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Elderly, Detained, and Justice-Involved: The Most Incarcerated Generation

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ELDERLY, DETAINED, AND JUSTICE-INVOLVED: THE MOST INCARCERATED GENERATION

Rachael Bedard, M.D., Joshua Vaughn, & Angela Silletti Murolo, M.A.†

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INTRODUCTION

The “graying” of the United States prison system is a well-documented phenomenon that describes the aging of the population currently held in U.S. state and federal prisons.¹ Between 2009 and 2019, as the total population of individuals detained in state and federal prison systems decreased by 11.4%, the number of people over age 55 incarcerated in state and federal correctional institutions more than doubled from 75,300 to 180,836.² This is often attributed to the large number of detained individuals who are aging in place due to long sentences³ and restrictive parole practices.⁴ Less well-known or well-characterized is the fact that the U.S.’s justice-involved population outside of prisons is also “graying”—that the demographics of people who are being arrested, jail detained, transferred to prisons on new criminal convictions, and monitored under community surveillance programs are also changing to include a higher proportion of seniors.⁵ Because older adults are not popularly imagined as frequent recidivists,

¹ See, e.g., RONALD H. ADAY, AGING PRISONERS: CRISIS IN AMERICAN CORRECTIONS 9 (2003); TINA CHIU, VERA INST. OF JUST., IT’S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE 2 (2010); Tina Maschi et al., *The Case for Human Agency, Well-Being, and Community Reintegration for People Aging in Prison: A Statewide Case Analysis*, 19 J. OF CORR. HEALTH CARE 194,195-96 (2013); Mark Miller, *New York Plan Puts Spotlight on Graying of U.S. Prison Population*, REUTERS (Mar. 18, 2018), <https://perma.cc/TZ2Z-TTQC>; Eileen Rivers, Opinion, *The Graying of America’s Prisons: When is Enough Enough?*, USA TODAY (Apr. 23, 2020), <https://perma.cc/3W2E-J3RS>.

² See E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2019 3, 15 (2020); E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUST. STAT., AGING OF THE STATE PRISON POPULATION, 1993-2013 27 (2016).

³ Maschi et al., *supra* note 1, at 195-96.

⁴ HUMAN RIGHT WATCH, OLD BEHIND BARS: THE AGING PRISONS POPULATION IN THE UNITED STATES 6 (2012), <https://perma.cc/ZJ5R-Q33H>; see JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER ENTRY 59-69 (2003).

⁵ E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUST. STAT., AGING OF THE STATE PRISON POPULATION, 1993-2013 1 (2016); Jeffrey A. Butts, *Older Adults Responsible for Total Growth in Drug Arrests*, THE RSCH. AND EVALUATION CTR. AT JOHN JAY COLL. OF CRIM. JUST. (Nov. 11, 2019), <https://perma.cc/PP8C-J7DV>.

this problem has been greatly under-examined by researchers and policymakers alike.⁶

The consequences of this neglect, however, are significant for elders caught up in the criminal justice system at every stage, including interactions with the police, courts and sentencing, correctional facilities, parole boards, and supervision programs. Aging and justice-involved people struggle to get their needs met in settings that cannot accommodate them, and approach the end of their lives sitting in jail and prison cells.⁷ Judges may find it difficult to determine appropriate dispositions for cases involving defendants with dementia, or medically frail elders.⁸ Correctional systems are in the difficult position of providing comprehensive medical care to an aging, increasingly sick, and frail subpopulation, with enormous associated costs.⁹ With high denial rates, parole boards almost ensure that older incarcerated people with progressive medical issues will be less fit to care for themselves independently in the community when finally released, or end up de facto condemning older incarcerated people to die awaiting release.¹⁰ Community supervision programs are contending with the difficulty of trying to monitor older people who cannot thrive in shelter systems and conventional reentry programs.¹¹

We approach this issue from different backgrounds. One of us, Rachael Bedard (“RB”), is a jail-based geriatrician and palliative care

⁶ See, e.g., Roland Neil & Robert J. Sampson, *The Birth Lottery of History: Arrest Over the Life Course of Multiple Cohorts Coming of Age, 1995-2018*, 126 AM. J. OF SOCIO. 1127, 1131, 1134 (2021); Sarah Rakes et al., *Recidivism Among Older Adults: Correlates of Prison Re-entry*, 15 JUST. POL’Y J. 1, 4 (2018), <https://perma.cc/E8MY-8RTR>.

⁷ TINA MASCHI & KEITH MORGAN, AGING BEHIND PRISON WALLS: STUDIES IN TRAUMA AND RESILIENCE 1 (2021).

⁸ See Dana R. Miller, *Dementia and Competency in United States Courtrooms: A Case Law Review* 13 (2020) (Ph.D. dissertation, John Jay College of Criminal Justice, City University of New York) (on file with CUNY Academic Works).

⁹ Angela Silletti Murolo, *Geriatric Inmates: Policy and Practice*, 26 J. OF CORR. HEALTH CARE 4, 5 (2020) [hereinafter Murolo, *Geriatric Inmates*].

¹⁰ See Philip A. Ethridge & Thomas G. White, *The Use of Medically Recommended Intensive Supervision (Medical Parole) in Texas*, 21 J. OF CORR. HEALTH CARE, 375, 380-81 (2015); HUMAN RIGHTS WATCH, *supra* note 4, at 34-35; Larry White, *The Prospect of Aging in Prison: A Long-termer’s Perspective*, in AGING IN PRISON: REDUCING ELDER INCARCERATION AND PROMOTING PUBLIC SAFETY 34 (Samuel K. Roberts ed., 2015); Asher Stockler, *Inside New York’s Grueling Parole Application Process*, N.Y. FOCUS (June 7, 2021), <https://perma.cc/ZM7A-RZ6R>; Christie Thompson, *Old, Sick and Dying in Shackles*, MARSHALL PROJECT (Mar. 7, 2018), <https://perma.cc/9QG2-3W4W>.

¹¹ See Gaby Galvin, *A Better Return for Older Prisoners*, U.S. NEWS & WORLD REP. (Aug. 14, 2019), <https://perma.cc/RL3M-2HWC>; Mary H. Hughes & Tusty ten Bensel, *“Stuck in Their Ways”: Examining Parole Officers’ Perceptions on Guiding Older Offenders Through the Reentry Process*, AMER. J. OF CRIM. JUST. 1, 11-12, 16 (Feb. 6, 2021), <https://perma.cc/5MKW-6YU4>.

doctor, working in the New York City jail system; in that capacity, RB leads an interdisciplinary team providing clinical care, court advocacy, and reentry planning services to the oldest and sickest detainees across Rikers Island and the borough-based jails.¹² Joshua Vaughn (“JV”) is a journalist covering criminal justice issues who has extensively investigated conditions and experiences of aging individuals in the Pennsylvania state prison system.¹³ And Angela Silletti Murolo (“AM”) is a Ph.D. candidate in criminal justice at John Jay College of Criminal Justice/Graduate Center, City University of New York with a dissertation focused on the experience of elders returning to the community from prison. AM also has the lived experience of being the child of an aging, justice-involved parent.¹⁴ Throughout this review, we will include examples from our own personal and professional experiences to support our contentions; when we do so, we will indicate which author is being represented by use of our initials.

This article describes the magnitude of the aging crisis in the criminal justice system. It uses data from jurisdictions around the country to demonstrate that this is not only a problem of “longtimers” aging in place in prisons, but also of seniors cycling through the justice system’s various stops without effectively stabilizing in the community.¹⁵ It presents what is known about this elderly, justice-involved population in terms of their health burden, criminal charges, and reentry challenges. We hypothesize that this vulnerable subpopulation represents a birth cohort of individuals, a “Most Incarcerated Generation,” who had their first criminal justice contact in adolescence during the crime waves of the 1980s and 1990s when mass

¹² See generally Rachael Bedard et al., *Ageing Prisoners: An Introduction to Geriatric Health-care Challenges in Correctional Facilities*, 98 INT’L REV. RED CROSS 917 (2016); Rachael Bedard, *I’m a Doctor on Rikers Island. My Patients Shouldn’t Have to Die in Jail*, WASH. POST (Apr. 10, 2020), <https://perma.cc/34PM-GA68>; Jennifer Gonnerman, *A Rikers Island Doctor Speaks Out to Save her Elderly Patients from the Coronavirus*, THE NEW YORKER (Mar. 19, 2020), <https://perma.cc/7AFA-EV3N>.

¹³ See generally Joshua Vaughn, *Closer Look: Aging into Crime: A Look at Elderly Criminal Defendants*, SENTINEL (Dec. 7, 2018) [hereinafter *Closer Look*], <https://perma.cc/USJ3-9SCD>; Joshua Vaughn, *Aging into Crime: Pennsylvania Deals with Aging Prison Population*, SENTINEL (Dec. 7, 2018) [hereinafter *Aging into Crime*], <https://perma.cc/9C89-ZUM3>; Joshua Vaughn, *What Does Death by Incarceration Look Like in Pennsylvania? These Elderly, Disabled Men Housed in a State Prison*, APPEAL (Nov. 20, 2019) [hereinafter *What Does Death by Incarceration Look Like?*], <https://perma.cc/5X6T-AUML>; Joshua Vaughn, *What is Life?* (Mar. 9, 2021) [hereinafter *What is Life?*] (downloaded using apple Podcasts).

¹⁴ See generally Murolo, *Geriatric Inmates*, *supra* note 9; Angela Silletti Murolo, *Compassion, Savings Demand Releasing Elderly N.J. Prisoners*, STAR-LEDGER (Newark, NJ) (Nov. 2, 2020), <https://perma.cc/8BCB-KSAP>.

¹⁵ Maschi et al., *supra* note 1, at 196.

incarceration was most rapidly expanding, and who have remained justice involved since that time.¹⁶ We begin to articulate an urgent research agenda and propose interventions to effectively divert elders from justice involvement and to meet their care needs. We hope that in bringing this crisis into focus, highlighting its consequences, and pointing towards solutions, this article will serve as a call to action for policymakers, advocates, prosecutors, corrections officials, and elected leaders, all of whom have a role to play in meeting the needs of justice-involved elders at the end of their lives.

I. THE GRAYING OF THE AMERICAN JUSTICE SYSTEM:
SUMMARY OF WHAT HAS BEEN PREVIOUSLY PUBLISHED ABOUT THE
MAGNITUDE OF THE CRISIS

The United States prison population is aging¹⁷ at a faster rate than the general population.¹⁸ While the non-incarcerated population over 55 increased 24% between 1993 and 2013, driven by the aging of the baby boomer generation,¹⁹ the population of people over 55 serving sentences in state prisons increased by 400% over the same period.²⁰ This increase in the older incarcerated population is often referred to as the “graying of American prisons,” a phenomenon that has been well-documented by government agencies,²¹ criminal justice organizations,²² human rights organizations,²³ and the mainstream media.²⁴

There is no consensus on what constitutes “elderly” with respect to the justice-involved population. While an age of 65 is considered the “geriatric” threshold in community settings,²⁵ researchers and policy-makers often use either 50 or 55 as the geriatric cut-off for justice-

¹⁶ James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), <https://perma.cc/23LP-3M8M>; DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 14 (2012); Lauren C. Porter et al., *How the U.S. Prison Boom has Changed the Age Distribution of the Prison Population*, 54 *CRIMINOLOGY* 30, 45 (2016).

¹⁷ HUMAN RIGHTS WATCH, *supra* note 4, at 7; MASCHI & MORGEN, *supra* note 7, at 4-5; Pew Charitable Trusts, *supra* note 5, at 9.

¹⁸ CARSON & SABOL, *supra* note 5, at 1.

¹⁹ See CARSON & SABOL, *supra* note 5, at 4 fig.5.

²⁰ *Id.* at 2 tbl.1.

²¹ See generally Ronald H. Aday, *Golden Years Behind Bars: Special Programs and Facilities for Elderly Inmates*, 58 *FED. PROB.* 47 (1999); ADAY, *supra* note 1.

²² E.g., CHIU, *supra* note 1, at 3.

²³ E.g., HUMAN RIGHTS WATCH, *supra* note 4, at 6; HUMAN RIGHTS WATCH, *THE ANSWER IS NO: TOO LITTLE COMPASSIONATE RELEASE IN US FEDERAL PRISONS* 49 (2012), <https://perma.cc/J5EY-5MWV>.

²⁴ E.g., Christie Thompson, *Frail, Old and Dying, but Their Only Way Out of Prison is a Coffin*, *N.Y. TIMES* (Mar. 17, 2018), <https://perma.cc/77WB-SNTZ>.

²⁵ Maschi et al., *supra* note 1, at 195; ADAY, *supra* note 1, at 16.

involved people.²⁶ This difference reflects the widespread evidence of the “accelerated aging” of older incarcerated people, a phenomenon where individuals present as 10-15 years older than their chronological age due to increased exposure to a variety of risk factors for poor health, including substance use, violence, inconsistent access to medical care, and incarceration itself.²⁷ The accelerated aging theory was developed with respect to individuals detained in jails and prisons,²⁸ but evidence suggests it applies to justice-involved people dwelling in the community as well.²⁹

Scholars have theorized about three types of “older offenders”: “Late-onset offenders,” who are age 50 or older at the time of their first incarceration; “life course” in prison offenders, people who are serving long sentences and aging in place in prisons; and “chronic recidivists,” people who have cycled in and out of prison since they were juveniles.³⁰ Media coverage of the graying prison system has largely focused on the phenomenon of the “life course” in prison offenders or the “longtimers.”³¹ A longitudinal study of aging in prisons found that over 50% of people 65 and older have served more than ten years consecutively and that 31% of people in prisons over the age of 65 were serving a life or death sentence in 2013.³² Data obtained by The Sentencing Project in 2020 revealed that 30% of the population of over 200,000 people serving life sentences around the country were 55 years of age or older.³³ And a recent paper looking at incarceration trends in

²⁶ ADAY, *supra* note 1, at 16; e.g., Brie A. Williams et al., *Addressing the Aging Crisis in U.S. Criminal Justice Health Care*, 60 J. AM. GERIATRIC SOC’Y 1150, 1151 (2012) [hereinafter Williams, *Addressing the Aging Crisis*]; Brie A. Williams et al., *Coming Home: Health Status and Homelessness Risk of Older Pre-release Prisoners*, 25 J. GEN. INTERNAL MED. 1038, 1039 (2010) [hereinafter Williams, *Coming Home*].

²⁷ ADAY, *supra* note 1, at 17; CHIU, *supra* note 1, at 4-5; Maschi et al., *supra* note 1, at 195.

²⁸ ADAY, *supra* note 1, at 16.

²⁹ Benjamin H. Han et al., *Medical Multimorbidity, Mental Illness, and Substance Use Disorder Among Middle-Aged and Older Justice-Involved Adults in the USA, 2015–2018*, 36 J. GEN. INTERNAL MED. 1258, 1258-89 (Oct. 13, 2020), <https://perma.cc/PHP7-3322> (using representative sample data from the National Survey on Drug Use and Health, finding that 1.2% of people over the age of 50 living in community settings were recently “justice-involved” and that these individuals carried an excess burden of health concerns compared to age-matched controls).

³⁰ Maschi et al., *supra* note 1, at 195-96.

³¹ E.g., Amy Fettig, Opinion, *Aging and Dying Behind Prison Bars*, N.Y. DAILY NEWS (May 31, 2021), <https://perma.cc/G86U-KY5G>; Timothy Williams, *Number of Older Inmates Grows, Stressing Prisons*, N.Y. TIMES (Jan. 26, 2012), <https://perma.cc/9VVK-Z2GY>; Thompson, *supra* note 24.

³² CARSON & SABOL, *supra* note 5, at 5.

³³ ASHLEY NELLIS, SENT’G PROJECT, NO END IN SIGHT: AMERICA’S ENDURING RELIANCE ON LIFE IMPRISONMENT 4 (2021), <https://perma.cc/Z5MY-BEBB>.

North Carolina noted that the explosive growth of the state's prison population over 50, which increased sixfold between 1990 and 2018, was driven primarily by people serving long sentences.³⁴ This is not, however, entirely consistent with other findings. Nationally, while the incarcerated population over 65 is indeed made up of people serving long sentences, multiple studies have suggested that the steadily increasing number of elders over 50 years old who are serving time in prisons across the country is largely driven by new prison admissions, not those aging in place.³⁵ Increased admission rates of older adults to state and federal prisons are particularly notable when compared with current incarceration trends among youthful offenders, the cohort generally considered most at-risk of justice involvement: from 1999–2013, admissions of persons to state prisons aged 18–24 declined 11%, while admissions to state prisons among the 55 and older age group during the same period increased 308%.³⁶ While recidivist behavior does generally decrease as a person ages, particularly past the age of 65,³⁷ a longitudinal study on recidivism found that just under one-third of people released from prison over the age of 40 incurred new criminal charges over nine years of follow up.³⁸

Notably, non-White older adults are more likely to be readmitted to prison than White adults.³⁹ A study of reoffending patterns among people released from North Carolina prisons indicated that those with “minority status” (per self-report) were 1.2 times as likely to be readmitted to prison compared to White defendants.⁴⁰ These findings are supported by national data collected by the Bureau of Justice Statistics, evidencing disproportionate growth in the older Black population compared to the White population.⁴¹ In a study on aging and recidivism among federal detainees, Black people were rearrested at higher percentages in the 50–59 year old (36%) and 60 years and older (19.4%) categories compared to White, Hispanic, and “Other” racial or ethnic

³⁴ Frank R. Baumgartner et al., *Throwing Away the Key: The Unintended Consequences of “Tough-on-Crime” Laws*, PERSPECTIVES POL., July 26, 2021, at 1, 9-10.

³⁵ Butts, *supra* note 5; CARSON & SABOL, *supra* note 5, at 13-20; Jeremy Luallen & Ryan Kling, *A Method for Analyzing Changing Prison Populations: Explaining the Growth of the Elderly in Prison*, 38 EVALUATION REV. 459, 479-80 (2014).

³⁶ CARSON & SABOL, *supra* note 5, at 1-2.

³⁷ Rakes et al., *supra* note 6, at 7, 9.

³⁸ MARIEL ALPER ET AL., 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005-2014) (2018), <https://perma.cc/DNS8-Z2WM>.

³⁹ Rakes et al., *supra* note 6, at 7, 9; ALPER ET AL., *supra* note 38, at 6 tbl.3.

⁴⁰ Rakes et al., *supra* note 6, at 6, 9.

⁴¹ CARSON & SABOL, *supra* note 5, at 7 fig.8.

categories.⁴² The fact that Black Americans are disproportionately represented in the justice-involved population at large is well documented.⁴³

While we know that the prison-incarcerated population is aging in large part due to new admissions of older individuals, less is known about trends in jail demographics. The dearth of standardized, publicly available reporting by law enforcement agencies and correctional systems makes it difficult to quantify the population of non-prison-incarcerated, justice-involved older adults or to appreciate how many elders are jail detained each year.⁴⁴ Jail demographic data is also often reported without mention of age as a relevant variable.⁴⁵ Government reporting of jail and prison data has seen an overall slowdown of reporting in recent years, compounding the difficulty of getting an accurate hold of the older incarcerated population's demographics and movement.⁴⁶

We can also infer from rising arrest rates for elders and rising prison admission rates for elders that jails must also be accommodating increasing numbers of older detainees. FBI arrest data indicates that one million people over 50 have been arrested every year between 2007 and 2014.⁴⁷ Older individuals are frequently arrested for both violent and non-violent offenses.⁴⁸ In 2013, 30.5% of older adults admitted to prison were convicted of either murder, manslaughter, rape or sexual assault, robbery, assault, or another violent offense.⁴⁹ The remainder and majority of admissions were for non-violent public order offenses (24.3%), property offenses (22%), and drug offenses (21.6%).⁵⁰ Other

⁴² KIM STEVEN HUNT & BILLY EASLEY II, U.S. SENT'G COMM'N, THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS 24 fig.16 (2017), <https://perma.cc/JM3R-UEPT>.

⁴³ See, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS 99-100 (10th ed. 2020); E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUST. STAT., PRISONERS IN 2015 13 (2016); *Missouri Profile*, PRISON POL'Y INITIATIVE, <https://perma.cc/ZQK2-LBAZ> (last visited Nov. 23, 2021).

⁴⁴ See Wendy Sawyer, *Since You Asked: Is It Me, or Is the Government Releasing Less Data About the Criminal Justice System?*, PRISON POL'Y INITIATIVE (Nov. 14, 2019), <https://perma.cc/Z2F8-576W>.

⁴⁵ See ZHEN ZENG & TODD D. MINTON, BUREAU OF JUST. STAT., JAIL INMATES IN 2019 (2021), <https://perma.cc/84EZ-ZFYL>.

⁴⁶ Sawyer, *supra* note 44.

⁴⁷ Howard N. Snyder et al., *Arrest Data Analysis Tool*, BUREAU OF JUST. STAT., <https://perma.cc/R3RS-W9SJ> (follow National Estimates, then select Age Arrest Curves for All Offenses from the years 2007 through 2014 and choose Offense by Age) (last visited Nov. 23, 2021).

⁴⁸ See CARSON & SABOL, *supra* note 5, at 17-18.

⁴⁹ *Id.* at 16 tbl.11.

⁵⁰ *Id.*

research has shown a strong association between substance use disorders, drug offenses, and the aging prison population.⁵¹ The rate of drug arrests for people over 50 increased 92% between 2000 and 2018; while the absolute number of older adults arrested in 2018 for drug crimes was still lower than the number of people under 50 arrested for drug crimes, this was the greatest proportional increase of any age group.⁵²

II. WHY IS THE JUSTICE-INVOLVED POPULATION AGING?: THE AGE-CRIME CURVE AND EXPLANATIONS FOR FREQUENT RECIDIVISM AMONG OLDER ADULTS

Why the justice-involved population is aging has not previously been fully theorized or elucidated. This is due, in part, to the “Age-Crime Curve Theory,” a foundational assertion in criminology that suggests that criminal behavior generally begins around 14 or 15 years of age and tapers off after early adulthood.⁵³ Multiple studies have reaffirmed the strong association between adolescence and criminal activity.⁵⁴ However, recent data challenges the strength of this association. Figure 1 shows a reproduction of the conventional Age-Crime curve, based on the one presented in Travis Hirschi and Michael Gottfredson’s seminal 1983 paper. Figure 2 shows arrest trends in original data that we have analyzed from Missouri, New York, and Pennsylvania for different five-year periods, where the bolded line represents arrest data from 2014 to 2019.⁵⁵ When looking at these charts,

⁵¹ See, e.g., Butts *supra* note 35; CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, BUREAU OF JUST. STAT., DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004, at 5 tbl.3 (2006), <https://perma.cc/QB2M-GQKM>; Porter et al., *supra* note 16, at 36.

⁵² Butts, *supra* note 5.

⁵³ David P. Farrington, *Age and Crime*, 7 CRIME & JUST. 189, 189-90, 192-93 (1986).

⁵⁴ See *id.*; see also Arjan A.J. Blokland & Hanneke Palmen, *Criminal Career Paths*, in PERSISTS AND DESISTS IN CRIME FROM ADOLESCENCE INTO ADULTHOOD: EXPLANATION, PREVENTION AND PUNISHMENT 13 (Rolf Loeber et al. eds., 2016); ROBERT J. SAMPSON & JOHN H. LAUB, CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE 6-7 (1st paperback ed. 1995).

⁵⁵ This data was collected from prison admission data available through the Department of Corrections in Missouri, New York, and Pennsylvania. It was supplemented with St. Louis jail data, through the St. Louis Open Data Portal, Kaplan’s concatenated data files of Uniform Crime Reporting (“UCR”) data from the FBI, and NYPD data. The statistical summaries of the data collected was produced through the program “R.” See MO. DEP’T OF CORR., PROFILE OF THE INSTITUTIONAL AND SUPERVISED OFFENDER POPULATION (Mar. 1, 2020), <https://perma.cc/H8N4-XVGB>; N.Y. POLICE DEP’T, NYPD ARRESTS DATA (HISTORIC) (May 3, 2021), <https://perma.cc/6DUN-WBHV>; COMMONWEALTH OF PA. DEP’T OF CORR., INMATE STATISTICS (Dec. 31, 2019), <https://perma.cc/P9GC-QQC9>; N.Y. STATE CORR. & CMTY. SUPERVISION, UNDER CUSTODY REPORT: PROFILE OF UNDER CUSTODY POPULATION AS OF JANUARY 1, 2019 (2019), <https://perma.cc/Q3JU-ZPJX>.

one can appreciate the long tail of the curve lifting off the X-axis most dramatically for the lines representing the most recent time period; this demonstrates that many more people over 50 were arrested for both violent and property crimes between 2014 and 2019 than in years before. Thus, real world data suggests that people are not, in fact, “aging out of crime” as they are predicted to do by this foundational principle in criminology.⁵⁶

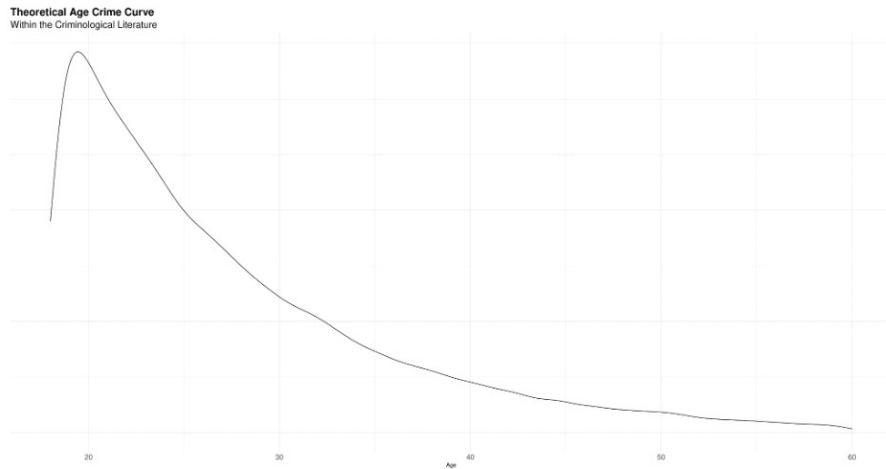


Figure 1: A representation of the traditional age-crime curve described in Hirschi & Gottfredson, 1983

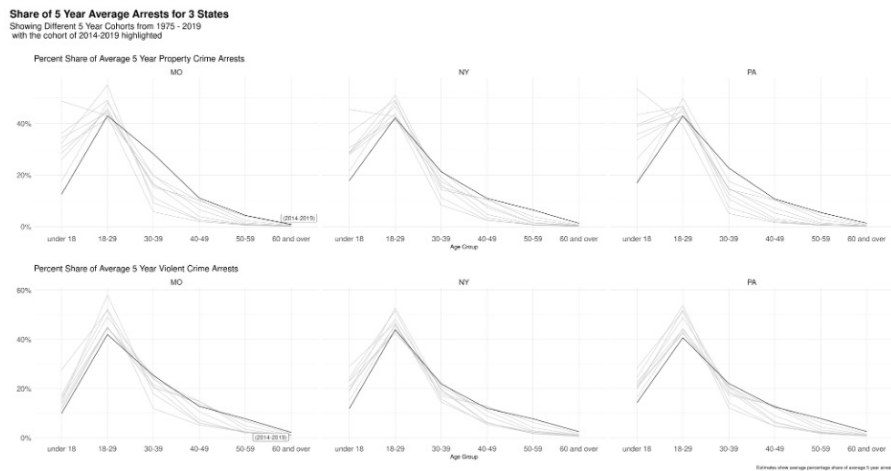


Figure 2: Age-crime curves representing real data from Missouri, Pennsylvania and New York. Each line represents the way that the curve looked for a different

⁵⁶ See Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOCIO. 552, 552-62 (1983).

five-year time period; the bolded line represents the most recent period, 2014–2019.

The fact that more people are now being arrested at later ages than in previous eras⁵⁷ complicates fundamental assumptions about who is justice involved and prompts the question: Are older people more prone to illegal activity now than in the past, and if so, why?

When assessing longitudinal trends impacting an aging generation, sociologists consider whether an observed phenomenon is an “aging effect,” a “cohort effect,” or a “period effect.”⁵⁸ Aging effects reflect changes that happen across all generations as they age, regardless of time or place.⁵⁹ Cohort effects are distinct characteristics or trends attached to a particular birth cohort.⁶⁰ And period effects are phenomena related to a point in history that impact all age cohorts alive at that time.⁶¹ That working-age people were more likely to be out of work during the Great Depression is a period effect; that people who were children of the Great Depression grew up with certain attitudes about money that persisted as they aged was a cohort effect.⁶²

In 2016, Porter et al. published a study suggesting that a generational cohort of individuals, people born in the 1960s who came into adolescence and young adulthood during the 1980s, seemed to be driving the aging of the justice system between the 1970s and early 2000s.⁶³ The sustained justice involvement of the 1960s birth cohort was shown in Porter’s model to be a stronger driver of an aging prison population than relevant period factors.⁶⁴ However, Porter still noted the strong relationship between risk of prolonged or recurrent incarceration and membership in the cohort that hit young adulthood when the crack epidemic was at its height, a period factor.⁶⁵ Prior cohort analyses have focused on risk factors and behavioral tendencies within a cohort that might increase its propensity for criminal behavior, such as exposure to

⁵⁷ See Keith Humphreys, *Young People Are Committing Much Less Crime. Older People Are Still Behaving as Badly as Before*, WASH. POST (Sept. 7, 2016), <https://perma.cc/F5TP-56WN>.

⁵⁸ Robert D. Blanchard et al., *Distinguishing Aging, Period and Cohort Effects in Longitudinal Studies of Elderly Populations*, 11 SOCIO-ECON. PLAN. SCIS. 137, 137-38 (1977).

⁵⁹ *Id.* at 137.

⁶⁰ *Id.* at 137-38.

⁶¹ *Id.* at 137.

⁶² *Id.* at 137-38, 145.

⁶³ Porter, *supra* note 51, at 36.

⁶⁴ See *id.* at 30.

⁶⁵ *Id.*

lead as children.⁶⁶ Other studies have considered that age-crime curves may shift over time due to just such a cohort effect.⁶⁷ Porter's work is supported by data from E. Ann Carson and William Sabol, which affirmed that admission of state detainees increased most among 45-49-year-olds between 1993 and 2003, and among people age 55 and older from 2003 to 2013;⁶⁸ one might reasonably infer that these are simply many of the same people, aging through multiple incarcerations.

While the expectation that people will age out of crime is clearly not borne out in the current context, the age-crime curve's central thesis, that propensity for criminal activity and subsequent arrest is highest in teenagers, is still important to understanding why the justice-involved population is aging. The critical relevance of the historical moment at which a cohort ages into adolescence was recently demonstrated in a paper from 2021 by Roland Neil and Robert Sampson.⁶⁹ The study's authors looked at arrests and incarceration data for over 1,000 people born in Chicago between 1979 and 1996.⁷⁰ They found that people born in the earlier years of the study period, who came into adolescence during the tail end of the crime wave of the early 1990s, were much more likely to become justice involved and to stay justice involved over their adulthood when compared with people born in the mid-1990s.⁷¹ Birth year was a bigger risk factor for justice involvement than all other known risk factors: People who were in the lowest socioeconomic strata born in the latest birth cohort, for example, had a lower risk of arrest and incarceration as people born in the highest socioeconomic group who were born in the earliest one.⁷² While the notion that, as the authors put it, "our individual experiences are inevitably bound up with social change, and when that change is substantial, it distinguishes the life experiences of different age cohorts," they also note that "[t]hese substantial changes have been surprisingly neglected in the study of age, crime, and the life course, due to both data and theoretical limitations."⁷³

⁶⁶ See, e.g., Anna Aizer & Janet Currie, *Lead and Juvenile Delinquency: New Evidence from Linked Birth, School, and Juvenile Detention Records*, 101 REV. ECON. & STAT. 575 (2019); Jennifer L. Doleac, *New Evidence that Lead Exposure Increases Crime*, BROOKINGS INST. (June 1, 2017), <https://perma.cc/KW65-VTGC>; James J. Feigenbaum & Christopher Muller, *Lead Exposure and Violent Crime in the Early Twentieth Century*, 62 EXPLORATIONS ECON. HIST. 51, 62 (2016).

⁶⁷ See, e.g., Porter et al., *supra* note 16, at 30.

⁶⁸ CARSON & SABOL, *supra* note 5, at 1.

⁶⁹ Neil & Sampson, *supra* note 6.

⁷⁰ *Id.* at 1127-29, 1136; Juan Siliezar, *Best Predictor of Arrest Rates? The "Birth Lottery of History"*, HARV. GAZETTE (June 22, 2021), <https://perma.cc/L3N5-YKGG>.

⁷¹ Neil & Sampson, *supra* note 6, at 1134, 1152 fig.1.

⁷² See *Id.* at 1156.

⁷³ *Id.* at 1128.

Neil and Sampson’s work proposes that “the birth lottery of history” is a primary determinant impacting whether or not an individual comes into contact with the criminal justice system at a young age.⁷⁴ Several other studies have demonstrated that justice-system involvement is itself a strong predictor of future justice-system involvement,⁷⁵ and that incarceration and justice involvement during adolescence and early adulthood disrupt one’s ability to create the foundation for a stable and thriving future.⁷⁶ We propose a theoretical integration of these findings: that a birth cohort born in the 1960s and 70s were set on a path towards lifetime justice involvement as a result of having come into adolescence during the height of the crack era and crime waves of the 1980s and early 1990s. We will refer to this cohort from hereon as the “Most Incarcerated Generation.”

III. WHY IS THE JUSTICE-INVOLVED POPULATION AGING?: ELABORATING ON A HYPOTHESIS ABOUT THE “MOST INCARCERATED GENERATION”

We propose that the birth cohort that scholars have remarked on—people born predominantly in the 1960s and possibly the early 1970s—drive the aging of the justice system largely because they were the generation that was most intensely impacted by mass incarceration and its consequences.⁷⁷ The “Most Incarcerated Generation,” as we will refer to them from here on, are the people who collectively experienced disproportionate contact with law enforcement by coming of age during the crack epidemic and the crime waves of the 1980s and early 1990s, and as a result were disproportionately vulnerable to arrest.⁷⁸ Their incident incarcerations occurred during an era defined by a turn towards disproportionate punishment, including lengthy sentences, increased use of life without parole, increased use of solitary confinement, and “no frills imprisonment.”⁷⁹ Prison systems expanded in part due to increased

⁷⁴ *Id.*

⁷⁵ See ALPER ET AL., *supra* note 38, at 1; Matt Clarke, *Long-Term Recidivism Studies Show High Arrest Rates*, PRISON LEGAL NEWS (May 3, 2019), <https://perma.cc/2HQW-5XQW>.

⁷⁶ See Gilman et al., *When Is a Youth’s Debt to Society Paid? Examining the Long-Term Consequences of Juvenile Incarceration for Adult Functioning*, 1 J. DEVELOPMENTAL & LIFE-COURSE CRIMINOLOGY 33, 33 (2015).

⁷⁷ Porter et al., *supra* note 16, at 36.

⁷⁸ MARC MAUER & TRACY HULING, SENT’G PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 1-2, 7-10 (1995), <https://perma.cc/WNL8-XPER>.

⁷⁹ JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 22-24, 31 (2005); Kevin H. Wozniak, *American Public Opinion About Prisons*, 39 CRIM. JUST. REV. 305, 305-06 (2014).

obstacles to prison release, including reduced use of clemency, “truth in sentencing” efforts, and restrictive parole board practices resulting in frequent denials of release even for long-serving individuals.⁸⁰

Once released from prison, the “Most Incarcerated Generation” faced obstacles to reintegrating into the community, including employment discrimination, housing discrimination, and disenfranchisement.⁸¹ And those who returned to the community under community supervision programs such as parole, probation, or with court-mandated obligations to register as sex offenders, have been put at risk of re-incarceration simply by virtue of being under constant surveillance.⁸² For example, while researching a story on people on the sex offender registry charged with failure to register their address with the government, JV recently came across the case of a 55-year-old man who was violated and incarcerated for walking on a street that was not on his approved map of walking routes.

Having spent their entire adult lives ensnared in the net of the legal system, the “Most Incarcerated Generation” have not felt that net loosen as much as other cohorts over the past fifteen years. In 2009, the size of the population of incarcerated Americans held across jails and prisons throughout the country peaked at 1.6 million people.⁸³ Since 2009 the population has decreased every year, such that just over 1.4 million people were incarcerated at the end of 2019.⁸⁴ This decarceration has been accomplished not by mass release of people serving long sentences, but as a result of historically low crime rates in many major cities and a growing effort to divert people away from incarceration in favor of other forms of surveillance, supervision, and mandated programming.⁸⁵

The “Most Incarcerated Generation,” however, has not been easily diverted, for reasons both legal and related to their aging status. Because

⁸⁰ PETERSILIA, *supra* note 4, at 62, 68-69; MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 8-10, 66-69 (2004).

⁸¹ Peter Leasure, *Securing Private Housing with a Criminal Record*, 58 J. OFFENDER REHAB. 30, 30-31 (2019); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIO. 937, 939-43 (2002); TRAVIS *supra* note 79, at 35, 83-86.

⁸² See Jordan M. Hyatt & Geoffrey C. Barnes, *An Experimental Evaluation of the Impact of Intensive Supervision on the Recidivism of High-Risk Probationers*, 63 CRIME & DELINQ. 3, 7 (2017).

⁸³ CARSON & ANDERSON (2016), *supra* note 43, at 3 tbl.1.

⁸⁴ E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUST. STAT., PRISONERS IN 2019 3 tbl.2 (2020).

⁸⁵ See *id.* at 13; JOAN PETERSILIA & SUSAN TURNER, DIVERTING PRISONERS TO INTENSIVE PROBATION 1 (1990); Harold Pollack et al., *If Drug Treatment Works So Well, Why Are So Many Drug Users in Prison?*, in CONTROLLING CRIME: STRATEGIES AND TRADEOFFS 125, 138-44 (Philip Cook et al. eds., 2011).

the majority of these individuals are considered chronic recidivists, they are often designated predicate felons who face long mandatory sentences and are therefore ineligible for diversion programming.⁸⁶ Older individuals who use drugs and have long criminal histories, for example, are often prohibited from participation in diversion programs and drug courts and thus are basically guaranteed a prison sentence if charged with a new offense. If they are under parole or probation, they may have violated or be returned to jail as a result of violating terms of supervision, even if a new criminal charge is fairly minor.⁸⁷ And because they are now in their fifth to seventh decades of life, in working with older individuals returning to the community, we have found that they are often deemed unfit for residential treatment programs that do not have on-site medical staff, for day programming that conflicts with medical care, or for treatment plans that exclude individuals with cognitive impairment or difficulty with self-care.⁸⁸ RB has taken care of dozens of individuals in the New York City jail system who have languished in pretrial detention because the court is only willing to offer them a residential program that cannot accommodate their needs, or a prison sentence.

The intersection of this generation's coming of age at the dawn of mass incarceration,⁸⁹ their now decades-long history of justice-involvement and acquired trauma,⁹⁰ trauma-related behaviors,⁹¹ undertreated substance use issues,⁹² particular experience of barriers to successful reentry,⁹³ and their elder status, has created a perfect storm in the graying justice system. The system's constituent parts are fundamentally designed to interact with young people but are now increasingly responsible for older people.⁹⁴ And this aging cohort, the "Most Incarcerated Generation," is particularly vulnerable to harms and obstacles at every stage of their justice involvement, from arrest through prison release.

⁸⁶ See, e.g., Pollack et al., *supra* note 85, at 127-28, 139.

⁸⁷ See Ginia Bellafante, *Criminal Justice Reform Empties Cells, Parole Fills Them Up Again*, N.Y. TIMES (Feb. 2, 2018), <https://perma.cc/Q87U-7LQP>.

⁸⁸ Observations are based on RB's professional experience.

⁸⁹ Porter et al., *supra* note 16, at 32, 48-49.

⁹⁰ MASCHI & MORGEN, *supra* note 7, at 74-97.

⁹¹ *Id.* at 77.

⁹² See Pollack et al., *supra* note 85, at 149; Redonna K. Chandler et al., *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety*, 301 JAMA 183, 183 (2009).

⁹³ See Bruce Western et al., *Stress and Hardship After Prison*, 120 AM. J. SOCIO. 1512, 1524-26 (2015).

⁹⁴ See Murolo, *Geriatric Inmates*, *supra* note 9, at 4-5.

IV. PARTICULAR CHALLENGES IMPACTING JUSTICE-INVOLVED ELDERS

A. *Justice-Involved Elders Have an Excess Burden of Health Concerns*

Older people who are incarcerated have an excess burden of health concerns compared to younger incarcerated people and to age-matched controls in the community.⁹⁵ This poses significant challenges for correctional systems, which are obligated to provide all detainees in their care “community standard” healthcare.⁹⁶ Jails and prisons were not designed to house frail and medically vulnerable people;⁹⁷ as a result, sick elders who are incarcerated are particularly vulnerable to poor health outcomes. While reviewing the living accommodations for elders in one prison as part of an evaluation of that facility’s geriatric care capacity, for example, RB noted that there were no housing accommodations for those prone to falls, and that the majority of housing blocks required detainees to climb stairs, navigate narrow hallways, and climb into top bunks. This is typical of the mismatch between correctional facilities and an aging population with increasing debility and disability.⁹⁸

A study out of the San Francisco jail found evidence of geriatric conditions in 70% of subjects over 55, including multimorbidity of falls, incontinence, functional impairment, mobility impairment, and hearing impairment.⁹⁹ Older adults were also found to have increased prevalence of functional impairment, mobility impairment, and hearing impairment compared to age-matched controls in the community, an excess burden of chronic and frequent pain, and high rates of frequent distressing

⁹⁵ See Laura M. Maruschak, BUREAU OF JUST. STAT., MEDICAL PROBLEMS OF JAIL INMATES 2 (2006), <https://perma.cc/HZ9B-QBGR>; *Aging Inmates: Correctional Issues and Initiatives*, CORRECTIONS TODAY 84, 84-85 (2012).

⁹⁶ Josiah D. Rich et al., *The Need for Higher Standards in Correctional Healthcare to Improve Public Health*, 30 J. GEN. INTERNAL MED. 503, 503 (2015); see *Estelle v. Gamble*, 429 U.S. 97, 102, 106 (1976) (holding that deliberate indifference to the medical needs of incarcerated people is repugnant to “the evolving standards of decency” and thus a violation of the Eighth Amendment); *United States v. DeCologero*, 821 F.2d 39, 43 (1st Cir. 1987) (holding that prisons are required to provide adequate medical services, defined as “services at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards”).

⁹⁷ *Aging Inmates: Correctional Issues and Initiatives*, *supra* note 95, at 85-86.

⁹⁸ See ADAY, *supra* note 1, at 105-06; Maschi et al., *supra* note 1, at 205.

⁹⁹ Meredith Greene et al., *Older Adults in Jail: High Rates and Early Onset of Geriatric Conditions*, HEALTH & JUST. 1, 6 (2018).

symptoms.¹⁰⁰ A survey of patients in U.S. jails and prisons in 2012 found that 78.6% of jail detainees older than 50 reported at least one chronic condition, and 30% reported at least one infectious disease other than HIV/AIDS.¹⁰¹ Similarly, studies regarding the health status of older patients in prisons have found that they have higher rates of chronic illness,¹⁰² use more medical resources, and take more medications than their younger counterparts.¹⁰³ During a visit to a state prison in Pennsylvania that houses hospice and long-term nursing care for men, JV met a man who had been incarcerated for more than 40 years.¹⁰⁴ The man had been a bodybuilder in his youth. At 65, he relied on a wheelchair to get around, his hands were curled from arthritis, and he had suffered a broken neck twice during his incarceration. This is a typical trajectory for longtimers in prisons around the country: The complex medical needs of justice-involved elders are compounded by injuries incurred from cumulative experiences of violence.¹⁰⁵

Unsurprisingly, older detainees are more likely than younger detainees to die while incarcerated: 59% percent of people incarcerated in state prisons who died in 2014 were 55 and over.¹⁰⁶ In 2020, COVID-19 case rates among incarcerated people were over five times higher than rates in the general U.S. population.¹⁰⁷ Older detainees in both jails and prisons were particularly vulnerable to COVID-19 related morbidity and mortality and died at a rate higher than age-matched controls in noninstitutional settings,¹⁰⁸ prompting both advocacy¹⁰⁹ and

¹⁰⁰ See *id.* at 3-6; Marielle Bolano et al., *Detained and Distressed: Persistent Distressing Symptoms in a Population of Older Jail Inmates*, 64 J. AM. GERIATRICS SOC'Y 2349, 2349-50 (2016); Brie A. Williams et al., *Pain Behind Bars: The Epidemiology of Pain in Older Jail Inmates in a County Jail*, 17 J. PALLIATIVE MED. 1336, 1337 (2014).

¹⁰¹ Maruschak et al., *supra* note 95, at 5 tbl.3.

¹⁰² See, e.g., Jacques Baillargeon et al., *The Disease Profile of Texas Prison Inmates*, 10 ANNALS EPIDEMIOLOGY 74, 75 (2000); Seena Fazel et al., *Health of Elderly Male Prisoners: Worse than the General Population, Worse than Younger Prisoners*, 30 AGE & AGEING 403, 405-406 (2001).

¹⁰³ See, e.g., OFF. OF THE INSPECTOR GEN., *THE IMPACT OF AN AGING INMATE POPULATION ON THE FEDERAL BUREAU OF PRISONS 14-15* (May 2015) (revised Feb. 2016).

¹⁰⁴ Vaughn, *What Does Death by Incarceration Look Like?*, *supra* note 13.

¹⁰⁵ See Tina Maschi et al., *Trauma and Life Event Stressors Among Young and Older Adult Prisoners*, 17 J. CORR. HEALTH CARE 160, 162, 168 (2010).

¹⁰⁶ MARGARET E. NOONAN, BUREAU OF JUST. STAT., *MORTALITY IN STATE PRISONS, 2011-2014 - STATISTICAL TABLES 1* (2016).

¹⁰⁷ Brandon Saloner et al., *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 J. AM. MED. ASS'N 602, 602-03 (2020).

¹⁰⁸ *Id.* at 603.

¹⁰⁹ See Weihua Li & Nicole Lewis, *This Charts Shows Why the Prison Population Is So Vulnerable to COVID-19*, MARSHALL PROJECT (Mar. 19, 2020), <https://perma.cc/7R3Q-RRC7>.

recriminations towards systems that did not protect or release them before they died.¹¹⁰

Because correctional systems cover healthcare costs for all detainees for the duration of their incarceration, the growing elderly population is creating a fiscal crisis in jail and prison systems around the country.¹¹¹ While data on prison healthcare utilization and expenditures is often hard to come by, researchers have estimated that people over 55 cost three to nine times as much to house as younger detainees, largely due to healthcare costs.¹¹² An analysis by the New York State Comptroller found that the state prison system's healthcare expenditures went up over 20% between 2013 and 2016,¹¹³ a period during which the population over 50 increased while the population under 50 decreased.¹¹⁴ A report by the Office of the Inspector General found a strong relationship between correctional healthcare costs and the number of people over 50 in a state correctional system.¹¹⁵

Compassionate release or medical parole policies are in place in 46 state prison systems and the Federal Bureau of Prisons.¹¹⁶ These policies theoretically facilitate release for elderly, sick, and dying detainees based on the rationale that advanced or terminal illness may compromise an individual's capacity to derive either benefit or punishment from imprisonment.¹¹⁷ In practice, however, compassionate release is a sorely underused tool, for reasons having to do with both process and political factors.¹¹⁸ RB's first professional interaction with an elderly, incarcerated patient involved a man dying of liver cancer for whom approval of medical parole came too late. Release policies that require a safe reentry plan may, paradoxically, require someone to be well enough

¹¹⁰ See Lisa Armstrong, *Lost Opportunities, Lost Lives*, MARSHALL PROJECT (June 29, 2021), <https://perma.cc/8WH7-TB2Q>; Steven Paulikas, *My Parishioner Was Not Sentenced to Death. He Still Died.*, N.Y. TIMES (May 31, 2021), <https://perma.cc/LZ6U-ZL38>.

¹¹¹ See Murolo, *Geriatric Inmates*, *supra* note 9, at 5.

¹¹² Cyrus Ahalt et al., *Paying the Price: The Pressing Need for Quality, Cost, and Outcomes Data to Improve Correctional Healthcare for Older Prisoners*, 61 J. AM. GERIATRICS SOC'Y 2013, 2013-15 (2013).

¹¹³ OFF. OF THE STATE COMPTROLLER, NEW YORK STATE'S AGING PRISON POPULATION 2 (2017).

¹¹⁴ *Id.* at 1-2.

¹¹⁵ OFF. OF THE INSPECTOR GEN., *supra* note 103, at i-ii.

¹¹⁶ Tina Maschi et al., *Analysis of US Compassionate and Geriatric Release Laws: Applying a Human Rights Framework to Global Prison Health*, 1 J. HUM. RTS. SOC'Y WORK 165, 167 (2016).

¹¹⁷ Brie A. Williams et al., *Balancing Punishment and Compassion for Seriously Ill Prisoners*, 155 ANNALS INTERNAL MED. 122, 122 (2011).

¹¹⁸ See CHIU, *supra* note 1, at 6-9; HUMAN RIGHTS WATCH, *supra* note 23, at 2-5; REBECCA SILBER ET AL., VERA INST. OF JUST., A QUESTION OF COMPASSION: MEDICAL PAROLE IN NEW YORK STATE 3 (2018).

to survive a transfer to a community setting. In other words, we have heard of cases where compassionate release has been denied precisely because someone has become “too sick to release.” In September 2019, while observing commutation hearings at the Pennsylvania Board of Pardons, JV watched as the board denied a commutation to an elderly man in late-stage renal failure. The board noted that the man was a good candidate for a commutation and release based on the merits of his legal situation but stated they did not feel confident that he would receive adequate medical care outside of prison if he was released.

V. OLDER JUSTICE-INVOLVED INDIVIDUALS FREQUENTLY FACE CHALLENGES UPON REENTRY TO THE COMMUNITY AFTER INCARCERATION

Older adults report anxiety and fear about being released from prison, largely related to concerns around housing and employment,¹¹⁹ social isolation,¹²⁰ and health issues or acquiring healthcare.¹²¹

Their fears are well founded. As older people leave jails and prisons, “invisible punishments” intensify the challenges of reentry.¹²² Invisible punishments come in the form of housing and employment discrimination, prohibitions on employment opportunities that require a license, such as barbering, voter disenfranchisement, and denial of access to public entitlements.¹²³ Additional punitive policies came into effect in the 1980s and 1990s during the “tough on crime” era as a corollary to mass incarceration.¹²⁴ As a response to social movements demanding “fair chance housing,”¹²⁵ that employers “ban the box,”¹²⁶ and that states restore voting rights to formerly incarcerated people,¹²⁷

¹¹⁹ Charmaine Clarke, *Reentry Experiences of Elderly Ex-Offenders: Wasted Lives 6* (2017) (Ph.D. dissertation, Stony Brook University) (ProQuest); Elaine Crawley & Richard Sparks, *Is There Life After Imprisonment? How Elderly Men Talk About Imprisonment and Release*, 6 CRIMINOLOGY & CRIM. JUST. 63, 75 (2006).

¹²⁰ See Clarke, *supra* note 119, at 15.

¹²¹ Susan J. Loeb et al., *In Their Own Words: Older Male Prisoners’ Health Beliefs and Concerns for the Future*, 28 GERIATRIC NURSING 319, 319 (2007); Amy B. Smoyer et al., *Older Adults’ Lived Experience of Incarceration*, 58 J. OFFENDER REHAB. 220, 231 (2020).

¹²² TRAVIS, *supra* note 79, at 64.

¹²³ *Id.*

¹²⁴ See David Garland, *Introduction: The Meaning of Mass Imprisonment*, 3 PUNISHMENT & SOC’Y 5, 5-6 (2001); Murolo, *supra* note 9, at 4.

¹²⁵ See Tracey Tully, *Landlords Barred from Using Criminal Records to Deny Housing*, N.Y. TIMES (June 4, 2021), <https://perma.cc/2S7L-MHR3>; *Fair Chance for Housing*, FAIR CHANCE FOR HOUSING, <https://perma.cc/NM5J-MM2S> (last visited Dec. 4, 2021).

¹²⁶ See BETH AVERY & HAN LU, NAT’L EMP. LAW PROJECT, BAN THE BOX 2 (2021).

¹²⁷ See *Voting Rights Restoration*, BRENNAN CTR. FOR JUST., <https://perma.cc/XE5Q-TZKD> (last visited Dec. 4, 2021).

some of these policies have been rolled back.¹²⁸ If these movements are successful, the impact of these invisible punishments will have been disproportionately borne by individuals returning home from prison over the past 30 years—largely the same aging cohort as the “Most Incarcerated Generation.”

A. *Employment*

One of the people that AM interviewed for her dissertation was retired from employment at the time of his arrest. Post-incarceration, he was released on parole with the condition that he had to find employment, despite having aged out of his prior work. This strikes us as both unreasonable and unrealistic. The reentry literature underscores the difficulty of obtaining employment upon release, especially for people over 44.¹²⁹ A study from 2002 found that a criminal record reduced the likelihood of receiving a call back from an employer by 50%.¹³⁰ In investigating employment challenges facing 740 people leaving prison, a study found that eight months after release, 55% of respondents were unemployed, and those who were employed earned an average of \$9 per hour.¹³¹ Having a history of multiple incarcerations, a history of a violent offense, or a history of drug convictions all further impact employment and living wage prospects.¹³² Given the fact that the majority of justice-involved elders are chronic recidivists or longtimers serving time for violent offenses, older individuals are particularly disadvantaged by these prejudices.

B. *Housing*

“Tough on public housing” policies for people with criminal records were implemented in the 1980s and 1990s.¹³³ The Anti-Drug Abuse Act of 1988 required criminal background checks for applications for housing assistance, including Section 8, resulting in

¹²⁸ For instance, formerly incarcerated people in Florida have been given voting rights but they have been challenged or have some restrictions based on offense. Bill Cottrell, “*The Greatest Challenge*”: *Felon Voting Rights Advocate Gives Speech in Tallahassee*, TALLAHASSEE DEMOCRAT (Nov. 1, 2021), <https://perma.cc/WSY7-4AUU>; Jesse Wegman, *When It Costs \$53,000 to Vote*, N.Y. TIMES (Oct. 7, 2021), <https://perma.cc/QMF3-73FX>.

¹²⁹ E.g., Western et al., *supra* note 93, at 1532-33.

¹³⁰ Pager, *supra* note 81, at 958.

¹³¹ CHRISTY VISHER ET AL., EMPLOYMENT AFTER PRISON: A LONGITUDINAL OF RELEASEES IN THREE STATES 4 (2008), <https://perma.cc/59EZ-U7PM>.

¹³² See Tina Maschi et al., *Ageing, Incarceration, and Employment Prospects: Recommendations for Practice and Policy Reform*, 45 J. APPLIED REHAB. COUNSELING 44, 45, 52 (2014).

¹³³ TRAVIS, *supra* note 79, at 227-28, 231-32.

denials of assistance or termination of existing leases for people with criminal histories.¹³⁴ Subsequently, President Clinton encouraged state and city housing authorities to implement the federal housing guidelines with the catchphrase “one strike and you’re out,” further restricting housing support for people with any history of incarceration.¹³⁵

Even as some of these policies are rolled back, secure housing remains elusive for elders returning home from prison. Older adults confront unique challenges and increased likelihood of long-term housing instability.¹³⁶ Many older adults report a period of homelessness after leaving prison¹³⁷ resulting in a burgeoning crisis of homeless or shelter-dependent elders in cities around the country.¹³⁸ The Boston Reentry Study indicated that housing instability was most prevalent among those over the age 44 with substance use disorders and mental illness.¹³⁹ Older adults leaving prison often report staying with family on a short-term basis, but that support diminishes over time.¹⁴⁰

C. Community Reintegration and Social Bonds

Older adults leaving prison can experience compounded social isolation due to the cumulative burden of years of incarceration.¹⁴¹ Lack of contact with family and friends leads to weak social bonds over time so that people returning to the community from prison do not necessarily have friends or family to stay with.¹⁴² This is not as common for younger incarcerated people, who feel they are able to seek forgiveness and reconnect with their family after being incarcerated.¹⁴³ In AM’s personal experience, her father exhausted resources and support from family and friends due to his frequent legal infractions,

¹³⁴ *Id.* at 231.

¹³⁵ *Id.* at 232.

¹³⁶ Western et al., *supra* note 93, at 1512.

¹³⁷ Lucius Couloute, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, PRISON POL’Y INITIATIVE (Aug. 2018), <https://perma.cc/R7NU-87XH>.

¹³⁸ Galvin, *supra* note 11; Aria Bendix, *The 9 States with the Worst Homelessness Crises Reveal How Bad the Housing Crunch Has Gotten in US Cities*, BUS. INSIDER, <https://perma.cc/8R7B-WJWW> (last updated Nov. 18, 2019, 11:25 AM); Tanvi Misra, *The Homelessness Problem We Don’t Talk About*, CITY LAB (Aug. 16, 2018), <https://perma.cc/SN8J-CBWX>.

¹³⁹ Western et al., *supra* note 93, at 1526.

¹⁴⁰ See Clarke, *supra* note 119, at 37-38.

¹⁴¹ Jessica Wyse, *Older Men’s Social Integration After Prison*, 62(8) INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 2154, 2156-66 (2017); see Jeremy Travis & Joan Petersilia, *Reentry Reconsidered: A New Look at an Old Question*, 47 CRIME & DELINQ. 291, 299 (2001).

¹⁴² Western et al., *supra* note 93, at 1523, 1525.

¹⁴³ Michael L. Benson et al., *Reintegration or Stigmatization? Offenders’ Expectations of Community Re-entry*, 39 J. CRIM. JUST. 385, 389-90 (2011).

leaving him homeless at 68 years old (at the height of the COVID-19 pandemic).

In terms of formal community support, there are very few age-based or age-affirming services for older adults leaving prison.¹⁴⁴ Parole restrictions often prohibit socializing or living with other justice-involved people, limiting opportunities for support and comfort amongst one's peers.¹⁴⁵ In RB's experience coordinating reentry for hundreds of older people being released from jail to the community, few nursing homes are willing to accept people with a criminal history due to fears of violence or lawsuits. This can present particular obstacles for individuals applying for release via compassionate release or medical parole policies.¹⁴⁶

VI. THE GRAYING JUSTICE SYSTEM: POTENTIAL APPROACHES AND ACTION ITEMS

The aging of the justice-involved population represents a moral, legal, and economic crisis for the U.S. justice system. The insight that this phenomenon is potentially driven by the aging of the "Most Incarcerated Generation" offers an opportunity to once again reframe our understanding of the profound harms of mass incarceration as a system of punishment, control, and violence that have effectively condemned a generation to a lifetime of justice involvement. It is urgent that we better understand the scale and consequences of this phenomenon and pursue interventions to off-ramp these elders from the criminal legal system.

A. *Articulating a Research Agenda*

In this article we have summarized some of the available data quantifying, describing, and theorizing the existence of the aging justice-involved population. More work needs to be done to fully understand the scope of this problem. One outstanding question is whether the trend is truly a national one, or if it is disproportionately borne by certain regions or systems. Jail-level data is especially difficult to come by but is a critical missing piece here, both since pretrial detention can and should be avoided in favor of alternative arrangements. Extensive research indicates that prisons are ill-fitted to house seniors with complex care needs; thus, by virtue of being

¹⁴⁴ MASCHI & MORGEN, *supra* note 7, at 4-5.

¹⁴⁵ PETERSILIA, *supra* note 4, at 83.

¹⁴⁶ Christie Thompson, *Ever Committed a Crime? Good Luck Finding a Place to Grow Old*, THINKPROGRESS (July 1, 2014), <https://perma.cc/WP4E-N3J6>; see Ethridge & White, *supra* note 10, at 384.

designed as short-term detention centers, jails are likely to be particularly ill-suited to housing seniors with such needs, an inference borne out by our own professional experiences.¹⁴⁷ Dr. Brie Williams, the leading national expert on issues related to the intersection of aging, health, and incarceration, has written extensively on the need for further research into the health challenges, healthcare needs, and systems issues related to the aging jail and prison population.¹⁴⁸ Existing and additional research should inform correctional system practices around care, housing, and release policies for older individuals.

We have hypothesized in this article about the existence of a “Most Incarcerated Generation,” a theory that unifies existing data and scholarship about the critical interaction between a vulnerable birth cohort, the far-reaching consequences of mass incarceration in the U.S., and the way that justice involvement begets justice involvement to explain ongoing observed distortions in the age-crime curve. We do not yet have the data or demographic analysis, however, to prove this concept. Much more research is needed to “track back” the experiences of currently justice-involved seniors to identify their points of entry into the criminal legal system, their trajectories throughout the past three decades, and the barriers they have faced around reintegrating into a society that relegated them to a “civil death.”¹⁴⁹

The national conversation around drivers of mass incarceration has increasingly turned towards the recognition that, in order to fully divest from the punishment-industrial complex, we need to collectively rethink how we understand and demand accountability for violence.¹⁵⁰ Given that the majority of elders serving long prison sentences and a sizable proportion of elder chronic recidivists are accused of committing violence, this conversation takes on new urgency.¹⁵¹ The very existence

¹⁴⁷ CHIU, *supra* note 1, at 5; MASCHI & MORGEN, *supra* note 7, at 11; Williams et al., *Addressing the Aging Crisis*, *supra* note 26, at 1154-55.

¹⁴⁸ Williams et al., *Coming Home*, *supra* note 26, at 7; Williams et al., *Addressing the Aging Crisis*, *supra* note 26, at 1151.

¹⁴⁹ Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, 2 PERSPECTIVES ON POL. 491, 492 (2004); ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* 16 (1961); *see, e.g.*, Marc Meredith & Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, 46 J. LEGAL STUD. 309, 309, 334 (2017); Bradley D. Custer, *The Disenfranchisement of Justice Involved College Students from State Financial Aid 1-3* (2019) (unpublished Ph.D. dissertation, Michigan State University) (ProQuest).

¹⁵⁰ Michelle Alexander, *Opinion, Reckoning with Violence*, N.Y. TIMES (Mar. 3, 2019), <https://perma.cc/ZET8-F2K8>; JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 185-86 (2017); *see DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* (2019).

¹⁵¹ CARSON & SABOL, *supra* note 5, at 1, 5; Maschi et al., *supra* note 1, at 195-96.

of this cohort simultaneously points to the failure of incarceration as a tool to rehabilitate or deter and the dire need for alternative interventions to address violent behaviors. Specific research into how to effectively create safe structures that provide opportunities for elders to hold themselves accountable and/or to be forgiven and released from supervision is sorely needed.

B. *Current Interventions and Potential Solutions*

There are many extant efforts to improve the lives of justice-involved elders. In this section we also discuss some of our own proposals. We will make a point of identifying which of these efforts ought to be considered “harm reduction” and which are “decarceral.”¹⁵² It is our opinion that the bulk of investment of time, resources, and political capital ought to be directed at decarceral projects.

1. Police Training and Crisis Response Teams

The violent arrest of a 73-year-old woman with dementia, caught on camera, sparked national outrage about the potential harm of police-elder interactions and led to several officers’ resignations.¹⁵³ Cognitive impairment is often accompanied by behavioral changes, personality changes, and episodes of psychosis.¹⁵⁴ Dementia as a risk factor for illegal behaviors is a likely underrecognized concern.¹⁵⁵ In San Francisco, a geriatrics group led a three-part training for police officers around recognizing and responding to unusual behaviors that may be attributable to geriatric syndromes.¹⁵⁶ Eighty-four percent of the participating police officers reported interacting with older adults on a monthly basis, with 45% interacting on a daily basis, and the majority said they anticipated using the skills learned in the training in the future.¹⁵⁷ The same group has led similar sessions for corrections officers around the country (RB has trained similar groups in New York City). This is potentially a harm reduction intervention if it leads to fewer violent interactions between officers and elders; it is potentially a

¹⁵² See generally TRAVIS C. PRATT, *ADDICTED TO INCARCERATION: CORRECTIONS POLICY AND THE POLITICS OF MISINFORMATION IN THE UNITED STATES* 22-23 (2d ed. 2019).

¹⁵³ Leigh Paterson, *The Violent Arrest of a Woman with Dementia Highlights the Lack of Police Training*, N.P.R. (June 15, 2021, 5:00 AM), <https://perma.cc/Y52B-MCTD>.

¹⁵⁴ Abi V. Rayner et al., *Behavior Disorders of Dementia: Recognition and Treatment*, 73 AM. FAM. PHYSICIAN 647, 647 (2006).

¹⁵⁵ Madeleine Liljegren et al., *Criminal Behavior in Frontotemporal Dementia and Alzheimer Disease* 72 J. AM. MED. ASS’N NEUROLOGY 295, 296 (2015).

¹⁵⁶ See Brown et al., *Good Cop, Better Cop: Evaluation of a Geriatrics Training Program for Police*, 65 J. AM. GERIATRICS SOC’Y 1842 (2017).

¹⁵⁷ *Id.* at 1842-43.

decarcerated one if officers begin to recognize when an agitated elder ought to be diverted from the precinct to a hospital for evaluation, avoiding arrest.

Alternatively and simultaneously, responding to behaviors of dementia ought to fall under the jurisdiction of non-police responder crisis teams whenever possible.¹⁵⁸ Many such models are already in use in cities around the country,¹⁵⁹ such as CAHOOTS (“Crisis Assistance Helping Out On The Streets”) in Eugene, Oregon,¹⁶⁰ and Oakland Power Projects in Oakland, California.¹⁶¹ It is imperative that such teams are trained to specifically recognize and support elders in crisis who may not present with typical manifestations of psychosis, who require special consideration due to physical debility and frailty, and who may warrant medical evaluation for delirium secondary to medical illness.¹⁶²

As a new physician in the jails on Rikers Island, RB’s first case involved a man over 80 who had been arrested after threatening a family member with a knife. This was a case of dementia presenting as criminal behavior.¹⁶³ The detainee had no prior history of arrest but had demonstrated cognitive and personality changes in the year leading up to the incident. Once arrested, the court put an order of protection in place, preventing the individual from being able to go back to live with his family and condemning him to a prolonged jail stay.¹⁶⁴ He was rejected from over a dozen nursing homes before he was finally accepted for transfer to a more appropriate care facility. The entire incident, which provoked extreme distress for the older detainee involved, his family, his jail caregivers, and all legal decision-makers, could have been avoided entirely had a non-police crisis team, trained in de-escalation and triage, responded to the family’s call for help. Similarly, JV reported on a 75-year-old woman in the apparent early stages of dementia arrested for domestic violence in Cumberland County, Pennsylvania in

¹⁵⁸ See Phillip Atiba Goff & Katie Porter, *A Mental Health Crisis Is Not a Crime*, N.Y. TIMES (July 6, 2021), <https://perma.cc/YMZ5-UGMJ>.

¹⁵⁹ JACKSON BECK ET AL., VERA INST. OF JUST., BEHAVIORAL HEALTH CRISIS ALTERNATIVES: SHIFTING FROM POLICE TO COMMUNITY RESPONSES (2020), <https://perma.cc/KXL5-HU9N>.

¹⁶⁰ See, e.g., Ben Adam Climer & Brenton Gicker, *CAHOOTS: A Model for Prehospital Mental Health Crisis Intervention*, PSYCHIATRIC TIMES, Jan. 2021, at 15; *CAHOOTS*, EUGENE POLICE DEP’T, <https://perma.cc/62Q3-JCKH> (last visited Nov. 23, 2021).

¹⁶¹ See, e.g., *Mission*, OAKLAND POWER PROJECTS, <https://perma.cc/2LC9-VN2L> (last visited Nov. 23, 2021).

¹⁶² See, e.g., BECK ET AL., *supra* note 159; Climer & Gicker, *supra* note 160, at 15; EUGENE POLICE DEP’T, *supra* note 160; OAKLAND POWER PROJECTS, *supra* note 161.

¹⁶³ See Liljegren, *supra* note 155, at 296.

¹⁶⁴ See generally *Resources and Services: Orders of Protection*, N.Y.C POLICE DEP’T, <https://perma.cc/A5C5-9KTA> (last visited Dec. 4, 2021).

2018. The woman had scratched her care-dependent husband's arm. She was charged with a misdemeanor assault and held in jail on \$50 bail.¹⁶⁵ JV learned from jail staff that attempts to move the woman to a nursing facility had failed because none would take her due to her pending charges.

2. Court-Level Interventions

Researchers conducted surveys with legal advocates and decision-makers including defense attorneys, prosecutors, judges, and court social workers in San Francisco to understand their perspectives and challenges when working with older defendants.¹⁶⁶ Respondents reported a wide range of confidence with regards to their knowledge of aging-related health and behavior issues.¹⁶⁷ Dominant themes included anxiety about working with clients who had cognitive impairment and advocating for patients at risk of victimization while incarcerated.¹⁶⁸

To the degree that court systems have recognized the problem of an aging population, their focus has been on elders as potential victims of crime, extortion, and abuse, rather than as defendants in criminal court.¹⁶⁹ Elder law practices similarly focus on advocacy for elders around estate planning, benefits entitlement, decision-making conflicts, and other related areas.¹⁷⁰ Our observation is that the notion of elders as defendants who would benefit from lawyers with specialized knowledge has not yet penetrated the legal field.

There is plenty of precedent, however, for problem-solving courts oriented around special populations. Problem-solving courts address the endemic social determinants of criminal behavior that lead to recurrent contact between specific populations and the criminal justice system.¹⁷¹ Existing problem-solving courts in New York City include specialized mental health courts, drug courts, and courts devoted to human

¹⁶⁵ *Closer Look*, *supra* note 13.

¹⁶⁶ See Tacara Soones et al., "My Older Clients Fall Through Every Crack in the System": *Geriatrics Knowledge Among Legal Professionals*, 62 J. AM. GERIATRIC SOC'Y 734, 734-39 (2014).

¹⁶⁷ *Id.* at 736-37.

¹⁶⁸ *Id.* at 736-38.

¹⁶⁹ See *Elder Justice*, N.Y. STATE UNIFIED CT. SYS., <https://perma.cc/E57L-XEYZ> (last visited Nov. 23, 2021).

¹⁷⁰ *Elder Law & Special Needs Section*, N.Y. STATE BAR ASS'N, <https://perma.cc/76A2-NKPH> (last visited Nov. 23, 2021).

¹⁷¹ Randall Brown, *Drug Court Effectiveness: A Matched Cohort Study in the Dane County Drug Treatment Court*, 50 J. OFFENDER REHAB. 191, 192 (2011); Pamela M. Casey & David B. Rottman, *Problem-Solving Courts: Models and Trends*, 26 JUST. SYS. J. 35, 35 (2005); see, e.g., Robert T. Russell, *Veteran Treatment Courts*, 31 Touro L. REV. 385, 386 (2015).

trafficking and to domestic violence.¹⁷² Staff in these court parts, including judges, defense attorneys, prosecutors, and social workers receive dedicated training and knowledge about the challenges facing their specialized population.¹⁷³ Theoretically, whenever possible, defendants are diverted from the traditional prison and punishment path towards community programs that support treatment, rehabilitation, and stability.¹⁷⁴ This requires close partnerships between the courts and community partners and alternative models of defining accountability that reflect the perspectives of all relevant stakeholders.¹⁷⁵

We propose a new problem-solving “Elder Court.” An Elder Court would be made up of advocates and decision-makers with specialized knowledge regarding common geriatric medical issues, cognitive impairment and its varied presentations, the geriatric service landscape, and disease prognostication. Crucially, however, the ideal Elder Court would not only aim to reduce the harms of justice involvement for medically vulnerable elders. An effective Elder Court would be explicitly decarceral in its mission, operating within a conceptual framework that acknowledged the experiences and trauma histories of justice-involved elders and would take “off-ramping” them from the criminal-legal system as its mission.

On a practical level, such a court might involve personnel with dedicated interest and advanced knowledge around geriatric and palliative care issues, create specialized lines of communication with dedicated health care providers who can interpret complex medical information, establish strong community partnerships with organizations that could support patients in appropriate alternative to incarceration settings, and define expectations for participants to complete successful diversion “programming” that would be sensitive to their cognitive and functional limitations and competing medical needs. As far as we know, no such court exists in any U.S. state at this time.

Finally, given the rising prevalence of dementia syndromes amongst criminal defendants, there is urgent need to reexamine the way

¹⁷² *Problem-Solving Courts*, N. Y. STATE UNIFIED CT. SYS., <https://perma.cc/8Z87-KJQ2> (last visited Nov. 23, 2021).

¹⁷³ See, e.g., Russell, *supra* note 171, at 386; Casey & Rottman, *supra* note 171, at 41.

¹⁷⁴ See Casey & Rottman, *supra* note 171, at 36; see, e.g., Russell, *supra* note 171, at 386.

¹⁷⁵ We are describing the idealized problem-solving court model here; in practice, these courts are known to often fall short of their stated goals by relying on ineffective “rehabilitative” models and excessive threat of punishment to exert control over defendant behavior. RB has cared for many patients facing cases in drug courts, for example, who have stated that they would rather “just do the time” instead of complying with the demands of the court’s prescribed drug treatment program.

that cognitive impairment is managed through processes designed to assess and restore competency to stand trial.¹⁷⁶ Dementia syndromes present in subtle and varied ways and are generally incurable.¹⁷⁷ Treatments focus on improving quality of life and in rare cases on slowing disease progression, but are seldom beneficial to the point of restoring function.¹⁷⁸ Individuals with dementia may well be incompetent to stand trial, but are seldom actually eligible or appropriate for restoration efforts through psychiatric treatment.¹⁷⁹ RB has taken care of many elder patients with dementia who are effectively “unrestorable” but who spend months, even years, cycling between jail detention and detention in a forensic psychiatric unit. This cycle significantly delays resolution of their cases, often creates discontinuity in management of both their dementia and comorbid medical issues, and exacerbates trajectories of decline.¹⁸⁰ Existing processes to declare someone “unrestorable” are seldom used,¹⁸¹ but should be engaged at point of assessment if the cause of someone’s neurocognitive deficit is likely to be a dementia syndrome. Patients who fit this profile need to have their cases resolved and be triaged towards appropriate care settings that can meet their needs as they decline.

3. Diversion Programming

Alternatives to Incarceration programs (“ATIs”) are diversion programs that theoretically provide structured programming and support services to justice-involved people in the community, rather than in a correctional facility.¹⁸² Drug courts, for example, claim to divert defendants with substance dependence away from incarceration through mandated participation in ATIs that provide inpatient and/or outpatient

¹⁷⁶ See Dana R. Miller, *Dementia and Competency in United States Courtrooms: A Case Law Review* 13-18 (May 2020) (unpublished MA thesis, John Jay Community College) (on file with CUNY Academic Works).

¹⁷⁷ See Wietse Wiels et al., *Depressive Symptoms in the Elderly—An Elderly Symptom of Dementia? A Systematic Review*, 11 *FRONTIERS IN PHARMACOLOGY*, Feb. 2, 2020, at 1-2.

¹⁷⁸ See Kaycee M. Sink et al., *Pharmacological Treatment of Neuropsychiatric Symptoms of Dementia: A Review of the Evidence*, 293 *AM. MODEL ASS’N* 596, 604, 607 (2005).

¹⁷⁹ See Miller, *supra* note 176, at 54-55.

¹⁸⁰ See Douglas R. Morris & George F. Parker, *Effects of Advanced Age and Dementia on Restoration of Competence to Stand Trial*, 32 *INT’L J. OF L. & PSYCHIATRY* 156, 159-60 (2009).

¹⁸¹ See Miller, *supra* note 176, at 54; Morris & Parker, *supra* note 180, at 158.

¹⁸² CITY OF NEW YORK, MAYOR’S OFF. OF CRIM. JUST., *ALTERNATIVES TO INCARCERATION* (2020), <https://perma.cc/289R-GE6W> (last visited Dec. 28, 2021); see Hung-En Sung, *From Diversion to Reentry: Recidivism Risks among Graduates of an Alternative to Incarceration Program*, 22 *CRIM. JUST. POL’Y REV.* 219, 220 (2011).

drug treatment.¹⁸³ These arrangements usually require multi-month participation on the part of the individual receiving treatment, have little flexibility to adjust around individual defendant circumstances, and threaten to sentence a person to prison time if they do not complete the entirety of the prescribed program.¹⁸⁴ Most programs are not equipped to provide substantial material support, such as housing, cash assistance, transportation support, or childcare and are not flexible in response to defendant circumstances.¹⁸⁵

In our experience supporting older individuals returning to the community from jails and prisons, very few ATI programs will even accommodate older people, should they want to participate.¹⁸⁶ A review of the ATI programs currently supported by the New York City Mayor's Office of Criminal Justice shows that the city does not fund any programs designed to meet the needs of justice-involved seniors, and that, in fact, the majority of programs are intended to support people under the age of 30.¹⁸⁷ Furthermore, these programs often restrict participant eligibility according to criminal charges, which can effectively bar people classified as predicate felons from diversion opportunities.¹⁸⁸

Effective diversion programming for older justice-involved people needs to be tailored and responsive to their unique circumstances. Adult day care programming has been shown to have positive outcomes for non-justice involved elderly participants and their regular caregivers, and might serve as one type of model.¹⁸⁹ These programs, however, are not usually effective at dealing with participants who have serious mental illness or trauma histories.¹⁹⁰ A program intended to serve justice-involved seniors would have to be able to accommodate the complex needs and behaviors associated with that group and require

¹⁸³ See Sung, *supra* note 182, at 220-21.

¹⁸⁴ Christine Mehta, *How Drug Courts Are Falling Short*, OPEN SOC'Y FOUND. (June 7, 2017), <https://perma.cc/59CE-UG3H>.

¹⁸⁵ See CITY OF NEW YORK, MAYOR'S OFF. OF CRIM. JUST., *supra* note 182.

¹⁸⁶ This observation is based on RB's professional experience.

¹⁸⁷ CITY OF NEW YORK, MAYOR'S OFF. OF CRIM. JUST., *supra* note 182, at 2-3.

¹⁸⁸ See, e.g., Pollack et al., *supra* note 85, at 139; JANINE M. ZWEIG ET AL., URBAN INST. JUST. POL'Y CTR. WHAT'S HAPPENING WITH DRUG COURTS? A PORTRAIT OF ADULT DRUG COURTS IN 2004 (EDS. SHELLI V. ROSSMAN ET AL. 2011), <https://perma.cc/XKD9-YNHY>; John F. Frana & Ryan D. Schroeder, *Alternatives to Incarceration*, 5 JUST. POL'Y J., Fall 2008, at 25-26.

¹⁸⁹ Moriah E. Ellen et al., *Adult Day Center Programs and Their Associated Outcomes on Clients, Caregivers, and the Health System: A Scoping Review*, 57 THE GERONTOLOGIST e85, e90 (2017); Noelle L. Fields et al., *The Effectiveness of Adult Day Services for Older Adults: A Review of Literature From 2000 to 2011*, 33 J. OF APPLIED GERONTOLOGY 130, 133 (2014).

¹⁹⁰ Pollack et al., *supra* note 85, at 129.

interdisciplinary, on-site support. Additionally, given that participants in an ATI for seniors will by definition have ongoing legal issues, it would be ideal to have program-embedded court navigators who could help participants meet their mandated requirements.

Most importantly, ATI programs designed for justice-involved seniors must be participant-centered, designed to have minimum requirements, and be flexible depending on evolving circumstances in a participant's life, especially with respect to their medical needs. RB's clinical experience taking care of older patients who do get diverted through drug courts is that they are often deemed too sick for residential treatment and too overscheduled with medical appointments for outpatient programming; more than once, a patient has been admitted to jail for having violated the terms of their mandate in part due to a hospitalization. Programming designed for justice-involved seniors cannot be part of the punishment industrial complex and needs to break new ground in the ATI universe.

4. Specialized Housing Units and Geriatric Competency in Jails and Prisons

Jails and prisons are fundamentally unsafe settings for elder detainees.¹⁹¹ This has prompted many systems to design specialized housing areas designated for seniors,¹⁹² although stakeholders hold competing views on age-segregated housing.¹⁹³ Given the burdens of caring for aging individuals who are likely to decline and eventually die while incarcerated, several systems have opened units that effectively provide nursing home-level care in a prison setting.¹⁹⁴ JV has extensively covered one facility in Somerset County that has specialized units for men in need of long-term assistance and end-of-life care.¹⁹⁵ Both the New York and Pennsylvania correctional systems have opened dementia care units in recent years.¹⁹⁶ While the cost is not yet known

¹⁹¹ See, e.g., MASCHI & MORGEN, *supra* note 7, at 33; Murolo, *Geriatric Inmates*, *supra* note 9, at 6; Williams et al., *Addressing the Aging Crisis*, *supra* note 26, at 1150.

¹⁹² Murolo, *Geriatric Inmates*, *supra* note 9, at 5.

¹⁹³ See, e.g., Bedard et al., *supra* note 12, at 930-32; John J. Kerbs & Jennifer M. Jolley, *A Commentary on Age Segregation for Older Prisoners: Philosophical and Pragmatic Considerations for Correctional Systems*, 34 CRIM. JUST. REV. 119, 119 (2009); Tenzin Wangmo et al., *Prisons Should Mirror Society: The Debate on Age-segregated Housing for Older Prisoners*, 37 AGEING AND SOC'Y 675, 677 (2017).

¹⁹⁴ See Marina Stal, *Treatment of Older and Elderly Inmates Within Prisons*, 19 J. CORR. HEALTH CARE 69, 71 (2012).

¹⁹⁵ Vaughn, *Closer Look*, *supra* note 13.

¹⁹⁶ Deb Erdley, *Pennsylvania to Open Dementia Unit at Rockville Prison*, TRIBUNE LIVE (July 9, 2021) <https://perma.cc/R2HX-ZTEF>; Pam Belluck, *Life, with Dementia*, N.Y. TIMES (Feb. 25, 2012), <https://perma.cc/W8BG-5VFF>.

for the Pennsylvania specialized care unit since it opened in 2021,¹⁹⁷ the New York unit was opened at enormous expense.¹⁹⁸ Several state systems have well-regarded hospice programs, many where incarcerated people can be trained to provide care to the dying.¹⁹⁹ These harm reduction interventions are an improvement over prior standards in correctional health, where no such care was available to an aging and dying incarcerated population.²⁰⁰ We doubt the wisdom, however, of investing significant resources into building capacity to take care of frail individuals who cannot remember the reasons they are incarcerated.

Outside of specialized units, geriatric and palliative care competency is sorely lacking throughout correctional health.²⁰¹ The consequences of this gap in expertise include underdiagnosis of geriatric syndromes, such as frailty and cognitive impairment, and inappropriate care administered to elders, such as the use of multiple medications known to cause mental status changes and falls in older people.²⁰² RB's geriatric practice in the New York City jail system has provided ample opportunity to diagnose and manage geriatric syndromes, including gait abnormalities, cognitive impairment, and weight loss. Pragmatic interventions to make people safer in the jail environment include writing orders that a patient at risk of falls cannot be shackled when taken to court, recognizing that a patient does not know how to perform "prison activities of daily living,"²⁰³ and ordering dietary supplementation for frail individuals who are losing weight.

Geriatricians and palliative care physicians are also experts in two areas relevant to people near the end of their lives: Advanced Care Planning, the decision-making one does around end of life care,²⁰⁴ and prognostication, the ability to estimate a patient's likely disease

¹⁹⁷ Erdley, *supra* note 196.

¹⁹⁸ Belluck, *supra* note 196.

¹⁹⁹ See Susan J. Loeb et al., *Inmates Care: Computer-Based Training for Geriatric and End-of-Life Care in Prisons*, 27 J. CORR. HEALTH CARE 132, 132 (2021); see also *Hospice Models*, NAT'L PRISON HOSPICE ASS'N, <https://perma.cc/Q635-5FQG> (last visited Nov. 23, 2021).

²⁰⁰ See Susan J. Loeb et al., *Who Wants to Die in Here? Perspectives of Prisoners with Chronic Conditions*, 16 J. HOSPICE PALLIATIVE NURSING 173, 173 (2014).

²⁰¹ Stephanie Grace Prost et al., *Prisons and COVID-19: A Desperate Call for Gerontological Expertise in Correctional Health Care*, 61 GERONTOLOGIST 3, 4 (2021).

²⁰² See Bedard et al., *supra* note 12, at 923-29.

²⁰³ See Brie A. Williams et al., *Being Old and Doing Time: Functional Impairment and Adverse Experiences of Geriatric Female Prisoners*, 54 J. AM. GERIATRICS SOC'Y 702, 703 (2006).

²⁰⁴ See Rachael Ekaireb et al., *"We Take Care of Patients, but We Don't Advocate for Them": Advance Care Planning in Prison or Jail*, 66 J. AM. GERIATRICS SOC'Y 2382, 2382 (2018).

trajectory and life expectancy.²⁰⁵ Given how little agency incarcerated people feel over their own futures and even their own bodies, it is imperative that they receive end of life care in accordance with their rights and wishes.²⁰⁶ Prognostication skill is particularly important not only to inform patient decision-making, but also to accurately identify patients who may be eligible for medical parole or compassionate release. Training primary correctional health providers on core geriatrics and palliative care skills is one scalable intervention to help ameliorate this situation. Recruiting geriatricians as consultants who can evaluate patients as needed or based on an age threshold is another.²⁰⁷ Similarly, correctional officers lack awareness regarding issues affecting aging detainees and can also benefit from training in this area.²⁰⁸ Training correctional personnel to better care for and protect older detainees is a harm reduction effort. Resources might be better invested in expanding release opportunities for older detainees.

5. Expanded Use of Clemency and Compassionate Release

Much has been written about expanding the use of clemency powers and compassionate release policies to release longtimers aging in place in prisons around the country.²⁰⁹ Despite the fact that these mechanisms exist to allow correctional systems to release people who have served significant years of time or people who are sick or near the end of their lives, they are consistently underused.²¹⁰ In brief, clemency and compassionate release policies both consistently fail in part because decision-making rests with entities aligned with prosecutorial interests that are disincentivized from taking even theoretical political risks.²¹¹

²⁰⁵ See Christina Chu et al., *Prognostication in Palliative Care*, 19 CLINICAL MED. 306, 306 (2019).

²⁰⁶ See Michele DiTomas et al., *Shackled at the End of Life: We Can Do Better*, 19 AM. J. BIOETHICS 61, 61 (2019); Murolo, *supra* note 9, at 12.

²⁰⁷ These proposals are based on our professional experiences.

²⁰⁸ Julie L. Masters et al., *Preparing Corrections Staff for the Future: Results of a 2-Day Training About Aging Inmates*, 22 J. CORR. HEALTH CARE 118, 118-19 (2016).

²⁰⁹ E.g., Rachel E. Barkow & Mark Oster, *We Know How to Fix the Clemency Process. So Why Don't We?* N.Y. TIMES (July 13, 2021), <https://perma.cc/PM44-4N9K>; Jean Lee, *New York's Elderly Prisoners Are Asking for a Second Chance*, BROOKLYN DAILY EAGLE (Feb. 14, 2020), <https://perma.cc/7FCT-ST53>; N.Y. Times Editorial Board, Opinion, *Governor Cuomo's Stingy Pardons*, N.Y. TIMES (Jan. 3, 2014), <https://perma.cc/SG56-Q323>; Christie Thompson, *Frail, Old and Dying, but Their Only Way Out of Prison Is a Coffin*, N.Y. TIMES (Mar. 7, 2018), <https://perma.cc/AG59-3QZ6>.

²¹⁰ OFF. OF THE INSPECTOR GEN., THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM i-iv (2013); MARY PRICE, FAMILIES AGAINST MANDATORY MINIMUMS, EVERYWHERE AND NOWHERE: COMPASSIONATE RELEASE IN THE STATES 12-13 (2018).

²¹¹ See, e.g., Murolo, *supra* note 9, at 6; Rachel Barkow & Mark Oster, *Where Reform Goes to Die*, INQUEST (July 26, 2021), <https://perma.cc/4LHK-7MQQ>.

Clemency power rests with governors and the president, who have historically deferred to the Department of Justice to manage the process of appeals.²¹² This results in few releases, as the Department of Justice tends to defer to its own prosecutors who tried the cases of the detainee in question.²¹³ Compassionate release decision-making usually rests with the same parole boards that are famous for their high rates of denials; these committees are biased to heavily weigh consideration of the crime involved when making decisions, even if that crime was committed decades ago and the person is now both an incarcerated individual in good standing and near the end of their life.²¹⁴ Rachel Barkow, JD, and others have written persuasively that to reform clemency, decision-making needs to be taken out of the hands of prosecutors and given to a bipartisan committee of relevant experts.²¹⁵ Brie Williams, MD-MPH, and others have made recommendations around how to expand the use of compassionate release, including loosening eligibility criteria, expediting decision-making timelines, and ending charge exclusions for who may be released.²¹⁶

Notably, the COVID-19 pandemic created both new urgency and new opportunity to bring these issues to the fore. Decarceration was widely acknowledged by advocates and public health experts alike to be the most critical mitigation effort that a correctional system could take in order to minimize both infection spread and cases of serious disease and death among its detainee and staff populations.²¹⁷ As a result, governors and judges let an unprecedented number of people, mostly older people who were particularly vulnerable to serious outcomes with COVID-19, out of prisons and jails using both clemency and compassionate release pathways to do so; even still, far too few elders were actually released and many died in custody from COVID-19 complications.²¹⁸ This experience provided proof of concept that these powers could be quickly and effectively employed to release dozens of people from a system at once, a lesson advocates should not forget.

²¹² See Barkow & Oster, *supra* note 209, at 18-19.

²¹³ *Id.*

²¹⁴ SILBER ET. AL., *supra* note 118, at 19-29.

²¹⁵ Barkow & Oster, *supra* note 209, at 19-22.

²¹⁶ See Stephanie Grace Prost & Brie Williams, *Strategies to Optimize the Use of Compassionate Release from US Prisons*, 110 AM. J. PUB. HEALTH S25 (2020).

²¹⁷ E.g., COMM. ON LAW & JUST., NAT'L ACAD. OF SCI., ENG'G, & MED., *DECARCERATING CORRECTIONAL FACILITIES DURING COVID-19: ADVANCING HEALTH, EQUITY, AND SAFETY* 1-2 (EMILY A. WANG ET AL. eds., 2020).

²¹⁸ *The Most Significant Criminal Justice Policy Changes from the Covid-19 Pandemic*, PRISON POL'Y INITIATIVE, <https://perma.cc/LP34-7UD8> (Nov. 19, 2021).

6. Parole Reform

Compassionate release and clemency policies allow someone to leave prison before completion of their minimum sentence.²¹⁹ A persistent problem, however, is that parole boards deny release from prison repeatedly even to people who have served many more years than their minimum sentence.²²⁰ Many states eliminated the possibility of parole for violent offenses altogether in the 1990s.²²¹ Experts have made several recommendations around parole board composition and parole board processes that might be implemented without legislative changes.²²² In addition, several states have either passed or are considering passing parole reform legislation.²²³ Bills like “Elder Parole,” which propose automatic parole hearings granted to people age 55 and over who had served at least 15 years of their sentence,²²⁴ and “Fair and Timely Parole,” which proposed revisions in the parole evaluation process to deemphasize the nature of a person’s crime and more heavily weigh their true public safety risk,²²⁵ did not pass in the New York State senate this year but garnered significant support.²²⁶ The “Less is More” Act did pass in the New York State legislature and was signed by New York’s governor on September 17, 2021.²²⁷ It restricts the use of incarceration for technical parole violations and proposes changes to the process by which those violations are adjudicated.²²⁸ To decarcerate both longtimers and chronic recidivists, both types of reform (improved chance of release and diminished chance of return) are necessary.

The other type of parole reform necessary to alleviate the burden of ongoing surveillance on elder parolees is a fundamental reassessment of

²¹⁹ PRICE, *supra* note 210, at 6.

²²⁰ Tiana Herring, *Parole Boards Approved Fewer Releases in 2020 than in 2019, Despite the Raging Pandemic*, PRISON POL’Y INITIATIVE (Feb. 3, 2021), <https://perma.cc/4AE5-YBRU>.

²²¹ PETERSILIA, *supra* note 4, at 65-68; see Murolo, *supra* note 9, at 1.

²²² See, e.g., Edward E. Rhine et al., *Improving Parole Release in America*, 28 FED. SENT’G REP. 96 (2015).

²²³ Nicole D. Porter, *Top Trends in State Criminal Justice Reform, 2020*, SENT’G PROJECT (Jan. 15, 2021), <https://perma.cc/L4SN-5F2M>; e.g., S.B. 2144, 2019-2020 Leg., Reg. Sess. (N.Y. 2019).

²²⁴ S.B. 2144, 2019 Leg., 2019-2020 Reg. Sess. (N.Y. 2019).

²²⁵ S.B. 497A, 2019 Leg., 2019-2020 Reg. Sess. (N.Y. 2019).

²²⁶ Darrell Camp, *Parole Changes in the Spotlight as New York’s Legislative Session Ends*, WSKG (June 8, 2021), <https://perma.cc/D3MZ-MMEE>; Rodney Holcombe, *New York Lawmakers Fail to Deliver on Parole Legislation to Address State’s Incarceration Crisis*, FWD.US (June 11, 2021), <https://perma.cc/RT26-968J>.

²²⁷ See S.B. 1144A, 2021 Leg., 2021-2022 Reg. Sess. (N.Y. 2021).

²²⁸ *Id.*

what restrictions and expectations can reasonably be applied to older individuals. This is true both for people on parole and probation and for those on sex offender registries. In addition to having had patients incur technical parole violations due to failure to report to their parole officers while hospitalized, RB has treated patients who were violated for failure to report who had cognitive impairments significant enough that they could not manage appointments or remember phone numbers. Others have been violated for visiting family members they hadn't seen in decades. One was violated for leaving the state because they stayed with a family member in Newark, New Jersey rather than living in congregate shelters in New York. It is neither humane nor justifiable to hold older adults to standards designed to force younger adults to demonstrate strict compliance with onerous regulations while they "get back on their feet."

7. Reentry Pathways and Community Supports

Justice-involved elders returning to the community from either jail or prison need material support, dedicated community programming, and supportive housing that has on-site capacity to meet their complex needs.²²⁹

In 2016, two-thirds of people over 50 released from New York State prisons were released directly to congregate shelters.²³⁰ AM's interviews with older people leaving prison have revealed a variety of experiences regarding housing stability and homelessness. One 58-year-old man reported that "there is nowhere to go" while another cited his "pride" for not wanting to ask for help. A 62-year-old woman reported adequate food security through family and the Women's Prison Association, but lacked housing stability and "went to the shelter at night." Still others reported staying in parole-sanctioned housing or staying in sober houses because they were "cheap."²³¹ One 84-year-old patient of RB's described the fear and weariness he felt about living amongst younger people in tight, tense quarters: "I don't feel like I can protect myself as well as I used to, it feels rougher than it used to for me." In New York City, the shelter system does not have the capacity to accommodate people who cannot be fully independent in their self-care, effectively barring many elders from even getting a bed.²³² People who

²²⁹ See THE OSBORNE ASS'N, *THE HIGH COSTS OF LOW RISK: THE CRISIS OF AMERICA'S AGING PRISON* (2018), <https://perma.cc/HKT4-S8ZU>.

²³⁰ *Id.* at 33.

²³¹ These reports are based on interviews AM conducted.

²³² Roshan Abraham, *What's It Like Growing Older in the NYC Homeless Shelter System?*, CITY LIMITS (June 5, 2019), <https://perma.cc/VMY2-JSLW>.

need daily medical care or nursing attention also cannot be accommodated.²³³

Supportive housing designed to accommodate returning elders would be accessible for people with varying levels of debility and disability—safe for people with sensory impairments, such as low vision, and appropriate for people who had little experience of a world dependent on technology and the internet (e.g., would not require use of cell phones in order to access a building or its services)—and would have resources on site to meet their needs. These might include medical care, substance use treatment programs, mental health care, social work, and legal navigators, and senior day programming. Crucially, these housing arrangements need to be designed to be long-term, not transitional. It is simply not realistic that justice-involved elders will be able to transition within months to independent living given the expected trajectory of their functional and medical decline.

Some elders returning home may require a level of care beyond what supportive housing can provide. Prisons and jails have extreme difficulty successfully referring individuals for nursing home admission, and traditional nursing homes often do not have the cultural milieu or services on site to meet the needs of justice-involved elders.²³⁴ Given the magnitude of the population in need of assisted-living or nursing home level services, it is reasonable to think that each state should have at least one dedicated care facility for such patients. This already exists in Connecticut, where 60 West Nursing Home, a privately owned facility, provides care for elderly justice-involved adults in partnership with the state corrections system.²³⁵

Older people returning home to any housing situation also need to enroll in benefits, set up doctor appointments, pick up medications, and meet parole or probation requirements.²³⁶ Dedicated reentry programs can support justice-involved elders through this difficult transition. A few such programs already exist and might serve as models that can be scaled around the country.²³⁷

²³³ *Id.*

²³⁴ See, e.g., VA. DEP'T OF CORR. & VA. PAROLE BD., "A BALANCED APPROACH:" ASSISTED LIVING FACILITIES FOR GERIATRIC INMATES 9-10 (2008); see generally Shira Shavit et al., *Transitions Clinic Network: Challenges and Lessons in Primary Care for People Released from Prison*, 36 HEALTH AFF. 1006 (2017).

²³⁵ MASCHI & MORGEN, *supra* note 7, at 223.

²³⁶ See *Services That Build Lives*, FORTUNE SOC'Y, <https://perma.cc/M5EH-AE65> (last visited Dec. 5, 2021); THE TAKEAWAY, *Frozen in Time: What Older People Face After Prison*, WNYC STUDIOS (Oct. 2, 2018), <https://perma.cc/APM4-YAX3>.

²³⁷ See, e.g., *Elder Reentry*, OSBORNE ASSOCIATION, <https://perma.cc/9JUD-QGK8> (last visited Nov. 23, 2021); Galvin, *supra* note 11; *Senior Ex-Offender Program*, BAYVIEW SENIOR SERVICES, <https://perma.cc/5MYB-HZTG> (last visited Nov. 23, 2021).

CONCLUSION

The proposals we have included here are all aimed at better understanding the aging crisis in the justice system and improving the lives of justice-involved elders. We have not discussed the implications of the potential existence of a “Most Incarcerated Generation” for the criminal justice system writ large. If there is emerging consensus that mass incarceration is racist, violent, overly punitive, and traumatizing;²³⁸ that it leads to premature morbidity and mortality;²³⁹ that it robs communities of economic advancement and families of caregivers, parents and children;²⁴⁰ that it is astronomically expensive with very little return on investment;²⁴¹ we must now add to that list of consequences the effective condemnation of a generation of people, disproportionately Black men, to a lifetime spent swirling through the criminal legal system as if caught in a funnel shunting them towards prison. The majority of justice-involved seniors have effectively spent very little of their adult lives in any state that could be approximately called “free.” The “Most Incarcerated Generation’s” existence is a testament to mass incarceration’s failure to rehabilitate and to the fact that the harms of excess punishment are felt by individuals and borne by society for decades.

We have argued in this article that the aging crisis in the justice system and its implications for both the individuals involved and the systems they interact with is an urgent one. “Urgency” here is not only a reflection of seriousness; but also the fact is that the generation we have described is old, sick, and burdened with risk for premature mortality. In addition to reckoning with what their experience has been, we owe them swift and comprehensive action to honor their dignity and protect their wellbeing in the final decades of their lives.

²³⁸ See, e.g., ALEXANDER, *supra* note 43; MASCHI & MORGEN, *supra* note 7, at 74-97; TRAVIS, *supra* note 79, at 3-38.

²³⁹ See Michael Massoglia & William Alex Pridemore, *Incarceration and Health*, 41 ANN. REV. OF SOC. 291, 295-96 (2015); *Incarceration Is Strongly Linked with Premature Death in U.S.*, COLUMBIA UNIV. MAILMAN SCH. OF PUB. HEALTH (Feb. 23, 2021), <https://perma.cc/55RA-R9PG>; see also Williams et al., *supra* note 203, at 702, 706.

²⁴⁰ MARTIZA PEREZ ET AL., CTR. FOR AM. PROGRESS, USING MARIJUANA REVENUE TO CREATE JOBS 2-3 (2019), <https://perma.cc/2HVJ-ZV7H>; Alana Semuels, *What Incarceration Costs American Families*, ATLANTIC (Sept. 15, 2015), <https://perma.cc/4Q8B-JE7F>.

²⁴¹ See Carrie Pettus-Davis & Matthew W. Epperson, *From Mass Incarceration to Smart Decarceration* 3, 6 (Am. Acad. of Soc. Work & Soc. Welfare, Working Paper No. 4, 2014).