than that of China, an authoritarian nation with three times our population. *See* James Austin, *supra*, at 3. The national rate of incarceration, 737 per 100,000 persons, exceeds that of Russia, which imprisons 581 per 100,000. *Id.* This rate is far higher than those of peer nations with democratic, market-based economies. Such countries incarcerate between 63 and 196 people per 100,000, Nicola Lacey, *American Imprisonment in Comparative Perspective*, Daedalus, Summer 2010, at 103, a rate comparable to that of the United States for much of the twentieth century. Among our peer nations, the second-highest rate is found in New Zealand, which incarcerates 196 per 100,000 people. *Id.*

The increased prison population is due in large part to longer sentences.

For the same crimes, American prisoners receive sentences twice as long as English prisoners, three times as long as Canadian prisoners, four times as long as Dutch prisoners, five to 10 times as long as French prisoners, and five times as long as Swedish prisoners. Yet these countries' rates of violent crime are lower than ours, and their rates of property crime are comparable.

James Austin, *supra*, at 4. *See also id.* at 3 (stating that between 1990 and 1997, the prison population increased 60 percent even though admissions increased by only 17 percent).

The length of sentences is often a product of mandatory minimum sentencing statutes.

Since 1991, the number of criminal statutes which have mandatory minimum sentences has increased by more than 78%. There are now over 170 provisions which bear mandatory minimum sentences. Twenty-eight percent of the federal criminal cases subject to the sentencing guidelines in 2009 involved statutes that carried mandatory minimums. That figure increases to 40% of the docket if immigration cases are excluded.

Sessions, *supra*, at 39. *Cf.* Harcourt, *Illusion*, *supra*, at 198 (“In 2009, one of every eleven state and federal prisoners was serving a sentence of life imprisonment[.]”).

Mandatory minimum sentencing deviated from the common law tradition of granting courts discretion to sentence criminals based on the varying circumstances of their backgrounds and offenses. *See United States v. Polouizzi*, 687 F.Supp.2d 133, at 167–86 (EDNY 2010) (discussing wide sentencing discretion afforded to judges and juries at the founding of the Republic). Mandatory minimum sentences have been sharply criticized since at least the 1960s. Am. L. Inst., Model Penal Code: Sentencing § 6.06 rep. note d, at 31–32 (Tentative Draft No. 2, 2011) (not yet adopted) (collecting sources critical of mandatory minimum sentencing); \*651 *id.* § 6.06 cmt. a, at 19 (“[T]here is no current mechanism in American law more misconceived than mandatory minimum penalty laws.”).

Our emphasis on lengthy sentences began, in part, as a response to the high crime rates of the 1960s and 1970s, when the rehabilitation of criminals and attempt to address the root causes of crime were increasingly seen as futile endeavors. *See, e.g.*, James Q. Wilson, *Lock 'Em Up: And Other Thoughts on Crime*, N.Y. Times Mag., Mar. 9, 1975, at 11 (“Considering that our society is in the grip of a decade-old crime wave ..., it is strange that we should persist in the view that we can find and alleviate the ‘causes’ of crime, that serious criminals can be rehabilitated, ... and that prosecutors and judges have the wisdom to tailor sentences to fit the ‘needs’ of the individual offender.”); *id.* at 46 (“Wicked people exist. Nothing avails but to set them apart from innocent people.”).

While the movement to mass incarceration was prompted largely by concerns with violent crime, much of its focus is on nonviolent activities, particularly drug offenses. In 2008 and 2009, only about 8 percent of federal prisoners were serving time for violent crimes. *See* Heather C. West, et al., Bureau of Justice Stat., U.S. Dep't of Justice, *Prisoners in 2009* 33 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf>. Over half were incarcerated for drug offenses. *Id.*

Convictions for drug offenses are the single most important cause of the explosion in incarceration rates in the United States. Drug offenses alone account for two-thirds of the rise in the federal inmate population and more than half of the rise in state prisoners between 1985 and 2000. Approximately a half-million people are in prison or jail for a drug offense today, compared to an estimated 41,400 in 1980—an increase of 1,100 percent.

Alexander, *supra*, at 59. *See also* Perkinson, *supra*, at 335 (stating that between 1982 and 1988, the number of federal drug prosecutions increased 99 percent, while nondrug prosecutions increased only 4 percent).

Today's high incarceration rate bears little relationship to the prevalence of crime. “[T]he crime decline of the 1990s did coincide with a large increase in the prison population. But the large crime *increase* during the preceding period coincided with an even bigger jump in imprisonment, and incarceration rates continued to climb after 2000 even though crime rates were relatively static[.]” Cook & Ludwig, *supra*, at 64 (emphasis in original).

## 2. Racial Disparity

Excessive incarceration has disproportionately affected African Americans. “Today, a generation after the triumphs of the civil rights movement, African Americans are incarcerated at seven times the rate of whites, nearly double the disparity measured before desegregation.” Perkinson, *supra*, at 3. Racial disparities in investigation, prosecution, and sentencing have long existed in the United States.

[T]hroughout the twentieth century,  
both before and after developments

in civil rights, blacks have been arrested, convicted, and jailed entirely out of proportion to their share of the population. Southern chain gangs ... were, to all intents and purposes, gangs of black semislaves. [B]lacks still constitute far more than their share of the prison population; they have done so for decades. Since 1933, the federal government's *Uniform Crime Reports* have kept track each year of the race of men and women arrested for serious crime. Blacks were arrested at a higher rate than whites even at the start; in 1940, 17 blacks per 1,000 were arrested, and only 6 whites. \*652 Arrest rates for both races have skyrocketed since 1933, but the gap remains, and it gets if anything wider. The figures for blacks are, indeed, staggering.... In 1978, 35 whites out of every 1,000 were arrested, and almost 100 out of every 1,000 blacks—nearly one out of ten.

Friedman, *Crime, supra*, at 377–78. *See also* Thorsten Sellin, *The Negro Criminal: A Statistical Note*, 140 Ann. Am. Acad. Pol. & Soc. Sci. 52, 59 (1928) (“The Negro is not only convicted more frequently than whites, but he seems to receive the heavier sentences”).

Race-based differences in incarceration continue today.

Other than sheer scale, [the] most salient feature [of prisons in the United States] is the heavy racial and ethnic imbalances among those incarcerated. Roughly 60 percent of the nations' prisoners are either African American or Hispanic. The current black-male imprisonment rate stands at nearly 7 times the rate for whites, while the Latino rate is 2.5 times the white rate. Today, 1 of every 100 adults is held in prison on any given day, including 1 of every 15 black males between the ages of 20 and 50. The U.S. Justice Department estimated that the lifetime likelihood of serving a state or federal prison term for a white male born in

2001 was 6.6 percent, while for a black male child it was a staggering 32.2 percent.

Am. L. Inst., Model Penal Code: Sentencing xx-xxi (Tentative Draft No. 2, 2011) (not yet adopted). *See also* Patterson, *supra*, at 398–99 (stating that in 2005, 25 percent of the United States prison population was African American men between the ages of twenty and thirty-nine); Western & Pettit, *supra*, at 11 (reporting a 68 percent risk of imprisonment for African American male high school dropouts born from 1975 to 1979, versus 28 percent for Whites of the same demographic). If African Americans and Latinos were sentenced at the same frequency at which Whites are sentenced, the American prison population would be cut in half. *See* James Austin, *supra*, at 8. African American men with little schooling are more likely to be incarcerated than employed. Western & Pettit, *supra*, at 12. “The main sources of upward mobility for African American men—namely, military service and a college degree—are significantly less common than a prison record.” *Id.* at 11.

Racial disparity in incarceration is particularly stark with regard to drug crimes. Between 1983 and 1987, African Americans and Whites were incarcerated for such offenses in roughly equal numbers. Petersilia, *supra*, at 29. Between 1983 and 1998, the population of African Americans imprisoned for drug offenses increased twenty-six times, compared to an eighteenfold increase for Hispanics and a sevenfold increase for Whites. *Id.* at 28 (citing Michael Tonry, *Malign Neglect: Race, Crime, and Punishment in America* (1995)). African Americans comprised only 11 to 12 percent of the United States population during this period. *Id.* at 28.

Among those convicted of drug offenses, racial disparities exist in both the likelihood of imprisonment and the length of imprisonment. 2004 U.S.S.C. Report 122 (“The odds of a typical Black drug offender being sentenced to imprisonment are about 20 percent higher than the odds of a typical White offender, while the odds of a Hispanic drug offender are about 40 percent higher.”); *id.* at 123 (“The typical Black drug trafficker receives a sentence about ten percent longer than a similar White drug trafficker. This translates into a sentence about seven months longer.”). *Cf. id.* at 129 (African Americans \*653 are less likely than defendants of other races to receive downward departures under the sentencing guidelines).

The disproportionate imprisonment of African Americans far exceeds other statistics related to poverty. “[A]t roughly

seven to one, the black-white ratio of male incarceration rates dwarfs the two to one ratio of unemployment rates, the three to one nonmarital child-bearing ratio, the two to one black-white ratio of infant mortality rates, and the one to five ratio of net worth.” Loury, *supra*, at 137.

It has been persuasively argued that the enactment of harsh sentencing schemes has been motivated in part by racial animus.

Empirical research has established that support for highly punitive policies correlates with the tendency to think that Blacks have inherently criminal tendencies. The pattern is consistent at the state level: The size of a state’s Black population is a stronger prediction of the prison population and its propensity to adopt the death penalty than its rate of violent crime.

Doris Marie Provine, *Unequal Under the Law: Race in the War on Drugs* 102 (2007) (citations omitted).

### 3. Consequences

#### a. Inmates, Families, and Communities

Incarceration affects the lives not only of prisoners but of those around them. Families of prisoners face higher rates of divorce, separation, domestic violence, and developmental and behavioral problems among children than the families of non-prisoners. Western & Pettit, *supra*, at 15. Prisoners’ children may experience numerous consequences of incarceration, including loss of contact with the incarcerated parent, strained relationships with caregivers, a diminished sense of stability and safety, economic insecurity, social stigma, shame, increased risk of drug involvement, and susceptibility to adverse peer pressure and risky behavior. *See generally* Patricia Allard & Judith Greene, Justice Strategies, *Children on the Outside: Voicing the Pain and Human Costs of Parental Incarceration* (2011), available at <http://www.justicestrategies.org/sites/default/files/publications/JS-COIP-1-13-11.pdf>. These children are at “greater risk of diminished life chances and criminal involvement, and at a greater risk of incarceration as a result.” Western & Pettit, *supra*, at 16.

As with incarceration itself, these adverse effects are multiplied when racial disparity is taken into account. In 2008, 11 percent of African American children had lived with a parent being locked up, compared to 1.75 percent of White children. *Id.* at 16. High incarceration affects communities as well. Disadvantaged communities are more likely to send more persons to prison, increasing their likelihood of becoming even more troubled in the future. See Robert J. Sampson & Charles Loeffler, *Punishment's Place: The Local Concentration of Mass Incarceration*, Daedalus, Summer 2010, at 20. “[T]he combination of poverty, unemployment, family disruption, and racial isolation is bound up with high levels of incarceration even when adjusting for the rate of crime that a community experiences.” *Id.* at 21.

### b. Collateral

Beyond separating convicts from their families and the work force, incarceration imposes numerous collateral consequences. “In every state and under federal law, there are hundreds of collateral consequences that apply automatically or on a discretionary basis, to people convicted of crimes. Most of these apply for life ... and can never be removed, or can be relieved only through virtually unavailable \*654 methods like a pardon from the President [.]” Gabriel Chin, *The Constitution in 2020 and the Secret Sentence: Rethinking Collateral Consequences*, Balkinization (Sept. 30, 2010), <http://balkin.blogspot.com/2010/09/constitution-in-2020-andsecret.html> (hyperlink omitted).

Consequences imposed by law include “ineligibility for federal welfare benefits, public housing, student loans, and employment opportunities, as well as various forms of civic exclusion, such as ineligibility for jury service and felon disenfranchisement.” Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. Rev. 457, 459 (2010). Felon disenfranchisement laws, which have their roots in attempts by Whites to suppress African American votes in the late nineteenth century, bar 13 percent of African American men from casting ballots. Erika Wood, Brennan Center, *Restoring the Right to Vote* 6–7 (2d ed. 2009), available at [http://brennan.3cdn.net/5c8532e8134b233182\\_z5m6ibv1n.pdf](http://brennan.3cdn.net/5c8532e8134b233182_z5m6ibv1n.pdf). Ex-convicts' difficulties in finding work are discussed in detail below.

Other handicaps limit felons' ability to rehabilitate themselves in more tangible ways. Ineligibility for federal student loans may bar those convicted of drug offenses, even misdemeanors, from attending college or pursuing vocational training after release. See Pinard, *supra*, at 5–14. Drug offenders are ineligible in many states for receipt of federal welfare benefits. *Id.* at 494. Felons are ineligible for receipt of public housing assistance for five years after their release from prison, and private landlords routinely, and lawfully, discriminate against applicants based on criminal history. Alexander, *supra*, at 141–42.

The cumulative effect of such adverse consequences is to render an ex-convict a social pariah.

[I]t is legal to discriminate against ex-offenders in ways it was once legal to discriminate against African Americans. Once you're labeled a felon depending on the state you're in, the old forms of discrimination ... are suddenly legal. As a criminal, you have scarcely more rights and arguably less respect than a black man living in Alabama at the height of Jim Crow.”

Michelle Alexander, *The New Jim Crow: How Mass Incarceration Turns People of Color into Permanent Second-Class Citizens*, Am. Prospect (Jan.-Feb.2011), at A19–20. Prior incarceration is a greater predictor of low upward mobility among low-income men than failure to complete high school or very low levels of cognitive ability. Western & Pettit, *supra*, at 14–15.

Beyond the direct and indirect consequences of imprisonment, the convict upon reentry must still face those problems that complicated his life before imprisonment but that remain unresolved: poverty; dysfunctional family relationships; addiction to drugs, alcohol, or gambling; and limited education and vocational skills.

### c. Fiscal

Mass incarceration imposes serious costs upon the wider society. “As of 2006, the U.S. imprisoned over 1.6 million of its people at a cost of \$69 billion, an increase in cost of over six times during the prior quarter century.” Vuong, *supra*, at 70. See also Western & Pettit, *supra*, at 18 (reporting the annual cost of imprisonment as \$70



billion); Perkinson, *supra*, at 343 (“[B]y 2000, states were spending nearly \$40 billion on corrections, one of every fourteen general revenue dollars.”). The average cost of incarcerating an inmate for a year was \$22,650 in 2001, the latest year for which national data is available. \*655 Vanessa Gregory, *Indefensible*, Am. Prospect (Jan.-Feb.2011), at A11; Harcourt, *Illusion*, *supra*, at 202. Cf. Carrie Johnson, *Budget Crunch Forces a New Approach to Prisons*, Nat’l Pub. Radio, Feb. 15, 2011, <http://www.npr.org/2011/02/15/133760412/budget-crunch-forces-a-new-approach-to-prisons> (quoting Adam Gelb, Pew Ctr. on the States) (“It costs 23 times as much to have somebody behind the walls as it does in the community [.]”). Expenditures for corrections account for as much as 10 percent of state budgets. Harcourt, *Illusion*, *supra*, at 199. In Connecticut, Delaware, Michigan, Oregon, and Vermont, more state money is spent on corrections than on higher education. *Id.* (citing 2007 data).

Much of the cost of incarceration is due to the imprisonment of nonviolent offenders. If the number of such inmates were cut in half, taxpayers would be saved an estimated \$16.9 billion annually. Valerie Wright, Sentencing Project, *Deterrence in Criminal Justice: Evaluating Certainty v. Severity of Punishment* 8 (2010), available at <http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf>.

#### 4. Alternatives

##### a. Generally

Concerns about strained state budgets and prison overcrowding have prompted lawmakers to reconsider lengthy incarceration as the preferred response to crime. Carrie Johnson, *supra*. Some reforms are designed to eliminate or shorten sentences, often by increasing judicial discretion. Between 2000 and 2002, more than two dozen states implemented sentencing reforms, “eliminating mandatory minimums, accelerating parole, or expanding [prison] alternatives like drug treatment.” Perkinson, *supra*, at 344. *But see* Heather Gillers, *Daniels–Backed Prison Reform is Dealt a Blow by Prosecutors*, Indianapolis Star, Feb. 15, 2011, <http://www.indystar.com/fdcp/?1299882692541> (reporting that legislation in Indiana designed to reduce incarceration due to budgetary pressures was amended at the pressure of state prosecutors to include a provision that would result in longer sentences). A provision that would eliminate all mandatory minimum sentences is included in a draft of

the Model Penal Code. Am. L. Inst., Model Penal Code: Sentencing § 6.06(3) (Tentative Draft No. 2, 2011) (not yet adopted) (“The court is not required to impose a minimum term of imprisonment for any offense under this Code.”).

In New York, a recent rescission of the vicious Rockefeller drug laws eliminated mandatory minimum prison sentences for first-time and many second-time nonviolent drug offenders and some drug-related property offenses, such as third-degree burglary. Noeleen G. Walder, *One–Year–Old Reform Saves 1, 000 Drug Offenders from Prison, According to Preliminary Estimates*, N.Y.L.J. (Oct. 14, 2010), at 1. Courts may order drug treatment instead of imprisonment for many drug and property crime offenders, even over the objection of prosecutors. *Id.* Mandatory minimum sentences for certain felonies have been reduced from three years to two. Adrienne Austin, *supra*, at 12 (citing S. 56, 231st Legis. Sess. (N.Y. 2009)).

Numerous states have shortened or eliminated mandatory minimum sentences and allowed greater judicial discretion. Adrienne Austin, *supra*, at 12–13, 15–16 (citing H.B. 210, 142d Gen. Assemb. (Del.2003) (decreasing mandatory minimum sentences for drug trafficking crimes and increasing the quantity threshold for crack-related offenses from five to ten grams); S.B. 1722, 110th Reg. Sess. (Fla.2009) (requiring non-prison sentences for certain third-degree felons unless a risk of public endangerment is found); H.B. 1892, S.B. 358 112th Gen. Assemb., 1st Reg. \*656 Sess. (Ind. 2001) (eliminating mandatory minimums for certain nonviolent drug offenses, allowing judges to sentence offenders to home detention or work release, providing for drug treatment as an alternative to prison for some offenders, and exempting certain drug offenders from the state’s “three strikes” scheme); H.B. 372, 2009 Reg. Sess. (Ky. 2009) (authorizing time served on parole to be credited toward a total sentence, except for violent offenders, registered sex offenders, or parole violators convicted of new felonies); H.B. 225, 35th Reg. Sess. (La. 2009) (expanding from two to four years the period that a felon may be sentenced to house arrest instead of incarceration); Mich. Pub. Acts 665, 666, 670 of 2002 (eliminating most mandatory minimum sentences for drug offenses and eliminating a separate sentencing scheme for drug offenders); S.F. 802, 1st Reg. Sess. of 86th Legis. Sess. (Minn. 2009) (authorizing courts to disregard mandatory minimum sentences for individuals convicted of fifth-degree drug felonies); A.B. 239, 75th Reg. Sess. (Nev. 2009) (limiting “habitual offender” status, which requires a five-year mandatory minimum sentence,

to offenders with prior felony convictions); S.B. 1866, 86th Legis. Sess. (N.J. 2009) (authorizing courts to waive or reduce mandatory minimum sentences for drug offenses within 1,000 feet of a school); S.B. 39, Gen. Assemb. (R.I. 2009) (removing mandatory minimum sentences for two categories of drug offenses and reducing maximum sentences from fifty years to twenty years and from life to thirty years); S1154, 118th Sess. Gen. Assemb. (S.Car. 2010) (eliminating mandatory minimum sentences for simple drug possession and eliminating a powder/crack sentencing disparity); H.B. 2073, 85th Legis. Assemb. (S.Dak. 2010) (allowing courts to suspend any portion of a sentence); H.B. 2338, 57th Legis., Reg. Sess. (Wash. 2002) (expanding opportunities for drug offenders to receive treatment instead of imprisonment)).

Some states have enacted laws expanding opportunities for inmates, particularly nonviolent ones, to qualify for early release, often based on their successful completion of programs such as training or counseling. Adrienne Austin, *supra*, at 13–15 (citing S.B. 1476, 48th Legis., 2d Reg. Sess. (Ariz. 2008); H.B. 1351, 1st Reg. Sess., 67th Gen. Assemb. (Colo. 2009); S.B. 193, 150th Gen. Assemb., Reg. Sess. (Ga. 2009); S.B. 14, 2007 Sess. (Kan. 2007); S.B. 2136, 2008 Reg. Sess. (Miss. 2008); A.B. 510, Seventy–Fifth Reg. Sess. (Nev. 2007); H.B. 4, 2007 Sess. (Penn. 2008); S.B. 292, 2009–10 Reg. Sess. (Vt.2009); A.B. 500, 99th Legis. (Wis.2009); S.F. 32, 59th Legis. (Wyo. 2008)). *Cf.* Second Chance Act of 2007, Pub. L. 110–199, § 231(g), 122 Stat. 657 (providing for a pilot program of home detention of certain elderly offenders who have completed ten years or 75 percent of their prison terms).

In general, reforms reducing the length of prison sentences are not expected to affect deterrence. Wright, *supra*, at 9.

#### b. Non–Incarceratory Sentencing

As prison sentences are reduced or eliminated, non-incarceratory methods of rehabilitation can be used and improved to minimize the risk of recidivism. Systems of probation, parole, and supervised release have proven to be effective when violations are met with swift, consistent, and predictable negative consequences. *See* Mark A.R. Kleiman, *Smarter Punishment, Less Crime*, Am. Prospect, Jan.–Feb. 2011, at A5 (discussing a probation enforcement program for drug offenders in Hawaii).

“Problem-solving” or “behavioral” courts may order nonviolent offenders to undergo drug and alcohol treatment,

counseling, or \*657 other programs as an alternative to incarceration. In some circumstances, charges are dismissed when a convict has successfully complied with such a regimen. Sasha Abramsky, *May It Please the Court*, Am. Prospect (Jan.–Feb. 2011), at A14. Crucial to post-release programs is job training to equip ex-convicts for lawful work. *See* Adam Serwer, *Permanent Lockdown*, Am. Prospect (Jan.–Feb. 2011), at A16. Non-incarceratory methods have proven effective when used in a coordinated fashion.

By combining punishment and rigorous court monitoring with essential services like drug treatment, counseling, and job training, problem-solving courts have successfully reengineered how courts respond to societal dysfunction, especially low-level, nonviolent crime. These courts have a demonstrated record of reducing recidivism and forging better outcomes for offenders, victims, and communities.

Hon. Jonathan Lippman, *Chief Judge Judith S. Kaye: A Visionary Third Branch Leader*, 84 N.Y.U. L. Rev. 655, 658 (2009). *But see* Hon. Kevin S. Burke, *Just What Made Drug Courts Successful?*, 36 New Eng. J. on Crim. & Civ. Confinement 39, 51 (2010) (arguing that drug courts may coerce defendants, including victims of racial profiling, to accept guilty pleas); Nat'l Assn' of Crim. Defense Lawyers, *America's Problem–Solving Courts: The Criminal Costs of Treatment and the Case for Reform* 22–24 (2009), available at <http://www1.spa.american.edu/justice/documents/2710.pdf> (criticizing problem-solving courts' tendency to direct resources to nonviolent, first-time offenders instead of higher-risk offenders).

Technological advances promise useful innovations in non-incarceratory sentencing, either after or in lieu of a custodial sentence. Electronic monitoring of ex-convicts' movements helps keep convicts confined to their homes and other permissible locations and enables probation officers and police to locate them quickly when they stray-and to swiftly detect any crimes they may commit. *See* Graeme Wood, *Prison Without Walls*, Atlantic, Sept. 2010, at 88. Biological monitoring systems detect alcohol use and could be used to identify the abuse of other drugs or the presence of elevated tension. *Id.* at 96. Such tools promise the effective control of criminals at much lower cost and without subjecting them to the anti-rehabilitative aspects of prison life. *Id.* at 88, 96.

Because would-be coconspirators may realize that associating with an electronically monitored convicted felon increases the likelihood of their own detection and capture, such tools may dissuade criminal conspiracies involving monitored ex-prisoners.

## 5. Effectiveness in Reducing Crime

### a. Rehabilitation

The effectiveness of prisons as places for maximum rehabilitation is called into question by high rates of recidivism. “More than 40 percent of murders and robberies are committed by people on probation, parole, or pretrial release.” Kleiman, *supra*, at A5. A 2002 study of 272,111 former state prisoners in fifteen states indicated high rates of recidivism within three years of release from prison: 68 percent were rearrested for new offenses, almost exclusively felonies and serious misdemeanors; 52 percent were returned to prison for new offenses or technical violations; 47 percent were convicted of new offenses; and 25 percent were resentenced to prison for new offenses. Patrick A. Langan & David J. Levin, Bureau of Justice Stat., Dep’t of Justice, *Recidivism of Prisoners Released in 1994* 1 (2002), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf> (reporting results for prisoners released since 1994). Thirty percent of ex-convicts were \*658 arrested for a serious offense in the first six months after release. *Id.* at 3.

Demographic data correlate with higher risks of recidivism. In the 2002 study, men were more likely to be rearrested than women (68 percent versus 58 percent) and African Americans more than Whites (73 percent versus 63 percent). *Id.* at 7. The risk of recidivism is inversely correlated with age; prisoners released as teenagers were those most likely to be rearrested or reconvicted within three years, and those released at the age of forty-five or older were the least. *Id.* at 7. The highest rearrest rates were seen for those initially convicted of property offenses: 74 percent. *Id.* at 8. Prisoners convicted of violent crimes and drug crimes had lower rearrest rates: 62 percent and 67 percent, respectively. *Id.*

The ability to relate such factors to recidivism risks has led some to suggest strong reliance on them in determining the length of prison sentences. See Am. L. Inst., Model Penal Code: Sentencing § 6B.09 cmt. A at 56 (Preliminary Draft No. 5, 2007) (not yet adopted) (citing Stephen D. Gottfredson & Laura J. Moriarty, *Statistical Risk Assessment: Old Problems*

*and New Applications*, 52 Crime & Delinq. 178, 192 (2006)) (“Risk assessment may be defined as predicting who will or will not behave criminally in the future.”). It has been argued that these instruments can reduce prison populations by allowing the release of inmates who pose little risk to the public. Bernard E. Harcourt, *Risk as a Proxy for Race* 1 (U. Chi. L. Sch., John M. Olin Law and Economics Working Paper No. 535, Public Law and Legal Theory Working Paper No. 323), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1677654&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677654&download=yes) (“Risk”). The reliability of risk assessment tools may be undermined by faulty assumptions. See generally, e.g., *United States v. C.R.*, No. 09–CR–155, draft op., at 243–297 (E.D.N.Y. Mar. 10, 2011) (discussing the limitations of risk assessment tools in detecting the danger to the public posed by some classes of child pornography offenders). From the 1920s to the 1970s, race and nationality were explicitly relied upon in making such determinations. Harcourt, *Risk*, *supra*, at 4–5. Racial disparity continues today through the use of prior criminal history as a tool for determining sentence length. *Id.* at 8. Criminal history may be a reflection less of a defendant’s risk of recidivism than of disparities in investigation, arrest, prosecution, and sentencing.

Except for the incapacitation effect of incarceration, there is little apparent correlation between recidivism and the length of imprisonment. Those who serve five years or less in prison have rearrest rates of 63 to 68 percent, with no discernible pattern relating to sentence length. Langan & Levin, *supra*, at 11. A 2002 study did note a lower rearrest rate—54 percent—among those who served more than five years. *Id.* No conclusions regarding these longer sentences can be drawn because the report did not differentiate among them by length. See *id.* It appears that among low-risk offenders, recidivism may to a limited extent be fostered, not prevented, by lengthy imprisonment.

Among low-risk offenders, those who spent less time in prison were 4% less likely to recidivate than low-risk offenders who served longer sentences. Thus, when prison sentences are relatively short, offenders are more likely to maintain their ties to family, employers, and their community, all of which promote successful reentry into society. Conversely, when prisoners serve longer sentences they are more likely to become institutionalized, lose

pro-social contacts in the community, and become \*659 removed from legitimate opportunities, all of which promote recidivism.

Wright, *supra*, at 7; *but see* Langan & Levin, *supra*, at 11 (“No evidence was found that spending more time in prison raises the recidivism rate.”).

Because prisons are often located in rural areas, and because convicts' families and friends have limited ability to travel, convicts' relationships with people on the outside—the people most likely to motivate convicts to lead straight lives—may be eroded seriously during long terms of imprisonment. *See* Jeremy Travis, et al., Urban Inst. Justice Pol'y Ctr., *Families Left Behind: The Hidden Costs of Incarceration and Reentry* 1 (rev. ed. 2005) available at [http://www.urban.org/uploadedpdf/310882\\_families\\_left\\_behind.pdf](http://www.urban.org/uploadedpdf/310882_families_left_behind.pdf) (reporting that incarcerated fathers and mothers are housed an average of 100 and 160 miles, respectively, from their children); *id.* (stating that over half of incarcerated parents report never receiving a personal visit from their children).

Programs such as those for drug and alcohol treatment, adult basic education, vocational training, and prison industries reduce recidivism by 8 to 15 percent. Petersilia, *supra*, at 17. *See also id.* at 34 (reporting a study of inmates in three states that found that those who underwent prison education programs were 23 percent less likely than other inmates to be re-incarcerated). Treatment for [mental disabilities](#) may have an even greater positive impact. Nearly a third of state prisoners and a quarter of federal prisoners suffer from a mental condition or physical impairment. *Id.* at 35. Ten percent of state prisoners and 5 percent of federal prisoners have a learning disability. *Id.* Among state prisoners, 19 percent are completely illiterate and 40 percent functionally illiterate, compared to 4 percent and 21 percent, respectively, of the non-incarcerated population. *Id.* at 32. In 1999, 51 percent of released prisoners lacked a high school education, and 11 percent had an eighth-grade education or less. *Id.*

Coinciding with the nationwide push for stiffer prison sentences since the 1970s has been a de-emphasis on the rehabilitation of criminals and a preference for lengthy incapacitation. *Id.* at 13. When rehabilitative measures were retained, it was often with the purpose of keeping inmates manageable, not in reducing recidivism. *Id.* The continued existence of programs effective at combating recidivism both for current and released prisoners may be threatened by budgetary pressures. *See* Kevin Johnson, *Budget Cuts Slice*

*Programs for Ex-Inmates*, USA Today, Feb. 9, 2011, at 7A (reporting concerns that state government spending for parole and probation departments may be reduced, depleting resources for drug treatment, supervision of offenders, and housing and job assistance).

Recidivism may be promoted by the behavior traits prisoners develop while incarcerated. To survive, they “tend to develop characteristics institutionally selected for survival: circumspection, canniness, coldness, and cruelty.” Perkinson, *supra*, at 368. After release, the negative traits cultivated in prison may be received as virtues on the street. “[P]rison usually enhances one's prestige on the street, particularly in terms of ... values like toughness, nerve, and willingness to retaliate for transgressions.” Anderson, *supra*, at 292.

## b. Incapacitation

Some penologists have estimated that by incapacitating criminals, incarceration has caused between 10 and 25 percent of the decrease in violent crime rates of the 1990s. Marc Mauer, *The Impact of Mandatory Minimum Penalties in Federal \*660 Sentencing*, Judicature, July–Aug. 2010, at 7; Perkinson, *supra*, at 370. It is not known, however, whether this reduction through incapacitation is greater than what could have been accomplished through less restrictive measures, nor is there any indication that mandatory minimum sentences have appreciably affected the reduction. Mauer, *supra*, at 7.

To some extent, the greater effectiveness of prisons in preventing crime through incapacitation may be decreasing as a result of technology. Cellular telephones and Internet-capable “smartphones” smuggled into prisons enable inmates to freely maintain contact with people on the outside. Kim Severson & Robbie Brown, *Outlawed, Cellphones are Thriving in Prisons*, N.Y. Times, Jan. 2, 2011, <http://www.nytimes.com/2011/01/03/us/03prisoners.html>. Such devices are ubiquitous in some prisons, and they may be used by gang-affiliated prisoners to maintain contact with outside criminal networks and orchestrate violence and drug trafficking. *Id.*

## c. General and Specific Deterrence

A purpose of imprisonment is to deter people generally from engaging in crime. Another form of deterrence directed to



this particular criminal who has violated the law—specific deterrence—is designed to prevent recidivism.

Compelling arguments have been made that the deterrent value of a sentence is highest when the chances of its being administered are high and the offender is able to rationally consider the consequences of his or her actions. It appears to be primarily in the certainty of punishment, not its severity, that deterrent power lies. *See* Steven N. Durlauf & Daniel S. Negin, *Imprisonment and Crime: Can Both be Reduced?*, 10 *Criminology & Pub. Pol'y* 13, 37 (2011); Wright, *supra*, 1–2, 4–5.

General deterrence depends on potential offenders' rational assessment of the likely costs and benefits of crime. Shawn D. Bushway & Peter Reuter, *Deterrence, Economics, and the Context of Drug Markets*, 10 *Criminology & Pub. Pol'y* 183, 184 (2011). That the defendants in this case were rationally capable of making accurate cost-benefit assessments when they were young, before embarking on crime, seems doubtful.

Deterrent power of either type is reduced when potential offenders' reasoning ability is impaired due to alcohol or drug use. *See* Wright, *supra*, at 2. It may be similarly affected among young people due to the natural rate of brain development. *See* B.J. Casey et al., *The Adolescent Brain*, 28 *Developmental Rev.* 62, 64 (2008) (“A cornerstone of cognitive development is the ability to suppress inappropriate thoughts and actions in favor of goal-directed ones, especially in the presence of compelling incentives.”); *United States v. C.R.*, No. 09–CR–155, draft op., at 375 (E.D.N.Y. Mar. 10, 2011) (collecting sources).

General deterrence particularly may be impaired when the perceived injustice of punishment damages the credibility of the justice system.

[Studies suggest] that knowledge of systematic injustice produced by the criminal justice system ... can have a range of deleterious effects on people's attitudes and behavior. People are less likely to comply with laws they perceive to be unjust. They may also be less likely to comply with the law in general when they perceive the criminal justice system to cause injustice.... [In contrast,] if the criminal justice system reflects ordinary perceptions of justice, it

can take advantage of a range of psychological \*661 mechanisms that increase assistance, compliance, and deference.

Paul H. Robinson, et al., *The Disutility of Injustice*, 85 *N.Y.U. L. Rev.* 1940, 2016 (2010).

## 6. Employment and Social Integration of Ex-Prisoners

Employment is a crucial antidote for recidivism. *See* Jack McDonough & William D. Burrell, *Offender Workforce Development: A New (and Better?) Approach to an Old Challenge*, *Fed. Probation*, June 2008, at 71 (2008); Mark Sherman, *Reducing Risk Through Employment and Education*, *Special Needs Offenders Bulletin*, Jan. 2000, at 1–2. “Employment helps ex-prisoners be productive, take care of their families, develop valuable life skills, and strengthen their self-esteem and social connectedness.” Petersilia, *supra*, at 112. There are few reliable analyses of post-release employment, *id.* at 119, but the unemployment rate for former prisoners has been found to be as high as 50 percent within the first nine months of release, compared to an overall national unemployment rate of 9.4 percent. *See* Steven Greenhouse, *Job Placement, with a Record: States Help Find Work (and Hope) for Ex-Convicts*, *N.Y. Times*, Jan. 25, 2011, at B4 (“Job Placement”).

Ex-prisoners face numerous obstacles to employment. Statutes and licensing regulations bar felons from holding certain jobs. Petersilia, *supra*, at 113–15. “The most common types of jobs with legal prohibitions ... are in the fields of child care, education, security, nursing, and home health care [.]” *Id.* at 113. Many prohibitions are in areas with little connection to public safety. *Id.* at 114–15. In New York, as in numerous other states, drug offenders' drivers' licenses are revoked. *Id.* at 115. Ex-offenders have difficulty meeting requirements of bonding against theft, required in many service businesses. *Id.* at 114.

Employers are often reluctant to employ released prisoners. A survey conducted in four major United States cities indicated that 60 percent of employers who had recently hired low-skilled workers were unwilling to hire applicants with criminal records. *Id.* at 116. A record is often seen by employers as a negative reflection on employee trustworthiness; employers also fear that by hiring a convict they may expose themselves to liability for suits for negligent

hiring. *Id.* at 116–117. Employers in the construction and manufacturing sectors are more likely to hire ex-convicts than those in businesses involving customer contact, child care, or elder care, but jobs in the former categories are diminishing. *Id.* at 118. Many of the areas in which released prisoners face significant obstacles to employment are those projected to show the greatest growth in coming years. *See* Hacker, *supra* (reporting that among the occupations projected to grow most significantly by the year 2018 are long-haul truck driver, security guard, receptionist, home health aide, nursing aide, orderly, and customer service representative).

Ex-convicts are often eligible for only temporary or seasonal work. Petersilia, *supra*, at 116. The jobs they are able to secure yield wages 10 to 30 percent lower than similar jobs held by those who have not been incarcerated. *Id.* at 119. Ex-offenders face additional competition for jobs as a result of welfare reform. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 instituted incentives for welfare recipients to join the work force; such recipients compete for the same low-skilled jobs as released prisoners. *Id.* at 120.

Obstacles beyond job availability exist. “Many offenders do not have the necessary \*662 skills or experience to find, compete for, and secure legitimate, full-time employment, even if they are sufficiently motivated.” McDonough & Burrell, *supra*, at 72. Often, released prisoners are hindered by limited education and work experience, substance abuse, psychological and mental problems, residence in inner-city neighborhoods far from available jobs, social connections to criminals, and embedded patterns of behavior learned from the criminal world. *See* Petersilia, *supra*, at 40, 113.

Limited programs have been implemented to prepare released convicts for entry into the job market. *See* Greenhouse, *Job Placement, supra*, at B 1. In the federal court for the Eastern District of New York, the Probation Department offers a number of useful services to ex-convicts through an “Offender Workforce Development” program: counseling in seeking and retaining jobs; furnishing of clothing for work; and instruction and assistance in obtaining state identification cards and driver’s licenses, searching for job openings, networking, filling out job applications, writing résumés, and interviewing. *See* Michelle A. Powell, *Report on Workforce Development Initiatives in the Eastern District of New York* 2–6 (2011). Probationers are eligible for subsidized training in such areas as food preparation, plumbing, pest control, and dental assistance through the New York City College of

Technology in Brooklyn under the Second Chance Act of 2007, *Pub. L. 110–199*, *122 Stat. 657*. *Id.* at 5.

## II. Law

### A. Sentencing Rules

[1] A sentencing court shall “state in open court the reasons for its imposition of the particular sentence.” 18 U.S.C. § 3553(c). If the sentence is not of the kind prescribed by, or is outside the range of, the sentencing guidelines referred to in section 3553(a)(4), the court shall indicate the specific reasons for imposing a sentence different from the guidelines. 18 U.S.C. § 3553(c)(2). These “reasons must also be stated with specificity in the written order of judgment and commitment.” *Id.* The mandatory nature of the guidelines has been excised, and they are now “advisory.” *United States v. Booker*, 543 U.S. 220, 245–46, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). *See also Gall v. United States*, 552 U.S. 38, 50, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007) (district judges “may not presume that the Guidelines range is reasonable but must make an individualized assessment based on the facts presented”). The sentencing court must still adhere to the requirements of 18 U.S.C. § 3553(c)(2). *United States v. Jones*, 460 F.3d 191, 197 (2d Cir.2006).

As to each defendant in this case, the “nature and circumstances of the offense and the history and characteristics of the defendant” were considered. *See* 18 U.S.C. § 3553(a)(1). Respectful consideration was given to the sentencing guidelines, the Sentencing Commission’s policy statements, and all other factors listed under 18 U.S.C. § 3553(a) to ensure that the sentence was “sufficient, but not greater than necessary, to comply with the purposes” of sentencing. *See* 18 U.S.C. § 3553(a). Under section 3553, there are two major considerations: specific and general deterrence. *Id.* Under our common law tradition, sentencing courts also consider the need to incapacitate criminals and the possibility of rehabilitating them. Wayne R. LaFave, 1 *Substantive Criminal Law* 38–39 (2d Ed. 2003).

[2] [3] Deviation from guideline sentences on policy grounds is permitted. “[D]istrict courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those guidelines.” *Spears v. United States*, 555 U.S. 261, 129 S.Ct. 840, 843–44, 172 L.Ed.2d 596 (2009). Such discretion may be exercised not only based on characteristics that distinguish a case from the “heartland” of cases contemplated by the guidelines, but also based on general policy considerations

that apply “even in a mine-run case.” *Kimbrough v. United States*, 552 U.S. 85, 109, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007). A court may substitute the congressional powder/crack ratio with a ratio of its own on the basis of such policy considerations. *Spears*, 129 S.Ct. at 844–45. See also, e.g., *United States v. Whigham*, 754 F.Supp.2d 239, 246 (D.Mass.2010) (“I will apply a 1:1 ratio for all crack cocaine sentencings”). This authority is consistent with the frequently employed power of federal courts to impose non-guideline sentences. See United States Sent'g Comm'n, *U.S. Sentencing Commission Preliminary Quarterly Data Report, 4th Quarter Release 1* (2010) (reporting that of sentences issued between October 1, 2009, and September 30, 2010, 43.6 percent deviated below the guidelines' recommended length, and 1.8 percent exceeded their recommended length).

## B. Equal Protection

**Table C: Amounts Necessary to Trigger Mandatory Minimum Sentences under the 1986 Act**

Drug	Five-Year Minimum	Ten-Year Minimum
Cocaine base (crack)	5 grams	50 grams
Powder cocaine	500 grams	5 kilograms
Heroin	100 grams	1 kilogram
LSD	1 gram	10 grams
PCP (not in mix)	0 grams	100 grams
Marijuana	100 kilograms	1,000 kilograms

Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat 3207 (1986).

The mandatory minimum sentence for crack cocaine offenses was amended by Congress in the Fair Sentencing Act of 2010 (FSA). Under the FSA, a five-year mandatory minimum sentence is imposed for offenses involving twenty-eight grams of crack, and a ten-year sentence for offenses involving 280 grams of crack. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372. In effect, the powder/crack sentencing ratio has been reduced from 100:1 to 18:1. These revised sentencing provisions are not implicated in the present case because they were enacted after the commission of the defendants' crimes and are not

## 1. Mandatory Minimum Sentences

The defendants in this case face steep sentences according to the Sentencing Guidelines. Most face mandatory minimum sentences of five or ten years for offenses involving heroin, crack cocaine, or both. The sentencing provisions in effect for these crimes are those enacted in the Anti-Drug Abuse Act of 1986. See Part II.E, *supra*. Before the enactment of the 1986 Act, federal drug offenders were subject to maximum sentences and no statutory mandatory minimum sentences. See, e.g., 21 U.S.C. § 841(b)(1)(A)(1982) (providing for a maximum sentence of fifteen years for offenses involving Schedule I or II narcotic drugs). As a result of the 1986 Act, mandatory minimum sentences were based primarily on the quantity of the drugs involved. See Table C below.

at this time retroactive. See *United States v. Acoff*, 634 F.3d 200, 201–02 (2d Cir.2011) (citing Pub. L. No. 111-220, § 2, 124 Stat. 2372) (holding that the Fair Sentencing Act does not apply retroactively). *But see id.* at 202–03 (Calabresi, J., concurring) (“[T]here is something troubling about [non-retroactivity] with regard to a statute whose grossly different treatment of chemically identical drugs—the rock and powder forms of cocaine—has been criticized and questioned, particularly on grounds of racial injustice.” \*664 ). Even if the FSA applied retroactively, its amended thresholds would not affect defendants' sentences. Each is subject to a mandatory minimum sentence on the basis of a heroin offense or an offense involving a quantity of crack cocaine in excess of 280 grams.

## 2. Framework

[4] The Supreme Court has established two elements for determining whether a superficially neutral law violates the Equal Protection Clause: “discriminatory effect” and “purposeful discrimination.” *McCleskey v. Kemp*, 481 U.S. 279, 292, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) (citing *Whitus v. Georgia*, 385 U.S. 545, 550, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967); *Wayte v. United States*, 470 U.S. 598, 608, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985)).

[5] [6] In cases involving alleged racial discrimination, once a discriminatory purpose and a discriminatory effect are shown, the law is subject to strict scrutiny. Strict scrutiny requires a law to be “ ‘narrowly tailored’ to achieve a ‘compelling government interest.’ ” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)). Under strict scrutiny, the state bears the burden of rebutting a presumption of unconstitutionality. *Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972)).

[7] If both a disparate impact and a discriminatory motive are not shown, in most cases a law is subjected to rational basis review, under which it can be overturned only if “it is [not] rationally related to a legitimate government purpose.” *United States v. Stevens*, 19 F.3d 93, 96 (1994) (citing *Schweiker v. Wilson*, 450 U.S. 221, 230, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981)). This rational basis for legislative action may be wholly notional; it need only be conceivable by a court, not actually contemplated by lawmakers. See *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980) (quoting *Flemming v. Nestor*, 363 U.S. 603, 612, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960)) (“Where ... there are plausible reasons ... our inquiry is at an end. It is, of course, ‘constitutionally irrelevant whether this reasoning in fact underlay the legislative decision.’ ”).

## 3. Discriminatory Effect

[8] The Supreme Court described a discriminatory effect in *Palmer v. Thompson* as “state action affecting [African

Americans] differently from whites.” 403 U.S. 217, 225, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971). Laws which criminalize voluntary conduct may violate the Equal Protection Clause when they target conduct associated with members of a protected class. See *Loving v. Commonwealth of Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (overturning a Virginia law criminalizing interracial marriage); *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (overturning an Oklahoma law establishing differing ages for legal alcohol purchase and consumption based on gender).

## 4. Discriminatory Purpose

Intent was not a clear requirement of Equal Protection violations before the Supreme Court’s 1976 decision of *Washington v. Davis*. Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. Pa. L. Rev. 540, 544 (1977) (discussing 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597). Pre-*Davis*, some cases indicated that impact alone was sufficient basis for finding a violation. \*665 See, e.g., *Hunter v. Erickson* 393 U.S. 385, 390–91, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969) (holding that a law violated the Equal Protection Clause without explicitly addressing its intent, purpose, or legislative history). The *Davis* Court rejected that approach, stating, “[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional [s]olely because it has a racially disproportionate impact.” 426 U.S. at 238–39, 96 S.Ct. 2040. The origin of the rule of *Davis* is not clear. See Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 Stan. L. Rev. 1105, 1109 (1989) (stating that the *Davis* Court followed the unsupported assumption by Professor Paul Brest that “the Constitution prohibits government not from reaching unequal results but from pursuing suspect objectives”) (citing Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95, 110, 116 (1970)).

[9] Intent requires more than mere predictability of consequences. “ ‘Discriminatory purpose’ ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Personnel Admin. of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979).



[10] Equal Protection Clause violations do not depend on but-for causation. “*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes.... When there is a proof that a discriminatory purpose has been a [—not *the*—] motivating factor in the decision, ... judicial deference is no longer justified.” *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (emphasis added).

[11] [12] A discriminatory purpose need not be clear from the text of the statute; even a facially neutral provision can result in *de jure* segregation. *Davis*, 426 U.S. at 241, 96 S.Ct. 2040. The task of recognizing intent is made particularly difficult by “the growing unacceptability of overtly bigoted behavior, and a growing awareness of the possible legal consequences of such behavior.” *U.S. v. Yonkers Bd. of Educ.*, 624 F.Supp. 1276, 1369 (S.D.N.Y.1985), *aff’d*, 837 F.2d 1181 (2d Cir.1987), *cert. denied*, 486 U.S. 1055, 108 S.Ct. 2821, 100 L.Ed.2d 922 (1988). Consequently, “[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555 (emphasis added).

[13] An initial indicator of discriminatory intent is a law's discriminatory impact itself, although such an impact, without more, is seldom dispositive.

Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) ] or *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) ], impact alone is not determinative, and the Court must look to other evidence.

\*666 *Id.* at 266, 97 S.Ct. 555 (citations omitted). Accord *Feeney*, 442 U.S. at 275, 99 S.Ct. 2282.

[14] A second factor is the foreseeability of such a discriminatory impact, especially “[a]dherence to a particular policy or practice, with full knowledge of the predictable

effects of such adherence upon racial imbalance.” *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464–65, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979) (citation and quotation marks omitted); *Davis v. Bandemer*, 478 U.S. 109, 127–129, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986). Foreseeability is to be determined through an objective reasonable person standard. *Arthur v. Nyquist*, 573 F.2d 134, 143 (2d Cir.1978); *Hart v. Cmty. Sch. Bd. of Educ., New York Sch. Dist. # 21*, 512 F.2d 37, 50 (2d Cir.1975).

[15] [16] Third, a court should consider “[t]he historical background of the decision ..., particularly if it reveals a series of official actions taken for invidious purposes.” *Arlington Heights*, 429 U.S. at 267, 97 S.Ct. 555. A court should consider the “[t]he specific sequence of events leading up to the challenged decision”; “[d]epartures from the normal procedural sequence”; and “[s]ubstantive departures ..., particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.” *Id.* Courts may also consider historical context dating from before the enactment of the law at issue. See *Rogers v. Lodge*, 458 U.S. 613, 623–25, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982).

Even where a sentencing law is constitutionally valid, its history and any disparate effect it works on those similarly situated to an individual defendant may be relevant to a court in determining an individual sentence.

## 5. Conclusion as to Constitutionality

As already indicated, there is substantial evidence of racial impact and awareness of probable racially invidious effect when the applicable drug statutes were adopted to warrant a finding that the mandatory minimum sentences for crack cocaine were motivated in part by racial animus, in contravention of the Equal Protection Clause of the United States Constitution.

Such a finding would be justified by numerous factors: (1) the stark racial disparity itself; (2) the reasonable foreseeability of that disparity, as indicated by the repeated racial references in the legislative history of the 1986 Act; (3) the inconsistency between the sentencing scheme and Congress's established law enforcement priorities; (4) Congress's deviations from legislative procedures in its haste to enact the legislation; and (5) the historical pattern of enacting anti-drug laws out of racial motivations.

Only a single published decision by a federal court has reached this conclusion. See *United States v. Clary*, 846 F.Supp. 768, 791 (E.D.Mo.1994), *rev'd*, 34 F.3d 709, 713 (8th Cir.1994), *cert. denied*, 513 U.S. 1182, 115 S.Ct. 1172, 130 L.Ed.2d 1126 (1995) (“[R]acial discriminatory influences, at least unconsciously, played an appreciable role in promulgating the enhanced statutory scheme for possession and distribution of crack.”). Cf. *State v. Russell*, 477 N.W.2d 886, 889–891 (Minn.1991) (holding that a law with a powder/crack disparity had no rational basis under Minnesota’s Equal Protection Clause because of the irrelevance of the crack/powder disparity to its statutory purpose and the lack of legitimate distinction between crack cocaine and powder cocaine or their respective users).

[17] A holding in the instant case of unconstitutionality under the Equal Protection Clause is precluded by rulings of \*667 the Court of Appeals for the Second Circuit. That court held “that Congress and the Sentencing Commission did not enact the 100 to 1 ratio with a discriminatory intent.” *United States v. Moore*, 54 F.3d 92, 99 (2d Cir.1995). See also *United States v. Teague*, 93 F.3d 81, 85 (2d Cir.1996) (quoting *Feeney*, 442 U.S. at 279, 99 S.Ct. 2282) (“There is no evidence that Congress reaffirmed the sentencing disparity ‘at least in part “because of,” not merely “in spite of,” its adverse effects’ upon blacks.”). While the holding must be followed, this analysis, it is respectfully suggested, needs revisiting in view of the strong contradictory evidence.

The holding of the *Moore* Court dramatizes the limitations of the intent requirement that was introduced in *Davis*. See Perry, *supra*, at 544. The ease with which lawmakers can conceal improper motives behind permissible, racially neutral legislation makes proving discriminatory intent on the part of a legislature almost impossible. Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 319 (1987). Nor is it clear why a discriminatory impact that would be prohibited when inflicted intentionally by lawmakers is permissible when accomplished through negligence or reckless disregard. Laurence H. Tribe, *American Constitutional Law* 1518–19 (2d ed. 1988) (quoted in *Russell*, 477 N.W.2d at 888 n. 2 (Minn.1991)) (“[The intent requirement] overlooks the fact that minorities can also be injured when the government is ‘only’ indifferent to their suffering or ‘merely’ blind to how prior official discrimination contributed to it and how current acts will perpetuate it.”). Cf. Olatunde C.A. Johnson, *Disparity Rules*, 107 Colum. L. Rev. 374, 386 (2007) (stating

that Equal Protection doctrine “provides little incentive for public institutions to address how their policies and practices perpetuate racial inequality.”). The cumulative effect of *Davis* and its progeny has been, some would charge, to suppress constitutional litigation and allow the perpetuation of inequality in such areas as sentencing.

[T]he Supreme Court has closed the courthouse doors to claims of racial bias at every stage of the criminal justice process, from stops and searches, to plea bargaining and sentencing. The Court has ruled that in the absence of conscious, intentional bias—tantamount to an admission or a racial slur—you can’t even get in the courthouse doors with allegations of race discrimination in the criminal justice system.

Michelle Alexander, *How the Drug War Has Subjugated Poor People of Color and Nullified the Fourth Amendment*, Nieman Watchdog (Sept. 20, 2010), <http://www.niemanwatchdog.org/index.cfm?fuseaction=background.view&backgroundid=00486>. A number of alternatives to the current Equal Protection framework have been proposed. E.g. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98–99, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (Marshall, J., dissenting) (quoting *Dandridge v. Williams*, 397 U.S. 471, 520–21, 90 S.Ct. 1153, 25 L.Ed.2d 491) (Marshall, J., dissenting) (suggesting that a balancing approach be adopted in place of the strict scrutiny/rational basis review structure); Perry, *supra*, at 560 (proposing a balancing test).

Although *Moore* precludes holding that the crack cocaine sentencing provisions of the Anti-Drug Abuse Act of 1986 were motivated by a discriminatory purpose, the facts concerning the history and impact of the law are relevant to a determination of the appropriate sentences in the instant case. They suggest that the mandatory minimum sentences and sentencing guidelines at issue in this case should be enforced with restraint.

\*668 To date, other constitutional attacks on mandatory minima have been rejected, but they also suggest discretion in enforcement. See, e.g., *United States v. Polizzi*, 549 F.Supp.2d 308, 400 (E.D.N.Y.2008), *rev'd*, 564 F.3d 142 (2d Cir.2009) (“[M]andatory minimum penalties may be unsoundly aggrandizing the power of the executive and

legislative branches.... Since the initial institution of the practice of widespread imprisonment in the United States, the legislature has assumed major responsibility for prescribing periods of incarceration for offenses. The Supreme Court has recognized the power of Congress to do so.”).

In sum, there is no significant basis for a finding of unconstitutionality that has not already been reviewed and rejected by the Court of Appeals for the Second Circuit.

## C. Rationale

### 1. General Deterrence

There is little evidence that our regime of mandatory minimum sentences works any significant deterrent effect on potential offenders from backgrounds similar to those of the defendants in this case. General deterrence is especially unlikely in the case of younger people with few educational or professional prospects; limited impulse control due to adolescent development; serious drug and alcohol abuse problems; limited guidance from responsible adults, particularly male ones; and pressure from peer groups in which criminal behavior is accepted and in which the penalty for deviance from the group's norms is embarrassment, ostracism, or physical punishment. In light of these circumstances and given that effective deterrence arises from certainty, not harshness, of punishment, our society might better consider whether our scarce resources would be better spent, not on extended incarceration, but on eliminating social conditions encouraging crime and on non-incarceratory techniques.

### 2. Specific Deterrence and Rehabilitation

Nothing suggests that the defendants will be rehabilitated or specifically deterred by lengthy incarceration. Resources for providing them necessary education or job training are limited. The experience of incarceration will remove them from their families and communities and whatever ties they may retain to the non-criminal world. Their peers inside prison are unlikely to serve as positive role models. Incarceration will give them opportunities to expand their networks of criminal acquaintances, develop antisocial behavior patterns and attitudes, and sharpen whatever criminal skills they have acquired on the streets. Upon release, they are likely to return to their broken families

and impoverished communities with underdeveloped skills, dismal job prospects, and a host of the lifelong punishments that are heaped upon ex-convicts in our society, all factors inclining them away from straight life and toward recidivism.

### 3. Incapacitation

The most compelling justification for incarceration in this case is that it will prevent defendants from committing further crimes while they are in prison. Excepting the possibility of organizing crimes outside the prison walls via cellular phone, incarcerated criminals can do little direct harm to the public. The hope—and experience—is that as they grow older they become less violent.

There is little evidence, however, that incapacitating the members of the modest-sized drug organization described in the instant case will cause a net decrease in crime. The sentences in this case will not suppress the demand for crack and heroin, \*669 nor are they likely to work any meaningful effect on the price or supply of drugs sold by other organizations near Louis Armstrong Houses. *See* Bushway & Reuter, *supra*, at 190 (reporting that the inflation-adjusted prices of cocaine and heroin in the United States have declined or remained relatively constant since the 1980s, while incarceration of drug offenders has increased dramatically). In this respect, the mandatory minimum sentences at issue here have failed in their apparent intention of depleting the pool of cheap, unskilled criminal labor on which the drug trade relies. Mark Osler, *What Would It Look Like if we Cared about Narcotics Trafficking?: An Argument to Attack Narcotics Capital Rather than Labor 3* (unpublished manuscript) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1800370](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1800370) (last visited Apr. 4, 2011). There is no shortage of would-be players, veteran criminals, and directionless young people to replace the incarcerated defendants as managers, enforcers, and dealers in the drug trade. *See id.* at 5 (stating that incarceration attempts “to shut [drug networks] down by taking away something they can easily replace.”).

### 4. Retribution

A meaningful regime of retribution requires a sober-minded assessment of proportionality and moral responsibility. The imposition of lengthy prison sentences for drug offenses, particularly for nonviolent offenses committed by street

vendors, often defies a fair sense of retribution. Violent offenders must be punished appropriately for their crimes. Such crimes as murder, rape, or armed robbery warrant harsh sentences. The same treatment may not be warranted for the consensual sale of a product, even a highly destructive one, to knowing, willing, adult purchasers in retail quantities. *See United States v. Brewer*, 624 F.3d 900, 910 (8th Cir.2010) (Bright, J., dissenting) (quoting Perkinson, *supra*, at 336) (discussing the frequency with which penalties for crack cocaine offenses exceed those for murder). This is particularly true since the higher-up dealers in this country and abroad continue to supply the enormous demand for drugs in this country. Demand is not reduced by sentencing low-level purveyors such as these defendants to prison.

Illegal drugs are dangerous products. They impair users' health, diminish their usefulness to their families and employers, and increase their likelihood of committing further crime. But the moral burden for drug use is borne primarily by the users themselves. Putting aside cases where users become helplessly addicted as children, drug habits are generally the product of voluntary choices. The notion of the drug pusher preying upon defenseless, sober individuals, coercing them to sample addictive drugs so that they may become lifelong customers, has little congruence with reality as observed in court.

In moral terms, those working in the drug trade are primarily responsible not for drug abuse but for the trade itself and the violence and extortion attendant to it. Those who engage in violence and extortion should be punished in accordance with the danger their actions represent to the community. Street-level dealers are at least indirectly complicit in such acts; this commerce cannot continue without people serving their function. But it cannot be assumed that such low-level players are morally in the same category as murderers, assailants, and major purveyors of monetary frauds. They may be little more than cogs, easily replaced. To fix their punishment under mandatory minimum sentences, not on the basis of their limited roles and acts but on the quantities of drugs they sell by chance or in cooperation \*670 with others of their ilk, ill accords with a fair sense of retribution.

### III. Application of Law to Defendants

#### A. Excessiveness

A number of the sentences described in Part B, below, are excessive because of the requirement of statutory mandatory minimum terms of incarceration under present case law. They

cannot as yet be said to violate the Constitution. *See* Part III.B.5, *supra*. *Cf. United States v. C.R.*, No. 09–CR–155, draft op., at 394–402 (E.D.N.Y. Mar. 10, 2011) (discussing unconstitutionality of five-year mandatory minimum as applied to nineteen-year-old charged with possession of child pornography).

Were four defendants—Darrell Bannister, Roger Patrick, Jawara Tatum, and Pedro Torres—sentenced to shorter, more appropriate terms, defendants and society would be better served.

For three defendants, sentences both met the applicable mandatory minimum sentence and were required by the defendants' offenses and criminal history. They are Christopher Hall, Cyril McCray, and Derrick Tatum.

Damien Bannister was not subject to a mandatory minimum sentence. He received a long sentence but less than five years because of his vicious behavior.

The remaining defendants are not discussed in this memorandum.

### B. Individual Defendants

#### 1. Damien Bannister

##### a. Background

Damien Bannister is African American. He was born in Brooklyn in 1984. His parents were married and had three children. Damien Bannister PSR ¶ 45. He is the younger brother of defendant Darrell Bannister; both grow up together in the same household in Louis Armstrong Houses. *Id.* at ¶¶ 45, 48; Tr. of Sent'g of Damien Bannister 13 (Jan. 19, 2011) (“Damien Bannister Tr.”). Their father was a heroin addict who used drugs at home, often with friends. Damien Bannister PSR ¶ 45. While the Bannisters were children, their father was “in and out” of drug treatment programs and often in jail on drug and gun-related charges. *Id.*; *see also* Darrell Bannister PSR ¶ 44. Their grandmother, who abused cocaine, lived with the family sporadically. Darrell Bannister PSR ¶ 45.

Defendant was raised by both parents until the age of nine or ten, when his father was “kicked out of the home” because of his drug abuse. Darrell Bannister PSR ¶ 45. The family



struggled financially during defendant's childhood. Damien Bannister PSR ¶ 46. His mother, who worked for the New York City Department of Social Services, was the family's sole breadwinner; she received no financial support from the father, other family members, or public assistance. *Id.* at ¶ 46; Darrell Bannister PSR ¶ 45. Defendant was not physically abused as a child. Damien Bannister PSR ¶ 45.

In 1996, Bannister volunteered for the Bedford–Stuyvesant Volunteer Ambulance Corps as a janitorial worker. *Id.* at ¶ 79. His mother sent him to Hawaii in 1998 to live for a year with an uncle, a police officer, so that he could escape his home and neighborhood environment. He returned the next year because he was homesick. *Id.* at ¶ 51.

Defendant attended Grover Cleveland High School in Ridgewood, Queens; the John V. Lindsay Wildcat Academy High School, a charter school in Lower Manhattan; and a high school in Hawaii before dropping out of school in the tenth grade. *Id.* at ¶¶ 68–70. (A number of other defendants \*671 also attended Grover Cleveland High School.) Grover Cleveland has been identified by the New York City Department of Education as poorly performing. New York City Dep't of Educ., 2008–09 *Progress Report Measures for High Schools*, <http://schools.nyc.gov/Accountability/tools/report/default.htm#FindPR>, select “PR Results 2009–10” and “High Schools” (last visited Mar. 20, 2011) (reporting a student performance grade of “D” for Grover Cleveland High School for the 2009–2010 school year).

In the summers of 1999 and 2000, Bannister performed maintenance work for NYCHA through the New York City Summer Youth Program. Damien Bannister PSR ¶ 79. His subsequent employment history consisted of intermittent work assembling office cubicles for a company in Long Island City, New York, and a four-month stint in 2003 and 2004 as a vertical blind installer in Brooklyn. *Id.* at ¶¶ 75–76. He has never filed a tax return. *Id.* at ¶ 82. He has expressed an interest in learning a trade, such as plumbing or electricity. Damien Bannister Tr. 13.

When sixteen, defendant began smoking marijuana; while he has been enrolled in drug treatment programs, he has continued to smoke marijuana and drink cognac heavily. Damien Bannister PSR ¶ 62. He has twice been treated for substance abuse. *Id.* at ¶¶ 63–65. Before his arrest, he gambled on dice, cards, or sports events every other day. *Id.* at ¶ 58.

Damien Bannister suffers from [asthma](#). He is otherwise in good health. *Id.* at ¶ 60.

He has two children, ages five and seven, with his fiancée, whom he has dated for nine years. *Id.* at ¶ 49. She describes him as a devoted father. *Id.* at ¶ 53. She worked as an administrative assistant but is currently unemployed. Damien Bannister Tr. 18. She relies on public assistance to support the family. Damien Bannister PSR ¶ 49.

Defendant's father died in 2008, at the age of fifty-seven, from a heart attack. His mother suffers from diabetes and lives in Chattanooga, Tennessee, where she receives disability payments. *Id.* at ¶ 47. She moved out of Louis Armstrong Houses in about 2004. Defendant's sister continues to live in the development. Damien Bannister Tr. 20.

Bannister has a substantial criminal history. At the age of fourteen, he was found by police in a car with defendant Derrick Tatum and a loaded gun, but his record does not indicate that this incident resulted in a conviction. Derrick Tatum PSR ¶ 28–29; *see generally* Damien Bannister PSR. When sixteen, he stole a car from a woman at knifepoint, fled in the car, and used the knife to menace two people who pursued him. *Id.* at ¶ 21–22. When he was twenty-one, he, together with his brother Darrell Bannister and three others, stole merchandise from a store after intimidating an employee with a pair of scissors. *Id.* at ¶ 28.

#### b. Offense

Defendant was a street-level dealer in the crew, with no managerial role. He is personally charged with selling 150 grams of crack cocaine between August 2008 and January 2010. While he had no personal involvement with firearms, he maintained access to firearms shared with other members of the crew. *Id.* at ¶¶ 5–6.

Bannister was arrested on August 9, 2009, with forty-eight bags of crack and ninety glassines of heroin. On January 21, 2010, he was sentenced by the State of New York to a year of incarceration. He was transferred from state to federal custody on February 9, 2010. *Id.* at ¶¶ 39–40.

\*672 On July 27, 2010, he pled guilty to a lesser included offense within Count One of a twenty-four-count superseding indictment. Count One charged that between September 2007 and January 2010, defendant and others conspired to

distribute and possess with intent to distribute cocaine base in violation of 21 U.S.C. §§ 846 and 841(b)(1)(C). *Id.* at ¶ 1.

The total offense level was seventeen, and the criminal history category was V, yielding a guidelines range between forty-six and fifty-seven months. Bannister's offense, unlike those pled to by other members of the crew, carried no mandatory minimum sentence. The guidelines range of fine was from \$5,000 to \$1,000,000.

### c. Sentence

[18] Bannister was sentenced on January 19, 2011. At his sentencing, he apologized to his mother and his family members. Damien Bannister Tr. 17.

He was sentenced to three years' incarceration and five years' supervised release. The three-year sentence was set to begin at the date of sentencing, rather than the date of arrest, because of a state sentence then being served. Damien Bannister Tr. 21–22. A \$100 special assessment was imposed. No fines were imposed because the defendant does not have any assets, and it is unlikely that he will have any in the future to pay a fine. The remaining counts of the indictment were dismissed.

A non-guideline sentence was imposed under 18 U.S.C. § 3553(a) and *Booker*, 543 U.S. 220, 125 S.Ct. 738. This sentence balances the threat posed by Bannister's past crimes of violence with his involvement as a street-level dealer, his lack of personal involvement with firearms, his impoverished background in a fatherless home, his remorse for his crime, and his desire to reform his life and be a good husband to his fiancée and father to his children. The sentence provides ample specific and general deterrence. Given defendant's background, an excessively harsh sentence would lead only to a greater risk of recidivism.

## 2. Darrell Bannister

### a. Background

Darrell Bannister is African American. He was born in Brooklyn in 1979. He is the older brother of defendant Damien Bannister; the two grew up together in the same household in Louis Armstrong Houses. Darrell Bannister PSR ¶ 44; *see* Part IV.B. 1.a, *supra*. The troubled relationship

between defendant's parents cast him into depression as a child. He attempted suicide around 1989 by hanging himself and cutting his wrists. *Id.* at ¶ 57. His mother beat him with a belt to discipline him, and he once reported her to Child Protective Services; the case was eventually dismissed. *Id.* at ¶ 46. He was treated by a psychiatrist in 1989 and 1990. *Id.* at ¶ 57.

As a teenager, defendant volunteered with the Bedford–Stuyvesant Volunteer Ambulance Corps, assisting with ambulance dispatching and CPR classes. *Id.* at ¶ 78. He attended Grover Cleveland High School in Queens, but he failed all of his classes and had excessive absences. He was expelled in the tenth grade for fighting with a school security officer after he tried to bring a prohibited mobile phone to school. *Id.* at ¶ 72. He once left home to live with an aunt because his mother was pressuring him to attend school. *Id.* at ¶ 46.

Bannister suffered from [schizophrenia](#) as a child, experiencing his most recent episode around 2007. Tr. of Sent'g of Darrell Bannister 7–8 (Nov. 16, 2010) (“Darrell Bannister Tr.”) (testimony of defendant's mother). He has experienced \*673 difficulties controlling his temper. *Id.* at 9, 16 (testimony of defendant and his mother). Like his brother Damien, he suffers from [asthma](#). Darrell Bannister PSR ¶ 61; Damien Bannister PSR ¶ 60.

When fourteen, defendant began smoking marijuana. From the age of sixteen until his arrest for the current offense, he smoked marijuana daily and marijuana mixed with cocaine about once a week. Darrell Bannister PSR ¶ 67. He has used crack cocaine as well. Darrell Bannister Tr. 8. He was treated for substance abuse in 1996 and 1997 while on probation for a prior offense. Darrell Bannister PSR ¶ 70. He gambled several times a week before his arrest, usually playing poker or dice on the street and wagering about \$200 each time. *Id.* at ¶ 59.

From 2003 to 2008, Bannister and his then-girlfriend, with whom he fathered two children, lived in upstate New York and Tennessee. He returned to New York City periodically. He and his girlfriend broke up after he was arrested for the instant offense. *Id.* at ¶ 52.

Darrell Bannister has held only two paying, legal jobs. *Id.* at ¶ 74. He reports that in 2003, he worked as an industrial laborer in Binghamton, New York, but this information could not be verified. *Id.* at ¶ 77. He spent part of 2005 working in construction at Brooklyn College. *Id.* at ¶ 76. At his

sentencing, he expressed an interest in receiving training in construction and electrical work. Darrell Bannister Tr. 16.

Before his arrest, he was primarily supported by his mother and former girlfriend. Darrell Bannister PSR ¶ 74. In his free time, he watched his children and used drugs. *Id.*

Bannister has a number of prior convictions, most from his adult years. In 2005, while he was twenty-five, he, together with his brother Damien and three others, stole merchandise from a store after intimidating an employee with scissors. *Id.* at ¶ 31. At the age of nineteen, he was arrested for possession of a loaded, defaced gun, but he was not convicted. *Id.* at ¶¶ 35–36.

### b. Offense

Bannister's tenure with the crew, from July 2008 through September 2008, *id.* at ¶ 6, was the shortest among the defendants. He worked as a street-level dealer with no managerial role. He is charged with the sale of more than 100 grams of heroin. It has not been shown that he possessed or maintained access to firearms during the course of the conspiracy or that possession of firearms by his coconspirators was part of his jointly undertaken criminal activity. *Id.* at ¶ 7.

Bannister was arrested on a state charge in October 2009, a year after his involvement with the conspiracy ceased, for possession of marijuana, 500 grams of cocaine, and paraphernalia for weighing and packaging drugs. A gun was recovered from the location where he was arrested, but he was not charged with a firearms offense. *Id.* at ¶ 33.

Defendant was arrested for the instant offense on January 27, 2010. *Id.* at 1. On July 13, 2010, he pled guilty to a lesser included offense within Count One of a 24-count superseding indictment. The lesser included offense charged that between September 2007 and January 2010, he and others conspired to distribute and possess with intent to distribute 100 grams or more of heroin in violation of 21 U.S.C. §§ 846 and 841(b)(1)(B)(i). *Id.* at ¶ 1.

The total offense level was twenty-three, and the criminal history category was II, yielding a guidelines range between fifty-one and sixty-three months. The offense carried a mandatory minimum sentence of five years. *See* 18 U.S.C.

§ 841(b)(1)(B). \*674 The guidelines fine range was from \$10,000 to \$2,000,000.

### c. Sentence

[19] Bannister was sentenced on November 16, 2010. At his sentencing, he stated, “I would like to say sorry to the court and to my mother, my family, and friends, and most important, my little brother[, Damien Bannister,] for looking at me as a role model[,] and I wasn't really a role model.” Darrell Bannister 13.

Defendant was sentenced to five years' incarceration and five years' supervised release. A \$100 special assessment was imposed. No fines were imposed because defendant does not have any assets, and it is unlikely that he will have any in the future to pay a fine. A non-guideline sentence was imposed under 18 U.S.C. § 3553(a) and *Booker*, 543 U.S. 220, 125 S.Ct. 738. The remaining counts of the indictment were dismissed.

This sentence, mandated by the Anti-Drug Abuse Act of 1986, is excessive under 18 U.S.C. § 3553(a) in view of Bannister's troubled upbringing, his childhood history of mental illness, his brief and low-level involvement in the conspiracy, his remorse for his crime, his lack of personal involvement during the conspiracy with firearms, and the fact that his criminal history includes but a single offense involving violence or the threat of violence. General and specific deterrence would be amply served by a sentence of two to three years; a five-year sentence serves only to diminish his potential for rehabilitation.

## 3. Christopher Hall

### a. Background

Christopher Hall is African American. Hall PSR 2. He was born in an unknown location in North Carolina in 1986. He is the sole child of a nonmarital union. *Id.* at ¶ 37. His father's surname is unknown; the father died when defendant was an infant. Tr. of Sent'g of Christopher Hall 21 (Nov. 16, 2010) (“Hall Tr.”). Hall reports an uneventful childhood. His mother smoked marijuana while he was a child, but not in his presence. She worked for the Metropolitan Transit Authority (MTA) as a bus traffic checker but was fired in 2007 or

2008 for failing a drug test. She received public assistance during defendant's childhood. Hall PSR ¶ 37. She also worked for the New York City Department of Parks and Recreation, but her position was terminated. Hall Tr. 21. In 2010, the family was living in a building with no heat or hot water. They subsequently moved in with defendant's grandmother. Presentence Hr'g Tr. 9–10 Aug. 16, 2010.

Despite being a poor student, Hall graduated from Grover Cleveland High School in 2004. Hall PSR at ¶ 53. In 2005, he worked as a maintenance worker through the New York City Summer Youth Program, and in 2005 and 2006 he performed janitorial work for the MTA. From mid–2009 to his arrest for the instant offense, he performed construction work for the Bedford Stuyvesant Restoration Corporation as part of a job training program. *Id.* at ¶ 58–60. At his sentencing, he expressed an interest in receiving training in construction. Hall Tr. 18.

Defendant enjoys generally good health, although it was reported that he has had occasional chest pains from an unspecified congenital lung condition. Hall PSR ¶ 49. He drinks occasionally and has no history of drug use. *Id.* at ¶ 52. He impregnated a girlfriend. After his arrest, she left New York to live with her mother in an unspecified location “down South.” *Id.* at ¶ 40.

Hall has three prior convictions. In 2008, while twenty-two, he was arrested for selling drugs and was found in possession of twenty glassines of heroin and \*675 \$515. He was twice convicted of disorderly conduct. *Id.* at ¶¶ 29–30, 32–34.

### b. Offense

Hall worked in the crew from September 2007 to January 2010 as a street-level dealer of heroin and crack. He sold drugs once or twice a week, earning \$150 for every \$500 worth he sold. He is charged with the sale of more than 4.5 kilograms of crack and three kilograms of heroin over the course of the conspiracy. He held no managerial role but was occasionally ordered by Derrick Tatum, the leader, to pick up packages of drugs from suppliers and distribute them to members of the crew. *Id.* at ¶¶ 6, 8.

Hall personally possessed a firearm in furtherance of the conspiracy. He purchased a .380 caliber handgun for \$200 and a bulletproof vest for \$100. *Id.* at ¶ 8. In September 2008, he and defendant Pedro Torres were at a location on Clifton

Place where the crew regularly sold drugs. Several armed individuals approached, and an altercation ensued. Hall was armed. An unnamed individual was shot in the leg and chest, and Torres was shot in the leg. It is not known whether Hall fired any of the shots that wounded Torres or the unknown victim, and he has not been charged in connection with this shooting. *Id.* at ¶ 6; Torres PSR ¶ 6. On June 30, 2009, police recovered a loaded gun and thirty-five bags of heroin—about two grams' worth—from an apartment that was used by Hall. Hall PSR ¶ 6.

Defendant was arrested on January 27, 2010. *Id.* at 1. On May 13, 2010, he pled guilty to both counts of a two-count indictment. Count One charged that between September 2007 and January 2010, he conspired with others to distribute and to possess with intent to distribute one kilogram or more of heroin and fifty grams or more of cocaine base in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A). Count Two charged that between September 2007 and January 2010, he, together with others, possessed a firearm in furtherance of the drug trafficking crime charged in Count One, in violation of 18 U.S.C. § 924(c)(1)(A)(i). *Id.* at ¶ 1.

The total offense level was thirty-three, and the criminal history category was I, yielding a guidelines range between 135 and 168 months. A two-point enhancement for the use of a firearm ordinarily would have been added, but none applied in order to avoid double counting, because defendant was convicted of an 18 U.S.C. § 924(c) gun offense. The guidelines range of fine was from \$17,500 to \$4,000,000. The offense carried a mandatory minimum sentence of ten years. *See* 18 U.S.C. § 924(c)(1)(A).

### c. Sentence

[20] Hall was sentenced on November 16, 2010 to ten years' incarceration and five years' supervised release. A \$200 special assessment was imposed. No fines were imposed because defendant does not have any assets, and it is unlikely that he will have any in the future to pay a fine.

A non-guideline sentence was imposed under 18 U.S.C. § 3553(a) and *Booker*, 543 U.S. 220, 125 S.Ct. 738. This sentence is appropriate. Defendant was raised in a fatherless home under impoverished conditions. Nevertheless, the relative stability of his background, his completion of high school, and his work history indicate that he had substantial options beyond criminal activity. The sentence is



justified by his brazen use of guns. Shootouts conducted in residential areas to protect drug operations are among the worst consequences of the illegal drug trade. They contribute to the climate of terror in which residents of drug-ridden neighborhoods are forced to live. Defendant's acquisition of a bulletproof vest indicates a calculated decision to \*676 engage in such street combat. The sentence imposed provides ample general and specific deterrence. Given defendant's background, an excessively harsh sentence would lead only to a greater risk of recidivism.

#### 4. Cyril McCray

##### a. Background

Cyril McCray is African American. McCray PSR 2. He was born in Brooklyn in 1964. His parents were married, but they separated when he was two years old. *Id.* at ¶ 64. He never knew his father. Tr. of Sent'g of Cyril McCray 13 (Nov. 16, 2010) ("McCray Tr."). An uncle occasionally cared for defendant and provided financial support. McCray's mother worked as a schoolteacher and relied on public assistance to support the family. She beat him with extension cords and hangers when he was a child for being rebellious, but he does not feel he was abused. McCray PSR ¶¶ 64–66.

Defendant attended Boys and Girls High School in Bed-Stuy but dropped out after the tenth grade. *Id.* at ¶ 91. Boys and Girls High School has been identified by the New York City Department of Education as a poorly performing school. New York City Dep't of Educ., *2009–2010 Progress Report Measures for High Schools*, <http://schools.nyc.gov/Accountability/tools/report/efault.htm> # FindPR, select "PR Results 2009–10" and "High Schools" (last visited Mar. 20, 2011) (reporting a student performance grade of "F" for Boys and Girls High School for the 2009–2010 school year). See also Patrick Wall, *Boys and Girls High School Struggles to Survive*, Brooklyn Movement Ctr., <http://brooklynmovementcenter.org/node/39> (last visited Mar. 14, 2011) (reporting the attempts of the school's principal to change its rating as one of the city's "'persistently lowest-achieving' schools").

After dropping out of high school, McCray temporarily lived with friends in Brooklyn. His mother then sent him to North Carolina, where he resided with grandparents for four years before returning to Brooklyn. McCray PSR ¶¶ 73, 91.

He has worked as a security guard, day laborer, stock person, janitor, maintenance worker, and helper to a truck driver. *Id.* at ¶¶ 98–109. It was reported that he worked for a paving company for fourteen years, but this could not be verified. *Id.* at ¶ 103. He has held a number of unskilled positions while in state custody for prior offenses. *Id.* at ¶ 101. In 2006, he received a security guard license after attending classes at a vocational college. *Id.* at ¶ 92. He was unemployed from 2006 to 2007 and from mid-2008 until his arrest in January 2010. *Id.* at ¶¶ 97, 99. He has expressed an interest in receiving training in electrical work and obtaining his graduate equivalency diploma (G.E.D.) while incarcerated. McCray Tr. 8.

McCray has an extensive history of serious, violent criminal offenses. In 1981, at the age of seventeen, he robbed a victim at gunpoint and attempted to rape her. McCray PSR ¶¶ 23–24. In 1986, he and two others attempted to break into an apartment and menaced a witness. *Id.* at ¶¶ 27–28. He was arrested in 1991 for assaulting a victim with a baseball bat, along with nine other individuals, but the charge was dismissed. *Id.* at ¶¶ 61–62. In 1998, he pushed a long-time girlfriend into a bathtub, injuring her. *Id.* at ¶¶ 34–35. He has been convicted of numerous offenses relating to car theft; driving with stolen license plates, falsified insurance information, and altered vehicle identification numbers; and fleeing from police who were attempting to effect traffic stops. *Id.* at ¶¶ 29–30, 36–41, 46–51, 54–57. In 1998, \*677 he and another individual intentionally blocked police officers' cars from pursuing a vehicle that a coconspirator had stolen. *Id.* at ¶¶ 36–37. In 2000, McCray was pursued by police as he fled with a stolen car; he sped through stoplights and stop signs, causing the collision of two police cars and injuries to two officers. *Id.* at ¶¶ 40–41. His driver's license has been suspended at least thirty times. *Id.* at ¶ 57.

Two orders of protection have been issued against McCray by a prior girlfriend. Details concerning these orders have not been provided. *Id.* at ¶ 72. McCray acknowledged physically abusing another girlfriend on one occasion. *Id.* at ¶ 69.

In 2005, Defendant was diagnosed with [diabetes](#); he also suffers from [high blood pressure](#) and depression. *Id.* at ¶¶ 82, 85. Between 2005 and 2007, he drank three to four glasses of rum a day. *Id.* at ¶ 88. In 2007, he gambled at casinos in Atlantic City two weekends each month and lost \$4,000 to \$5,000 on each occasion. *Id.* at ¶ 80. It was reported in 2000 that he smoked marijuana daily. *Id.* at ¶ 87. He has also smoked crack cocaine. McCray Tr. 7. In 2002, he underwent

drug and alcohol treatment while incarcerated for a prior offense. McCray PSR ¶ 89.

McCray has never been married, but he is engaged to his girlfriend of three years. She lives in Brooklyn and has three children from a prior relationship. She also has two adopted children. Defendant has a sixteen-year-old daughter with a prior girlfriend; the daughter lives with her mother in Brooklyn. McCray stated that before his arrest, he saw his daughter weekly and provided her with \$100 to \$150 of voluntary financial support every week or two. He has stayed in contact with his daughter since his arrest by writing her letters from jail. McCray PSR ¶¶ 68, 70. He has a son, now twenty-nine years of age, from another relationship; the two have not maintained contact. *Id.* at ¶ 71. Attempts by the Probation Department to contact McCray's mother and the mother of his daughter were unsuccessful. *Id.* at ¶ 63. His address of record is in Louis Armstrong Houses, near where the crew sold drugs. *See id.* at 2.

#### b. Offense

Defendant participated in the conspiracy throughout its duration, from September 2007 until January 2010, as a street-level dealer with no managerial role. He is charged with responsibility for the sale of more than 4.5 kilograms of crack and three kilograms of heroin. *Id.* at ¶¶ 5, 8.

He personally possessed firearms during the conspiracy. On October 23, 2007, he was stopped by police near the intersection of Clifton Place and Nostrand Avenue, at a location where members of the crew regularly sold drugs, when police observed that the license plate on his car was assigned to a different vehicle. In a hidden compartment, officers found a loaded .38 caliber revolver, a loaded .22 caliber revolver, 249 glassine bags of heroin, and \$1,190 in cash. *Id.* at ¶ 6.

Defendant was arrested on January 26, 2010. *Id.* at 1. On July 22, 2010, he pled guilty to a lesser included offense in Count One of a twenty-four-count superseding indictment. *Id.* at ¶ 1. Count One charged that between September 2007 and January 2010, McCray and others conspired to distribute and possess with intent to distribute one kilogram or more of heroin and fifty grams or more of cocaine base in violation of 21 U.S.C. §§ 846, 841(b)(1)(A)(i), and 841(b)(1)(A)(iii). *Id.*

The total offense level was thirty-five, and the criminal history category was VI, yielding a guidelines range between 292 and 365 months. The total offense level included a two-point enhancement for possession \*678 of a firearm during a drug offense. The guidelines range of fine was from \$20,000 to \$4,000,000. The offense carried a mandatory minimum sentence of ten years. *See* 18 U.S.C. § 924(c)(1)(A).

#### c. Sentence

[21] McCray was sentenced on November 16, 2010 to ten years' incarceration and five years' supervised release. A \$100 special assessment was imposed. No fines were imposed because defendant does not have any assets, and it is unlikely that he will have any in the future to pay a fine. The remaining counts of the indictment were dismissed.

A non-guideline sentence was imposed under 18 U.S.C. § 3553(a) and *Booker*, 543 U.S. 220, 125 S.Ct. 738. This sentence is high in light of defendant's impoverished background in a fatherless home, his remorse for his crimes, his age and medical condition, and his desire to be a good father and husband. Nevertheless, his role in the conspiracy, his carrying of guns, and the threat to the community indicated by his extensive history of violent crimes warrant the mandatory minimum sentence. The sentence provides ample specific and general deterrence. To follow the guidelines in this case would mean sending defendant to prison for over twenty years, at which point he would emerge a sixty-six-year-old, diabetic ex-convict with little to no hope of a productive life.

### 5. Roger Patrick

#### a. Background

Roger Patrick is African American. Patrick PSR 2. He was born in 1989 in Puerto Rico. His parents were married and had six children. *Id.* at ¶ 39. His father frequently came home drunk and abused Patrick, his siblings, and his mother by beating them with his hands and with extension cords, sticks, an iron, and a frying pan. He once threw an electric fan into Patrick's mother's face. Patrick received the worst of the abuse because he intervened to protect his mother from his father's attacks. *Id.* at ¶ 40. This history of abuse was corroborated in letters sent to the court by defendant's family members. In

1995, to escape defendant's father's abuse, his mother moved with her children from Puerto Rico to Antigua to live with her mother. Patrick PSR ¶ 40. She then moved alone to New York City and had the children sent afterward to join her. In New York, the family lived in homeless shelters before finding an apartment. They would often go a day or two without food so that his mother could afford to keep their apartment, when they had one. *Id.* at ¶¶ 39, 41. She supported the family by working as a home health aide. *Id.* at ¶ 44.

Defendant smoked marijuana daily from the age of twelve until his arrest for the current offense. From the age of fifteen, he drank cognac or vodka each weekend to the point of losing his memory of what happened the night before. *Id.* at ¶ 57. He has expressed an interest in substance abuse treatment. *Id.* at ¶ 60.

About 2002, codefendant Jawara Tatum, who had abused drugs and alcohol heavily starting as a teenager, lived with Patrick's family. Tatum again lived with the family for part of 2009, around the time that Tatum and Patrick were involved in the instant conspiracy. Jawara Tatum PSR ¶ 43.

Patrick attended Lafayette High School, in the Bath Beach section of Brooklyn, but he withdrew in February 2005, while in the ninth grade, when he was arrested for a prior offense. Patrick PSR ¶ 62.

He has two prior convictions, both for robberies committed while he was a teenager. In April 2004, while fifteen and under the influence of alcohol, he and several \*679 other teenagers were on their way to a party when they robbed a man they saw on the street. Defendant was armed with a knife during the incident and struck the victim in the head with a long-handled dustpan. *Id.* at ¶¶ 24–26. While serving probation for this offense, in February 2005, he committed the second robbery. In it, Patrick and two others, wearing masks, attacked a victim by choking, punching, and kicking him. They also pistol-whipped him with a bb gun. Patrick was incarcerated for the second robbery and for a parole violation from September 2005 to April 2008. *Id.* at ¶¶ 29–30. While in custody, he committed several disciplinary infractions, including fighting. *Id.* at ¶ 32.

Unskilled jobs defendant held while in custody constitute his entire employment history. *Id.* at ¶ 68. He was released from prison in April 2008 at the age of nineteen. *Id.* at ¶ 29. He was enrolled in a G.E.D. program from 2008 until his arrest for the instant offense. *Id.* at ¶ 61. He has expressed an interest

in doing carpentry and electrical work. Tr. of Sent'g of Roger Patrick 16 (Nov. 16, 2010).

Patrick has never been married and has no children. Since 2008, he has been in a relationship with a college student, Shakeyia Tatum, who plans to become a parole or probation officer. *Id.* at ¶ 46. Shakeyia Tatum is the sister of Jawara Tatum and the niece of Derrick Tatum. Jawara Tatum PSR ¶ 37; Tr. of Sent'g of Derrick Tatum 5 (Nov. 16, 2010) (“Derrick Tatum Tr.”).

Defendant experiences pain from an untreated [knee injury](#) he suffered as a result of a car accident in 2002 or 2003. Otherwise he enjoys good health. *Id.* at ¶¶ 54–55.

His family lives in an apartment in Louis Armstrong Houses on the same block where Cyril McCray and Pedro Torres lived and near where the crew sold drugs. *See id.* at 2. Patrick has described the neighborhood as a “negative” environment where there is substantial pressure from peers to engage in crime. *Id.* at ¶ 42.

## b. Offense

Defendant began working with the crew in August 2008 as a street-level dealer, with no supervisory role. He continued in that capacity until January 2010. He is responsible for selling more than a kilogram of heroin. He maintained access to guns shared by members of the crew, but he did not personally possess firearms. *Id.* at ¶ 6.

Defendant was arrested on January 27, 2010. *Id.* at ¶ 7. On July 27, 2010, he pled guilty to a lesser included offense in Count One of a twenty-four-count indictment. Count One charged that between September 2007 and January 2010, he conspired to distribute and possess with intent to distribute more than 100 grams of heroin, in violation of [21 U.S.C. §§ 841\(b\)\(1\)\(B\)\(i\)](#) and [846](#). *Id.* at ¶ 1.

The total offense level was thirty-one, and the criminal history category was VI, yielding a guidelines range between 188 and 235 months. The offense level included a two-point enhancement because defendant maintained access to firearms used by the conspiracy. The guidelines range of fine was from \$15,000 to \$2,000,000. The offense for which he pled guilty under Count One carried a mandatory minimum sentence of five years. *See* [18 U.S.C. § 924\(c\)\(1\)\(B\)](#).

### c. Sentence

It was stated orally at Patrick's sentencing on November 16, 2010 that he would be incarcerated for six years. In general, sentence is imposed when orally announced. [Fed.R.Crim.P. 35\(c\)](#). It may then be corrected within fourteen days for arithmetical, technical, or other clear \*680 error. [Fed.R.Crim.P. 35\(a\)](#). It is the practice of this court for judgment to be entered promptly after sentence is orally announced. In the case of this defendant, given the mandatory minimum sentence required by [21 U.S.C. section 841\(b\)\(1\)\(B\)\(i\)](#), five years was the reasonable sentence under [section 3553\(a\)](#). The sentence of six years, announced orally, violated [18 U.S.C. section 3553\(a\)\(6\)](#), requiring consistency with like cases. *See* Part IV.B.1.c, *supra* (three-year sentence for Damien Bannister); Part IV.B.2.c, *supra* (five-year sentence for Darrell Bannister); Part IV.B.7.c, *infra* (five-year sentence for Jawara Tatum). A hearing was held Mar. 24, 2011, and defendant was resentenced to five years' imprisonment and five years' supervised release.

[22] A non-guideline sentence was imposed under [18 U.S.C. § 3553\(a\)](#) and *Booker*, [543 U.S. 220](#), [125 S.Ct. 738](#). A \$100 special assessment was imposed. No fines were imposed because defendant does not have any assets, and it is unlikely that he will have any in the future to pay a fine. The remaining counts of the indictment were dismissed.

Even a five-year sentence, mandated by the Anti-Drug Abuse Act of 1986, is excessive in view of Patrick's remorse for his crime, his childhood history of grave abuse and deprivation, the young age at which he became involved in this conspiracy, his lack of personal involvement with guns, and the fact that all of his prior offenses were committed while he was a minor. It provides more than enough general and specific deterrence. Given defendant's background, its excessive length can lead only to a greater risk of recidivism.

## 6. Derrick Tatum

### a. Background

Derrick Tatum is African American. Derrick Tatum PSR 2. He was born in 1980 in Brooklyn. *Id.* at 2, ¶ 44. His parents were unmarried and had six children. *Id.* at ¶ 44. His father

supported the family through plumbing and boiler work; his mother was a homemaker. *Id.*

Derrick Tatum has described a bleak upbringing that is only partially corroborated. He stated that he lived in poor conditions without heat or hot water, that the family “had nothing” and “barely had food,” and that his father was an alcoholic who was intoxicated daily and beat Tatum's mother once or twice a week. He stated that his older brother, Michael Tatum, used drugs in the house. *Id.* at ¶¶ 44, 45. His mother confirmed that the family lived at times without heat or hot water, but she denied that the family went without food or had financial difficulties. She stated that Tatum's father drank alcohol only occasionally. *Id.* at ¶ 51. Tatum's fiancée expressed familiarity with his upbringing, but she said she was unaware of any drug or alcohol abuse or physical abuse in the household. *Id.* at ¶ 52.

Derrick Tatum's older brother, Michael Tatum, has an extensive criminal history, including robbery and attempted robbery. Defendant reported that Michael Tatum has been shot nine times. A second brother, Jermaine Tatum, was killed in a car accident in 2002. Defendant's remaining five siblings are ages thirty-five to forty-three, live in Brooklyn, are single, and enjoy good health. One sister is the mother of codefendant Indio Tatum; another is the mother of codefendant Jawara Tatum. *Id.* at ¶ 47.

Defendant attended Grover Cleveland High School to the ninth grade. He was expelled because he did not attend classes. *Id.* at ¶ 71. He then went to Street Academy in Bed-Stuy for the tenth grade, but he withdrew when he started selling drugs. *Id.* at ¶ 70.

\*681 Tatum began smoking marijuana daily at the age of eighteen. He was enrolled in multiple drug treatment programs between 1999 and 2005 but continued to smoke marijuana heavily—about three “blunts” of it per day—until his arrest for the present offense in January 2010. *Id.* at ¶¶ 63, 65–67. He declined to state how he financed his drug habit. *Id.* at ¶ 64. He has no history of other drug or alcohol use. *Id.* at ¶ 63, 69. He claims that he would be interested in receiving drug treatment. *Id.* at ¶ 68.

Tatum has a lengthy history of serious criminal offenses. In May 1998, while he was seventeen years old, he drove a vehicle into the wall of a building after almost striking several children. *Id.* at ¶ 26; Addendum to the Presentence Report of Derrick Tatum 2. In October of that year, he was observed



by police in a car with codefendant Damien Bannister, who was then fourteen years old, and two others in a car speeding and weaving from lane to lane. Derrick Tatum PSR ¶¶ 28–29. Police recovered a loaded, defaced .25 caliber handgun from the car. *Id.* at ¶ 29. In 2000, he was convicted for possession of drugs and sentenced to a year of confinement after police executing a search warrant recovered twenty-eight bags of crack cocaine and a loaded .357 Magnum pistol from a residence to which he was connected. *Id.* at ¶¶ 33–34. In February 2001, he fired six shots at an individual with a stolen .9 millimeter handgun; he explained to a probation officer that he did so because he “had a problem [that he] had to take care of.” *Id.* at ¶¶ 35–36. In July 2001, he was arrested for selling heroin. *Id.* at ¶¶ 37–38. He was convicted of the shooting and the sale of drugs and sentenced to six years in prison. *Id.* at ¶¶ 35, 37. While incarcerated he was cited for numerous violations, including fighting, interference, and drug use. *Id.* at ¶ 39. He was discharged in July 2007. *Id.* at ¶ 35.

Defendant has had little legal employment. In 2000 and 2001, his late brother, Jermaine Tatum, found him sporadic employment with a moving and storage company. *Id.* at ¶ 78. He worked as a porter and group leader while incarcerated from 2001 to 2005, and he worked briefly in 2007 as a laborer with a scrap metal company. *Id.* at ¶¶ 74, 76–77. He declined to state how he supported himself between 2007 and 2010. *Id.* at ¶ 74. He has expressed an interest in receiving culinary training and opening a restaurant. Derrick Tatum Tr. 13.

Tatum has a ten-year-old daughter with a woman he has been seeing since 1995 and who works as a 911 operator. The two are engaged to be married. He has no other children and has never been married. Derrick Tatum PSR ¶ 48.

Defendant gambled frequently. He wagered \$4,000 to \$5,000 per month at various gambling spots in Brooklyn and took regular trips to Atlantic City and Las Vegas. *Id.* at ¶ 56. He reported that his greatest gambling payout was \$30,000 and that he used his gambling proceeds to finance his involvement in the current offense. *Id.* His fiancée is paying his legal bills. *Id.* at ¶ 82.

#### b. Offense

The present conspiracy was initiated by Derrick Tatum in September 2007. He led the crew until January 2010. He recruited members, determined how much they should

be compensated, negotiated major transactions, obtained bulk quantities of heroin and cocaine from suppliers, and received a portion of the proceeds of all sales. *Id.* at ¶¶ 5–6. Occasionally he packaged bulk quantities of drugs to distribute to street-level dealers and collected their proceeds from drug sales, but he typically delegated this role to others in \*682 the organization, particularly his nephew, Indio Tatum. *Id.*; Indio Tatum PSR ¶ 10.

Defendant personally possessed and maintained access to multiple firearms. Derrick Tatum PSR ¶ 7. In August 2008, he negotiated the sale of a loaded .32 caliber pistol to a confidential informant, and he directed Indio Tatum to deliver it to the customer. *Id.* Derrick Tatum is charged with responsibility for the distribution of more than 4.5 kilograms of cocaine base and three kilograms of heroin over the course of the conspiracy. *Id.* at ¶ 10.

He was arrested on January 27, 2010. *Id.* at ¶ 10. Officers executing a search warrant at his apartment on the day of his arrest recovered approximately \$10,000 in cash, which was retained by the government. *Id.* at ¶ 8.

On July 22, 2010, defendant pled guilty to Count One of a twenty-four-count indictment, charging that between September 2007 and January 2010, he conspired with others to distribute and possess with intent to distribute one kilogram or more of heroin and fifty grams or more of cocaine base in violation of 21 U.S.C. §§ 846, 841(b)(1)(A)(i), and 841(b)(1)(A)(iii). *Id.* at ¶ 1.

The total offense level was thirty-nine, and the criminal history category was IV, yielding a guidelines range of 360 months to life in prison. The offense level included a two-point enhancement for defendant's involvement with firearms and a four-point enhancement for his leadership role in the conspiracy. The guidelines range of fine was from \$25,000 to \$4,000,000. The offense carried a mandatory minimum sentence of ten years. *See* 18 U.S.C. § 924(c)(1)(A).

#### c. Sentence

[23] Tatum was sentenced on November 16, 2010 to fifteen years' incarceration and five years' supervised release. A \$10,000 fine and a \$100 special assessment were imposed. The remaining counts of the indictment were dismissed.

A non-guideline sentence was imposed under 18 U.S.C. § 3553(a) and *Booker*, 543 U.S. 220, 125 S.Ct. 738. This sentence is appropriate in light of defendant's criminal history, his impoverished background, his professed desire to lead a lawful life, and his desire to provide a stable home for his family. Defendant was sentenced to a significantly longer term of imprisonment than any of his coconspirators, consistent with the court's practice of giving heavier sentences to those who have played senior roles in criminal conspiracies or who for their own gain have induced or encouraged others to enter into criminal enterprises. This sentence provides substantial incapacitation and ample specific and general deterrence. Given defendant's background, an excessively harsh sentence would lead only to a greater risk of recidivism.

## 7. Jawara Tatum

### a. Background

Jawara Tatum is African American. Jawara Tatum PSR 2. He was born in 1988 in Brooklyn. *Id.* at ¶ 35. His parents were unmarried. *Id.* at ¶ 7. He is the nephew of Derrick Tatum and the cousin of Indio Tatum, both leaders of the conspiracy; his mother is Derrick Tatum's sister. *Id.* at ¶ 34; *see* Derrick Tatum PSR ¶ 47, Indio Tatum PSR ¶ 7.

Defendant's father was only intermittently present during his childhood. Jawara Tatum PSR ¶ 35. He and his siblings were raised primarily by his mother, who works as a home health aide, with assistance from his maternal grandmother. His mother received financial assistance from his father and from welfare. *Id.* ¶¶ 35, 38. Deprived of a male role model, Tatum relied for guidance on his maternal \*683 grandparents; on a maternal uncle, Jermaine Tatum; and on a maternal aunt, Barbara Judkins. *Id.* at ¶ 38.

Jawara Tatum appears to have a serious learning disability. As a child, he was “cursed out” by his mother for being “not smart.” *Id.* at ¶ 35. He struggled in school and was held back twice in the fifth grade. *Id.* He was enrolled in special education classes and was identified by teachers as being emotionally disturbed and having skills far below his grade level. New York City Bd. of Educ., Individualized Education Program for Jawara Tatum, Nov. 14, 2001, at 1, 3. When he was in the sixth grade, at age thirteen, a teacher wrote, “Student has severe problems in self-control and, at the same time, is beginning to perceive external events as over-whelming. He relies upon physical aggression to

avoid emotional pain. This dynamic when combined with his physical strength creates a dangerous situation.” *Id.* at 4. He is functionally illiterate and is able to read “only a little bit.” Addendum to the Presentence Report of Jawara Tatum 2 (“Jawara Tatum Addendum”); Tr. of Sent'g of Jawara Tatum 19 (Nov. 16, 2010) (“Jawara Tatum Tr.”).

Defendant suffered grave physical abuse at the hands of his father as punishment for his continued difficulties in school. On one occasion, his father burned him in the face with an iron. On another, defendant was beaten fiercely and found by police in a nearby park, covered with blood. Between the ages of fourteen and fifteen, he ran away from home three times to escape his father's abuse, sometimes after his mother informed his father that he was doing poorly in school. Once, after running away, he slept in a park and begged publicly for food. His mother stated that she never abused him and never witnessed his father treat him badly. Jawara Tatum PSR ¶ 35.

While fourteen, defendant was hit in the head with a rock while playing with friends; his mother declined to take him to the hospital for treatment because he was being “dumb.” He suffers sporadic headaches that he associates with this injury and with previous [head trauma](#) suffered at the age of thirteen. *Id.* at ¶ 53.

While thirteen, Tatum began suffering from depression caused by the physical abuse his father inflicted. *Id.* at ¶ 47. He began living in the apartment of Jean Patrick, a family friend and the mother of codefendant Roger Patrick, in Louis Armstrong Houses. *Id.* at ¶ 43.

Tatum began drinking alcohol and using drugs as a means of coping with his depression. He regularly drank cognac and used marijuana, ecstasy, and PCP. *Id.* at ¶¶ 47, 56.

Between 2003 and 2004, while he was a middle-school student, he worked periodically for a moving and storage company. The job was arranged by his uncle, Jermaine Tatum. After this job he worked briefly at a pet store and at a different moving company. *Id.* at ¶¶ 68, 70.

Defendant was promoted to the ninth grade at sixteen, in 2004, and attended William E. Grady Career and Technical Education High School, in the Brighton Beach section of Brooklyn. *Id.* at ¶ 59. His grades were poor, and he was occasionally suspended for fighting and skipping class. *Id.* at ¶ 60. He was ridiculed by his peers for his poor academic

performance. Jawara Tatum Tr. 25. He acknowledges that he has had difficulty controlling his anger. *Id.* at 24.

In 2004 and 2005, a series of violent events occurred that culminated in defendant's conviction for robbery and attempted robbery. In 2004, his uncle Jermaine, the only positive male role model he had known for most of his life, was struck and \*684 killed by a car. Jawara Tatum PSR ¶ 38. In the same year, defendant was stabbed at a house party after he punched someone who had insulted his mother. A stab wound [punctured his lung](#); he still bears scars from the stab and from a chest tube that was inserted so that he could breathe while in the hospital. *Id.* at ¶ 52.

When sixteen, in December 2004 and January 2005, Tatum participated in a series of robberies. On December 19, 2004, he and four other individuals surrounded a victim and demanded his wallet, then knocked him to the ground and repeatedly kicked him in the face. *Id.* at ¶¶ 25–26. On January 9, 2005, Tatum and four others surrounded a victim and punched him, knocking out his teeth, and struck him on the head with a weapon. *Id.* at ¶¶ 21–22. They robbed him of money and a mobile phone. On January 14, 2005, Tatum was arrested for another assault and robbery. After this incident, he was seen running into a nearby apartment and throwing a bb gun out of a window. *Id.* at ¶ 22.

In March 2005, his brother, Ras–Sahara Tatum, filed for a protection order against him after the two got into a fight at their mother's home. The police were called, and defendant was detained overnight, but no charges were filed. *Id.* at ¶ 42.

In November 2005, Jawara Tatum was convicted of robbery and attempted robbery and sentenced to forty-two months confinement. *Id.* at ¶ 21. While in custody he committed numerous violations, including drug possession, fighting, assault, and gang activity. *Id.* at ¶ 23. He is a member of the Bloods gang. *Id.* at ¶ 45. He took a number of classes while incarcerated, including special education and maintenance. *Id.* at ¶ 61.

He was released on parole on March 9, 2009 at the age of twenty. *Id.* at ¶ 21. He lived at his mother's home and that of Jean Patrick and Roger Patrick. *Id.* at ¶ 43. Roger Patrick had been working with the crew as a drug dealer since August 2008. Roger Patrick PSR ¶ 6. After his release, Jawara Tatum worked full-time in a job training program. He also helped out at a corner store on an unpaid basis in exchange for food and other items. Jawara Tatum PSR ¶ 66.

Tatum resumed heavy drug use after his release, usually taking drugs alone, at home. He smoked marijuana about ten times daily and took ecstasy and drank cognac every second or third day. For part of this period he used cocaine. *Id.* at ¶ 56. He underwent drug counseling after his release, from March 2009 to May 2009, but he was discharged from the program because he failed to file for Medicaid. From May 2009 until his arrest in January 2010, he was enrolled in an outpatient drug treatment program, but his drug use went undetected because the program failed to require on-site drug testing. *Id.* at ¶ 57.

Tatum has few family ties. He lost contact with the majority of his family after his prior imprisonment began in 2005, and his brother, Ras–Sahara Tatum, was incarcerated on a drug conviction from 2008 to 2010. Only his mother and his sister Shakeyia Tatum, the girlfriend of Roger Patrick, remain in contact with and supportive of him. *Id.* at ¶¶ 35, 37. He has stated that he feels “alone and lonely.” *Id.* at ¶ 47.

He has never married and has no children. *Id.* at ¶¶ 39–41. Since April 2009, he has been involved in a relationship with a woman living in Staten Island. *Id.* at ¶ 43. She became pregnant but had a miscarriage after his arrest for the present offense. *Id.* at ¶ 39; Jawara Tatum Addendum 1. He believes that he may have fathered a child with another woman and is willing to support the child financially if it is his. Jawara Tatum PSR ¶ 40.

#### \*685 b. Offense

Jawara Tatum began working for the crew in September 2009. *Id.* at ¶ 5. He was the last of the eleven defendants in this case to join the crew. He sold drugs at the street level on a daily basis and is charged with responsibility for selling 315 grams of crack and eighty grams of heroin. He had no managerial role. *Id.* at ¶ 5. He had access to firearms possessed by his coconspirators, but he did not personally carry a gun. *Id.* at ¶ 6.

Defendant was arrested on January 27, 2010. *Id.* at ¶ 35. On June 22, 2010, he pled guilty to a lesser included offense in Count One of a two-count indictment. Count One charged that between September 2007 and January 2010, he conspired to distribute and possess with intent to distribute 100 grams or more of heroin and five grams or more of cocaine base in

violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(B). *Id.* at ¶ 1.

The total offense level was twenty-three, and the criminal history category was III, yielding a guidelines range between fifty-seven and seventy-one months. The offense level included a two-point enhancement because Tatum maintained access to firearms used in the conspiracy. The guidelines range of fine was from \$10,000 to \$2,000,000. The offense for which he pled guilty under Count One carried a mandatory minimum sentence of five years. *See* 18 U.S.C. § 924(c)(1)(B).

### c. Sentence

[24] Defendant was sentenced on November 16, 2010. At his sentencing, he stated, “I learned from my mistakes, I just want to get a second chance in society, to live with my family and ... help out others that wasn't helped and to have kids of my own and raise them and just do better in life and know how to read and write and go home.” *Jawara Tatum Tr.* 16.

Tatum was sentenced to five years' incarceration and five years' supervised release. A \$100 special assessment was imposed. No fines were imposed because defendant does not have any assets, and it is unlikely that he will have any in the future to pay a fine. The remaining counts of the indictment were dismissed.

This sentence, mandated by the Anti-Drug Abuse Act of 1986, is excessive under 18 U.S.C. § 3553(a) in view of defendant's upbringing in an atmosphere of horrific physical abuse; his functional illiteracy and apparent learning disability; the absence of a positive male role model in his childhood; his crippling addiction to drugs and alcohol; his continuing efforts to occupy himself with lawful work; the involvement of his uncle, Derrick Tatum, in bringing him into the conspiracy; his relatively brief involvement as a low-level member of the conspiracy; his lack of personal involvement with firearms; his lack of involvement as an adult in any crimes of violence; his sincere remorse for his crimes; his stated desire to lead an honest, healthy, and productive life; and the fact that all of his criminal history points stem from offenses committed during a short period of time while he was a minor. A shorter period of incarceration would provide ample general and specific deterrence. Given defendant's background, the excessive length of the sentence imposed will probably increase the risk of recidivism.

## 8. Pedro Torres

### a. Background

Pedro Torres is White and Hispanic. Torres PSR 2. He was born in 1987 in Brooklyn. His parents never married. They had nine children. His father was a crack cocaine addict and spent much of Torres's childhood in and out of various drug treatment programs. Defendant has not seen his father since 2006. \*686 *Id.* at ¶¶ 28–29. Over a five-year period during Torres's childhood, he and his family lived in four different shelters, including two for victims of domestic violence. *Id.* at ¶¶ 28, 33. The family lives in an apartment in Louis Armstrong Houses, a few doors from Roger Patrick's and Cyril McCray's apartments and near where the crew sold drugs. *See id.* at 2; McCray PSR 2; Patrick PSR 2.

Torres's mother was unemployed and depended on public assistance to support the family. The mother received no financial support from defendant's father or from their extended family, which lives in Puerto Rico. *Id.* at ¶ 28. She receives a \$170 public assistance check every three weeks and \$600 a month in disability benefits; she pays \$450 a month in rent. *Id.* at ¶¶ 30, 35. The family receives clothing and food from their church. They rarely had enough money for school supplies. *Id.* at ¶ 28.

Torres received little parental guidance while growing up because of his father's absence and his mother's need to attend to his siblings. Seven of them, ages twelve through twenty-five, continue to reside with his mother in Brooklyn. The eighth, age nine, was adopted by a Queens family at birth so that he could receive medical attention for a severe birth defect. *Id.* at ¶ 31.

Torres began smoking marijuana at the age of sixteen. He was drinking alcohol to excess at the age of seventeen. Before his incarceration in July 2009, he smoked marijuana twice a day and daily drank cognac to the point of inebriation. He admits to having a substance abuse problem, but he says he is interested in treatment. *Id.* at ¶ 45. His mother reports that he has been depressed since 2007. She attempted to obtain psychological treatment for him but was unable to afford it. *Id.* at ¶ 40.

Defendant attended Abraham Lincoln High School, in the Coney Island section of Brooklyn, from 2003 to 2005, at



which point he transferred to a school with a vocational training program. *Id.* at ¶ 48. He was enrolled in special education classes and was able to graduate despite never having learned to read or write. Tr. of Sent'g. of Pedro Torres 10 (Nov. 16, 2010). He worked intermittently at pet stores from 2003 to 2009 and from 2007 to 2009. Torres PSR ¶ 53.

For the past six years, Torres has been in a relationship with a woman, now twenty years old, who plans to attend St. Francis College. The two expect to be married. He has no children. *Id.* at ¶ 32.

He was injured in a shooting in July 2006. He had returned home from a funeral when three individuals walked down his street firing randomly into houses. He was shot in his chest, back, right leg, and right forearm. Doctors were unable to remove a bullet from his chest because it was lodged near his heart. As a result of his injuries, Torres continues to suffer pain in his chest and nerve damage that limits the use of his right hand. *Id.* at ¶ 42.

Torres has two prior convictions. In July 2007, he was arrested for possession of two loaded firearms. *Id.* at ¶¶ 22–23. In April 2008, he was arrested for possession of narcotics after he was seen exchanging an envelope containing heroin. *Id.* at ¶ 24–25.

### b. Offense

Torres became involved in the conspiracy as a street-level dealer in September 2007 and distributed a total of more than 300 grams of crack. Torres PSR ¶ 5; Addendum to the Presentence Report of Pedro Torres 1. He had no managerial responsibility. He carried guns and had access to firearms shared by the crew's members. Torres PSR ¶ 5. In September 2008, he and defendant Hall were approached \*687 by six armed men at a location where the two regularly sold drugs. A gunfight ensued. Torres was shot four times in the legs, and another individual was hit in the leg and chest. *Id.* at ¶¶ 6, 42.

Defendant's involvement in the conspiracy ended in July 2009, when he began serving a forty-two month sentence for a July 2007 firearms possession charge. *Id.* at ¶¶ 7, 22. On July 22, 2010, he pled guilty to an amended Count One of a 24-count superseding indictment. Count One charged that between September 2007 and January 2010, he conspired to distribute and possess with intent to distribute fifty grams or

more of cocaine base in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A). *Id.* at ¶ 1.

The total offense level was thirty-one, and the criminal history category was II, yielding a guidelines range of 121 to 151 months. The offense level included a two-point enhancement because defendant maintained access to firearms used by the conspiracy. The guidelines range of fine was from \$15,000 to \$4,000,000. The offense carried a mandatory minimum sentence of ten years. *See* 18 U.S.C. § 924(c)(1)(A).

### c. Sentence

[25] Defendant was sentenced on November 16, 2010 to 104 months' incarceration and five years' supervised release. This sentence, combined with the sixteen months he had already served for his July 2007 firearms offense, satisfies the ten-year mandatory minimum sentence. *See United States v. Rivers*, 329 F.3d 119 (2d Cir.2003). A \$100 special assessment was imposed. No fines were imposed because defendant does not have any assets, and it is unlikely that he will have any in the future to pay a fine. The remaining counts of the indictment were dismissed.

The sentence, mandated by the Anti-Drug Abuse Act of 1986, is excessive under 18 U.S.C. § 3553(a) in view of Torres's background of deprivation, physical abuse, and fatherlessness; his learning disability and illiteracy; his addiction to drugs and alcohol; his limited criminal history; his sincere remorse for his crime; his efforts to hold lawful employment; his commitment to his girlfriend of six years; his continuing medical difficulties; and the lack of evidence that he has engaged in violence against anyone. Because of his possession of guns, he poses a greater threat to the community than defendants who received sentences of four or five years in prison. But this threat is not so great that he must be incapacitated for ten years. A shorter sentence would provide ample specific and general deterrence. Given defendant's background, the excessive length of this sentence will probably lead to a greater risk of recidivism.

### C. Summary of Sentences Covered in this Memorandum

Defendants were sentenced as follows:

\*688

**Table D: Summary of Sentences**

<b>Name</b>	<b>Supervised Release</b>	<b>Special Assessment</b>	<b>Incarceration</b>	<b>Fine</b>	<b>Forfeiture</b>	<b>Evaluation of Appropriateness</b>
<b>Damien Bannister</b>	5 years	\$100	36 months (plus 12 months state time)	None	None	Appropriate
<b>Darrell Bannister</b>	5 years	\$100	60 months	None	None	Too High
<b>Christopher Hall</b>	5 years	\$200	120 months	None	None	Appropriate
<b>Cyril McCray</b>	5 years	\$200	120 months	None	None	Appropriate
<b>Roger Patrick</b>	5 years	\$100	60 months	None	None	Too High
<b>Derrick Tatum</b>	5 years	\$100	180 months	\$10,000	None	Appropriate
<b>Jawara Tatum</b>	5 years	\$100	60 months	None	None	Too High
<b>Pedro Torres</b>	5 years	\$100	104 months (plus 16 months state time)	None	None	Too High

#### IV. Conclusion

Several of the sentences in this case, imposed only because of statutory minima, are disproportionate to the crimes committed and the backgrounds of the defendants. Their excess causes particular concern when applied to youthful defendants. *See United States v. C.R.*, No. 09–CR–155, draft op., at 394–402 (E.D.N.Y. Mar. 10, 2011) (discussing unconstitutionality of five-year mandatory minimum as applied to a defendant who possessed and distributed child pornography between the ages of fifteen and nineteen). *Cf. Roper v. Simmons*, 543 U.S. 551, 575, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (holding that the death penalty is disproportionate for offenders under the age of eighteen); *Graham v. Florida*, — U.S. —, 130 S.Ct. 2011, 2034, 176 L.Ed.2d 825 (2010) (holding that sentences of life without parole are unconstitutional for juvenile offenders who have not committed homicides). That concern is multiplied by the imposition of these sentences upon young defendants subject to abuse, poverty, drug and alcohol addiction, unemployment,

illiteracy, and learning disability, largely attributable to their backgrounds.

Had the defendants been raised by cohesive, adequate families, most of the difficulties they encountered would probably never have come to pass. Well-resourced, attentive parents would have had the knowledge, ability, and insight to protect their children from many of the difficulties that befell these defendants in their youth, to obtain assistance to deal with their psychological and physical problems, to obtain crucial opportunities for education, work, and personal growth, and to act as useful role models. Those with learning disabilities would likely have been \*689 provided available resources to overcome their impairments at public expense. That the defendants were born into circumstances without such support is at the center of this tragedy.

As part of defendants' sentences, it has been ordered that every reasonable effort be made to provide counseling, drug and alcohol treatment, gambling rehabilitation, anger

management therapy, education, and job training while defendants are incarcerated and during supervised release.

Considering the limited resources devoted to such rehabilitative measures, however, it is by no means clear that these aids will be effectively provided. *See* Petersilia, *supra*, at 5–6. When the defendants are released from prison, they will probably have to return to all of the problems that led them to engage in crime. Whatever tenuous connection they retain to the lawful, supportive world will likely be diminished after years of forced separation in prison. Incarceration will make entry into the job market more difficult. Remaining will be the root problems that have largely brought them to this pass: poverty; dysfunctional families; mental and physical problems; legal and *de facto* housing segregation; segregated and inferior schools; and an economy that appears to have little need or concern for low- and semi-skilled workers. Such individuals constitute a permanent underclass with almost no opportunity to achieve economic stability, let alone the American dream of upward mobility.

These problems are concentrated among low-income African Americans, but they affect the country as a whole. Our rates of imprisonment, income inequality, and unemployment are either the highest or among the highest of the world's advanced economies, while our rates of life expectancy are among the lowest. Charles M. Blow, *Empire at the End of Decadence*, N.Y. Times, Feb. 19, 2011, at A23 (reporting statistics on thirty-two countries). The hardships of poverty fall most severely on the youngest Americans. *See* Charles M. Blow, *Suffer the Little Children*, N.Y. Times, Dec. 25, 2010, at A29 (“[A]ccording to a 2007 Unicef report on child poverty, the U.S. ranked last among 24 wealthy countries.”).

Significant reforms are needed in our sentencing regime. The Fairness in Sentencing Act of 2010 reduced the dubious 100:1 powder/crack ratio to a 17.8:1 ratio. It did nothing to remove the sentencing regime's dependence on arbitrary drug quantities—not just with regard to crack cocaine but other drugs as well—that bear little relationship to the harm a defendant has done to society or to the danger of his inflicting further harm. Harsh, disproportionate mandatory sentences impose grave costs not only on the punished but on the moral credibility upon which our system of criminal justice depends. *See* Robinson, *supra*, at 2025. Such sentences, aimed at the drug trade's lowest levels of labor, appear to have no effect on illegal drugs' price or availability. Osler, *supra*, at 3.

Judges approach the grave responsibility of sentencing criminals with all the thoughtfulness and limited insight that their knowledge and wisdom can muster. “Sentencing ... is in its essence subjective.... It is not possible to determine a condign sentence without looking closely at all relevant facts and circumstances, and making a nuanced decision.” Hon. John L. Kane, *Sentencing: Beyond the Calculus*, Litig., Fall 2010, at 5. *See also* Hon. David L. Bazelon, *Questioning Authority: Justice and Criminal Law* 27 (“We have to conduct this searching inquiry into the criminal's life history, not to excuse, but to appreciate the conditions that inevitably attend and may lead to criminal behavior. Focusing on the individual offender is not \*690 part of the problem of crime; it is part of the solution.”).

Mandatory minimum sentencing provisions, leaving no alternative but lengthy incarceration, prevent the exercise of this fundamental judicial duty. Such laws are “overly blunt instruments, bringing undue focus upon factors (such as drug quantities) to the exclusion of other important considerations, including role in the offense, use of guns and violence, criminal history, risk of recidivism, and many personal characteristics of an individual defendant.” Sessions, *supra*, at 42. It is difficult to conceive of a system of mandatory minimum sentences that could effectively anticipate and provide for such factors.

For nonviolent, low-level drug crimes, the goals of sentencing—general and specific deterrence, incapacitation, retribution, and rehabilitation—could in most cases be achieved with limited incarceration, through a system of intense supervised release utilizing home visits; meetings with parole officers; a combination of counseling, drug and alcohol treatment, education, job training, and job placement; and electronic monitoring to prevent flight, promote positive choices, and deter and detect incipient crime. Such a regime would likely be more effective in reducing crime and much less costly than imprisonment. Given discouraging economic, social, and psychological conditions, it seems doubtful that the long sentences of incarceration imposed will appreciably reduce crime.

Pragmatism and a sense of fairness suggest reconsideration of our overreliance on incarceration. Though defendants are hemmed in by circumstances, the law must believe that free will offers an escape. Otherwise, its vaunted belief in redemption and deterrence—both specific and general—is a euphemism for cruelty. These defendants are not merely



criminals, but human beings and fellow American citizens, deserving of an opportunity for rehabilitation. Even now, they are capable of useful lives, lived lawfully.

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