

AT AMERICA'S EXPENSE:

# The Mass Incarceration of the Elderly



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June 2012

*cited in Colwell v. Bannister, No. 12-15844 archived on September 12, 2014*



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**A prison nurse helps Charles Webb, 74, into bed.**

**Webb has been in prison for 17 years.**





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**Albert Carroll, 74, is admitted to the hospital for care  
beyond what the prison could provide.**



**An elderly prisoner spends the final stages of his life in prison hospice care. The man died later that afternoon and was buried in the prison cemetery.**

# Introduction

*“[Y]ou actually create victims by not letting [elderly prisoners] go and us[ing] your resources on rehabilitation for the ones that are going to get out . . . . When I came here and saw the elderly population, I said, ‘God, well, why are they here? Our name is Corrections to correct deviant behavior [but] there’s nothing to correct in these guys; they’re harmless . . . .’”*

—Burl Cain, Warden of Louisiana State Penitentiary at Angola<sup>1</sup>

The United States is the largest incarcerator in the world, with 2.3 million people behind bars. Prisoners across the country are also getting older and experiencing all the same ailments that afflict those of the same age who are not behind bars. Our extreme sentencing policies and a growing number of life sentences have effectively turned many of our correctional facilities into veritable nursing homes—and taxpayers are paying for it.

From 1980 to 2010, the United States prison population grew over 11 times faster than the general population. During this time, the general population increased by 36%, while the state and federal prison population increased by over 400%. The number of elderly people in our prisons is growing even faster. The graying prison population has become a national epidemic afflicting states around the country—from California to Missouri to Florida—further burdening already strained state budgets. According to the National Institute of Corrections, prisoners age 50 and older are considered “elderly” or “aging” due to unhealthy conditions prior to and during incarceration. This report uses that definition and finds that there are 246,600 elderly prisoners behind bars across the country. To the extent possible, this report provides data for prisoners age 50 and older; in a few cases when data for this age group is not readily available, this report provides data on the next closest age range.

In 1981, there were 8,853 state and federal prisoners age 55 and older. Today, that number stands at 124,900, and experts project that by 2030 this number will be over 400,000, amounting to over one-third of prisoners in the United States. In other words, the elderly prison population is expected to increase by 4,400% over this fifty-year time span. This astronomical projection does not even include prisoners ages 50-54, for which data over time is harder to access.



The United States keeps elderly men and women locked up despite an abundance of evidence demonstrating that recidivism drops dramatically with age. For example, in New York, only 7% of prisoners released from prison at ages 50-64 returned to prison for new convictions within three years. That number drops to 4% for prisoners age 65 and older. In contrast, this number is 16% for prisoners released at age 49 and younger. Further, most aging prisoners are not incarcerated for murder, but are in prison for low-level crimes. For example, in Texas, 65% of prisoners age 50 and older are incarcerated for nonviolent drug, property, and other nonviolent crimes.

This increasing warehousing of aging prisoners for low-level crimes and longer sentences is a nefarious outgrowth of the “tough on crime” and “war on drugs” policies of the 1980s and 1990s. Given the nation’s current overincarceration epidemic and persistent economic crisis, lawmakers should consider implementing parole reforms to release those elderly prisoners who no longer pose sufficient safety threats to justify their continued incarceration.

State and federal governments spend approximately \$77 billion annually to run our penal system. Over the last 25 years, state corrections spending grew by 674%, substantially outpacing the growth of other government spending, and becoming the fourth-largest category of state spending. These corrections costs are mainly spent on incarceration, and incarcerating aging prisoners costs far more than younger ones. Specifically, this report finds that it costs \$34,135 per year to house an average prisoner, but it costs \$68,270 per year to house a prisoner age 50 and older. To put that number into context, the average American household makes about \$40,000 a year in income.

States can implement mechanisms to determine which aging prisoners pose little safety risk and can be released. Releasing many of these individuals will ease the burden on taxpayers and reunite prisoners with their families to care for them. This report conducts a fiscal impact analysis detailing the cost savings to states in releasing the average aging prisoner. While some of these prisoners may turn to the government for their healthcare or other needs, government expenditures on released aging prisoners will be far cheaper than the costs of incarcerating them. Based on statistical analyses of available data, this report estimates that releasing an aging prisoner will save states, on average, \$66,294 per year per prisoner, including healthcare, other public benefits, parole, and any housing costs or tax revenue. Even on the low end, states will save at least \$28,362 per year per released aging prisoner.

The current fiscal crisis has forced many states to rethink their incarceration policies as they realize that their massive spending on incarceration is unsustainable and unnecessary to protect public safety. Public opinion is also starting to shift. A recent survey by the Pew Center on the States found that 73% of Americans who have not experienced violent crime think that too many people are behind bars; they are joined in that opinion by 70% of violent crime victims.

As detailed in the ACLU's 2011 *Smart Reform is Possible* report, several states have enacted cost-saving, effective reforms to respond to crimes, rather than using incarceration as a one-size-fits-all solution. Some states, like Louisiana, have enacted laws that would allow for the release of many aging prisoners. This type of conditional release program gives prisoners of a certain age the right to request a parole hearing. At the hearing, the parole board can use a risk assessment instrument to decide whether the prisoner can be safely released. Such laws allow states to safely depopulate their prisons of the elderly and save on incarceration costs, while simultaneously not forcing aging prisoners into homelessness by ensuring prisoners must elect to apply for parole.

This report makes a number of data-driven findings and issues recommendations for reform. Part I provides detailed statistics on the demographics of our aging prison population and the lower safety risks associated with this population. It then provides a fiscal impact analysis demonstrating the cost savings states can realize by depopulating prisons of those elderly Americans who pose little threat to public safety. Finally, Part I closes with a discussion of the sentencing and release policies that have caused so many people to grow old behind bars.

Part II provides recommendations to reduce our aging prisoner population. First, it provides a series of short-term recommendations, such as age-based parole programs similar to the law enacted in Louisiana as an immediate release valve. Part II then lays out systemic recommendations for our criminal justice system that would prevent the creation of so many aging prisoners at the outset, like enacting more proportionate sentencing laws that really do “fit the crime.”

With this report, the ACLU hopes to bring much-needed attention to the national epidemic of aging prisoners and suggests practical and feasible reforms for policymakers across the country.



**Shirley Goode, 73, sits outside of the prison nursing care unit.**

**“This place is going to kill me. I’ll be lucky if I make it out of here alive,” Goode says day after day.**

# Findings & Recommendations

This section details this report's findings and recommendations based on the data and graphs in the body of the report:

## Findings

### **Demographics of a Rapidly Graying Prison Population**

- There is an overwhelming consensus among correctional experts, criminologists, and the National Institute of Corrections that 50 years of age is the appropriate point marking when a prisoner becomes “aging” or “elderly.” The lack of appropriate healthcare and access to healthy living prior to incarceration, added to the heavy stresses of life behind bars, accelerates the aging process of prisoners so that they are actually physically older than average individuals. This report therefore uses age 50 and older to define the population of aging prisoners and provides data on this age group. In a few cases, when data for this age group is not accessible, this report provides data on the next closest age range.
- Approximately 16% of the national prison population is age 50 and older. There are several jurisdictions with far higher percentages of aging prisoners including West Virginia (20%), New Hampshire (20%), Massachusetts (19%), Florida (18%), and Texas (18%). Approximately 13.5% of federal prisoners are age 50 and older.
- There are 246,600 aging prisoners nationwide. The four jurisdictions with the highest actual number of prisoners age 50 and older are California (27,680), Texas (27,455), Florida (17,980), and the federal prison system (25,160). These four jurisdictions comprise 43% of the nation's aging prisoners.
- The population of prisoners age 55 and older is expected to increase by 4,400% from 1981 to 2030. In 1981, there were only 8,853 prisoners age 55 and older. Corrections experts project that, by 2030, there will be over 400,000 such prisoners, amounting to one-third of the prison population. This astronomical projection does not even include those prisoners ages 50-54 and is therefore a lower projection than the actual future elderly prison population.
- This high growth rate is found in individual jurisdictions as well. The elderly prisoner population increased, on average, by 145% between 1997 and 2007 in 16 southern states—a much higher growth rate than the total prison population growth rate in those states. For example, in Florida, the number of elderly prisoners grew 130%



compared to 36% growth in the total prison population. Texas had a 110% growth in the number of elderly prisoners and 15% growth in the total prison population; those percentages for Maryland are 124% and 2%, respectively.

- As is the case with the overall American prison population, America's elderly prisoners are overwhelmingly male. Women make up a mere 6% of aging prisoners.
- White prisoners comprise the largest segment of aging prisoners (42%). However, Black (33%) and Hispanic (15%) aging prisoners are overrepresented, meaning they make up a far higher percentage of the aging prisoner population than they do the general U.S. population.

## Lower Public Safety Risks of Aging Prisoners

- The elderly prison population is increasingly comprised of individuals sentenced to prison for long periods of time (20 years or more) and increasingly remain in prison into old age. In 1979, only 2% of aging prisoners fell into this category nationwide. Data collected from jurisdictions shows that this percentage is far higher now. For example, the percentage of aging prisoners falling into this category is now 15% in Mississippi and 19% in Ohio. Data collected from Florida, New Hampshire, Texas, and Utah show similar shifts in prison populations. Many individuals who would have been sentenced to shorter periods of incarceration for repeat crimes before 1979 are now caught in the net of later-enacted habitual offender laws and given punishments of 20 years or more.  
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- The majority of aging prisoners are not incarcerated for murder, but are in prison for low-level crimes. In fact, many aging prisoners are incarcerated for nonviolent crimes. For example, in Texas, 65% of aging prisoners are in prison for nonviolent drug crimes, property crimes, and other nonviolent crimes. In North Carolina, 26% of prisoners age 50 and older are in prison under habitual offender laws or for drug crimes. Another 14% are in prison for fraud, larceny, burglary, breaking and entering, and traffic and public order violations.
- The percentage of aging prisoners who were first imprisoned after they turned 50 is declining. In 1979, 41% of aging prisoners fit into this category nationwide. In Ohio, this percentage now stands at 25%. Likewise, in Florida, Texas, and New Hampshire, this percentage dropped to 4-8% in 2012.
- Research has conclusively shown that by age 50 most people have significantly outlived the years in which they are most likely to commit crimes. For example, arrest rates drop to just over 2% at age 50 and are almost 0% at age 65.

- There is also overwhelming evidence that prisoners age 50 and older are far less likely to return to prison for new crimes than their younger cohorts. For example, only 7% of New York state prisoners released at ages 50-64 returned to prison for new convictions; this number was 4% for prisoners released at age 65 and older. In Virginia, only 1.3% of prisoners age 55 and older returned to prison for a new conviction.
- The statistics taken together strongly suggest that the increasing incarceration of aging prisoners is not due to any “elderly crime wave” but rather due to younger prisoners who are sentenced to longer terms in prison, often for not so serious crimes.

## The High Costs of Incarcerating the Elderly

- This report undertakes a state fiscal impact analysis of releasing the average aging prisoner nationwide. This analysis finds that it costs \$34,135 per year to house an average prisoner, but it costs \$68,270 per year to house a prisoner age 50 and older. To put this number in context, the average American household makes about \$40,000 a year in income.
- This fiscal analysis shows that states will save, on average, \$66,294 per year per released aging prisoner. Even on the low end, states will save at least \$28,362 per year. These numbers account for increased parole, housing, public benefits (including healthcare) and emergency room costs to the state; they also consider any increased tax revenue.
- The vast majority of released prisoners—likely 63% to 88%—of any age nationwide live with a friend or family member. Due to their advanced age, aging prisoners may be more likely to live with family members upon release and will not impose additional housing assistance cost burdens on the government.
- Generally speaking, released prisoners of any age face an increased likelihood of becoming homeless compared to the general population. To avoid releasing aging prisoners into homelessness, this report includes in its Recommendations a strictly voluntary conditional release program for aging prisoners in which prisoners have the right to request a parole board hearing.

## How We Ended Up Here

- Beginning in the mid-1970s, states and the federal government increasingly enacted mandatory minimum provisions, “three-strikes-and-you’re-out” laws, and restrictions on parole. These “tough on crime” laws fueled the 377% increase in the number of Americans in prison from 319,598 in 1980 to over 1.5 million by 2009.
- Not only did longer sentences and limited parole cause our prison population to boom, these policies created more elderly prisoners. As demonstrated in the Lower Public Safety Risks of Aging Prisoners section, prisoners age 50 and above are much more likely to have served at least 20 years behind bars today than were aging prisoners in the 1970s; this growth is a result of younger people receiving significantly longer prison sentences with limited or no parole options and growing old behind bars.
- This trend is confirmed by data showing sentences have in fact gotten longer. From 1986 to 1995—the apex of the tough on crime period—the number of people sentenced to 20 years or more in prison more than tripled. From 1984 to 2002, the number of state and federal prisoners serving life sentences (with or without parole) more than quadrupled.

## Recommendations

**Short-Term Reforms** To begin addressing the unnecessary overincarceration of aging prisoners, states should implement changes to their parole systems. States should:

- **Grant Conditional Release for Aging Prisoners Who Pose Little Safety Risk.** Conditional release programs grant individuals age 50 and older the right to request a hearing before a parole board or a comparable agency. They often require that the prisoner serve a minimum number of years (for example, ten) in prison to become eligible. A parole board or comparable agency should use a peer-reviewed, evidence-based risk assessment instrument to ascertain if a prisoner poses a substantial risk to public safety. If the board finds by a preponderance of the evidence that a prisoner does not pose a substantial risk to public safety or that supervision conditions can reduce substantial risks, the parole board should grant release. The board should tailor release conditions to the prisoner’s risk assessment profile and provide other reintegration services, including information on public benefits available upon release.
- **Utilize & Expand Medical Parole.** Most medical parole programs condition eligibility on extremely narrow and restrictive criteria, such as requiring prisoners to be terminally ill or physically incapacitated. Such a high bar to eligibility ensures that

the vast majority of aging prisoners, who pose little threat to public safety, will remain needlessly behind bars. Many states also have such laws on the books but do not actually use them to release the medically infirm. States should fully utilize these programs and expand these laws to allow for the release of patients with medical conditions who pose limited safety risks.

- **Increase Accountability & Transparency of Parole Boards.** In order to ensure effectiveness of the short-term reforms described above, states need to increase accountability and transparency of parole board decisions. Quite often, states have age-based or medical parole programs on the books, but parole boards rarely utilize them. States should issue parole guidelines, require parole boards to explain their decisions in writing, open parole hearings up to the public, and possibly create an appeals process or right to defense counsel during hearings. In this way, states can encourage parole boards to use age-based and medical release programs to achieve significant savings in their budgets.
- **Reauthorize & Expand Federal Aging Prisoner Release.** In addition to states taking up the above reforms, Congress should reauthorize and expand the provision of the Second Chance Act that authorizes a federal aging prisoner release program.

**Systemic Reform: Rethink Our Disproportionate Sentencing Paradigm.** To prevent our prisons from continuing to fill up unnecessarily with aging prisoners who pose little or no risk to public safety, jurisdictions must take a holistic approach to reforming their criminal justice systems. The time is ripe for lawmakers to rethink this country's harsh and disproportionate sentencing regime. The "lock 'em up and throw away the key" mentality unnecessarily incarcerates millions of people for extraordinarily long periods of time—well into old age, and sometimes until they die. States and the federal government should reintroduce proportionality into sentences for crimes and should:

- **Repeal Mandatory Minimum Laws.** Federal and state governments have implemented strict, inflexible, and often irrational mandatory minimums laws that require the automatic imposition of brutally long and disproportionate prison sentences and prevent individualized sentencing. Mandatory minimum shift sentencing power to prosecutors, whose charging decisions dictate sentencing. These laws also prevent judges from tailoring the punishment to the individual circumstances of the case, the defendant, and the seriousness of the offense. Lawmakers should repeal mandatory minimums. Instead, they should use advisory sentencing guidelines and a prosecutor or defendant's right to appeal a sentencing decision, as a safeguard against wildly divergent sentencing outcomes.
- **Repeal Habitual Offender Laws.** Many states and the federal government have habitual offender laws that mandate long sentences, often life in prison, for individuals convicted of selected crimes. States enacted these laws in reaction to individual cases, but ended up casting a very wide net. In many states, low-level,



nonviolent offenses constitute strikes. Like mandatory minimum laws, habitual offender laws overcrowd our prisons with individuals who have committed multiple low-level offenses (like drug possession), pose little threat to public safety, and unnecessarily remain in prison into old age. States should eliminate these laws, especially those that include low-level offenses as strikes.

- **Repeal Truth-in-Sentencing Laws.** Many states have “truth-in-sentencing” laws, which require individuals to serve at least 85% of their prison terms before becoming eligible for parole or otherwise cut back parole. Recognizing that sentencing laws are already too harsh, states should expand eligibility for parole, particularly for people convicted of nonviolent offenses. This reform will allow individuals to leave prison when society is no longer served by their continued incarceration.

*cited in Colwell v. Bannister, No. 12-15844 archived on September 12, 2014*

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**A prison nurse helps Charles Webb, 74, shave after a shower.**

**Webb has been prison for 17 years.**

# Acknowledgments & Methodology

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For more information on the ACLU's Safe Communities, Fair Sentences Initiative to End Overincarceration, please visit <http://www.aclu.org/combating-mass-incarceration>.

This report is the product of seventeen months of in-depth research of available social science data produced by state corrections departments, the Department of Justice, academics, criminologists, and discussions with aging prisoner experts. It is also based on data obtained directly from state corrections departments that has not been previously published. The authors analyzed that data, and conducted statistical and mathematical analyses of that data. The authors also researched historical criminal law trends, current sentencing and parole laws, and relevant pending legislation to devise the Recommendations section.

As detailed in Section II.C, this report provides the results of the estimated fiscal impact on a state budget of the average released aging prisoner ("aging parolee"). This Methodology section describes in further detail how that analysis was conducted. The expected annual fiscal impact per released aging prisoner included an analysis of the following five expected fiscal impacts: annual saved incarceration costs per aging prisoner; annual parole costs per aging parolee; annual state public benefit costs per aging parolee; annual state income tax revenue generated per aging parolee; and annual state emergency room visit costs per aging parolee.



The calculation of these variables drew on data from a variety of different sources explained below. The analysis provided a low, middle, and high estimate for each variable. The low estimate assumed that aging parolees mirror the average aging American or average parolee. The high estimate made pessimistic assumptions about the income level, employment status, and public benefits needs of aging parolees. The middle estimate was somewhere in between and is the most accurate.

*Incarceration Costs:* The average annual incarceration cost of prisoners age 50 and older and the parole costs incurred by the state upon release of such prisoners were calculated based on research conducted by the Vera Institute of Justice and the Pew Center on the States as cited in Section I.C. Based on these reports and an independent examination of state corrections budgets, the estimated annual incarceration cost of a state prisoner of average age is \$34,135. A meta-analysis of existing studies suggested that it costs twice as much to incarcerate prisoners age 50 and older as opposed to average aged prisoners. Thus, the report calculated the middle estimated annual incarceration cost per aging prisoner as \$68,270.

*Parole Costs:* A similar meta-analysis of existing literature suggested that the average daily cost of parole ranges from between \$3.50 to \$13.50 per day. The middle estimate of parole costs assumed that the cost of monitoring the average aging parolee is the same as other parolees. This was a conservative assumption for reasons detailed in Section I.C.

*Public Benefits Costs:* The data for public benefits received and state income tax revenue generated were taken from the U.S. Census Bureau's Current Population Survey (CPS) from March 2011, which is the most recent available. The CPS is the primary source of data on unemployment rates, poverty, and income in the United States. It surveyed approximately 57,000 households, representing 112,000 individuals, in that month. The CPS provides comprehensive data on various demographic and socioeconomic characteristics, including age, sex, race, educational attainment, household composition, and employment status. The U.S. Census Bureau assigned weights to each respondent in the CPS to allow the results to be converted into a comprehensive statistical portrait of a subpopulation – in this case, of respondents age 50 and older. This report based its analysis on that subset of data.

The state public benefits specifically considered in the “public benefits variable” in the fiscal analysis were: Medicaid; Supplemental Security Income (SSI); food stamps; cash assistance; and energy assistance. There were two corrections made to this data. First, it is well-understood that respondents underreport their receipt of government benefits in the CPS. This report increased the amount of benefits to correct for this by using a multiplier constructed on a micro-simulation model developed by the Urban Institute for this purpose.<sup>2</sup> Second, these public benefit programs are jointly funded by state and federal governments. The analysis discounted the benefit payment as reported in the CPS by the ratio of aggregate state spending to aggregate total spending for each benefit. For example, aggregate state spending on SSI benefits is approximately 1/8 of total aggregate spending on SSI. Thus,

individual SSI benefits were multiplied by 1/8 to represent the proportion funded by state tax dollars.

The public benefits variable was therefore defined as a suitably-weighted and corrected sum of Medicaid, SSI, food stamps, public cash assistance, and energy assistance benefits received. That amount was then regressed on a set of demographic and socioeconomic variables, specifically, sex, race, educational attainment, household composition, and employment status. This linear regression for survey data was restricted to the subpopulation of the CPS sample population age 50 and older.

Unfortunately, the CPS did not include a validated question about past jail or prison incarceration. To correct for this, available data about prisoners and current and past released prisoners was used to infer the demographic and socioeconomic characteristics of released aging prisoners and to construct a “representative aging parolee.” The demographic and socioeconomic covariates corresponding to the representative aging parolee were then plugged into the regression equation above to yield a point estimate of state public benefits received. To create the low, middle, and high estimates, different assumptions were made about the likely characteristics of the representative released prisoner. For instance, the high estimate assumed that 75% of aging parolees will not have a high school diploma upon release and that 100% of aging parolees will be unemployed due to illness (65%) or lack of work (35%).

*Income Tax Revenue:* The report employed an identical statistical procedure (including a multiplier to correct for underreporting) to estimate expected state income tax revenue per released aging prisoner. The only difference here is that the analysis used state income tax liability as reported in the CPS for the basis of the calculation.

*Emergency Room Visits:* The report employs a similar—though not identical—statistical procedure to estimate the expected total costs of emergency room (ER) visits to the state per aging parolee. Data on ER visits was taken from the 2009 Emergency Room Visits File drawn from the 2009 Medical Expenditure Panel Survey (MEPS) Household Component, which is the most recent MEPS survey. The MEPS provides information on number of ER visits and the mean expense incurred per visit. The MEPS is a widely used nationally representative survey of healthcare use and expenditures. It interviewed approximately 13,875 families, representing 34,920 individuals, in 2009. The MEPS also includes the same set of demographic and socioeconomic variables included in the CPS, and additionally includes health insurance status (specifically whether an individual was uninsured or received Medicaid benefits in the past year).

To estimate the annual state cost of ER visits per released aging prisoner, the analysis proceeded in three steps. First, the number of ER visits was regressed on the same set of demographic and socioeconomic variables defining the representative aging parolee; two separate regression equations were estimated. The first regression was restricted to the

subpopulation of the survey age 50 and older who were uninsured. The second regression was restricted to the subpopulation age 50 and older who received Medicaid benefits. Using these two regressions, the expected number of ER visits was expressed as a function of demographic and socioeconomic covariates.

Second, the total expected ER cost per aging parolee was calculated as the mean dollar amount per visit reported in the MEPS multiplied by the estimated number of ER visits as derived above. Based on a meta-analysis of existing studies, this report also added the following assumptions to this analysis: 25% of the cost of an ER visit is paid for with state tax dollars when the patient is uninsured; and 10% of the cost of an ER visit is paid for with state tax dollars when the patient is receiving Medicaid benefits. Discounting total expected ER costs per aging parolee by these percentages yielded the expected fiscal impact of an ER visit on state budgets for uninsured and Medicaid recipients, respectively.

Finally, the analysis provided a low, middle, and high estimate for the ER variable. The high estimate assumed that 50% of released prisoners are uninsured and that 50% of released aging prisoners qualify for Medicaid benefits within a year of release. In other words, the high estimate assumed that 0% of aging parolees will rely exclusively on private health insurance. By contrast, the low estimate assumed that 12% of aging parolees were uninsured and that 12% of aging parolees qualify for Medicaid benefits—these are the actual percentages in the MEPS subpopulation of individuals age 50 and older. The middle estimate assumed that 35% of aging parolees were uninsured and 35% were on Medicaid.

This report calculated the middle estimate of the annual state fiscal impact per released aging prisoner as follows: the sum of the middle estimate of the saved annual incarceration cost per aging prisoner and the middle estimate of the annual state income tax revenue per aging parolee *minus* the sum of the middle estimate of the annual parole cost per aging parolee, the middle estimate of the annual state public benefits per aging parolee, and the middle estimate of the annual state emergency room visit cost per aging parolee. The low and high fiscal impact estimates were calculated in the same way.

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**Charlie Coffey, 65, is fed his lunch.**

**He has been in prison for over 30 years.**

# I. The Aging Prison Population & Its Consequences

## A. Demographics of a Rapidly Graying Prison Population

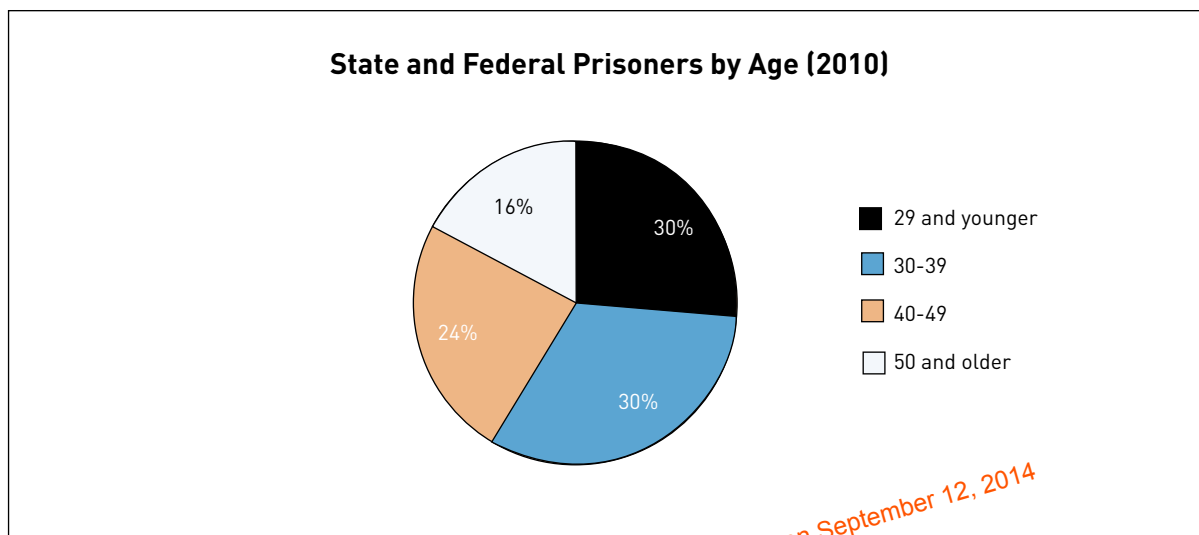
For the past two decades, there has been an overwhelming consensus among correctional experts and criminologists that 50 years of age is the appropriate point marking when a prisoner becomes “aging” or “elderly.” This is also the cutoff used by the National Institute of Corrections (NIC).<sup>3</sup> There are several scientific reasons for this designation. Mainly, prisoners age much more rapidly than the population at large. According to the NIC, a prisoner age 50 and older is likely to have a “physiological age” that is 10 to 15 years greater than his or her chronological age.<sup>4</sup> The stresses of life behind bars (including separation from family and friends, physical confinement, poor healthcare, and the threat of victimization) plus the lack of access to healthcare and healthy lifestyles before imprisonment exacerbate the risk of physical and mental illness and accelerate the aging process. In accordance with this social science data, this report uses age 50 and older to define the aging or elderly prison population.

### 1. Prison Population by Age

Our prison population is increasingly aging. In 2010, of the 1.5 million individuals in state and federal prisons in this country, 246,600 were age 50 and older.<sup>5</sup> This number represents individuals held by state and federal authorities as prisoners, and does not include individuals under the control of county jails. Notably, 86% of prisoners are held in state custody, as opposed to federal custody;<sup>6</sup> therefore much of the data in this report examines state prison populations.

As **Figure 1** below shows, individuals age 50 and older represent 16% of the total state and federal prison population.

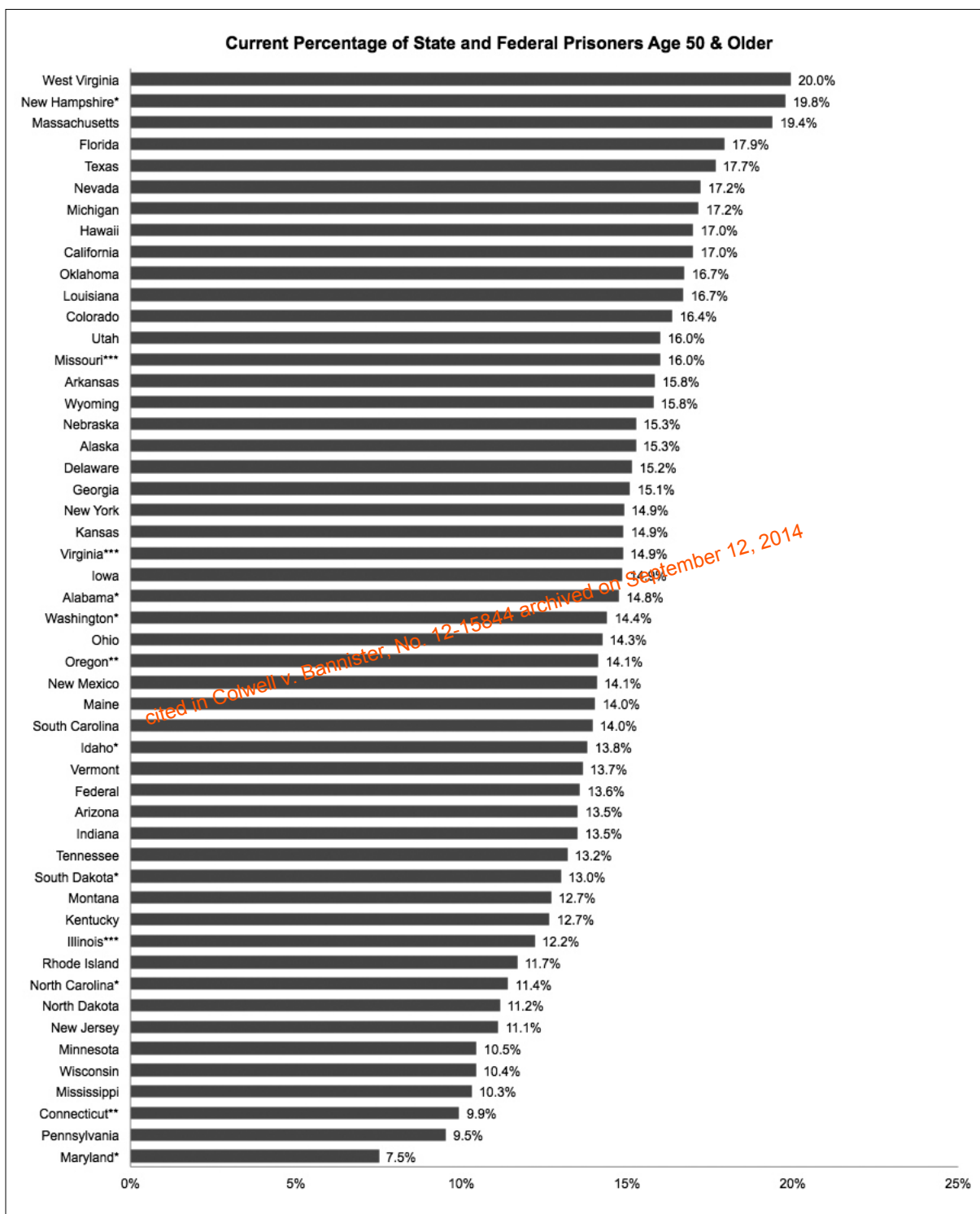
**Figure 1**



Source: Guerino et al., *Prisoners in 2010* (2011).<sup>7</sup>

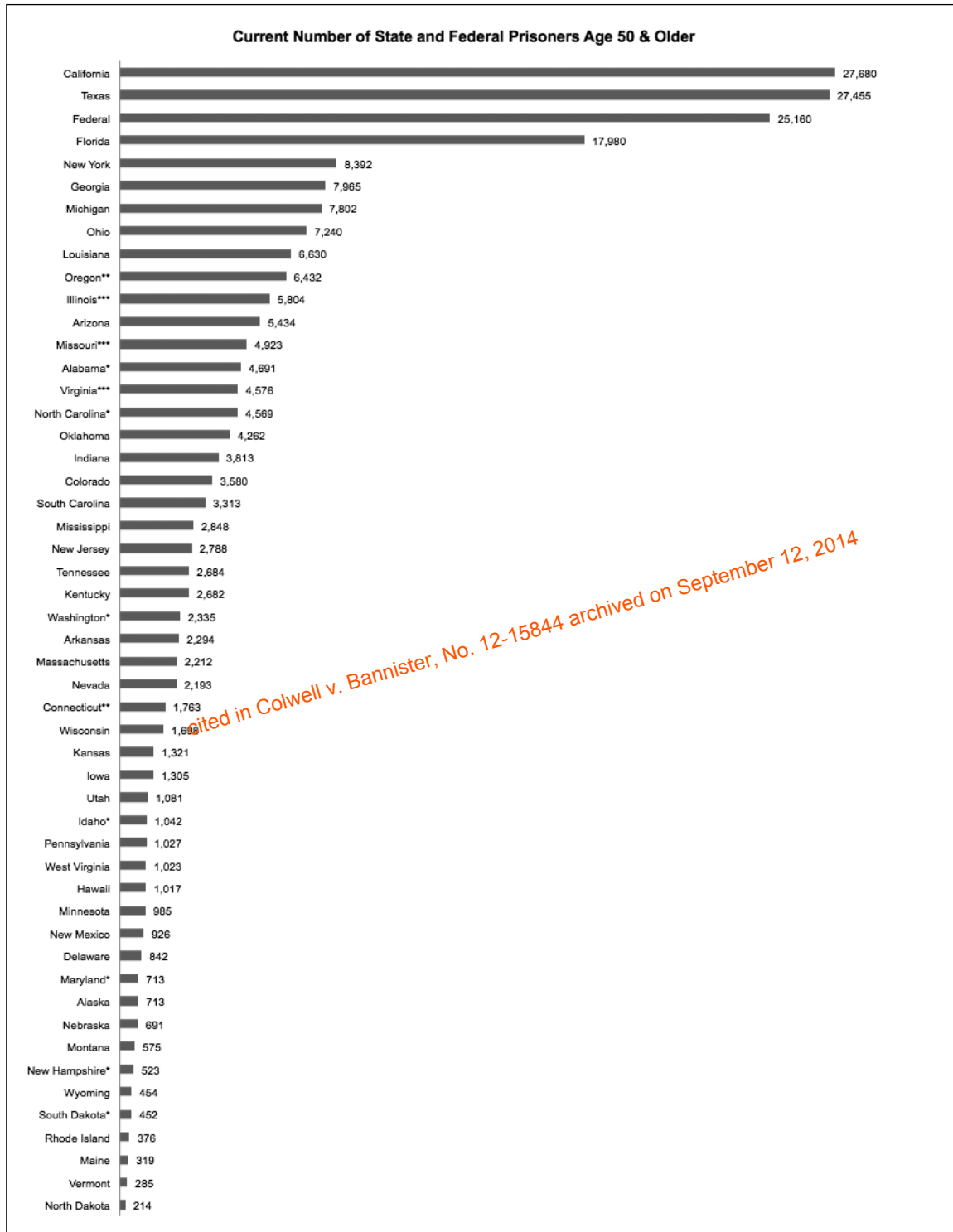
Based on available current data from all state departments of corrections and the federal Bureau of Justice Statistics (BJS), **Figures 2A & 2B** on the next two pages compare percentages and raw numbers of prisoners age 50 and older by jurisdiction. Most jurisdictions hover around the national average of 16%. There are several states, however, with far higher percentages of aging prisoners including West Virginia (20%), New Hampshire (20%), Massachusetts (19%), Florida (18%), and Texas (18%). Approximately 13.5% of federal prisoners are age 50 and older.

Figure 2A



Source: Data received directly from jurisdictions (most recent available).<sup>8</sup>

**Figure 2B**

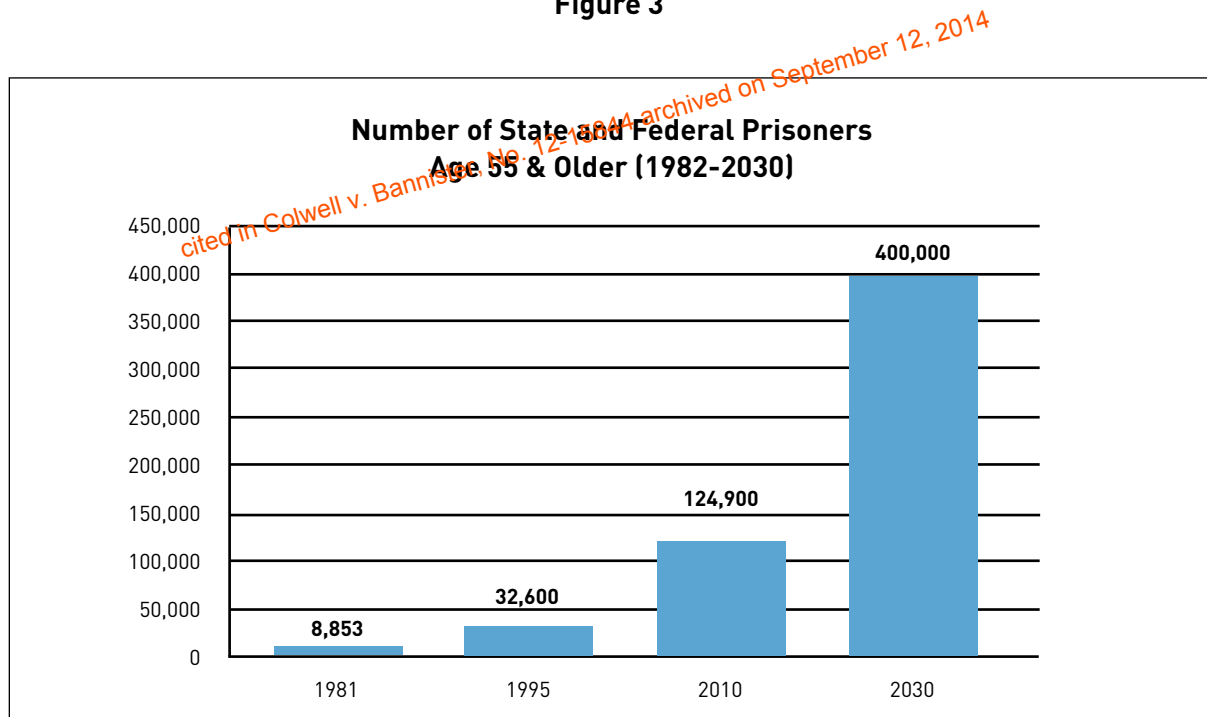


Source: Data received directly from jurisdictions (most recent available).<sup>9</sup>

The four jurisdictions with the highest actual number of prisoners age 50 and older are California (27,680), Texas (27,455), Florida (17,980), and the federal prison system (25,160). This comparison highlights how heavily skewed the distribution of aging prisoners nationwide is toward a small number of jurisdictions. In particular, these four jurisdictions incarcerate 43% of the overall population of aging prisoners in the United States.

Elderly prisoners did not always comprise such a substantial proportion of the nation's incarcerated population. The total number of aging prisoners in state and federal prisons has grown at an extraordinary rate, as shown in **Figure 3** below. Unfortunately, much of this data for past and future years is readily available only for prisoners age 55 and older. Specifically, in 1981, there were 8,853 state and federal prisoners age 55 and older.<sup>10</sup> By 1995, that number had increased to 32,600. And, in 2010, that number stood at 124,900. Corrections expert James Austin and the Urban Institute project that by 2030, one-third of all prisoners in the United States will be age 55 and older, amounting to over 400,000 prisoners. In other words, from 1981 to 2030 the elderly prison population is expected to increase by 4,400%. This astronomical number does not even include prisoners ages 50-54.

**Figure 3**

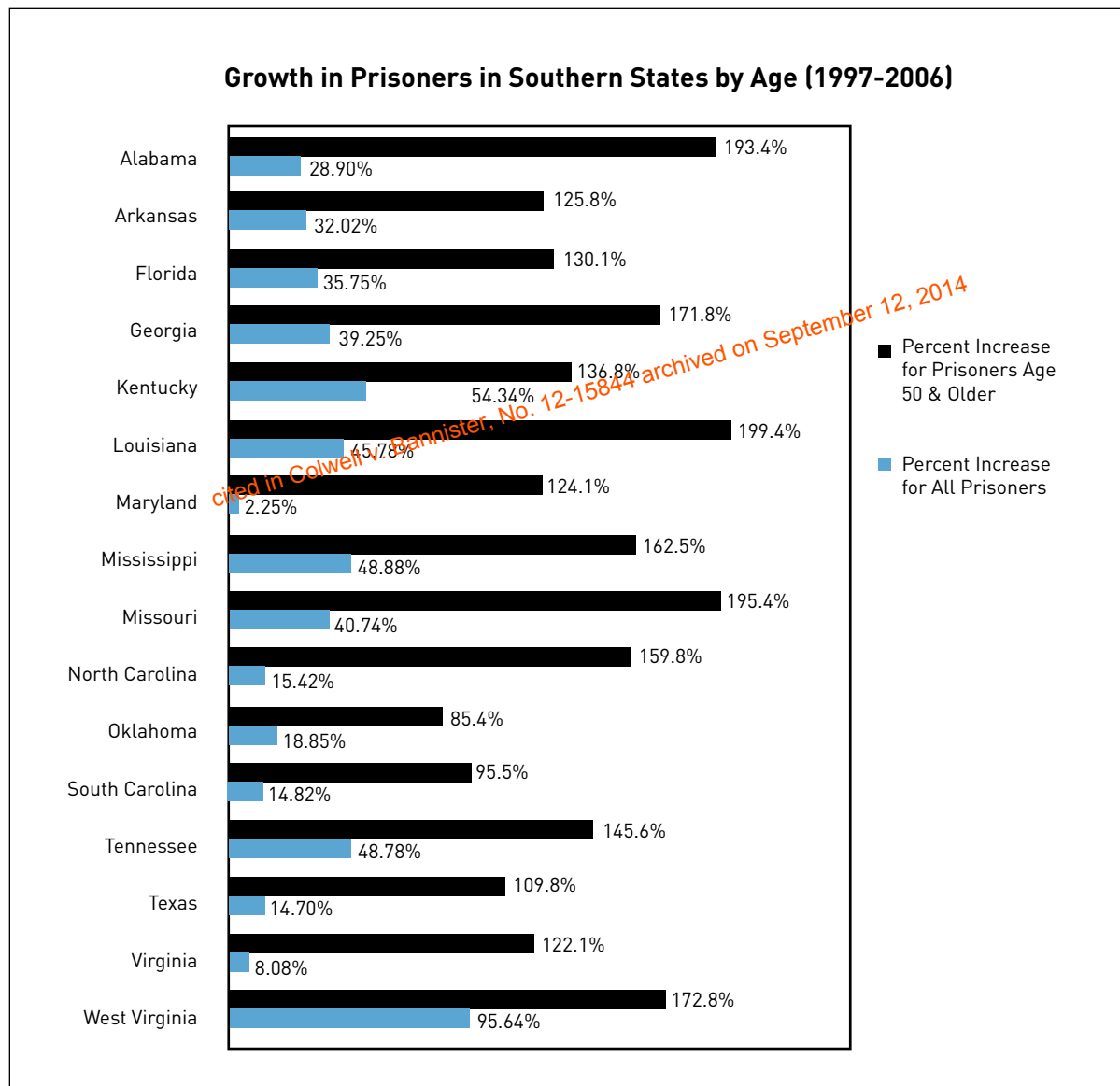


Source: Goetting, *The Elderly in Prison* (1984); Beck & Harrison, *Prisoners in 2003* (2004); Guerino et al., *Prisoners in 2010* (2011); Austin et al., *Exploring the Needs and Risks of the Returning Prisoner* (2002).<sup>11</sup>



Focusing on individual jurisdictions, as **Figure 4** below shows, the elderly prisoner population increased on average by 145% between 1997 and 2007 in 16 southern states—a much faster rate than the total prison population growth in those states. For example, in Florida, the number of elderly prisoners grew 130% compared to a 36% growth in the total prison population. Likewise, Texas had a 110% growth in the number of elderly prisoners, compared to a 15% growth in the total prison population. Those percentages for Maryland are 124% and 2%, respectively.

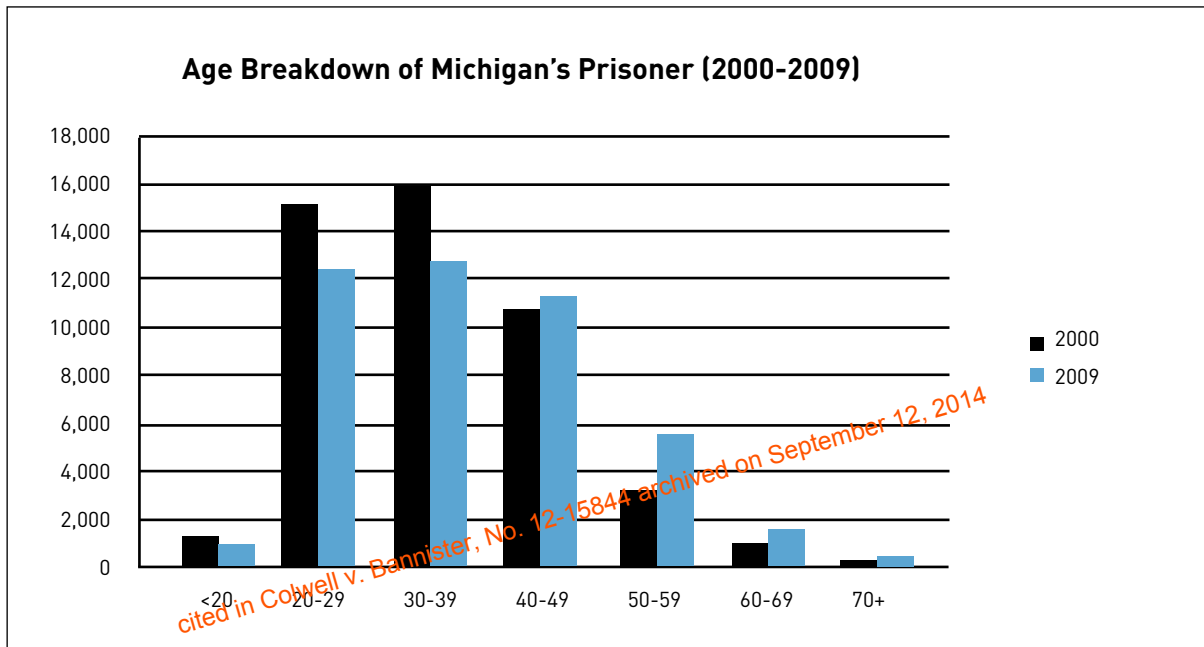
**Figure 4**



Source: Williams, *The Aging Inmate Population* (2006).<sup>12</sup>

**Figure 5** below provides similar data on the aging prisoner population in Michigan. From 2000 to 2009, the population of prisoners younger than 40 years old declined, while the number of prisoners age 40 and older increased. Particularly striking is the spike in prisoners ages 50-59 (a 41% increase) and ages 60-69 (a 54% increase).

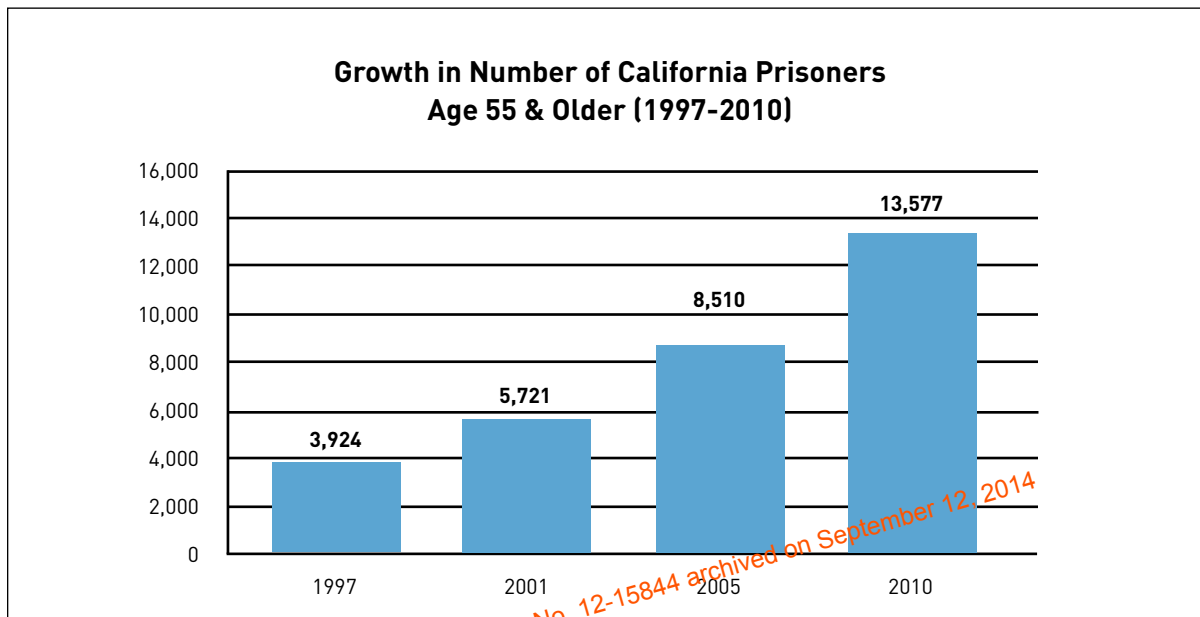
**Figure 5**



Source: Michigan Dep't of Corrections, *2000 and 2009 Statistical Reports* (2001, 2010).<sup>13</sup>

Similarly, as shown in **Figure 6** below, the number of California prisoners age 55 and older increased by almost 200% between 1997 and 2010.

**Figure 6**



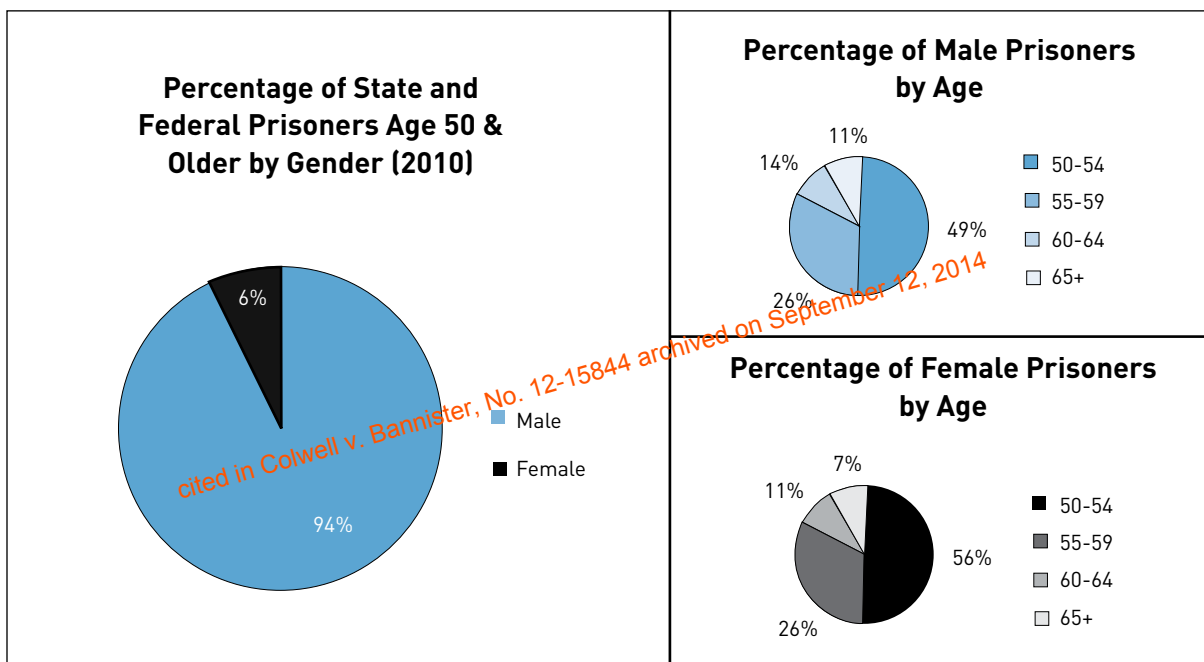
Source: Hill et al., *Aging Inmates* (2006); Bannister, No. 12-15844 archived on September 12, 2014; California Dep't of Correction & Rehabilitation (2010).<sup>14</sup>

Likewise, the number of prisoners age 50 and older in North Carolina grew 237%, from 1,254 in 1995 to 4,224 in 2007.<sup>15</sup> In sum, across the country, the aging prisoner population is growing at a stunning rate.

## 2. Gender & Race of Aging Prisoners

Our aging prison population is not homogeneous. As is the case with the overall prison population, America's elderly prison population is overwhelmingly male. As **Figure 7** below shows, women make up a mere 6% of aging prisoners. The population of male prisoners is, on average, older than the population of female prisoners. For instance, 56% of female aging prisoners fall into the age range 50-54, while 49% of male prisoners fall into this same age range.

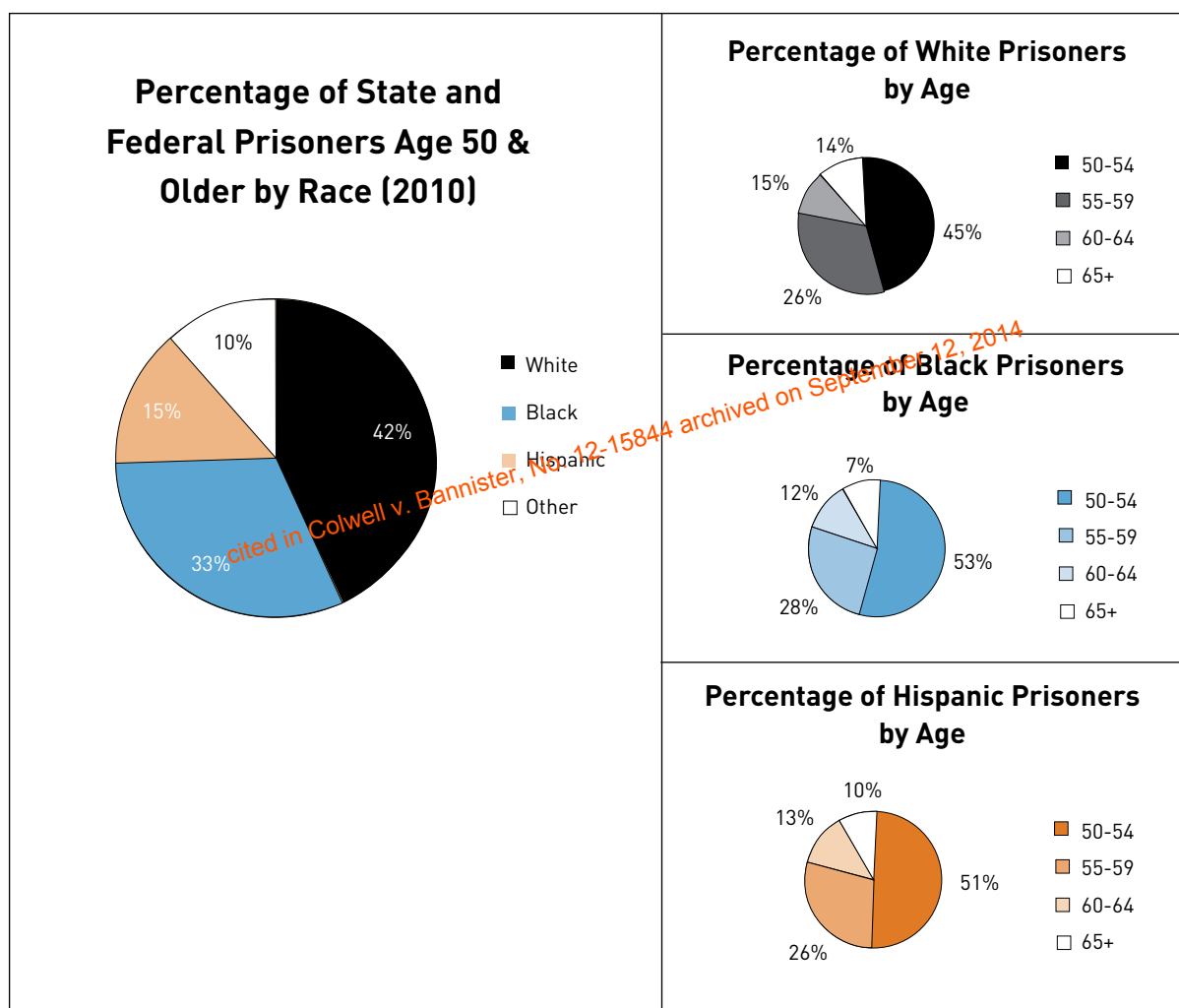
**Figure 7**



Source: Guerino et al., *Prisoners in 2010* [2011].<sup>16</sup>

**Figure 8** below shows the racial category breakdown of aging prisoners as reported by BJS. Aging prisoners are mostly white; specifically: 42% are white, 33% are Black, 15% are “of Hispanic origin,” and 10% belong to other racial categories. White aging prisoners tend to fall into the older end of the spectrum; whereas Black aging prisoners are, on average, younger. For example, 53% of Black aging prisoners are ages 50-54, whereas only 45% of white prisoners fall into this same age range.

**Figure 8**



Source: Guerino et al., *Prisoners in 2010* (2011).<sup>17</sup>

Although white prisoners comprise the vast majority of aging prisoners, Black and Hispanic aging prisoners are overrepresented, meaning they make up a far higher percentage of the aging prisoner population than they do in the general U.S. population. This disproportionate representation is reflective of the skewed racial distribution of U.S. prisoners more generally. Of the national total prison population, 38% are Black and 22% are Hispanic.<sup>18</sup> In contrast, the U.S. Census Bureau reports that, of the general U.S. population, 12.6% are Black and 16.3% are “of Hispanic or Latino origin.”<sup>19</sup>

**Figures 7 and 8** also demonstrate another valuable point: the largest subcategory of aging prisoners fall into ages 50-54. For example, 49% of male prisoners are ages 50-54, as are 49% of white prisoners. This holds true regardless of age and race. Thus any analysis or reform focused on aging prisoners using an age above 50 not only does not comport with the criminological consensus on the age when prisoners become elderly, it also dramatically undercounts the aging prison population.

*cited in Colwell v. Bannister, No. 12-15844 archived on September 12, 2014*



## B. Lower Public Safety Risks of Aging Prisoners

Criminologists and corrections experts universally agree that a person's average likelihood of committing any type of crime declines sharply with advancing age. The data in this section demonstrates that by the time a person turns 50, his or her likelihood of committing another crime has already dropped precipitously.<sup>20</sup> This holds true regardless of the crime for which the prisoner was originally convicted and sent to prison.

Additionally, this section analyzes original data collected from state departments of corrections to provide a snapshot of what crimes aging prisoners have committed and how long they have been in prison. This data shows that the elderly prison population is increasingly comprised of individuals sentenced under tough on crime laws (further explained in Section I.D below) who remain in prison for extraordinary long periods of time, as well as those who are in prison for nonviolent property crimes, such as burglary, theft, or drug possession. Further, the percentage of aging prisoners incarcerated for the first time after turning age 50 is declining. Thus, more aging prisoners were sentenced when they were younger and grew old in prison.

### 1. Crimes Committed & Time Served by Aging Prisoners

Determining what crimes landed aging prisoners behind bars and how long they have been in prison is a complex task. There are four distinct variables when examining the elderly prison population: the prisoner's current age; the age at which the prisoner was sent to prison; the offense for which the prisoner was sentenced to prison; and the amount of time the prisoner has spent behind bars. Examining the aging prison population through this lens will better inform any potential public safety risks posed by individual prisoners.

Criminologists have recognized four profiles of aging prisoners using different combinations of the variables listed above:<sup>21</sup>

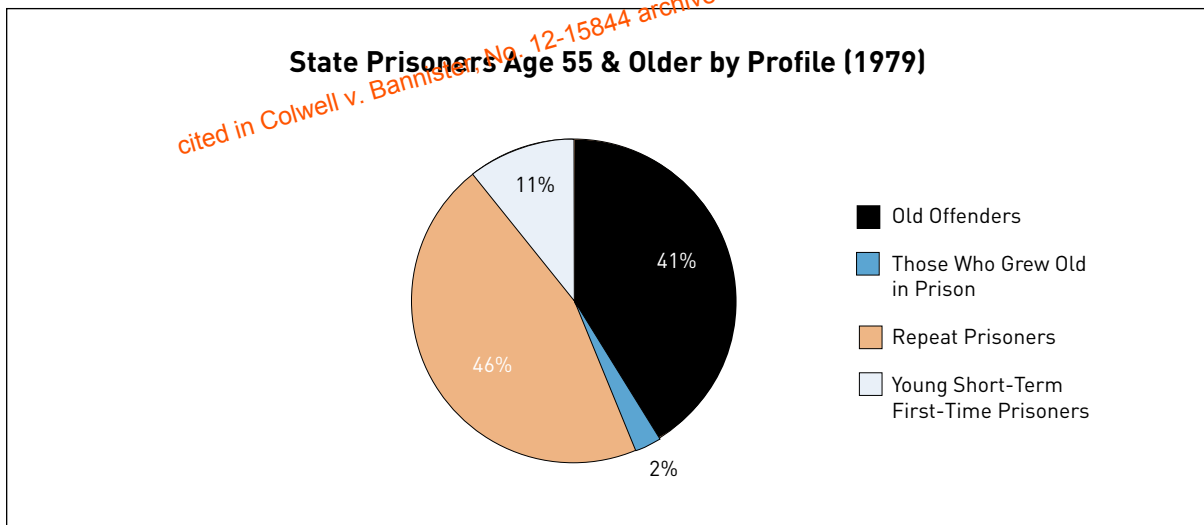
1. Old Offenders: Prisoners incarcerated for the first time when they were age 50 and older (regardless of how many times they were in prison after that first incarceration). Some of these prisoners were sentenced for murder or sex crimes.
2. Those Who Grew Old in Prison: Prisoners incarcerated for their current offense before age 50 and who have served at least 20 years of that current sentence (regardless of how many times they were incarcerated before that). These individuals have already served lengthy prison sentences and have grown old in prison. This profile includes prisoners sentenced for long periods of time or to life without parole, for such things as murder, armed robbery, and rape while in their youth. This profile also

increasingly includes individuals sentenced under habitual offender laws for low-level or drug crimes.

3. Repeat Prisoners: Prisoners who have served multiple periods of incarceration and who were first incarcerated before the age of 50. This profile excludes prisoners in the second category above who grew old in prison. Many Repeat Prisoners were incarcerated for crimes like burglary, theft, or low-level crimes like drug possession.
4. Young Short-Term First-Time Prisoners: Prisoners who were incarcerated for their first and only offense before the age of 50 and have served less than 20 continuous years of that sentence. Prisoners in this profile may be in prison for crimes like burglary, theft, or drug possession.

Unfortunately, the last nationwide analysis of these aging prisoner profiles was conducted in 1979. Ann Goetting analyzed a representative sample of state prisoners age 55 and older and weighted the data to ensure its national representativeness. Her results are shown below in **Figure 9**.

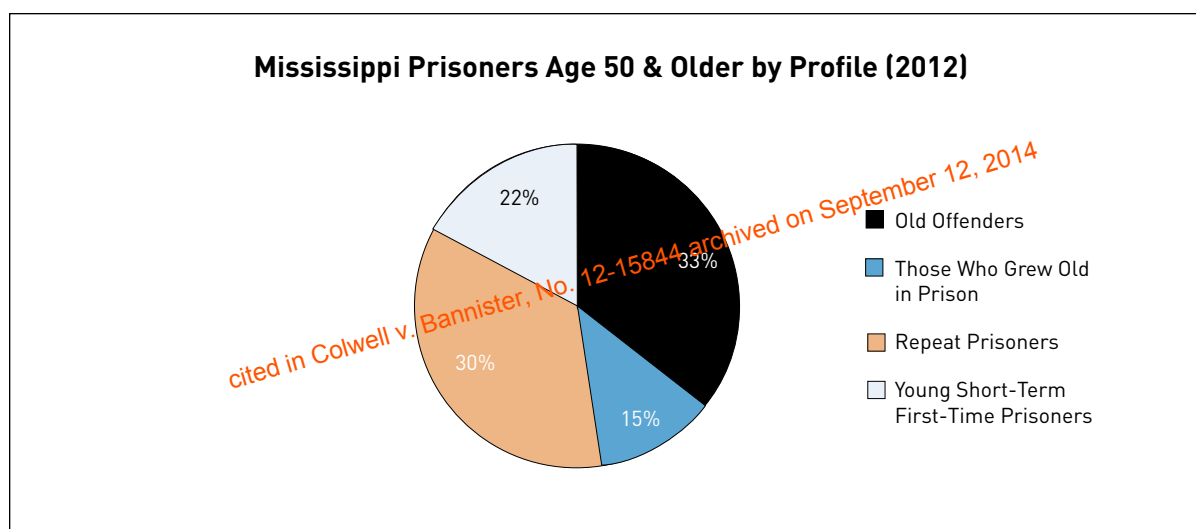
**Figure 9**



Source: Goetting, *The Elderly in Prison* (1984).<sup>22</sup>

This report collected current profile breakdowns from several state departments of correction to better understand the current national landscape of aging prisoners. Most significantly, the percentage of Those Who Grew Old in Prison has increased. As shown in **Figure 10**, the percentage of Those Who Grew Old in Prison in Mississippi is now 15%, compared to 2% reported by Goetting in 1979. Additionally, the percentage of Young Short-Term First-Time Prisoners increased from 11% to 22%. The percentage of Repeat Prisoners and Old Offenders, on the other hand, shrunk. Most likely, many individuals who would have been classified as Repeat Prisoners in 1979 are now caught in the net of the newer habitual offender and mandatory minimum laws and given punishments of 20 years or more for lower level and drug offenses, and are therefore now part of the Those Who Grew Old in Prison category. (These laws are further explained in Section I.D below.)

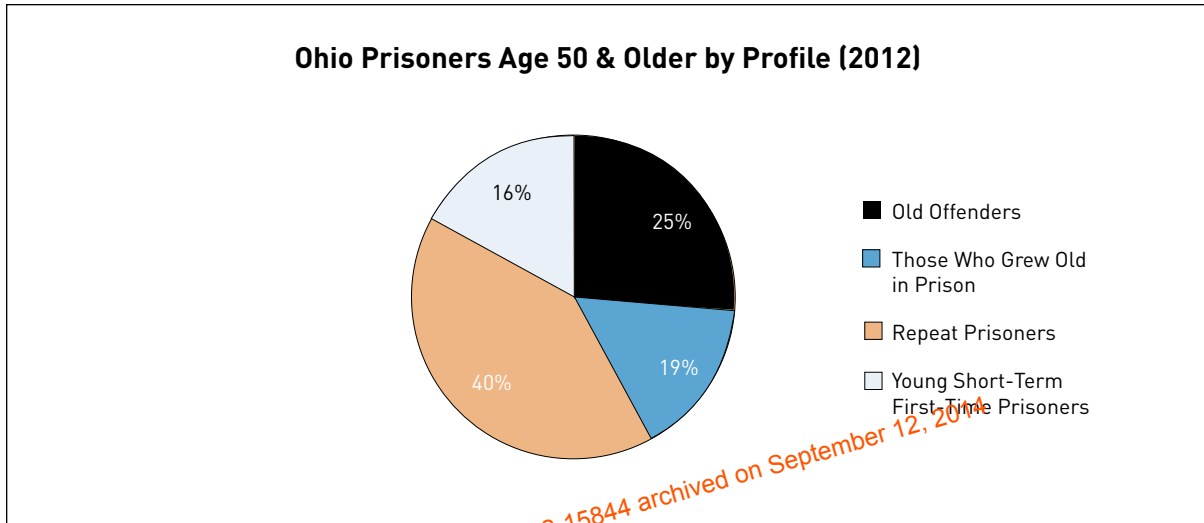
**Figure 10**



Source: Data collected directly from jurisdiction (2012).<sup>23</sup>

**Figure 11** below demonstrates that the results from Ohio are generally the same. The percentage of Those Who Grew Old in Prison in that state is more than nine times greater than the national figure in 1979, growing from 2% to 19%. Likewise, the percentage of Old Offenders shrunk from 41% to 25%.

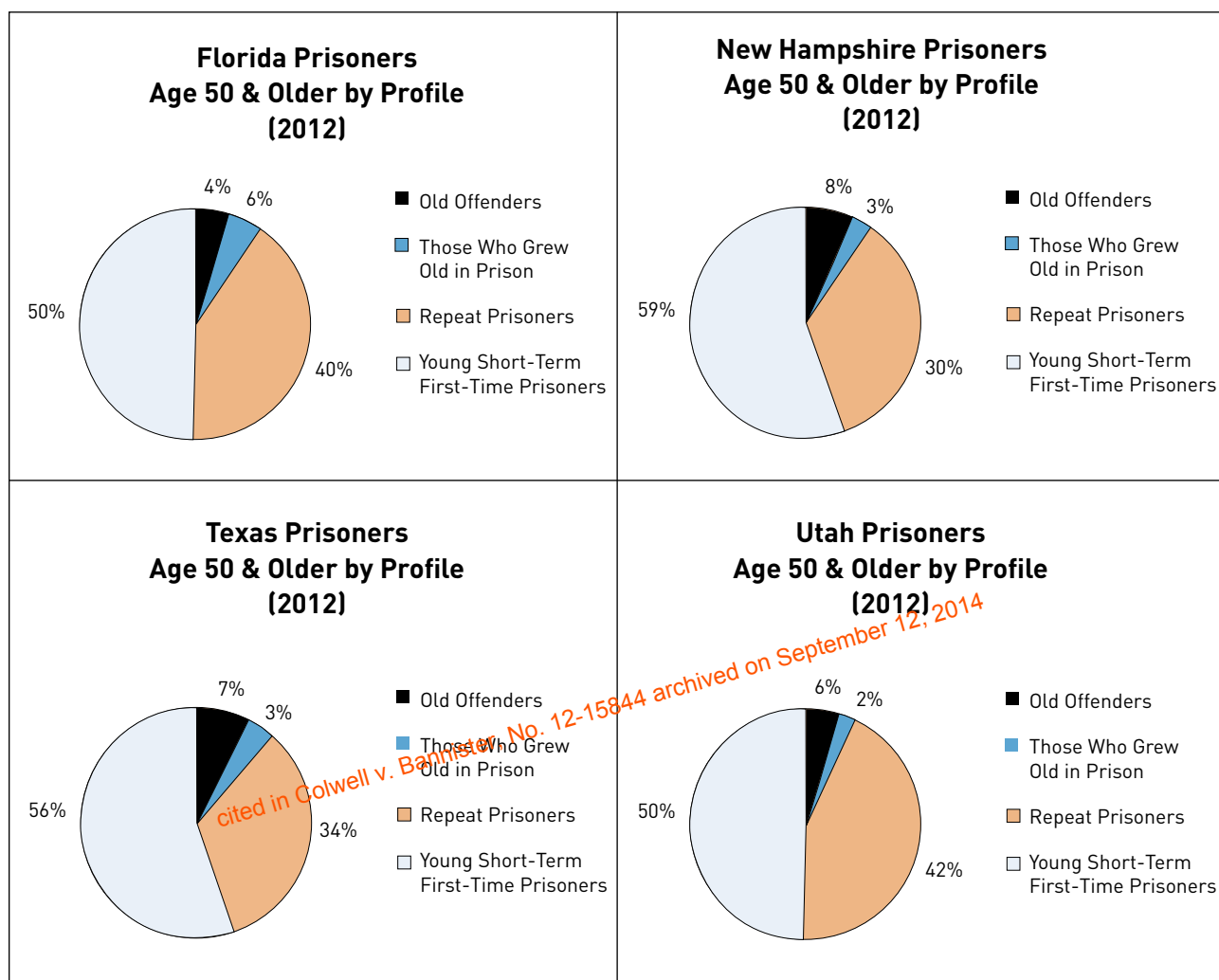
**Figure 11**



Source: Data collected directly from jurisdiction (2012).<sup>24</sup>

Data from other states generally confirms this growth trend of Those Who Grew Old in Prison. Notably, as **Figure 12** on the next page shows, in Florida, New Hampshire, Texas, and Utah, the percentage of Old Offenders ranges from 4-8% compared to 41% in 1979. This data suggests that there are more individuals entering prison at a younger age and staying there until they get old. Also, the percentage of Young Short-Term First-Time Prisoners ranges from 50-59% in 2012, whereas this percentage was only 11% in 1979. Thus, the subset of prisoners who entered the system young and are serving less than 20 years on their current sentence is increasingly comprised of individuals who have only committed a first offense.

**Figure 12**

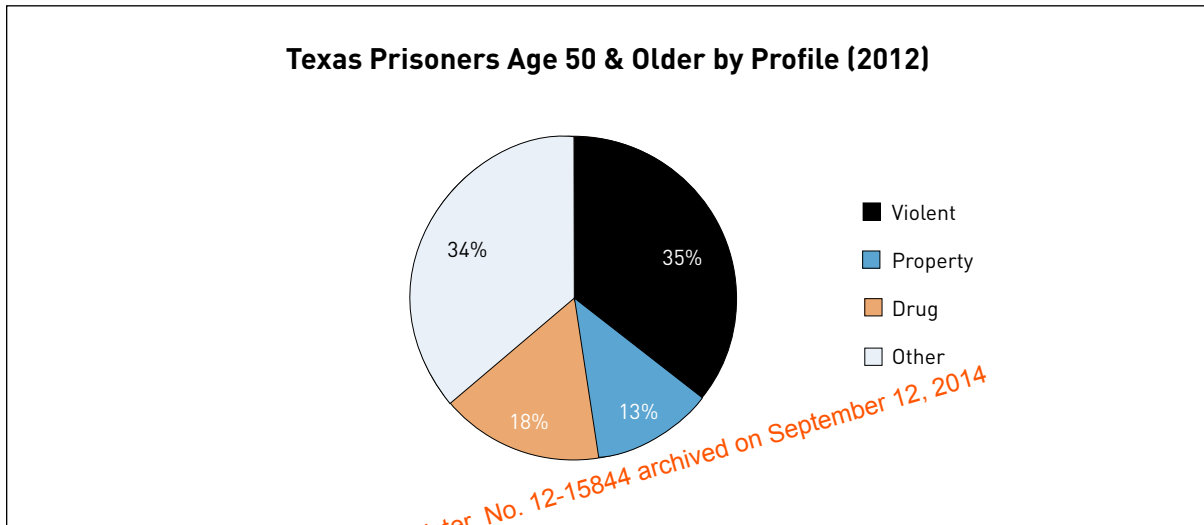


Source: Data collected directly from jurisdictions (2012).<sup>25</sup>

In addition to these profiles, data from specific states on the types of crimes committed by aging prisoners is also available. States differ, however, in how they track data and how they classify crimes. The same crime could have an entirely different name depending on the state. Moreover, many states use “habitual offender” as a crime category, which makes it impossible to determine which specific crime landed the prisoner behind bars for so long.

Many aging prisoners are incarcerated for nonviolent crimes. Data from Texas, shown in **Figure 13** below, details the types of crime committed by elderly prisoners who were behind bars in 2011. Notably, 65% are in prison for drug crimes, property crimes, and other nonviolent crimes. The rest are incarcerated for violent crimes, which can range from homicide to sexual assault to assault.

**Figure 13**

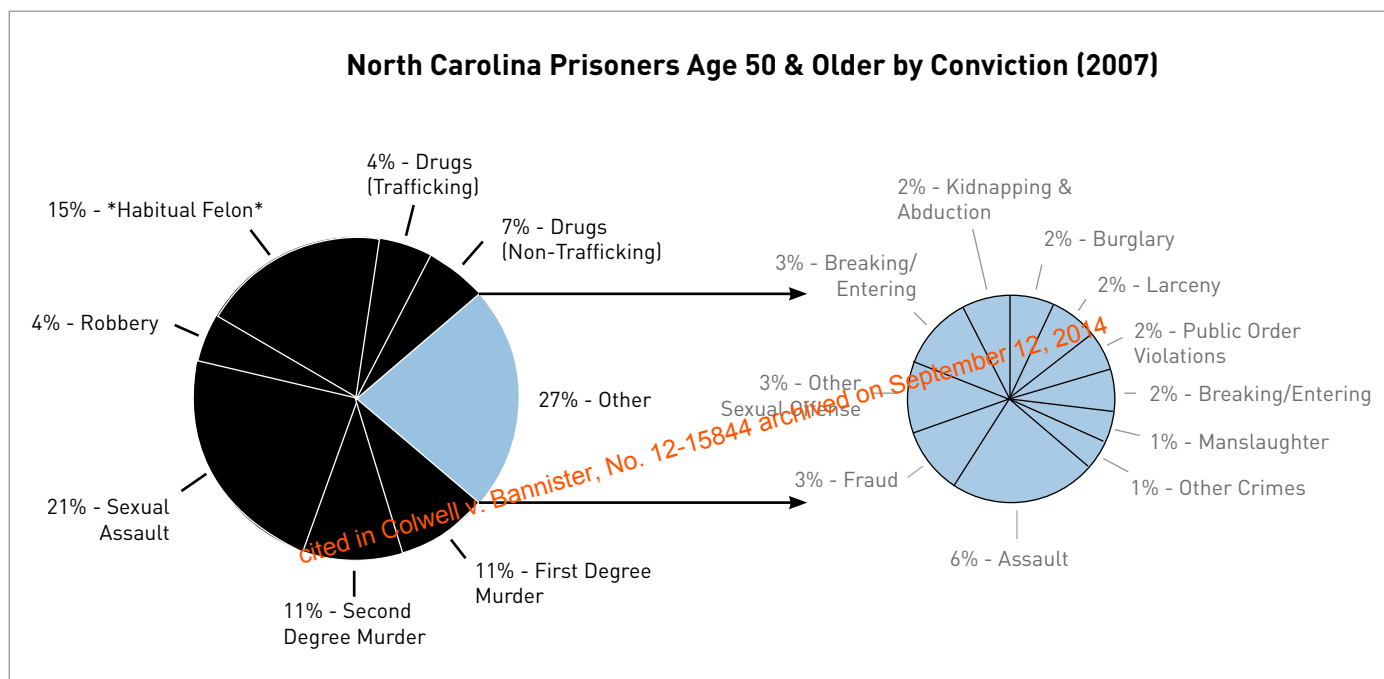


Source: Data obtained directly from jurisdiction (2011).<sup>26</sup>



This distribution holds true in other states as well. For example, in 2007, North Carolina published unusually detailed statistics on the type of crime aging prisoners committed that led to their current imprisonment, as shown in **Figure 14** below. “Habitual felon” and drug crimes represent 26% of North Carolina prisoners age 50 and older. Another 14% are in prison for fraud, larceny, burglary, breaking/entering, and traffic and public order violations. Further, 21% are in prison for sexual assault crimes that range from rape to sexual battery.<sup>27</sup>

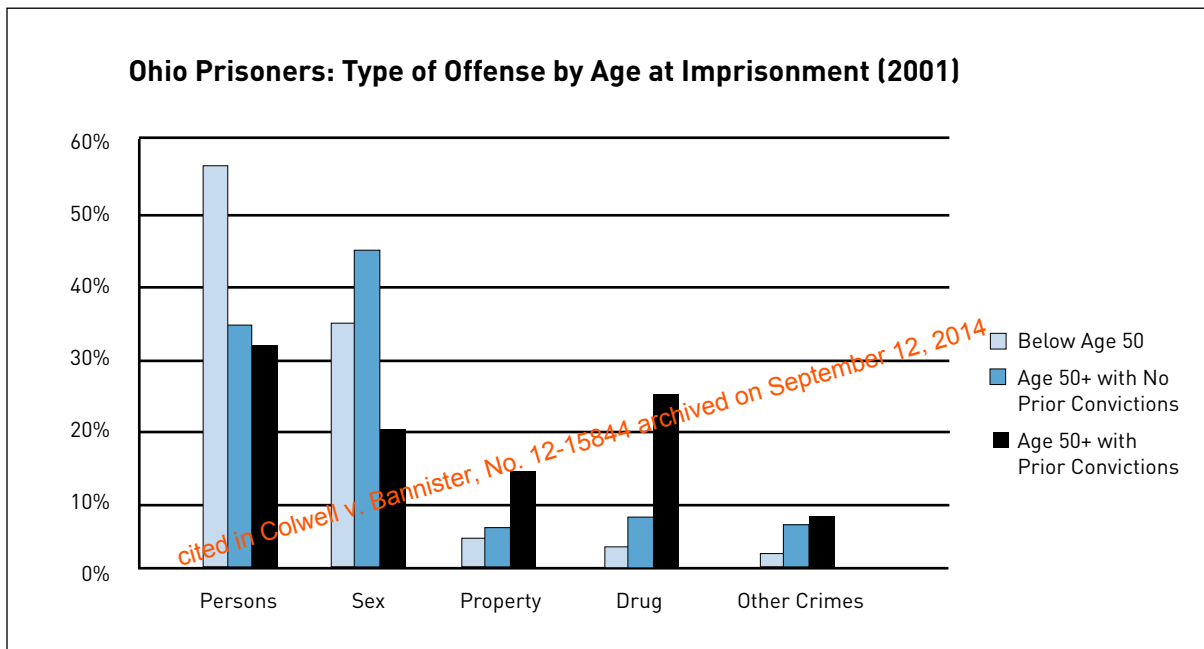
**Figure 14**



Source: Price, *Aging Inmate Population* (2007).<sup>28</sup>

Further, in at least some states, the majority of aging prisoners are incarcerated for their first offense. In Ohio, for example, 71% of prisoners age 50 and older in 2009 were in prison for their first offense, as **Figure 15** below shows. Further, 72% of aging prisoners convicted of crimes against the person and 84% of those convicted of sex offenses had no prior convictions. Also, aging prisoners with prior convictions were more likely to be serving time for lower-level crimes, like drug and property crimes.

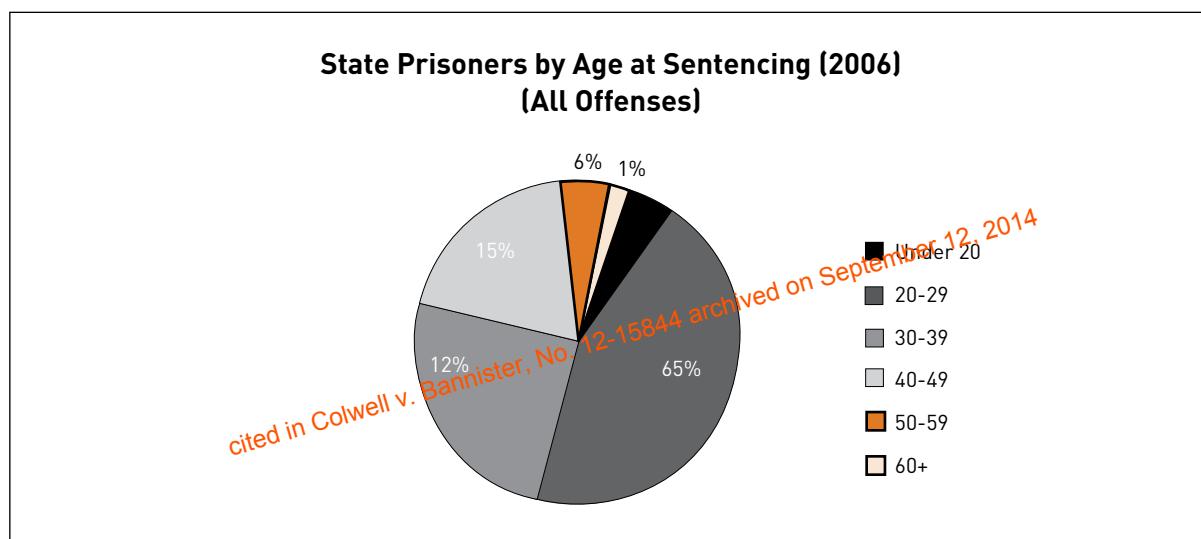
**Figure 15**



Source: Moore & Unwin, *Ohio's Older Inmates* (2002).<sup>29</sup>

As **Figure 16** below shows, BJS has examined data on all prisoners incarcerated for felonies by age at the time of their sentencing. Younger people are far more likely than older people to commit crimes that land them in prison. Across all felony crime categories, the average age at which state prisoners received their sentences was 33 and the median age was 31. Overall, only 7% of the total state prisoner population received their sentence at age 50 and older, compared to 40% of state prisoners who received their sentences between ages 20-29. This low level of prison admission for aging individuals holds true across crime categories.

**Figure 16**



Source: Rosenmerkel et al., *Felony Sentences in State Courts* (2010).<sup>30</sup>

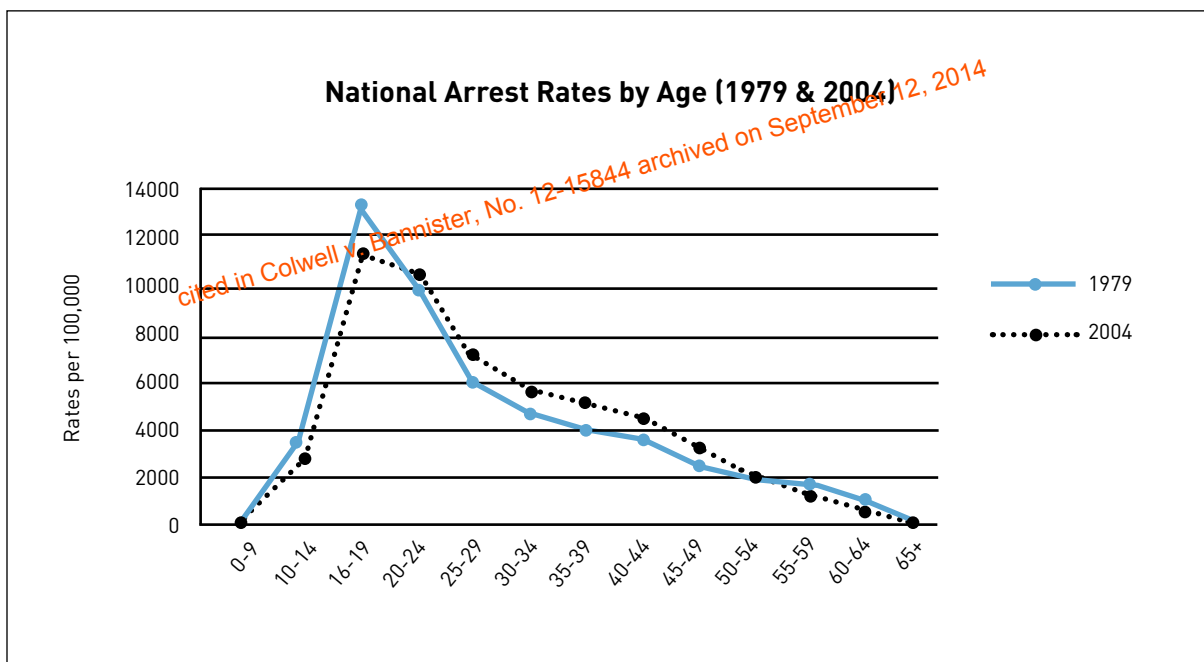
In sum, the data presented in this section taken together suggests that the elderly prison population is increasingly comprised of individuals sentenced when they were younger and remaining in prison for extraordinary long periods of time. The increasing numbers of aging prisoners is not due to any “elderly crime wave;” in fact, the percentage of aging prisoners who committed their crime in old age is declining. Aging prisoners are also increasingly in prison for nonviolent property crimes, such as burglary, theft, or drug possession.

## 2. Crime Declines Precipitously With Age for All Crimes

This section explains aging prisoners' lower propensity to commit crimes and pose threats to public safety.

Research has conclusively shown that long before age 50, most people have outlived the years in which they are most likely to commit crimes.<sup>31</sup> Even when examining data on arrests that may not lead to conviction or indicate guilt, this holds true. For example, **Figure 17** below shows the percentage of individuals arrested nationally by age in 2004. Less than 6% of individuals ages 30-34 were arrested, whereas a little over 2% of individuals ages 50-54 were arrested and almost 0% of those age 65 and older were arrested. This trend of decreasing crime rates from adulthood to old age has held constant over time, as shown by the 1979 arrest curve in **Figure 17**.

**Figure 17**



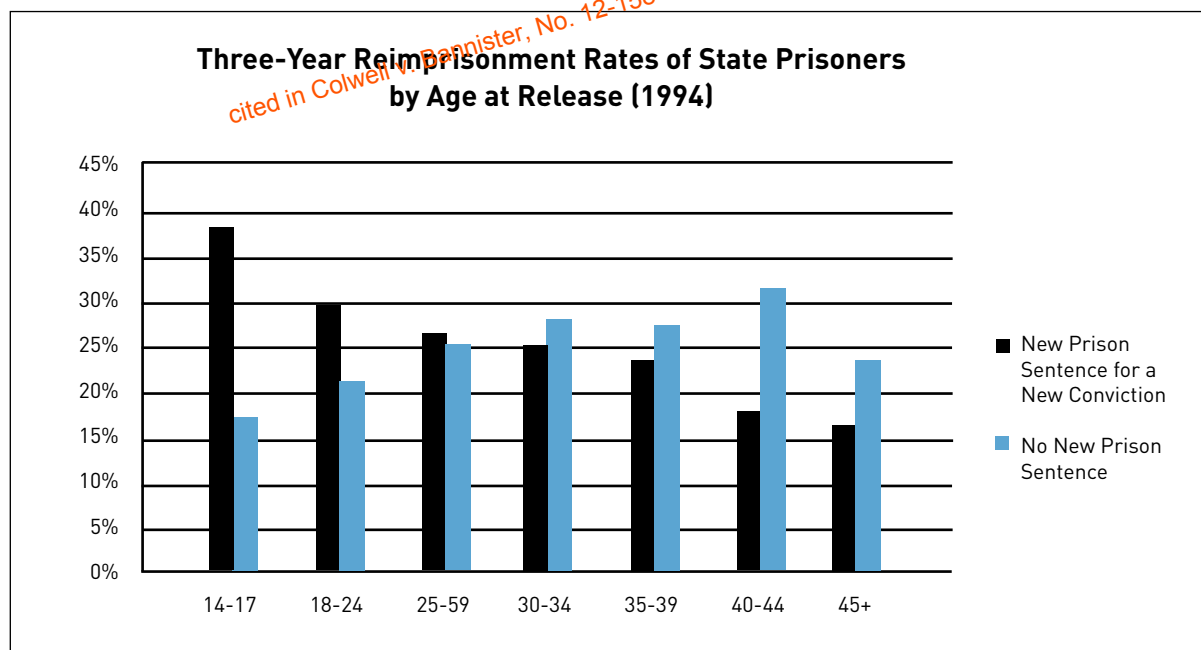
Source: Bushway et al., *Has the U.S. Prison Boom Changed the Age Distribution of the Prison Population?* (2011).<sup>32</sup>

Since this report seeks to understand the public safety threats posed by aging prisoners, it focuses on whether this population commits crimes that return them to prison. The vast majority of studies examining new crimes committed by released prisoners do not specify the exact type of new crime committed, meaning someone could be released from prison for armed robbery and end up back in prison for drug possession. Parole violations are

usually not new crimes and are therefore not accurate measures of threats to public safety, even though they are significant drivers of the prison population.<sup>33</sup> Similarly, arrests are not reliable measures of public safety threats because an arrest does not import guilt and many arrests do not result in convictions or incarceration.

In 2002, BJS researchers Patrick Langan and David Levin released a key study on reimprisonment and reconviction by age. This study tracked 272,111 prisoners for three years in fifteen states—a sample representing two-thirds of all prisoners released in the United States in 1994. This is an important period of time within which to measure return to prison for a new conviction because people are most likely to commit crimes soon after release from prison. As **Figure 18** below shows, the rate of reimprisonment for a new conviction for prisoners released at age 45 and older was 56% lower than the rate for prisoners released between ages 18-24. Only 16.9% of prisoners released at age 45 and older return to prison for new convictions. The driver of reimprisonment for this older age group seems to be parole violations—which could vary from missing a meeting with a parole officer, to a positive drug test, to contact with a victim—and can return individuals to prison without a conviction for a new crime.

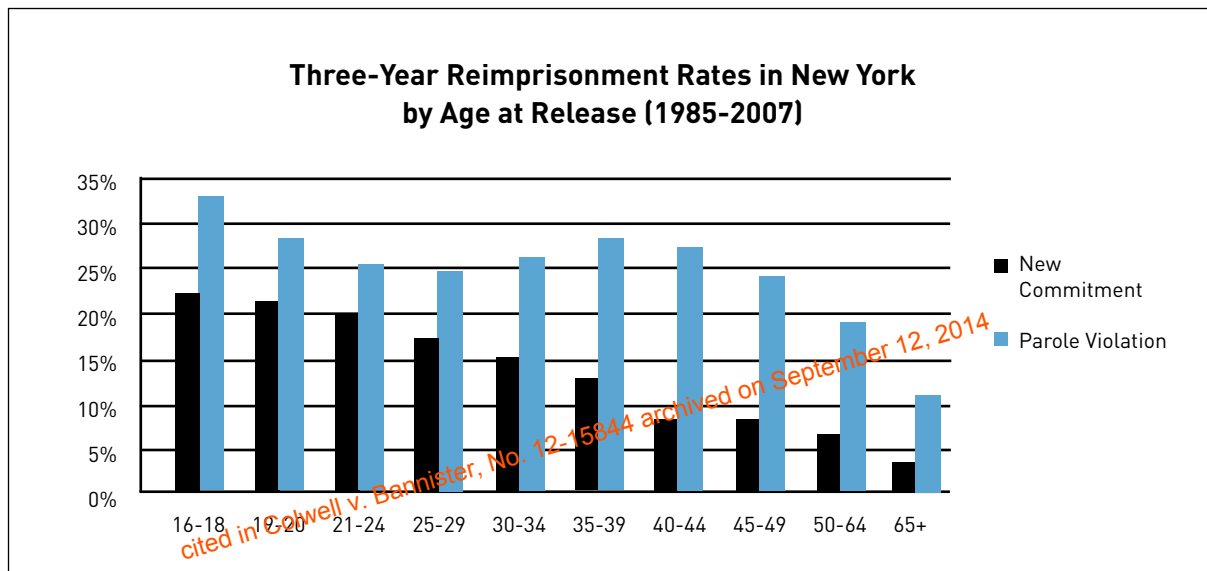
**Figure 18**



Source: Langan & Levin, *Recidivism of Prisoners Released in 1994* [2002].<sup>34</sup>

Additionally, data from specific states reveals the same lower rate of reimprisonment for aging prisoners. As **Figure 19** below represents, only 7% of New York state prisoners released at ages 50-64 returned to prison for new convictions, and only 4% of prisoners released at age 65 and older returned to prison for new convictions. Again, when this aging population returns to prison, it is far more likely for a parole violation than for a new conviction.

**Figure 19**

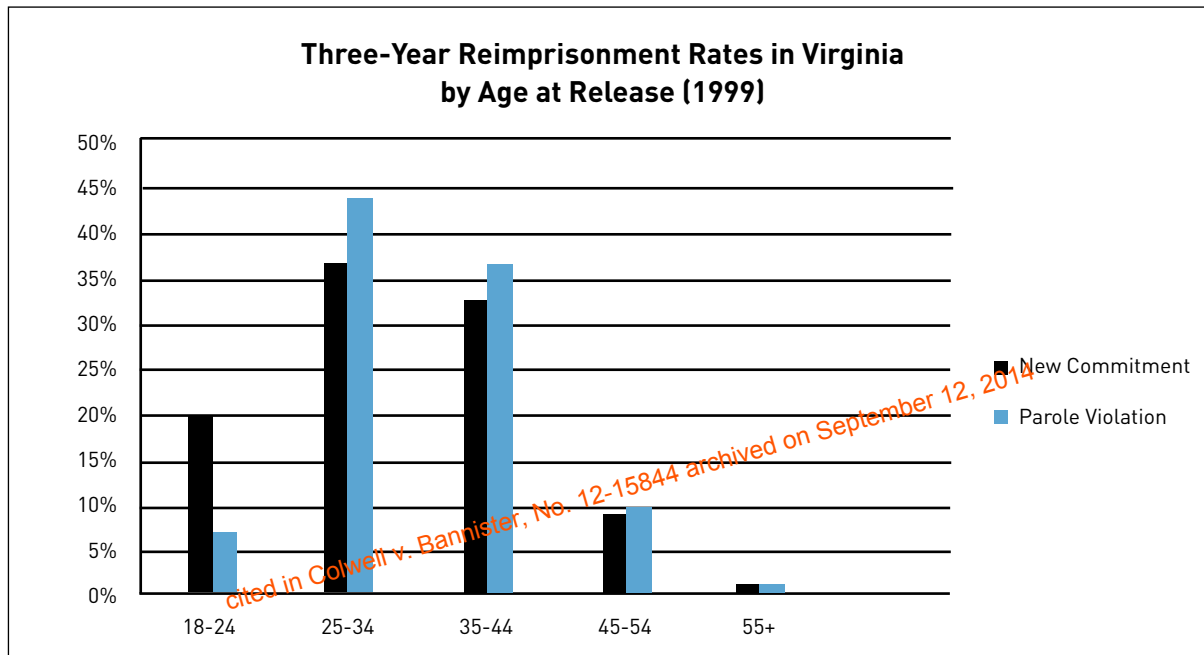


Source: New York Dep't of Corrections, *2007 Releases Three Year Post Release Follow Up* (2012).<sup>35</sup>



As **Figure 20** below shows, the data for Virginia prisoners displays a pattern of reimprisonment for new convictions similar to that in New York, with 1.3% of prisoners age 55 and older returning to prison on a new commitment and 9% of prisoners ages 45-54 returning on a new conviction. Notably, in Virginia, aging prisoners returning to prison for parole violations at rates similar to which they return to prison for new convictions.

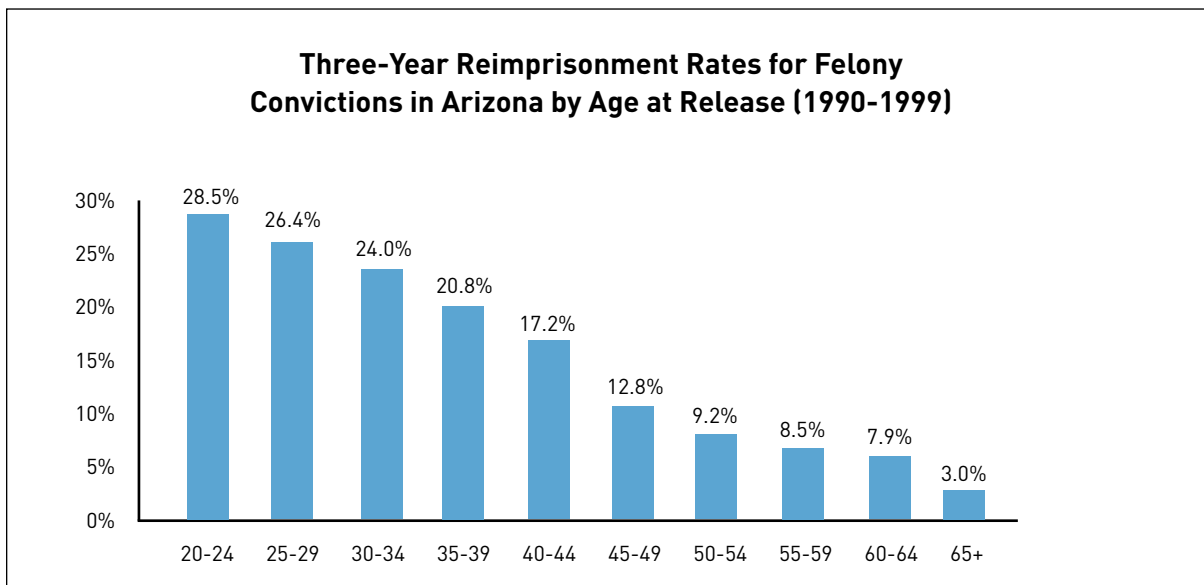
**Figure 20**



Source: Cross, *Recidivism in Virginia* (2005).<sup>36</sup>

Similarly, **Figure 21** on the next page shows prisoners in Arizona returning to prison for new felony convictions, with the percentage dropping from 28.5% for prisoners ages 20-24 at release to 9.2% for prisoners released at ages 50-54 and 3% for those released at age 65 and older.

**Figure 21**



Source: Arizona Dep't of Corrections, *Arizona Inmate Recidivism Study* (2005).<sup>37</sup>

In sum, as shown by the data in this section, there is overwhelming evidence that prisoners age 50 and older are far less likely to return to prison for new crimes than their younger cohorts. This holds true regardless of why they originally went to prison. However, as shown, some portion of aging prisoners will still commit crimes upon release. As explained in the Recommendations section, states can use risk assessment instruments to determine which of these aging prisoners are safe to release and which are not.

## C. The High Costs of Incarcerating the Elderly

The number of older prisoners is growing quickly and their needs are very different than those of younger prisoners, as are the costs of meeting them. Corrections departments are facing a very different prisoner population than they have been accustomed to managing. This population shift will become more dramatic in the future if we keep our current laws in place.

One common sense solution, explained in the Recommendations section, would be to release aging prisoners who do not pose substantial safety risks instead of unnecessarily incarcerating them. This section explains the results of a state fiscal impact analysis for the average aging prisoner released. How this analysis was conducted is further explained in the Methodology section above.

This section explains that aging prisoners are by far the most expensive prisoners to incarcerate. Although releasing an aging prisoner (to become an “aging parolee”) will impact state governments by increasing the costs of parole, housing, public benefits (including healthcare), and emergency room visits, it will also increase tax revenue and save the high incarceration costs. Taking these fiscal impacts into consideration, this report estimates that states will save, on average, \$66,294 per year per released aging prisoner. Even on the lowest end, states will save at least \$28,362 per year per released aging prisoner. Finally, this section will touch on the additional federal and local fiscal impacts and societal impacts.

### 1. State Fiscal Impact Analysis

This section first explores the high costs of incarcerating aging prisoners, and then deducts the cost savings of releasing aging prisoners to calculate the total fiscal cost savings per released aging prisoner.

#### *a. The High Costs of Incarceration*

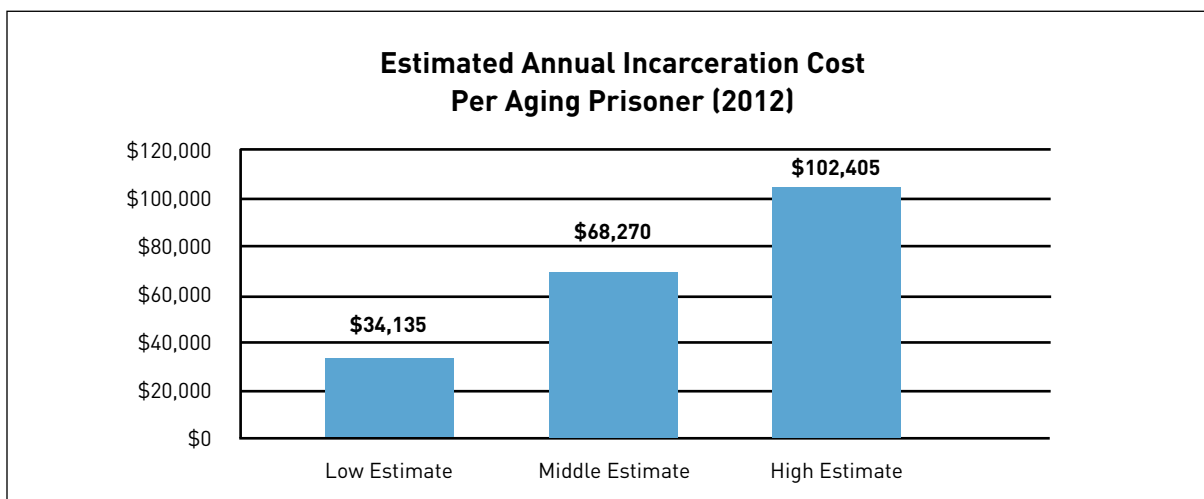
Corrections expenditures as a percentage of overall state budgets have exploded nationwide since the 1980s, often at the expense of other crucial state services, such as public education and infrastructure. Over the past 25 years, 14 states doubled their spending on corrections and 30 states increased their corrections spending by at least half.<sup>38</sup> According to a recent Pew Center on the States study, overall state spending on corrections increased from \$11 billion in 1988 to \$52 billion in 2008. Add in federal government corrections expenditures and that number climbs to \$68 billion.<sup>39</sup> According to a report from the Vera Institute of Justice released earlier this year, however, the actual total taxpayer cost of prisons expands beyond what states allocate in their corrections budgets. For example,

in some states such as New York, a significant proportion of the incarceration costs (like prison employee health insurance and pensions, and hospital care for prisoners) comes from other areas of the state budget, such as the “central administrative funds” or “central account.” The Vera Institute estimates the real cost of incarceration to be 14% higher than the costs highlighted in corrections budgets alone.<sup>40</sup> Thus, the true burden the corrections system imposes upon the American taxpayer is more realistically \$77 billion annually or more. Further, the Pew Center estimates that 90% of spending on corrections is devoted to incarceration (as opposed to probation, parole, or non-incarceration alternatives).<sup>41</sup> Taking data from the Vera report and the Pew study together, this report estimates that the average annual incarceration cost per prisoner is \$34,135.

The annual total cost per *aging* prisoner is, however, even higher. According to a National Institute of Corrections (NIC) study from 2004, taxpayers pay more than twice as much per year to incarcerate an aging prisoner than they pay to incarcerate a younger one.<sup>42</sup> In **Figure 22** below, this report provides three estimates of the average annual taxpayer cost of an aging prisoner: low, middle, and high.<sup>43</sup> The low estimate is the lowest possible cost of an aging prisoner. In this scenario, an aging prisoner costs the same as the average prisoner, \$34,135. Aging prisoners in this group may be healthy and not require additional staff or healthcare. The middle estimate uses the NIC calculation to set the cost of an aging prisoner at twice the cost of an average prisoner. It is the most accurate estimate. Finally, the high estimate equates the cost of an aging prisoner at three times the cost of the average prisoner; this estimate represents the most likely highest end of what it costs to incarcerate an aging prisoner. Such prisoners may require additional staff and higher levels of care to meet their physical or medical needs.

cited in Colwell v. Hannister, No. 12-15642, archived on September 12, 2014

**Figure 22**



Source: ACLU State Fiscal Impact Analysis (2012).

Using the middle estimate, it costs taxpayers \$16 billion every year to incarcerate the 246,600 prisoners age 50 and older—a relatively low-risk population. This amount is more than the federal Department of Energy budget and more than the federal Department of Education funding for state elementary and secondary school improvements.<sup>44</sup>

The staggeringly high costs associated with the incarceration of aging prisoners are largely due to increased staffing and healthcare needs. Most corrections budgets operate to ensure a certain prisoner-to-guard ratio. Aging prisoners, however, require additional staffing because they need more help with day-to-day activities, have limited mobility, and are more vulnerable to mental or physical abuse by younger prisoners.<sup>45</sup>

Most states estimate that healthcare for an elderly prisoner costs roughly two to three times that for a younger prisoner.<sup>46</sup> In some states, like North Carolina, the average annual cost of healthcare for prisoners 50 and older is four times higher than the cost for prisoners younger than 50. Moreover, while only 11% of North Carolina's prisoners are age 50 and older, the \$25 million it costs the state each year to provide healthcare to these aging prisoners constitutes nearly 30% of the state's total correctional healthcare budget.<sup>47</sup>

There are a number of reasons why a disproportionate share of prison healthcare expenditures is spent on aging prisoners. First, aging prisoners are relatively more likely to suffer from a variety of medical conditions and require more contacts with healthcare providers. According to a BJS study, the percentage of all state prisoners who reported any type of medical condition in 1997 increased dramatically with age: approximately 48% of prisoners age 45 and older reported some kind of medical problem (excluding physical injury), compared to only 24% of prisoners age 24 and younger.<sup>48</sup> In Florida, prisoners age 50 and older accounted for a disproportionate share of all medical contacts. In particular, while only 11% of the total prison population was in this age range, these prisoners constituted 38% of all medical contacts for hypertension, 44% for diabetes, 21% for asthma, and 36% for general medicine.<sup>49</sup> Aging prisoners also often require longer and more frequent hospitalizations.<sup>50</sup>

Second, these healthcare costs are not high because aging prisoners—or prisoners in general—are enjoying higher levels of healthcare than the rest of society. Indeed, most prisons only offer a constitutionally minimal level of care—which only means that prisons cannot show “deliberate indifference to serious medical needs” of prisoners.<sup>51</sup> Despite this constitutional floor, prisons often fall far short and provide subpar healthcare until forced to improve by court order.<sup>52</sup>

In other words, the high costs of aging prisoners' healthcare do not mean that these prisoners enjoy superior levels of care that should be cut. Rather, healthcare costs are high because the prison environment is, by design, an extremely poor place to house and care for people as they age or become increasingly ill or disabled. Prisons were designed with younger prisoners in mind and, as such, are often not suitably well-equipped to accommodate the varied needs of aging prisoners. Prisons typically do not have systems

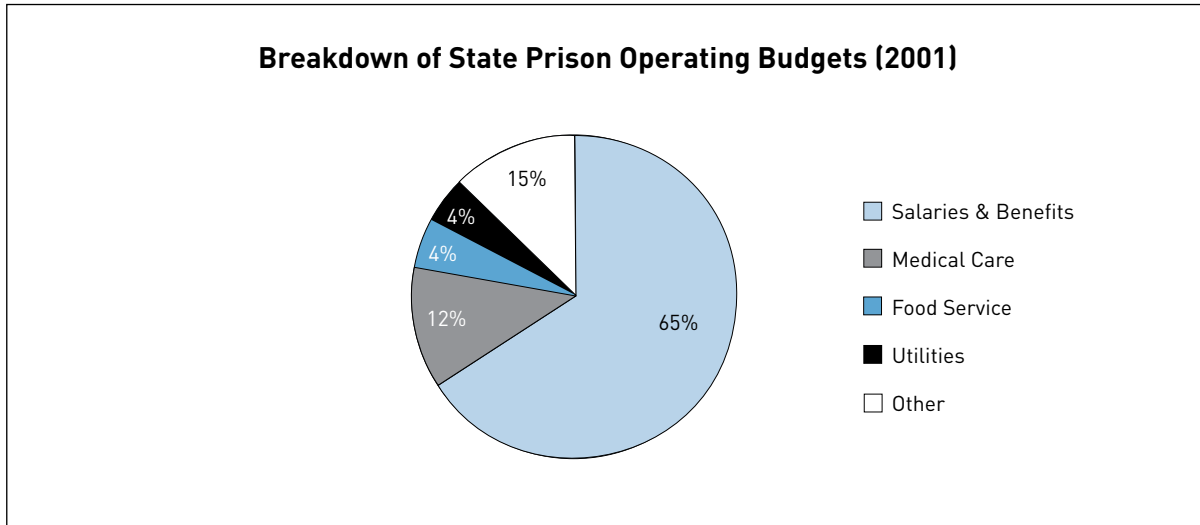
in place to monitor chronic problems or to implement preventative measures. Very often, correctional and healthcare staff lack appropriate training and technical expertise and have not been properly trained to treat age-related illnesses, such as hearing loss, vision problems, arthritis, hypertension, and dementia. Likewise, many prisons are not architecturally designed for prisoners requiring special services and devices, such as walkers, wheelchairs, and hearing or breathing aids.<sup>53</sup>

Third, due to these poor facilities and under-trained staff, added to the unique healthcare needs of aging prisoners, prisons must often send aging prisoners outside the prison for medical treatment. Any off-site treatment requires the government to pay for the added costs of transportation, the specialized treatment itself, and the costs of the officers that must accompany the prisoner at all times while outside the prison (often at overtime pay).<sup>54</sup> Transporting prisoners off-site for medical care is expensive and a sizeable portion of the healthcare budget. For example, in 2006, North Carolina spent \$18.1 million on external healthcare costs for all prisoners age 50 and older. These external care expenditures represent 72% of all healthcare costs spent on aging prisoners and account for 34% of the total external healthcare costs incurred by the state prison system.<sup>55</sup> Similarly, aging prisoners in Florida accounted for 34% of the total cost to the state of all outsourced healthcare services although they make up only 18% of the total prison population.<sup>56</sup>

Finally, aging prisoners sometimes require substantial costs simply to meet their basic needs. As an example, one 72-year-old woman in a California prison suffers from emphysema, heart disease, and arthritis and is incapable of walking more than 50 feet without stopping to catch her breath. The total cost of her heart treatment alone is \$750,000. The state must prepare her special medical diets, provide a prison cell that can accommodate her disability, and hire additional staff members to provide daily caretaking and monitoring.<sup>57</sup>

In sum, due to the unique challenges posed by the prison environment, even the most basic healthcare is extremely expensive to provide. According to the latest BJS study—conducted in 2001 and depicted in **Figure 23** on the next page—the largest proportion of spending in corrections for all states goes to prison staff and benefits. The second largest expenditure, however, is medical care for prisoners.

**Figure 23**



Source: Stephan, *State Prison Expenditures, 2001* (2004).<sup>58</sup>

Notably, not all state expenditures on healthcare are categorized as a healthcare expense line item. Overtime and regular pay for officers accompanying prisoners to external medical treatments, for example, is unlikely to be included in the medical care component of the budget, but, rather, is more likely listed as a salary expense. Further, as explained earlier, some state prison healthcare costs are not even included in the state's corrections budget at all, but are rather marked as parts of other state spending categories. Thus, official records of healthcare expenses are likely to understate the total costs created by healthcare needs of aging prisoners.

If the number of aging prisoners continues to increase to the extent projected by experts, it is hard to imagine states having funds left over to pay for any other public service without dramatically increasing revenues (by increasing taxes) or substantially cutting expenditures for other societal services.

### **b. The Cost Savings of Releasing Aging Prisoners**

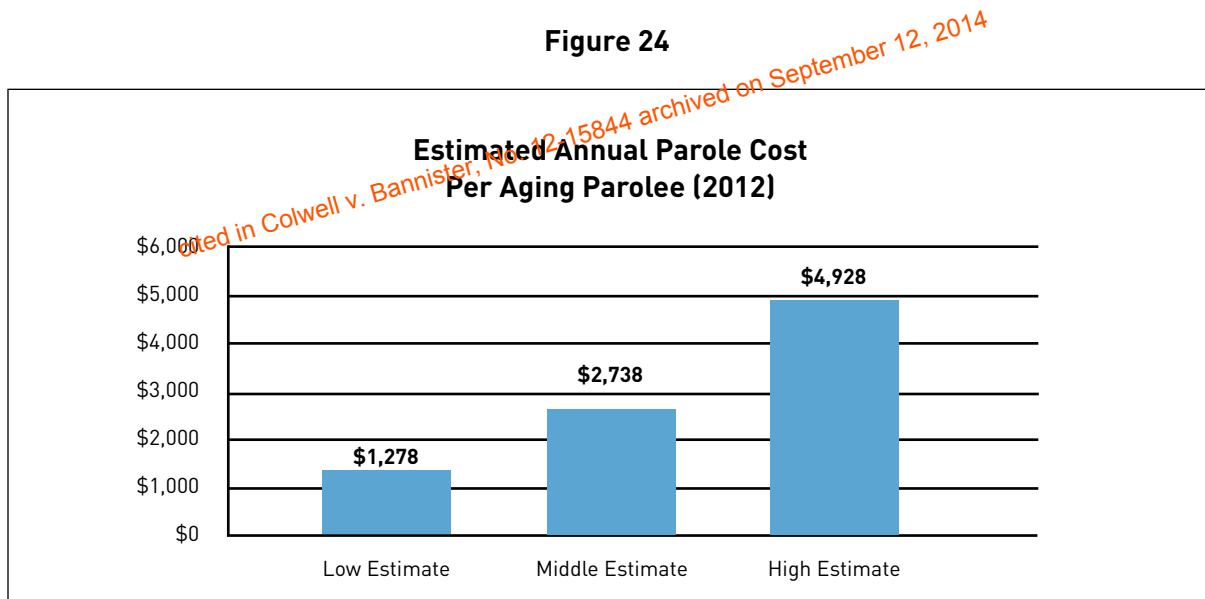
The section below discusses the five major areas of fiscal impact when releasing aging prisoners: (1) monitoring costs, (2) housing costs, (3) public benefits (including healthcare), (4) emergency room visits, and (5) tax revenue. As shown below, this fiscal estimate shows that the continued incarceration of aging prisoners who pose little safety risk is far more expensive than non-incarceration.

## 1. Monitoring

Most aging prisoners will be released onto parole or another type of corrections supervision in the short run, which is still a form of punishment. The level of supervision and intervention for each aging prisoner will vary according to the likelihood that he or she will pose a public safety threat.

According to the recent Pew report, the average daily cost of parole is \$7.50, with a range from a low of \$3.50 to a high of \$13.50 per day.<sup>59</sup> **Figure 24** below displays low, middle, and high estimates of the average annual cost of parole for aging prisoners. The low estimate assumes the low daily cost of \$3.50 per day. The high estimate assumes the high daily cost of \$13.50 per day. The middle estimate assumes the average daily cost of \$7.50 per day. The middle estimate assumes that the monitoring cost of the average *aging* parolee is the same as the monitoring cost of the average parolee. This is a conservative estimate because aging parolees most likely require less supervision and intervention because they are less likely to commit crimes that land them back in prison, and are physically weaker and suffer from more chronic health conditions than the general population.

**Figure 24**



Source: ACLU State Fiscal Impact Analysis (2012).



## 2. Housing

Released prisoners face a number of barriers to acquiring housing, including legal restrictions, stigma, and poverty. Some aging parolees earning low or no income may require government assistance to afford housing. Other aging parolees may return to live in private residences and require no government assistance.

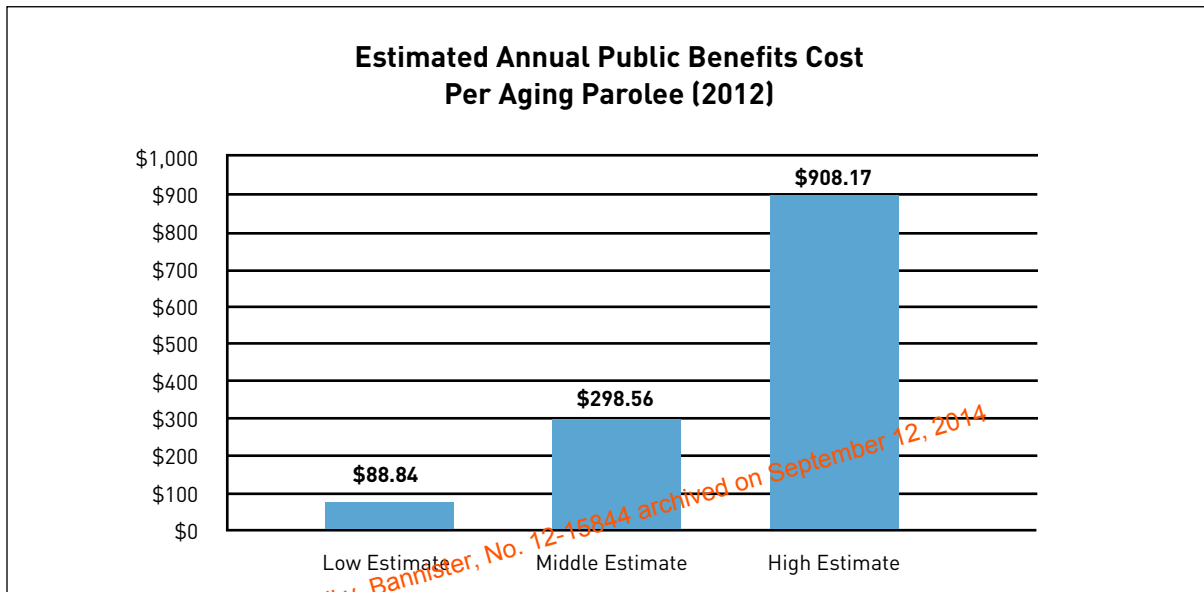
Public housing and rental assistance vouchers are funded primarily by the federal government. Some states and localities supplement these federal funds.<sup>60</sup> Only a small percentage of these housing benefits are actually paid with state funds and will therefore have a minimal impact on state budgets. This cost is therefore not included in the state fiscal analysis and is instead discussed in the Additional Considerations section below.

## 3. Public Benefits

As described in more detail in the Methodology section, for the remaining three categories of fiscal impact—public benefits, emergency room visits, and tax revenue—this report relies on a regression technique using available data on the population age 50 and older. This report estimates low, middle, and high impact for each category based on data from the most recent Current Population Survey. The low estimate assumes that aging parolees mirror the national population of aging Americans. The high estimate assumes that the entire aging parolee population is unemployed and has the lowest level of education. The middle estimate is somewhere in between and is the most accurate. This regression factors in demographic characteristics representative of the aging prison population including race, gender, education level, household composition, and unemployment. This analysis conservatively estimates the cost savings by assuming lower levels of educational attainment and higher levels of unemployment. Because public benefits and taxes are typically underreported in surveys, the analysis corrects for the underreporting by increasing projected benefits payments. Because many of these programs are jointly funded by state and federal governments, this report determines the share paid by state governments and only includes that cost in the state fiscal analysis.

To estimate the public benefits paid by the state to aging parolees, this report examined data on state payments for Medicaid, Supplemental Security Income (SSI), food stamps, cash public assistance, and energy assistance. **Figure 25** below shows that the middle estimate of the total annual amount of public benefits for the average aging parolee is \$298.

**Figure 25**



Source: ACLU State Fiscal Impact Analysis (2012).

The subsections below explain the different categories of public assistance included in this cost. Notably, this analysis excludes unemployment or workers' compensation payouts because aging parolees will not have met the requirements for unemployment as they will have not worked in eligible employment in the recent past.<sup>61</sup>

### *Healthcare*

The two primary government-funded healthcare programs are Medicare and Medicaid. When behind bars, prisoners lose their eligibility for both programs for the full duration of their prison term.<sup>62</sup> In some cases, states require prisoners to make co-pays or pay for part of their treatment; but the vast majority of prison healthcare is paid entirely by the state taxpayer.<sup>63</sup>

Aging prisoners who are released onto parole, on the other hand, may turn to public healthcare for their needs or they may not. An aging parolee who qualifies for private health insurance through his spouse or purchases private insurance costs the state nothing.

Research from the Urban Institute shows that 4 to 8 months after release, only 10-20% of released prisoners in Maryland and Illinois had private insurance. An aging parolee who is indigent or has low income may turn to government run programs. For example, the Urban Institute found that in Maryland, less than 5% of released prisoners drew Medicaid, Medicare, disability, or veterans' health insurance.<sup>64</sup>

The costs of Medicare and veterans' benefits—which are federally funded—do not affect a state fiscal impact analysis and are therefore discussed in the section on Additional Considerations below. Medicaid, which provides medical insurance to low-income individuals of any age, is jointly funded by federal and state governments based on a formula that results in considerable variation in Medicaid costs across states.<sup>65</sup> The federal government generally pays from \$1-\$3 for every \$1 spent by a state on Medicaid.<sup>66</sup>

Most people qualify for Medicaid by qualifying for SSI. Individuals with incomes up to 100% of the federal poverty level (\$10,890 annually for an individual)<sup>67</sup> and with very limited assets will qualify for this program.<sup>68</sup> Many aging prisoners will be eligible for Medicaid upon release because they have earned no income for several decades or years and face barriers to employment due to the stigma or status of having a criminal conviction or will be too old, physically weak, or ill to work.

However, Medicaid, even when coupled with other public health benefits, may still not cover the full cost of care for indigent aging parolees. Still, many aging parolees may be uninsured. These individuals may rely on emergency room or acute hospital visits for treatment. The fiscal impacts of these two scenarios are covered in subsection (4) below on emergency room costs.

### *Supplemental Security Income*

Some aging parolees may be eligible for Supplemental Security Income (SSI). SSI is a federal cash benefit program administered by the Social Security Administration. It provides cash for food, clothing, and shelter to those who are age 65 and older, blind, or disabled and have little or no income.<sup>69</sup> In all likelihood, many aging parolees may be eligible for this program. However, the 89% of aging prisoners under age 65 will not immediately qualify for those benefits upon release because of their age.

The federal government covers the vast majority of costs for SSI. Some states make supplemental payments to increase the cash assistance. This state and local supplement accounts for 8% of the total costs of SSI.<sup>70</sup> SSI payments are therefore included in the public benefits cost.

### *Food Stamps*

Some aging prisoners may also be eligible for government assistance under the Temporary Assistance to Needy Families (TANF) program or the Supplemental Nutrition Assistance Program (SNAP). TANF provides non-cash food stamps to low-income families with children when working adults meet weekly work requirements. SNAP provides financial assistance to low-income households for food purchase. The size of these benefits tends to vary from state to state. These two programs are federally-funded, with states bearing roughly half of the administrative costs (which are very small compared to the benefits received).<sup>71</sup>

To err on the side of over-including possible costs to the state, SNAP and TANF are included in the public benefits cost; it is possible that some aging prisoners may return to families with children thereby increasing the draw on these benefits.

### *Cash Public Assistance*

States provide additional cash public assistance in the form of Aid to Families with Dependent Children (AFDC, ADC), cash benefits through TANF, emergency assistance, and other general assistance. This category excludes TANF food stamps and SSI payments. These benefits are available to low-income families. They are included in the public benefit costs to again err on the side of over-including possible public benefits cost increases.

### *Energy Assistance*

Energy assistance programs help low income individuals with the cost of home energy. These programs are primarily federally-funded through the Low Income Home Energy Assistance Program federal block grant. Some states supplement these payments, however.<sup>72</sup> Aging parolees who live in their own residences may be eligible for energy assistance. This benefit is included in the public benefits cost.

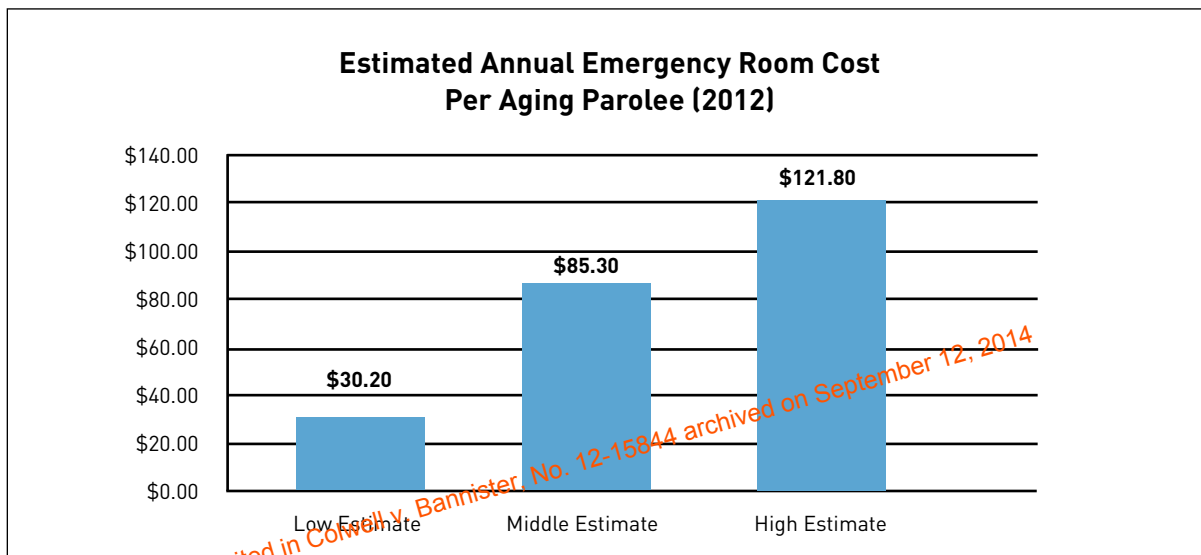
## 4. Emergency Room Visits

In some cases, public health benefits may not be sufficient to cover the cost of care for aging parolees. Others may be uninsured altogether. These aging parolees may go to a community clinic or hospital, visit the emergency room for acute care, or not seek healthcare due to lack of funds.

Emergency room visits will have some fiscal impact on states. The federal government covers a significant portion of the hospital bills of uninsured and Medicaid patients that patients cannot pay.<sup>73</sup> The portion paid by states varies.<sup>74</sup> Using data made available in the Medical Expenditure Population Survey database, this report calculates a low, middle, and

high estimate of the total expected ER cost to the state per aging parolee as shown in **Figure 26** below.<sup>75</sup> The low estimate assumes that aging prisoners are on Medicaid and uninsured in the same proportion as the general population age 50 and older; specifically, that 13% are on Medicaid and 12% are uninsured. The medium and high estimates make increasingly pessimistic assumptions about the ability of aging parolees to obtain private insurance or Medicaid.<sup>76</sup>

**Figure 26**



Source: ACLU State Fiscal Impact Analysis (2012).

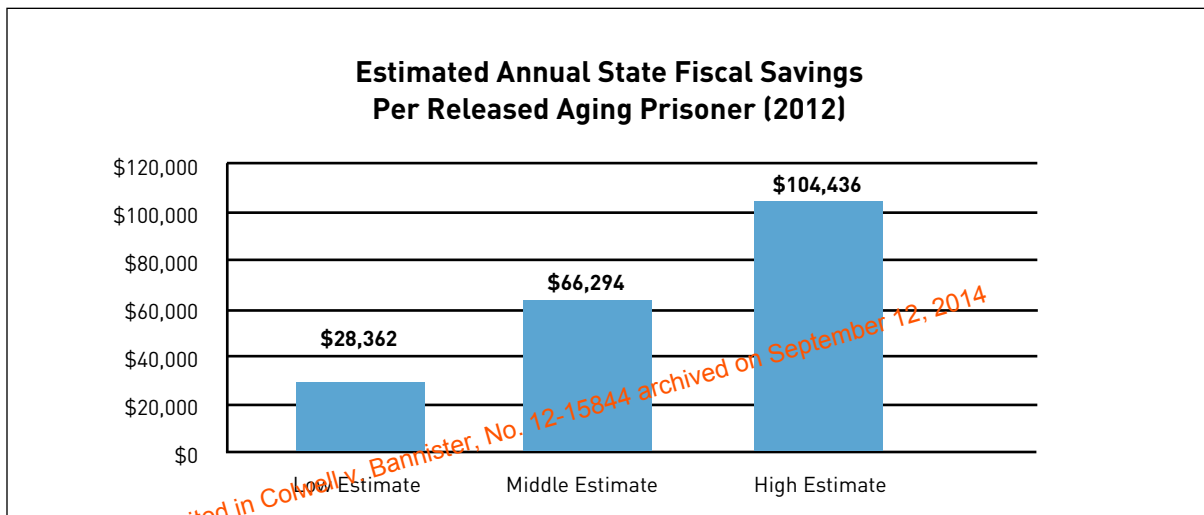
## 5. Tax Revenue

Some aging prisoners will leave prison to join the workforce and pay taxes to the state. This report conducts a regression on available data to estimate what percentage of aging parolees would return to the workforce based on age and other demographic data, thereby generating income tax revenue to the state. The middle estimate of the average aging prisoner state income tax liability is \$1,146.<sup>77</sup> Releasing aging parolees will also add sales tax revenue to the state, but this analysis does not include that additional impact.

c. Fiscal Impact Estimate

Combining the above analyses, **Figure 27** below provides three estimates of the annual fiscal cost savings of releasing an average aging prisoner as compared to the status quo of keeping that prisoner behind bars. The middle estimate shows that states, on average, will save \$66,294 per year per released aging prisoner. Even the most conservative estimate produces a \$28,362 savings per aging prisoner released.

**Figure 27**



Source: ACLU State Fiscal Impact Analysis (2012).

To clarify the calculations behind these numbers, **Figure 28** below breaks out the middle estimate into its constituent parts. The revenue and costs savings to the state upon release is represented in gray, and the costs in white.

**Figure 28**

<b>Breakdown of Annual Fiscal Savings Per Aging Prisoner Released (Middle Estimate, 2012)</b>	
Incarceration Costs	+\$68,270
State Income Tax Revenue	+\$1,145
Parole Costs	-\$2,738
State Public Benefits Received	-\$298
Public Cost of Emergency Room Visits	-\$85
<b>Total State Cost-Savings</b>	<b>+\$66,294</b>

Source: ACLU State Fiscal Impact Analysis (2012).

In sum, the fiscal impact analysis shows that releasing aging prisoners will produce a substantial cost savings to those states that choose to conditionally release aging prisoners.

## **2. Additional Considerations: Federal & Local Fiscal Impact and Societal Impact**

Releasing aging prisoners may also have fiscal impacts on federal and local governments, as well as on private actors and society at large.

### *Tax Revenue*

If aging prisoners return to the work force, they will increase the federal income tax revenue. These prisoners will also increase the tax revenue to local and state governments.

### *Public Benefits*

There will be some fiscal costs to the federal government in the form of increased public benefits for aging parolees, particularly the costs of Medicaid, SSI, TANF, and SNAP (already explained above) and additionally Medicare, Social Security, and Social Security Disability. Medicare, which is fully federally funded, provides healthcare for individuals

who have worked for 10 years in Medicare-covered employment and are age 65 and older or disabled.<sup>78</sup> Social Security provides retirement income to individuals age 65 and older who have worked for 10 years.<sup>79</sup> These programs do not provide benefits to those in prison. Upon release, aging prisoners may apply for them; however, due to extended or intermittent periods of incarceration, many aging parolees will likely be disqualified by the employment requirements. Additionally, the 89% of aging prisoners under age 65<sup>80</sup> will not meet the age requirement immediately.

Social Security Disability (SSD) provides benefits to individuals who have earned sufficient wages over time and cannot work for a year or more because of a disability. When an individual turns 65, these benefits are automatically converted to Social Security retirement benefits, but the amount remains the same. This means that an individual cannot collect both Social Security and SSD.<sup>81</sup> Aging prisoners who have been incarcerated for long periods may not meet the work requirements.

If aging prisoners join families using TANF and SNAP benefits, possibly causing these benefits to increase, the federal government will incur the costs for most of these benefits.

If any aging prisoners are veterans they may also be eligible for veterans' benefits. For aging prisoners who are uninsured or on Medicaid and cannot pay the balance of their medical bills, the federal government may need to dedicate additional funds for this purpose.<sup>82</sup> As explained, aging prisoners will not immediately qualify for federal unemployment benefits because they will not meet the necessary work requirements

### *Public Housing*

As mentioned above, low-income aging parolees may seek public housing assistance. According to various recent studies by the Urban Institute, the majority of returning prisoners live with family members, friends, or partners upon release. In particular, three months after release, 88% of released prisoners in Illinois and nearly 70% in Maryland lived with others.<sup>83</sup> Similarly, in Texas and Ohio, 63-70% of released prisoners lived with a family member.<sup>84</sup> Aging parolees, however, are probably as likely—if not more likely—to live with family than average aged parolees given their advanced age.

Some aging prisoners may go to halfway houses or residential treatment facilities but availability is limited, and is therefore not a permanent option for released prisoners. Nationwide, less than 0.5% of all prisoners released live in halfway houses.

Released prisoners also face an increased likelihood of becoming homeless. In the District of Columbia, for example, 25% of release plans for individuals on parole do not contain a stable housing placement.<sup>85</sup> Similarly, a 2008 study in California found that 21% of those on parole were homeless or living in a homeless shelter.<sup>86</sup> In order to avoid releasing aging prisoners to then become homeless, this report advocates for a strictly voluntary aging



prisoner conditional release program, in which prisoners have the right to go before a parole board to request parole, if they so choose. If prisoners fear they will become homeless, they can decide not to apply for this option.

Those parolees who do not live with family members or are indigent may turn to public housing. These costs vary by locality and are primarily funded by the federal government. States and localities provide additional supplemental funding. In New York, one of the most expensive real estate markets in the nation, the average monthly rent for public housing is \$434 and residents are required to pay no more than 30% of their family income toward rent. The federal Department of Housing and Urban Development pays the remainder—between \$3,645 and \$5,208 per year per unit.<sup>87</sup>

It is difficult to estimate the governmental housing costs for aging parolees. What is clear, however, is that the vast majority of aging prisoners—between 63-88%—will live with family members and will not use additional government funds for housing.

### *Societal Benefits*

Beyond fiscal considerations, there are many non-fiscal benefits to releasing aging prisoners that no longer pose substantial safety risks. Prisoners, their families, and society as a whole can benefit. For example, released aging prisoners and their families and friends will benefit from uniting with their loved ones. They will benefit from increased well-being and improved quality of life. Prisoners, their families, and society will benefit from the more stable family structures once aging parolees reintegrate into society.

Aging parolees will increase economic growth through increased productivity, greater demand for goods and services, and decreased unemployment to the extent that aging parolees engage in activities that create new jobs for others. Aging parolees may also add to economic growth if they return to workforce. Releasing relatively harmless elderly prisoners will also increase the United States' profile as a leader in human rights.

In short, although there will be some cost to the federal and local governments of creating state conditional release programs for aging prisoners, these costs pale in comparison to the large cost savings states will achieve and benefits society will gain from releasing aging prisoners. Common sense tells us that incarceration is always the most expensive way to deal with aging prisoners. The fiscal impact estimate set forth in this section confirms this intuition. Security, healthcare, and housing costs are far higher in prison than on the outside. States can save over \$66,000 per year per aging prisoner released. Releasing aging prisoners who pose little safety threat will save taxpayers billions in the long-run.

## D. How We Ended Up Here

Since the mid-1970s, federal and state lawmakers adopted tough on crime policies that have made the United States the largest incarcerator in the world.<sup>88</sup> This section will explain how these policies created a harsh and draconian sentencing regime and fueled the massive growth in our aging prisoner population.

Starting in the 1970s, federal and state governments enacted a series of mandatory minimum sentences for drug and other offenses. These laws required judges to impose automatic prison terms of at least a minimum amount of time—usually quite lengthy—for certain crimes.<sup>89</sup> In 1984, Congress established federal Sentencing Guidelines aimed at reducing sentencing disparities. The guidelines, however, set harsh mandatory minimum sentences that lengthened prison time for a range of crimes and undercut judicial discretion to craft individualized sentences. Though the mandatory nature of the guidelines was found unconstitutional in 2005, federal judges must continue to use them to guide their sentencing decisions.<sup>90</sup> Most states enacted similar laws that lengthened sentences for many offenses, particularly those involving drugs.<sup>91</sup>

During this same time period, many states also adopted habitual offender laws, also called “three-strikes-you’re-out” laws, which mandate life in prison or extremely long prison sentences for individuals convicted of a third felony offense.<sup>92</sup> The federal government followed suit. Because states at the same time also expanded the category of “felony” to include a far longer list than the seven traditional common law felonies (murder, rape, arson, burglary, robbery, mayhem, and kidnapping), countless prisoners are serving life terms for offenses that are not serious, including such offenses as petty theft<sup>93</sup> and drug possession.<sup>94</sup>

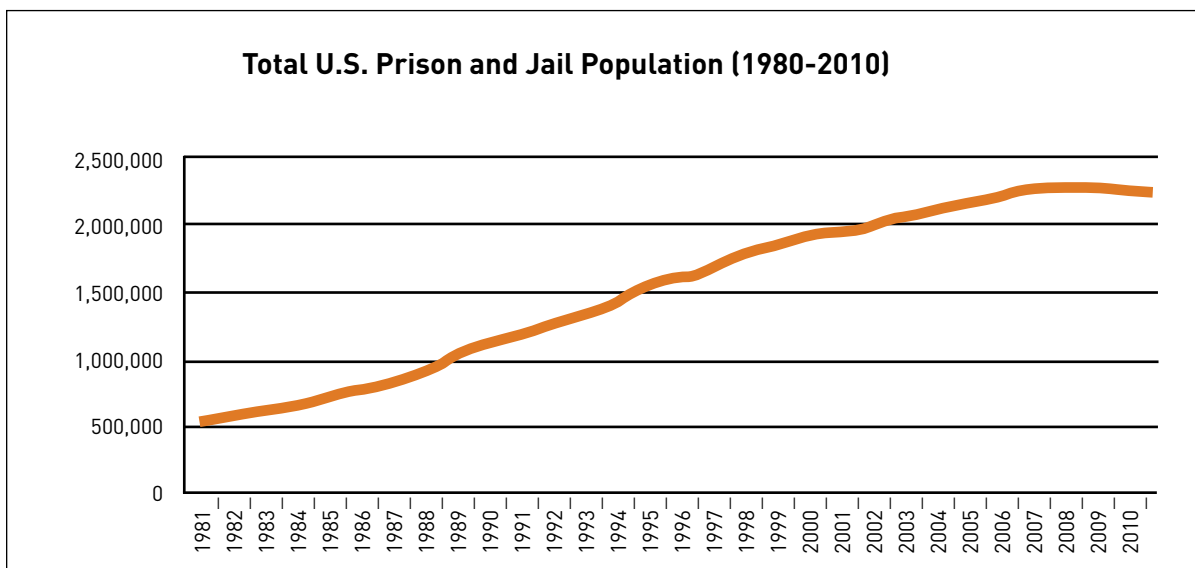
In the mid-1980s, many states also passed “truth-in-sentencing” laws, which require prisoners to serve a high percentage (typically 85%) of their sentences. Requiring prisoners to serve 85% of what are already extremely long and disproportionate sentences further cements our draconian system of punishment into the criminal justice system. A handful of states abolished parole, and in 1984 the federal government did so.<sup>95</sup> States also severely rolled back earned compliance provisions (or “good time credits”) that enable prisoners to earn the possibility of parole through good behavior or completing education and treatment programs while incarcerated.<sup>96</sup> Further, prisoners released onto parole faced new, stringent rules that led to unprecedented numbers of people returning to prison for technical parole violations.<sup>97</sup>

Below are just a few examples of individuals who committed low-level offenses and received disproportional sentences as a result of these tough on crime laws still in place:

- In California, Leandro Andrade, a father of three, received a mandatory sentence of 25 years to life in prison in 1996 for two counts of shoplifting children's videotapes valued at \$153. He had three prior offenses.<sup>98</sup>
- In Louisiana, 35-year-old Cornell Hood was sentenced to life in prison in 2011 for four offenses of possession and intent to sell marijuana.<sup>99</sup>
- In Mississippi, the now-famous Scott Sisters, Jamie and Gladys, were sentenced to two consecutive life terms for a robbery in which they stole \$11 when they were teenagers. After spending 16 years in prison, the sisters were released on parole in 2011 in a rare move by the governor because Jamie Scott's kidneys were failing.<sup>100</sup>
- In Nebraska, 21-year-old Hamedah Hassan agreed to run errands and transfer money for a cousin who sold drugs. It was her first offense but she was sentenced to life in prison for conspiracy to distribute crack cocaine due to federal mandatory sentencing guidelines. After serving 19 years behind bars, Hamedah was released in March 2012 under the federal Fair Sentencing Act of 2010, which reduced the sentencing disparity between crack and powder cocaine crimes.<sup>101</sup>

A generation of draconian sentencing and parole laws fueled the explosion of our prison and jail population. **Figure 29** on the next page shows this growth in our incarcerated population (in prisons and jails) during the same time as the enactment of these tough on crime laws that over-criminalized (increasingly criminalized private behavior and drug use) and over-punished (mandated more severe punishments for crimes).<sup>102</sup>

**Figure 29**



Source: Bureau of Justice Statistics (2012); Guerino et al., *Prisoners in 2010* (2011).<sup>103</sup>

In addition to making our prison population larger, these laws also made it older. By imposing longer sentences for a generation, this country has filled its prisons with more aging prisoners serving longer sentences. As detailed in Section I.B above, the percentage of aging prisoners serving 20 years or more has grown significantly. In 1979, near the beginning of the tough on crime shift in sentencing policy, only 2% of aging prisoners nationally had spent more than 20 years behind bars. By 2012, this percentage had grown substantially. For example, it grew to 15% in Mississippi and 19% in Ohio. Data from New Hampshire, Florida, Texas, and Utah confirms this growth trend. An aging prisoner today is far more likely to have spent more than 20 years in prison than was an aging prisoner in 1979. This is not the result of more older people committing serious crimes;<sup>104</sup> it is a direct result of younger people receiving longer sentences and growing old in prison.

As shown in **Figure 30** on the next page, a look at the change in state prison sentences from 1986 to 1995—the apex of the tough on crime movement—confirms that sentences grew during this period. The number of people sentenced to life terms (with or without parole) more than doubled, and the number of people sentenced to 20 years or more in prison more than tripled. The percentage of prisoners serving these severe sentence types increased from 17% to 24%.

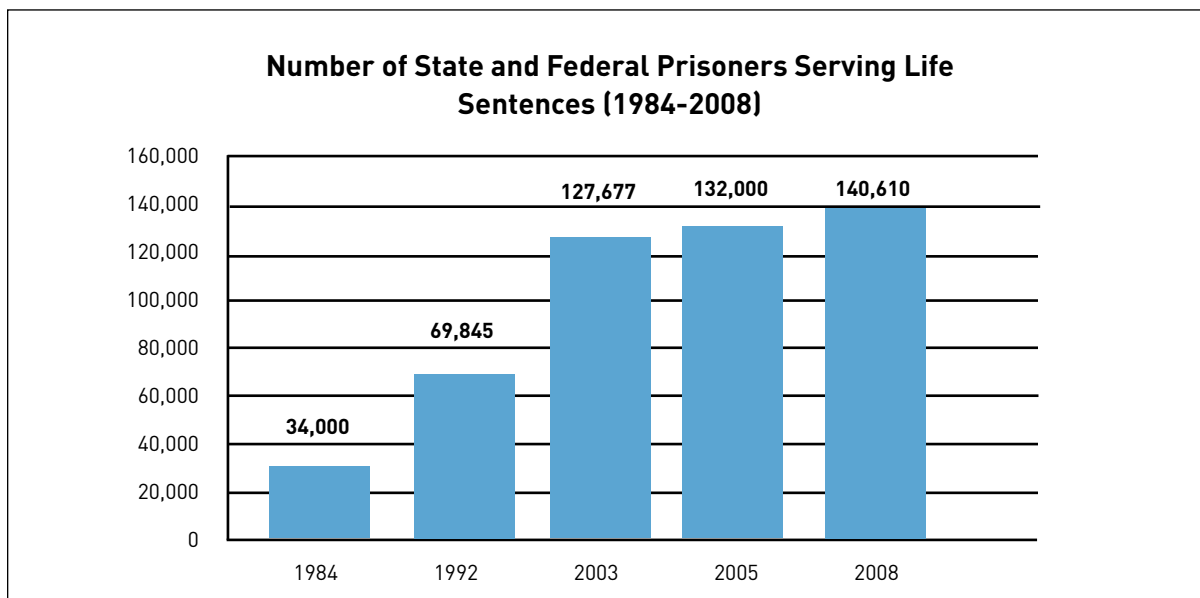
**Figure 30**

State Prison Sentences by Year & Type (1986-1995)				
Year	Life Without Parole	Life	20 Years or More	Percentage of Three Groups in Total Prison Population
1986	7,399	26,178	51,256	17%
1987	5,469	37,191	78,042	23%
1988	8,569	38,874	71,848	21%
1989	10,370	41,005	88,343	23%
1990	11,246	43,961	96,921	23%
1991	11,759	44,451	105,881	22%
1992	13,937	52,054	125,996	24%
1993	17,071	55,856	127,915	24%
1994	17,446	53,650	148,026	24%
1995	17,853	64,686	163,881	25%

Source: Merianos, *From the Outside In* (1997).<sup>105</sup>

**Figure 31** below specifically focuses on the population sentenced to life terms, either with or without parole, over a greater span of time. From 1984 to 2008, the number of state and federal prisoners serving life sentences more than quadrupled, increasing from 34,000 to 140,610 prisoners.<sup>106</sup>

**Figure 31**



Source: Nellis & King, *No Exit* (2009).<sup>107</sup>

As this data shows, our prison population has not grown so old by accident. The proliferation of severe sentencing policies—the enactment of mandatory minimum, three-strikes, and truth-in-sentencing laws along with the general increase in sentence lengths—has led to a massive explosion in the aging prisoner population.

As explained in the Human Rights Watch report on aging prisoners released early this year, continued incarceration of aging prisoners does not serve the four traditional goals of punishment and incarceration system.<sup>108</sup> Retribution (ensuring that the punishment fits the crime) is not served by continued incarceration as many aging prisoners have already served far more time behind bars than their crimes warrant. Our harsh sentencing policies are often devoid of the concept of proportionality, which is central to retribution. This is particularly true for the prisoners who have grown old in prison and are in the second profile of aging prisoners. Incapacitation (preventing a prisoner from committing a crime by locking him up) has little or no added value when dealing with aging prisoners who already have extremely low propensity to commit crimes that land them back in prison, and are often physically weak. The goal of deterrence is not served either because aging prisoners already pose low public safety risks; there is no need for further deterrence. Finally, incarcerating the elderly does not serve to rehabilitate them. Forcing someone to spend more time in prison without the necessary services does not rehabilitate anyone; on the other hand, reentry programs, reintegration, and treatment as needed will accomplish this goal.

*cited in Colwell v. Bannister, No. 12-15844 archived on September 02, 2014*



**Charles Webb, 74, shields his eyes from light.**

**Webb is losing his sight. He has been in prison for 17 years.**



## II. Recommendations

Our prisons are becoming a vast complex of nursing homes. Compared to all other prisoners, older prisoners on average cost taxpayers the most and threaten public safety the least. Even in a time of economic prosperity, states must be responsible with how they spend their money. But a time where no dollar can be wasted increases the urgency to act. The Recommendations below set forth various concrete steps that states can take to release a considerable portion of their aging prisoner population without compromising public safety and thereby free up billions of tax dollars for other neglected but vital priorities.

### A. Short-Term Reforms

#### 1. Grant Conditional Release for Aging Prisoners Who Pose Little Safety Risk

A handful of states, including Virginia and Maryland, have laws that grant prisoners above a certain age (usually 50 or 60) who have typically already served a minimum number of years in prison (usually 5 to 15) the ability to go before a parole board to request parole.<sup>109</sup> These types of “elderly parole” or “conditional release for aging prisoners” laws do not mandate the wholesale release of aging prisoners. Rather, they allow individuals to request—by their own choice—to be released onto parole. The parole board or comparable agency then determines whether the individual can be safely released. These laws are a release valve to allow parole boards to depopulate prisons of the elderly who pose little or no safety risks and for whom expensive incarceration is no longer warranted. These aging prisoners will be released onto parole—a form of punishment, where they will remain under government supervision in the short-term and be subject to sanctions for parole violations. States can thereby optimize the fiscal efficiency of the corrections system by ensuring continued public safety and reduced costs; as shown by this report’s fiscal impact analysis, parole supervision and other government benefits to released prisoners cost far less than incarceration.

In 2011, a bipartisan coalition in Louisiana helped enact a parole program for aging prisoners.<sup>110</sup> The law was championed by Burl Cain (the Warden of Louisiana State Penitentiary at Angola), Democratic House Representative Patricia Smith, the ACLU of Louisiana, and the Conference of Catholic Bishops, and signed into law by Republican Governor Bobby Jindal.<sup>111</sup> Although the Louisiana law is a big step in the right direction, it is limited in its effect because it unnecessarily restricts eligibility for the parole program.<sup>112</sup> Such restrictions are not the best practice and should not be duplicated in other states.



## *Best Practices for Conditional Release for Aging Prisoners:*

Model legislation creating a conditional release program that incorporates these best practices is attached to this report as an Appendix. The bill is carefully tailored to protect public safety and ensure that aging prisoners are not released to homelessness and do not become an added weight to taxpayers.

- *Define “aging” as individuals age 50 and older.*

Given the criminological consensus that 50 is the age at which prisoners ought to be considered elderly and given the evidence that recidivism in all crime categories plummets by the time prisoners turn 50, eligibility for age-based parole should begin at age 50.

- *States should use risk assessment instruments to ensure that their determination of a prisoner’s risk level is grounded in well-recognized science and evidence.*

Regardless of the type of crime committed, aging prisoners pose lower risks of committing future crimes because of their age, physical health problems, and/or disabilities. States should use a valid and reliable risk assessment instrument (RAI) well-supported by peer-reviewed literature to determine the prisoner’s average level of risk (i.e., his or her propensity to commit future crimes that endanger public safety) when making a release decision. States should also use RAIs to identify and develop supervision and reentry plans upon release, and treatment plans if needed.<sup>113</sup>

RAIs predict the likelihood that a specific prisoner will commit another crime if released. They use “actuarial data” to sort prisoners into accurate low, medium, and high risk categories for recidivism. Actuarial data predicts a prisoner’s average likelihood of reoffending based on broad categories and aggregate data, such as the prisoner’s conviction or whether the prisoner has a drug dependency. This data includes both “static factors” (those that do not change or those that change in one direction only, such as age and number of prior arrests or convictions) and “dynamic factors” (those that can be changed by interventions, like substance abuse or anger management issues).<sup>114</sup>

To ensure individual tailoring, states should use standardized clinical assessments or structured client interviews of the prisoner to supplement this actuarial data to most accurately predict the level of risk that the prisoner potentially poses to society if released.<sup>115</sup> These clinical assessments should include a careful review of the prisoner’s behavior and progress in prison.

Based on the three risk categories, parole boards can tailor release conditions (including reentry and reintegration programs, or supervision and treatment if appropriate) for each aging parolee to the risk category he or she falls into. It is imperative that the intensity of any release conditions or treatment be tailored to the prisoner's risk level. For example, low-risk prisoners should be subject to low-level intensity release conditions and services (like minimal supervision while on parole) and high-risk prisoners should be subject to high-level intensity release conditions and services (like intensive parole supervision or placement in a halfway home). Alarming, if low-risk prisoners are subject to high intensity conditions (like placing individuals who have committed first-time nonviolent offenses into daily check-ins while on parole), these inappropriately tailored interventions actually end up causing the released prisoners to recidivate more often. Contrary to popular belief, more restrictions and more supervision do not necessarily increase public safety.<sup>116</sup>

When making release determinations for high-risk aging prisoners, parole boards should focus on interventions (supervision, treatment, or programs) to reduce the estimated level of risk. To ensure parole boards determine risk appropriately and make decisions grounded in evidence, parole boards should issue written explanations for denials of parole to aging prisoners describing why the RAI indicates that the prisoner poses a substantial risk to public safety and why there are no appropriate release conditions to reduce this risk.

RAIs are used on prisoners of all ages, but unfortunately few instruments have been validated for elderly prisoners (i.e., those ages 50 to 90).<sup>117</sup> A state must ensure that the RAI it chooses is validated for the purpose of releasing aging prisoners, as opposed to for a different purpose. States should also partner with research universities to test the RAI on the state's population of aging prisoners. Simply importing an RAI from one state into another state strips the RAI of its validation; in such cases the RAI is being used on a population on which it has not been tested and prison populations and behaviors vary by locale.<sup>118</sup> The more accurate an RAI's prediction is for each aging prisoner, the better parole boards can release aging prisoners without harm to public safety and allocate appropriate post-release resources to each released prisoner.

- *Omit eligibility restrictions.*

Because the release decision is based on an RAI grounded in evidence, there is no reason for states to include eligibility restrictions in their aging prisoner parole programs. For example, there is no reason to condition release on the original conviction, which is an inaccurate proxy for a future public safety threat, when an RAI will accurately estimate the average public safety risk posed by the prisoner. Parole boards are often slow to release aging prisoners convicted of murder, sex crimes, or other violent crimes that they committed in their youth due to the seriousness of their crimes—even though these prisoners have often served far more time behind

bars than a proportional punishment warrants. An RAI will allow released prisoners meeting parole eligibility requirements to be released despite this stigma.

Further, such programs should not require unnecessary programming in prison (like completing high school equivalency exams) because such programming is not readily available in all state prisons and is not an accurate proxy for public safety risks. Additionally, individuals age 60 or older may find it more difficult to complete these programs. States should also not condition eligibility on maintaining a clean disciplinary record in prison, because a properly conducted risk assessment will determine the future public safety risk posed by a prisoner. Most states consider relatively benign actions—like “possessing an unauthorized amount of otherwise authorized clothing,”<sup>119</sup> “[failing] to go to bed when the lights are dimmed or get[ting] up during the night without securing permission of the correctional staff,”<sup>120</sup> and littering<sup>121</sup>—to be violations of the prison rules.

A risk assessment instrument will ensure that public safety and science are the paramount considerations for continued incarceration, as opposed to speculation, inaccurate proxies, unwarranted fear, or stigma.

- *Provide a simple form explaining public benefits information during the parole hearing.*

Because many prisoners may not know about available public assistance programs, states should prepare a simple, easy-to-read form providing this information during the parole hearing so that aging prisoners understand their support alternatives before release.

- *Provide a provisional 30-day supply of essential medications at release.*

Prisoners will face a number of practical barriers to acquiring medication after they are released. They may be unable to afford medication immediately, need time to acquire insurance, or need special medication that is not readily available. States should give a 30-day supply of essential medications to prisoners at release to cover a transition period if prisoners are on any such medications.

- *Ensure parole for aging prisoners is strictly voluntary.*

A compulsory parole program may risk expelling elderly prisoners into homelessness. For that reason, an aging prisoner parole program should be voluntary. A prisoner should have the right to choose to apply for parole but not be obligated to do so.

## **2. Utilize & Expand Medical Parole**

Medical parole or “compassionate release” laws condition parole eligibility not on a prisoner’s age but on the severity of a prisoner’s current medical condition. These laws are necessarily limited in their ability to depopulate prisons of the elderly because they usually require prisoners to be terminally ill or physically incapacitated—a subset of the overall population of aging prisoners.<sup>122</sup> Even if aging prisoners do not have such severe illnesses, they still pose relatively low safety risks due to their age, general physical deterioration, and low propensity for recidivism.

Lawmakers interested in implementing medical parole programs should avoid the shortcomings of those currently in place. Eligibility should not be hampered by restrictive requirements. In Hawaii, for example, eligibility is limited to prisoners who have a “terminal illness,” defined as an “illness that by its nature, can be expected to cause a patient to die within 1 year.”<sup>123</sup> Instead, medical parole programs should be open to non-terminal patients over age 50 who have health conditions that render them unlikely to pose substantial public safety risks.

In addition, medical parole programs should have straightforward procedures. Hawaii’s example is again instructive. Because of unnecessarily complicated application and review processes,<sup>124</sup> barely half of all prisoners approved for release from 2009 to 2012 were actually granted release.<sup>125</sup> A streamlined process will ensure that those who should be released are not stymied by bureaucratic stumbling blocks.

States that already have compassionate release laws or are considering them should simplify the application process, expand the medical conditions allowing for release to include age-based illnesses, and remove any unnecessary eligibility restrictions. State legislatures should also require parole boards to issue written decisions for their denials of medical parole explaining why the prisoner did not meet the factors enumerated in the medical parole laws for release. In this way, states can ensure that the truly sick and physically limited will actually be released.

## **3. Increase Accountability & Transparency of Parole Boards**

One challenge of laws increasing parole eligibility is the vast amount of discretion vested in parole boards and other comparable agencies. Parole boards are never required to release an individual even if evidence overwhelmingly shows that there is no longer a public safety reason to continue to keep that person locked up. The legislature can enact parole programs for aging and medically ill prisoners, but it is the parole board that actually

implements these laws. Currently, the vast majority of parole boards do not need to explain or justify their decisions whether or not to release a particular prisoner and they can ignore legislative guidelines. Because transparency sheds light on the parole board's decisionmaking and helps ensure that the state's laws are followed, any truly effective parole reform should be accompanied by policies to increase the accountability and transparency of parole boards.

- *States should create parole guidelines and require parole boards to explain their decisions in writing.*

State legislatures should either create guidelines for parole boards or require boards to create their own guidelines. States should also require parole boards to issue written decisions explaining why they chose to grant or deny parole. Written explanations would give parole programs teeth by forcing parole board members to either conform to existing law and guidelines or account for departures from them. Written explanations should also be cataloged and available for review by an independent agency or the legislature. Any sensitive personal information about the prisoner should be redacted. Such a reform would go a long way toward preventing parole board members from simply ignoring parole rules.

Colorado provides a good model for this practice. In 2009, Colorado enacted a law that increased data collection and reporting requirements of parole board decisions and tasked the Division of Criminal Justice with analyzing this data independently and providing a report to the General Assembly.<sup>126</sup> The parole board must state a reason for any departures from the legislature's guidelines.<sup>127</sup>

- *Parole board hearings should be open to the public.*

Opening parole board hearings to the public and making transcripts publicly available subject parole board actions to public scrutiny and accountability. Open hearings allow the media, legislators, defense counsel, prisoners, and victims to better understand parole board decisions. Parole boards should be allowed to restrict access to hearings in which particularly sensitive information is involved.

Canada presents a good example of openness in parole hearings. In 1992, Canada enacted the Corrections and Conditional Release Act, which, among other things, mandated open access to parole hearings. In 2009, 2,000 people attended parole hearings as observers, with victims and their supporters accounting for about 45% of these observers.<sup>128</sup>

- *Parole boards should consider creating an appeals process or providing a right to defense counsel at hearings.*

A further useful step toward accountability would be an open appeals process. In the context of parole, appeals are especially effective when paired with the requirement of a written explanation. A parole board that can be swiftly and directly challenged on the merits of its rationale will be more likely to grant parole to individuals that fall within the guidelines for parole.<sup>129</sup> States should also consider providing a right to defense counsel at hearings, which will allow prisoners to present their best case for release. Every state would be wise to create a review process to ensure that its parole board is operating accountably and in accordance with the intent of state laws.

#### **4. Reauthorize & Expand Federal Aging Prisoner Release**

Because the federal government abolished parole in 1984, elderly federal prisoners cannot be released early without an act of Congress. Congress should follow the forty-one states that have already embraced some version of parole. Specifically, it should reauthorize and expand the provision of the Second Chance Act that includes a pilot program to allow parole for elderly prisoners.

*cited in Colwell v. Bannister, No. 12-15844 archived on September 12, 2014*

## **B. Systemic Reform: Rethink Our Disproportionate Sentencing Paradigm**

The above reforms will help states and the federal government address the immediate problem of aging prisoners currently in prison by providing a back-end release valve. However, without a full review of our sentencing laws, our prisons will continue to overcrowd with the elderly. We have long used incarceration as a one-size-fits-all solution to crime. Faced with mounting incarceration costs and populations, lawmakers should reform sentencing laws and rethink whom they send to prison and for how long.

As explained in Section I.D above, over the last forty years, states have overcriminalized by creating new crimes and overpunished behavior by severely increasing the penalties for a wide variety of offenses. The result has been more arrests, more convictions, and longer prison sentences. Local jails have become increasingly crowded with people who cannot afford high bail amounts or have been charged with trivial offenses like traffic violations, petty theft, or simple drug possession. The number of criminal offenses classified as “felonies” has proliferated with no demonstrated public safety benefit. The war on drugs has resulted in long prison sentences for people convicted of low-level drug-related crimes that pose minimal public safety risks. Legislatively mandated minimum sentences for offenses have tied sentencing judges’ hands, and many states have severely curtailed parole eligibility. Much of this policymaking has been driven by overblown fear and anecdotal stories of crimes that spurred media attention.

One of the most effective ways of slowing and ultimately reversing the prison growth as a whole—and the growth in aging prisoners in particular—is to stop sending so many people to prison for so long.<sup>130</sup> Lawmakers should rethink the current harsh and disproportionate theory of sentencing. Our “lock ‘em up and throw away the key” mentality locks millions of people behind bars for extraordinarily long periods of time well into their old age, and often until they die. States and the federal government should reintroduce proportionality into sentences for crimes and reevaluate and reform their sentencing laws.

In addition to rethinking their sentencing laws states can also modify specific sentencing laws, including the Recommendations below.

### **1. Repeal Mandatory Minimum Laws**

Federal and state governments have implemented strict, inflexible, and often irrational mandatory minimum laws that require the automatic imposition of brutally long and disproportionate prison sentences and prevent individualized sentencing. Mandatory minimums shift sentencing power to prosecutors, whose charging decisions dictate sentencing. They also prevent judges from tailoring the punishment to the individual circumstances of the case and the seriousness of the offense. Lawmakers should repeal

mandatory minimums. They should instead use advisory guidelines and a prosecutor or defendant's right to appeal a sentencing decision, as a safeguard against wildly divergent sentencing outcomes.

## **2. Repeal Habitual Offender Laws**

Many states have three-strikes and habitual offender laws that mandate long sentences, often life in prison, for individuals convicted of three crimes on a selected list. These policies have no grounding in science or public safety. These laws overcrowd our prisons with individuals who have committed multiple low-level offenses like drug possession and pose little threat to public safety and remain in prison into old age. States should eliminate or at least reform these laws that allow for automatic sentence enhancements based on prior convictions, especially those based on low-level offenses.

## **3. Repeal Truth-in-Sentencing Laws**

Many states have truth-in-sentencing laws, which require individuals to serve at least 85% of their prison terms before becoming eligible for parole. Recognizing that sentencing laws are already too harsh, states should eliminate truth-in-sentencing laws, particularly for people convicted of nonviolent offenses. This increased eligibility for parole will allow individuals to leave prison when society is no longer served by their continued incarceration.

These reforms, implemented together as a package or separately, will begin to reverse our system of mass incarceration and our aging prisoner epidemic.





**John Foote, 69, stares out the window from his prison bed.**

**Foote fell out of his bed after having a stroke.**

**Foote has been in prison since 2003.**

# Conclusion

This report's in-depth examination of the United States' population of aging prisoners reveals two things: we are imprisoning people for far too long, and we are spending too much keeping them there—even when there is limited public safety benefit. In other words, overincarcerating the elderly is not cost-benefit justified. If our government continues to lock up the elderly at the projected growing rate, states may be forced to choose between funding incarceration of the old or funding schools and infrastructure for our youth. In addition to the vast fiscal costs, keeping aging prisoners locked up unnecessarily has vast societal consequences such as separating grandparents from their grandchildren and damaging the United States' reputation as a human rights leader.

Aging prisoners are the fastest growing cohort of prisoners. Today, we have over fourteen times as many prisoners over age 55 as we did in 1981, and experts project that by 2030 prisoners age 55 and older will comprise over one-third of prisoners in the United States. We are in the middle of a dramatic rise in prisoner age that will continue to skyrocket without reform. This fast-growing cohort of prisoners is also our most expensive. Because of healthcare and physical needs that prisons are ill-equipped to handle, each aging prisoner on average costs taxpayers \$68,270 per year—approximately double what it costs to incarcerate an average prisoner. This report finds that states on average will save \$66,294 per aging prisoner released per year, even if those prisoners rely on public assistance for support upon release.

Imprisoning more of the most expensive cohort of prisoners might make sense if these prisoners were more dangerous than any other and proportionality warranted such lengthy incarceration. However, that is not the case. Aging prisoners are, in fact, the least dangerous of any cohort of prisoners. Nationally, aging prisoners return to prison for new convictions at a rate between 5-10% and sometimes far lower.

The time is ripe for states to revise parole practices to release aging individuals that are no longer a substantial threat to public safety and to reform our sentencing laws so that fewer prisoners grow old behind bars. Governments should not waste money even in economically prosperous times. More urgently, governments should not spend precious dollars when budgets are tight and deficits are staggering, especially on policies that do not work or are not needed.

Some states have already recognized their aging prisoner population as a signal to change their approach to incarceration and parole. They have recognized the opportunity to reduce prison costs without compromising public safety as an opportunity for smart reform that can gain support within communities and legislatures. The ACLU's Center for Justice looks forward to offering our expertise and assistance to state and federal lawmakers as they move toward a more reasoned and humane approach to criminal justice.



**Albert Carroll, 74, uses a walker during his physical therapy in prison.**

# Appendix: Model Conditional Release of Aging Prisoners Act

**Section 1. {Intent}** This Act is intended to reduce unnecessary costs to state taxpayers by empowering the Board of Parole *[or comparable agency]* to grant conditional release to prisoners age 50 and older who have served at least ten years in prison and pose minimal public safety risks warranting continued incarceration.

**Section 2. {Definitions}** In this Act, the following words have the meanings indicated.

(A) “Aging prisoner” means any person incarcerated by the Department of Corrections *[or comparable agency]* who is 50 years of age or older.

(B) “Conditional release” means the release of a prisoner from prison prior to the completion of his or her sentence subject to conditions set by the Board of Parole. *[No need for definition if already exists in state law.]*

(C) “Evidence-based” means policies, procedures, programs, and practices that peer-reviewed, scientific research demonstrates are an accurate assessment of the risks a prisoner released onto conditional release poses to public safety.

(D) “Mentally disabled” for the purpose of this Act means a condition, as defined by the Americans with Disabilities Act, that is: (1) a mental impairment that substantially limits one or more major life activities of an individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.

(E) “Mentally ill” for the purpose of this Act means a condition, as defined by the American Psychiatric Association, that is: a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual, and is associated with present distress or disability (i.e., impairment in one or more important areas of functioning) or with a significant increased risk of suffering death, pain, disability, or an important loss of freedom.

(F) “Risk assessment instrument” means a peer-reviewed, actuarial mechanism for determining a prisoner’s likelihood of posing a substantial public safety risk that is tested on the state’s local population and tested for the purpose of granting release from prison.

### **Section 3. {Role and Authority of the Board of Parole}**

(A) The authority to grant conditional release under Section 4 of this Act shall rest with the Board of Parole.

(B) The Board of Parole shall select an evidence-based risk assessment instrument to assess the public safety risk posed by individual aging prisoners upon release.

(C) The Board of Parole shall adopt the necessary policies and evidence-based risk assessment instrument to effectuate this Act within six (6) months of the effective date of this Act.

### **Section 4. {Conditional Release Hearing}**

(A) Notwithstanding any other provision of law to the contrary, unless eligible for release at an earlier date, an aging prisoner who has been committed to the Department of Corrections for a term or terms of imprisonment shall have the ability to request a conditional release hearing before the Board of Parole if the prisoner has served, in actual custody, the shorter of:

- (1) ten years of the term or terms of imprisonment; or
- (2) one-third of the total term or terms of imprisonment.

(B) Once a prisoner requests a conditional release hearing under subparagraph (A), the Board of Parole shall hold a conditional release hearing. At any conditional release hearing:

- (1) The Board of Parole shall grant conditional release to a prisoner if the Board of Parole finds by a preponderance of the evidence that:
  - (i) The prisoner, if released, can live and remain at liberty without posing a substantial risk to public safety; or
  - (ii) The prisoner, if released, will pose a substantial risk to public safety but release conditions can be imposed that will reduce this risk so that it is no longer substantial.
- (2) The Board of Parole shall use the selected evidence-based risk assessment instrument to make the determination in subsection (1). This determination must not be based solely on the offense or offenses for which the prisoner was incarcerated.

(3) The Board of Parole shall provide to the prisoner:

- (i) The opportunity to speak on his or her own behalf and the option of having counsel present; and
- (ii) The ability to challenge a risk determination.

(C) If the Board of Parole denies the prisoner conditional release:

- (1) The Board shall, within thirty (30) days of its decision, issue a written statement explaining the reason(s) it has determined by a preponderance of the evidence that:
  - (i) The prisoner poses a substantial public safety risk sufficient to justify his or her continued incarceration; and
  - (ii) There are no conditions that can be imposed upon the prisoner at release that can adequately reduce the substantial public safety risk.
- (2) The prisoner may reapply for conditional release after twenty-four (24) months from the date of the Board's decision.

(D) If the Board of Parole grants the prisoner conditional release, the Board shall, within thirty (30) days of its decision and prior to the prisoner's release, prepare an individualized discharge plan that:

- (1) Sets conditions of supervision and treatment if necessary for a prisoner's release based on his or her individual risk assessment profile, as determined by the evidence-based risk assessment instrument used to grant release;
- (2) Includes a brief statement of state and federal public benefits available and contact information for relevant government agencies;
- (3) Provides at release a thirty (30)-day supply of all essential medications to the prisoner if the prisoner was receiving these essential medications or supplies in prison; and
- (4) Assigns a social worker to assist the prisoner reintegrate into society, find employment (if appropriate) and housing, procure medical care (if needed), procure any appropriate public benefits, and design and implement additional details of an individualized discharge plan.

(E) If a prisoner who the Board of Parole determines is mentally ill or mentally disabled applies for conditional release, the Board shall:

- (1) Appoint a guardian to represent the best interests of the prisoner at the conditional release hearing; and
- (2) If it decides to grant release to the prisoner, include in any discharge plan the following:
  - (i) An individualized assessment of the prisoner's need for clinically appropriate forms of continuing mental health treatment and support services; and
  - (ii) A confirmed residential placement consistent with the assessment in subsection (i).

**Section 5. {Effective Date}**

This Act shall become effective 30 days from the day of enactment.

*cited in Colwell v. Bannister, No. 12-15844 archived on September 12, 2014*

cited in Colwell v. Bannister, No. 12-15844 archived on September 12, 2014



cited in Colwell v. Bannister, No. 12-15844 archived on September 12, 2014

# Endnotes

- 1 PAROLE FOR THE ELDERLY (ACLU 2012), *available at* <http://www.aclu.org/prisoners-rights/parole-elderly>.
  - 2 See LAURA WHEATON, THE URBAN INST., UNDERREPORTING OF MEANS-TESTED TRANSFER PROGRAMS IN THE CPS AND SIPP, *available at* <http://www.urban.org/publications/411613.html>.
  - 3 JOANN B. MORTON, U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORR., AN ADMINISTRATIVE OVERVIEW OF THE OLDER INMATE 4 (1992), *available at* <http://static.nicic.gov/Library/010937.pdf>; see also JEREMY L. WILLIAMS, S. LEGISLATIVE CONFERENCE, THE AGING INMATE POPULATION: SOUTHERN STATES OUTLOOK 1-2 (2006), *available at* [http://www.slcatlanta.org/Publications/HSPS/aging\\_inmates\\_2006\\_lo.pdf](http://www.slcatlanta.org/Publications/HSPS/aging_inmates_2006_lo.pdf); RONALD H. ADAY, AGING PRISONERS: CRISIS IN AMERICAN CORRECTIONS 16-17 (2003).
  - 4 See B. JAYE ANNO ET AL., U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORR., CORRECTIONAL HEALTH CARE: ADDRESSING THE NEEDS OF ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES 10 (2004), *available at* <http://static.nicic.gov/Library/018735.pdf>.
  - 5 PAUL GUERINO ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2010 26 tbl.13 (2011), *available at* <http://www.bjs.gov/content/pub/pdf/p10.pdf>.
  - 6 LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATION IN THE UNITED STATES, 2010 7-8 tbls.2 & 3 (2011), *available at* <http://www.bjs.gov/content/pub/pdf/cpus10.pdf>.
  - 7 GUERINO ET AL., *supra* note 5, at 26 tbl.13. The Guerino study collected data from the departments of correction in each of the 50 states and the federal system and divided the male and female state and federal prison populations by race and five-year incremental age categories. The total number of state and federal prisoners in 2010 was 1,550,600. *Id.*
  - 8 See *infra* note 9 for further detail.
  - 9 Figures 2A and 2B are based on the most recent available data for each jurisdiction. This data was obtained from the websites of each individual department of corrections when available. When information was not available online, research assistants contacted departments of corrections directly; this information is on file with the authors. The following jurisdictions provided data for 2012: Florida, Mississippi, and Texas; For 2011: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and West Virginia; For 2010: Alaska, Hawaii, Illinois, Kansas, Maryland, Nebraska, North Carolina, North Dakota, Pennsylvania, South Dakota, Wisconsin, and Wyoming; For 2009: Michigan; and For 2008: Maine. Data on federal prisoners is from the BJS Federal Justice Statistics and is for 2009, *available at* <http://www.bjs.gov/fjsrc/>. Notably, the population numbers from these states adds up to 227,083, which is slightly less than the 2010 nationwide figure of 246,600 prisoners age 50 and older. This discrepancy occurs because data from each jurisdiction is for the years 2008-2012, whereas the nationwide number is from 2010.
- Because not all jurisdictions used an age range that cut off at age 50, adjustments were made to numbers from jurisdictions marked with asterisks. A single asterisk denotes those states that use age 51 as a cutoff (Alabama, Idaho, Maryland, South Dakota, New Hampshire, North Carolina, and Washington). No adjustment was made to this data because only one age year was missing.
- Two asterisks denote states in which an age range was 46-59 (instead of 50-59; these states are Connecticut and Oregon). Three asterisks denote states in which an age range was 45-54 (instead of 50-54) (Illinois, Missouri, and Virginia). To approximate the population of prisoners in states denoted with two or three asterisks, this report attempted to delete out the prisoners younger than age 50 from the numbers reported by these five states by assuming that the age distribution of prisoners in these states was similar to the national age distribution for prisoners. Nationally, there are 176,700 prisoners ages 45-49, 121,700 prisoners ages 50-54, and 65,200 prisoners ages 55-59. GUERINO ET AL., *supra* note 5, at 26 tbl.13. Thus, in the case of Illinois, for example, where 7,668 prisoners are ages 45-54, the estimated number of prisoners ages 50-54 was calculated by multiplying the total number of prisoners ages 45-55 (7,668) by the proportion of prisoners expected to lie in the ages 50-54, based on the national distribution (i.e., by the percentage: 121,700/(176,700 + 121,700)). Note that this percentage is simply the total number of state and federal prisoners ages 50-54 divided by the total number of state and federal prisoners ages 45-54. Calculations for the remaining states was calculated in the same manner.
- 10 Ann Goetting, *The Elderly in Prison: A Profile*, 9 CRIM. JUST. REV. 14, 14 (1984).
  - 11 Goetting, *supra* note 10, at 14; ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2003 8 tbl.10 (2004), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/p03.pdf>; GUERINO ET AL., *supra* note 5, at 27 tbl.13 (2011); James Austin et al., *Exploring the Needs and Risks of the Returning Prisoner Population*, "FROM PRISON TO HOME" CONFERENCE 55, 71 (2002), *available at* [http://www.urban.org/uploadedpdf/410626\\_returningprisonerpopulation.pdf](http://www.urban.org/uploadedpdf/410626_returningprisonerpopulation.pdf). The Goetting study obtained data from a nationwide survey of prisoners of all ages in state prisons. Goetting then analyzed the aging prison population by comparing data from their self-reports to those of their younger counterparts. The Beck &

Harrison study collected data from departments of correction in each of the 50 states and the federal system to ascertain the U.S. prison population in 2003. The study then compared that data to the 1995 population to provide an analysis of the increase in the prison population from 1995 to 2003. The Austin study derived its estimate of the elderly prison population in 2030 from interim projections of the total United States population published by the United States Census Bureau. See <http://www.census.gov/population/projections/SummaryTabA1.pdf>.

- 12 WILLIAMS, *supra* note 3, at 9. The Williams study derived its data from questionnaires sent to members of the Southern Legislative Conference regarding each state's prison population. The study used the data from each state to provide a general discussion of issues facing southern states and a specific analysis of conditions in each state with regard to elderly prisoners.
- 13 MICH. DEP'T OF CORR., 2000 STATISTICAL REPORT 173 tbl.C3a (2001), available at [http://www.michigan.gov/documents/Stat2000\\_51449\\_7.pdf](http://www.michigan.gov/documents/Stat2000_51449_7.pdf); MICH. DEP'T OF CORR., 2009 STATISTICAL REPORT C77 (2010), available at [http://www.michigan.gov/documents/corrections/2009\\_MDOC\\_STATISTICAL\\_REPORT\\_319907\\_7.pdf](http://www.michigan.gov/documents/corrections/2009_MDOC_STATISTICAL_REPORT_319907_7.pdf). See also STEVE ANGELOTTI & SARA WYCKOFF, MICH. S. FISCAL AGENCY, MICHIGAN'S PRISON HEALTH CARE: COSTS IN CONTEXT 4 (2010), available at <http://www.senate.michigan.gov/sfa/Publications/Issues/PrisonHealthCareCosts/PrisonHealthCareCosts.pdf>. Both of the Michigan statistical reports collected data from state prisons and used the data to produce detailed analyses of various aspects of the state's correctional system. The Angelotti & Wyckoff study examined age, demographic, and healthcare data for the prison populations of Michigan and 33 other states to estimate the cost impact of aging prisoners from 2000 to 2009.

The raw numbers for Figure 5 are given as follows:

	<20	20-29	30-39	40-49	50-59	60-69	70+
2000	1,224	15,277	15,972	10,695	3,358	805	261
2009	1,001	12,395	12,694	11,136	5,721	1,726	365

- 14 See TERRY HILL, ET AL., AGING INMATES: CHALLENGES FOR HEALTHCARE AND CUSTODY: A REPORT FOR THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION 3 (2006). The 2010 figure is produced using data from the Hill study as well as 2010 state prison population numbers as reported by the California Department of Corrections. See CA. DEP'T OF CORR. & REHAB., *Characteristics of Inmate Population Report Archive*, [http://www.cdcr.ca.gov/reports\\_research/offender\\_information\\_services\\_branch/Annual/CensusArchive.html](http://www.cdcr.ca.gov/reports_research/offender_information_services_branch/Annual/CensusArchive.html) (last visited May 24, 2012). The Hill study collected data on prisoners over age 55 from the California Department of Corrections and Rehabilitation from 1998 to 2005. The study then analyzed the data to generate a series of recommendations that would allow the state to improve the quality of care for elderly prisoners and reduce the cost of caring for them.
- 15 See CHARLOTTE PRICE, N.C. DEP'T OF CORR., DIV. OF PRISONS, AGING INMATE POPULATION: 2007 ADDENDUM REPORT 3 (2007), available at <http://www.wings.state-nc.intl.org/113010/NC Aging2007.pdf>.
- 16 GUERINO ET AL., *supra* note 5, at 26 tbl.13. Guerino uses the term "of Hispanic origin" in his study.
- 17 *Id.*
- 18 GUERINO ET AL., *supra* note 5, at 26 tbl.13.
- 19 *State and County QuickFacts*, U.S. CENSUS BUREAU (Jan. 17, 2012), <http://quickfacts.census.gov/qfd/states/00000.html>. The census uses the term "persons of Hispanic or Latino origin."
- 20 The two criminologists who wrote the pioneering scholarship demonstrating this fact in the 1980s are Hirschi and Gottfredson. Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552 (1983), available at <http://troublesofyouth.pbworks.com/f/age%2Band%2Bthe%2BExplanation%2Bof%2Bcrime%2B-%2BHirschi%2Band%2BGott.pdf>.
- 21 The first scholar to put forth the four categories of aging prisoners was Ann Goetting. See Goetting, *supra* note 10, at 18-19; Ann Goetting, *The Elderly in Prison: Issues and Perspectives*, 20 J. RES. CRIME & DELINQ. 291 (1983). Note that Goetting used age 55 when collecting data. This report uses more updated and humanistic names for the four categories but uses the exact same definitions. This report maintains the "Old offenders" category title; it renames "Old Timers" as "Those Who Grew Old in Prison;" it renames "Career criminals" as "Repeat Prisoners;" and it renames "Young short-term first offenders" as "Young Short-Term First-Time Prisoners."
- 22 Goetting, *supra* note 10, at 18-19.
- 23 E-mail from Miss. Dep't of Corr., to research assistant (Mar. 27, 2012) (on file with author). Some states have unified systems, meaning that the state system includes both prisoners and those incarcerated in jail. These states include: Alaska, Connecticut, Delaware, Hawaii, Rhode Island, and Vermont. Profile breakdown data from these states would not be accurate because they include individuals in jail and therefore the percentage of repeat prisoners – cycling in and out for small offenses – would be artificially inflated.
- 24 E-mail from Steve Van Dine, Ohio Dep't of Rehab. & Corr., to author (May 16, 2012, 10:49 EST) (on file with author).

- 25 E-mail from Fla. Dep't of Corr., to research assistant (Feb. 20, 2012) (on file with authors); Letter from Tex. Dep't of Criminal Justice, to research assistant (March 5, 2012) (on file with authors); E-mail from Utah Dep't of Corr., to research assistant (Aug. 1, 2011) (on file with authors); E-mail from N.H. Dep't of Corr., to research assistant (May 8, 2012) (on file with authors).
- 26 Letter from Tex. Dep't of Criminal Justice, to research assistant (Sep. 7, 2011) (on file with authors).
- 27 See N.C. GEN. STAT. §§ 14-27.2 to .7 (2010).
- 28 See PRICE, *supra* note 15, at 15 tbl.1. The Price study used data collected from state correctional databases to analyze the characteristics of the North Carolina's aging prison population.
- 29 Elizabeth Moore & Tessa Unwin, *Ohio's Older Inmates*, in OHIO DEP'T OF REHAB. & CORR., 2002 OHIO CORRECTIONS RESEARCH COMPENDIUM 36, 38, *available at* <http://www.drc.ohio.gov/web/Reports/compendium2002.pdf>. The Moore & Unwin study examined data on prisoners over age 50 incarcerated in Ohio as of 2001 and reviewed the literature to analyze the challenges posed by the state's aging prisoner population.
- 30 See SEAN ROSENMERKEL ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES 16 tbl.3.1 (2010), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf>. The Rosenmerkel study used a representative sample of state courts to compile individual data and detailed analysis on felony sentences in state courts in 2006.
- 31 *E.g.*, Hirschi & Gottfredson, *supra* note 20.
- 32 Shawn D. Bushway et al., *Has the U.S. Prison Boom Changed the Age Distribution of the Prison Population?* 37 fig.1 (June 16, 2011) (working paper), *available at* <http://www.irp.wisc.edu/newsevents/workshops/2011/participants/papers/6-BushwayTsaoSmith.pdf>. The Bushway study combines data from the federal BJS surveys of state prisoners for 1974, 1979, 1986, 1991, 1997 and 2004 (with 2004 data from the U.S. Census Bureau to document the expansion of the U.S. prison population during that period and demonstrate how the prison population has become older over time).
- 33 Over one-third of new prison admissions in the United States are for technical violations, rather than new crimes. GUERINO ET AL., *supra* note 5, at 6 tbl.3.
- 34 PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 7 tbl.8 (2002), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf>. The Langan & Levin study used 1998 data from fifteen state departments of correction to track people released from prison in 1994. The study then used four measures of recidivism (rearrest, reconviction, resentence to prison and return to prison with or without sentence) to analyze the recidivism of released prisoners over time.
- 35 N.Y. DEP'T OF CORR. & CMTY. SUPERVISION, 2007 RELEASES: THREE YEAR POST RELEASE FOLLOW-UP 49 (2012), *available at* [http://www.doccs.ny.gov/Research/Reports/2012/2007\\_releases\\_3yr\\_out.pdf](http://www.doccs.ny.gov/Research/Reports/2012/2007_releases_3yr_out.pdf). The study used data regarding all prison releases from 1985 through 2007. The study used a three-year follow-up period and linked the data relative to various demographic and legal history characteristics. The study also provided trends in rates of return since 1985.
- 36 LAURA D. CROSS, VA. DEP'T OF CORR., RECIDIVISM IN VIRGINIA: TRACKING THE 1999 RELEASE COHORT 13-14 tbl.5 (2005), *available at* [www.vadoc.state.va.us/about/facts/research/recidivism/recidivism05.doc](http://www.vadoc.state.va.us/about/facts/research/recidivism/recidivism05.doc). The study used state correctional data on 1999 prison releases to produce findings about recidivism among that population. The study used reincarceration for any reason following release as the measure of recidivism.
- 37 ARIZ. DEP'T OF CORR., ARIZONA INMATE RECIDIVISM STUDY 6 (2005), *available at* [http://www.azcorrections.gov/adcr/reports/recidivism\\_2005.pdf](http://www.azcorrections.gov/adcr/reports/recidivism_2005.pdf). The study examined the recidivism of prisoners released from Arizona state prisons from 1990 to 1999, excluding those released to jurisdictions other than the state of Arizona. The study varied the length of the follow-up period based on a number of factors and linked its analysis to a number of demographic factors.
- 38 See MICHAEL LEACHMAN, INIMAI CHETTIAR, AND BENJAMIN GEARE, CTR. ON BUDGET & POLICY PRIORITIES & ACLU, IMPROVING BUDGET ANALYSIS OF STATE CRIMINAL JUSTICE REFORMS: A STRATEGY FOR BETTER OUTCOMES AND SAVING MONEY 4 n.6 (2012), *available at* [http://www.aclu.org/files/assets/improvingbudgetanalysis\\_20120110.pdf](http://www.aclu.org/files/assets/improvingbudgetanalysis_20120110.pdf).
- 39 PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 11 (2009), *available at* [http://www.pewcenteronthestates.org/uploadedFiles/PSPP\\_1in31\\_report\\_FINAL\\_WEB\\_3-26-09.pdf](http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf).
- 40 VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 6, 8 (2012), *available at* <http://www.vera.org/download?file=3495/the-price-of-prisons-updated.pdf>.
- 41 PEW CTR. ON THE STATES, *supra* note 39, at 12.
- 42 B. JAYE ANNO ET AL., *supra* note 4, at 11. Aging prisoner expert Jonathan Turley predicts that if the current growth rate of the aging prisoner population holds, California's corrections department will have a budget of at least \$4 billion for aging prisoners alone by 2025. Tia Gubler & Joan Petersilia, Elderly Prisoners are Literally Dying for Reform 7 (Jan. 23, 2006) (working paper) [citing Professor Turley's remarks before the California State Senate], *available at* [http://www.law.stanford.edu/program/centers/scjc/workingpapers/TGubler\\_06.pdf](http://www.law.stanford.edu/program/centers/scjc/workingpapers/TGubler_06.pdf). This figure corresponds to roughly half of California's current corrections budget. VERA INST. OF JUSTICE, *supra* note 40, at 8 fig.3

- 43 This report uses the average cost of incarceration of an aging prisoner instead of the marginal cost to calculate cost savings. Because the Recommendations section and model legislation for the aging prisoner release program anticipate the release of many aging prisoners, the use of average cost is reliable to determine the fiscal impact of these reforms.
- 44 The national budget for energy in 2011 was \$13 billion. Wilson Andrews et al., *From Reagan to Obama: 30 Years of Spending Priorities*, WASH. POST (Feb. 14, 2011), <http://www.washingtonpost.com/wp-srv/special/politics/30-years-spending-priorities-federal-budget-2012/>. The national budget to provide state grants for elementary and secondary school improvements in 2011 was \$534,562. U.S. DEP'T OF EDUC., DEPARTMENT OF EDUCATION FISCAL YEAR 2012 CONGRESSIONAL ACTION 1 (2011), available at <http://www2.ed.gov/about/overview/budget/budget12/12action.pdf>.
- 45 *California's Aging Prisoner: Hearing Before the Subcomm. on Aging and Long Term Care of the S. Public Safety Comm.*, 2003-2004 Leg. 23-24 (Ca. 2003) (remarks of Professor Jonathan Turley), available at [http://www.prisonterminal.com/documents/AGING\\_PRISONERS\\_TRANSCRIPT.pdf](http://www.prisonterminal.com/documents/AGING_PRISONERS_TRANSCRIPT.pdf).
- 46 *E.g.*, HILL ET AL., *supra* note 14, at 4-5.
- 47 PRICE, *supra* note 15, at 16, 19.
- 48 LAURA M. MARUSCHAK & ALLEN BECK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MEDICAL PROBLEMS OF INMATES 1997 3 tbl.2 (2001), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/mp97.pdf>.
- 49 FLA. CORR. MED. AUTH., REPORT ON ELDERLY AND AGING INMATES IN THE FLORIDA DEPARTMENT OF CORRECTIONS 8 (2005), available at <http://www.doh.state.fl.us/cma/reports/agingreport04-05.pdf>.
- 50 ADAY, *supra* note 3, at 91.
- 51 *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).
- 52 *E.g.*, *Riker v. Gibbons*, No. 3:08-cv-00115-LRH-VPC, slip op. (D. Nev. Oct. 28, 2010). Note that conditional release of aging prisoners thus provides an additional benefit insofar as a smaller elderly prison population implies lower state expenditures on litigation and settlements of claims of poor prison healthcare.
- 53 ANNO, *supra* note 4, at 47.
- 54 Gubler & Petersilia, *supra* note 42, at 6-7.
- 55 PRICE, *supra* note 15, at 16.
- 56 FLA. CORR. MED. AUTH., *supra* note 49, at 8.
- 57 Gubler & Petersilia, *supra* note 42, at 7.
- 58 JAMES J. STEPHAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE PRISON EXPENDITURES, 2001 4, 6 tbls.3 & 5 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/spe01.pdf>. BJS asked government finance specialists at the U.S. Census Bureau to identify each state's corrections function code and submit data on each state's expenditures. State departments of correction and state budget specialists then reviewed and approved the submitted numbers. The study then used that data to estimate state prison expenditures for 2001.
- 59 PEW CTR. ON THE STATES, *supra* note 39, at 12-13.
- 60 CTR. ON BUDGET & POLICY PRIORITIES, POLICY BASICS: INTRODUCTION TO PUBLIC HOUSING 4 (2008), available at <http://www.cbpp.org/files/policybasics-housing.pdf>. Some states have housing trust funds that support affordable housing. See *Housing Trust Funds*, POLICYLINK (June 2001), [http://www.policylink.org/site/c.lkIXLbMNJrE/b.5137005/k.DB1/Housing\\_Trust\\_Funds.htm](http://www.policylink.org/site/c.lkIXLbMNJrE/b.5137005/k.DB1/Housing_Trust_Funds.htm). Similarly, some state and local governments provide property tax relief programs for low-income homeowners or renters. These benefits, however, are deducted from tax revenue rather than paid out from appropriations.
- 61 Eligibility for unemployment benefits varies by state, but the general rule is that one must lose one's job through no fault of one's own in order to qualify for unemployment insurance payments. Many parolees struggle to obtain employment; at year-end 2011 in New York, 62% of parolees were unemployed. *Parolee Facts*, N.Y. DEP'T OF CORR. & CMTY. SUPERVISION (Dec. 31, 2011), [https://www.parole.ny.gov/program\\_stats.html](https://www.parole.ny.gov/program_stats.html) (last visited May 23, 2012). Moreover, those parolees that are employed and lose their jobs may not necessarily qualify for unemployment insurance (for example, if they are fired for cause).
- 62 Under current Medicaid rules, prisoners are ineligible for federal reimbursement for care received in prisons or other public institutions "over which a governmental unit exercises administrative control." 42 U.S.C. § 1396d(a)(27)(A); 42 C.F.R. §§ 435.1009(a)(1), 435.1010, 441.13(a)(1). However, if a prisoner is eligible for Medicaid and is transferred for more than twenty-four hours to a non-prison medical facility (e.g., a hospital) for treatment, the prisoner's care expenses are eligible for federal reimbursement. Letter from Robert Streimer, Dir., Disabled & Elderly Health Programs Grp., U.S. Dep't of Health & Human Services, to All Associate Regional Administrators for Division for Medicaid and State Operations (Dec. 12, 1997), available at <http://www.ylc.org/pdfs/InmateExappench>. Because the Affordable Care Act will expand Medicaid eligibility and increase the federal portion of Medicaid funding while not changing the current off-site-care exception for prisoner eligibility, it is possible that in the future, more states will utilize Medicaid funding to cover off-site prisoner healthcare costs.

- 63 By 2000, the majority of states required prisoner copayment for medical services. DEBORAH LAMB-MECHANICK & JULIANNE NELSON, U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORR., PRISON HEALTH CARE SURVEY: AN ANALYSIS OF FACTORS INFLUENCING PER CAPITA COSTS 58 (2000), available at <http://static.nicic.gov/Library/015999.pdf>. Mississippi, for example, charges prisoners copayments of \$6 for each prisoner-initiated request for medical, dental, or prosthetic services, or medications. MISS. CODE ANN. § 47-5-179 (2011).
- 64 VISHNER ET AL., THE URBAN INST., RETURNING HOME: UNDERSTANDING THE CHALLENGES OF PRISONER REENTRY: MARYLAND PILOT STUDY: FINDINGS FROM BALTIMORE 4 (2004), available at [http://www.urban.org/uploadedPDF/410974\\_ReturningHome\\_MD.pdf](http://www.urban.org/uploadedPDF/410974_ReturningHome_MD.pdf).
- 65 *Medicaid Enrollment by State*, CTRS. FOR MEDICARE AND MEDICAID SERVS., <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-State/By-State.html> (last visited May 23, 2012).
- 66 Different proportions apply to the CHIP program, under which the relatively poorest state can receive up to as much as \$4 for every \$1 spent.
- 67 NAT'L CTR. FOR APPROPRIATE TECH., *2011/2012 Poverty Guidelines*, LIHEAPCLEARINGHOUSE, <http://liheap.ncat.org/profiles/povertytables/FY2011/popne.htm> (last visited May 22, 2012).
- 68 *Medicaid and CHIP Eligibility*, CTRS. FOR MEDICARE & MEDICAID SERVS., <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Eligibility/Eligibility.html> (last visited May 23, 2012).
- 69 *Supplemental Security Income*, U.S. SOC. SEC. ADMIN. (May 11, 2010), <http://www.ssa.gov/ssi/>.
- 70 2010 SUPPLEMENTAL SEC. INCOME PROGRAM ANN. REP. 16, U.S. SOC. SEC. ADMIN., available at <http://www.socialsecurity.gov/oact/ssir/SSI10/ssi2010.pdf>.
- 71 LADONNA PAVETTI & DOROTHY ROSENBAUM, CTR. ON BUDGET & POLICY PRIORITIES, CREATING A SAFETY NET THAT WORKS WHEN THE ECONOMY DOESN'T: THE ROLE OF FOOD STAMPS AND TANF PROGRAMS 12 (2010), available at <http://www.cbpp.org/files/2-25-10fa.pdf>; A *Short History of SNAP*, U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV. (Apr. 26, 2012), <http://www.fns.usda.gov/snap/rules/Legislation/about.htm>.
- 72 In most cases, the government offers a cash grant sent directly to the utility company, or a crisis grant for households in immediate danger of being without heat. In Utah, for example, in order to qualify for this benefit program, an individual must be a resident of Utah, need financial assistance for home energy costs, and have an annual household income of \$16,335 or less for a household of one or \$22,065 or a household of two or more. See *FY2011/2012 Utah Low-Income Energy Programs*, NAT'L CTR. FOR APPROPRIATE TECH., U.S. DEP'T OF HEALTH & HUMAN SERVS. (Jan. 20, 2012), <http://liheap.ncat.org/profiles/Utah.htm>. For further information, see Memorandum from Nick St. Angelo, Director, Division of Energy Assistance, U.S. Dep't of Health & Human Servs., to Low Income Home Energy Assistance Program Grantees and Other Interested Parties (Mar. 16, 2010), available at [http://www.acf.hhs.gov/programs/ocs/liheap/guidance/information\\_memo-oraanda/im10-03.html](http://www.acf.hhs.gov/programs/ocs/liheap/guidance/information_memo-oraanda/im10-03.html).
- 73 *Disproportionate Share Hospitals Allotments for Fiscal Year 2009*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Mar. 17, 2009), <http://www.hhs.gov/recovery/cms/dshstates.html>.
- 74 State payments to cover these hospital bills vary from less than half a million dollars to more than \$1.5 billion dollars. In Michigan, for example, federal money covers 22% of the state's payment limit for uninsured and Medicaid patients treated in private hospitals. This percentage is similar in other states: 32% in New York and 37% in Texas. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 10-69, MEDICAID: ONGOING FEDERAL OVERSIGHT OF PAYMENTS TO OFFSET UNCOMPENSATED HOSPITAL CARE COSTS IS WARRANTED 17 fig.2 (2009), available at <http://www.gao.gov/assets/300/298754.pdf>.
- 75 Uninsured aging parolees are estimated to make, on average, 0.27 visits to the emergency room each year. Similarly, aging parolees on Medicaid are estimated to make 0.33 visits to the emergency room each year. The cost of an average emergency room visit is roughly \$1,565. The expected ER cost takes into account the increased frequency with which formerly incarcerated versus never-incarcerated individuals are likely to visit the emergency room as well as the proportion of the total emergency room visit actually paid for by the state through community and neighborhood clinics, state and local health departments, and state programs other than Medicaid. Making different assumptions about the proportion of released prisoners who are uninsured and on Medicaid allows calculations of a total expected ER cost to the state per aging parolee.
- 76 This report makes a middle estimate that 35% are uninsured and 35% are on Medicaid and a high estimate that 50% are uninsured with the remaining 50% on Medicaid.
- 77 The state income tax liability variable, like other tax-related variables included in the March 2012 CPS, was not determined by directly questioning respondents. Rather, values for these variables come from the Census Bureau's tax model, which simulates individual tax returns to produce estimates of federal, state, and payroll taxes. The model incorporates information from non-CPS sources, such as the Internal Revenue Service's Statistics of Income series, the American Housing Survey, and the State Tax Handbook.
- 78 *Medicare Eligibility Tool*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://www.medicare.gov/MedicareEligibility/home.asp?dest=NAV%7CHome%7CGeneralEnrollment&version=default&browser=IE%7C8%7CWInXP&language=English> (last visited May 24, 2012).



- 79 *Number of Credits to be Eligible for Social Security Retirement Benefits*, U.S. SOC. SEC. ADMIN. (Mar. 2, 2012), [http://ssa-custhelp.ssa.gov/app/answers/detail/a\\_id/356/kw/eligibility](http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/356/kw/eligibility).
- 80 GUERINO ET AL., *supra* note 5, at 26 tbl.13.
- 81 See *Disability Planner: How You Qualify for Social Security Disability Benefits*, SOC. SEC. ADMIN., <http://www.ssa.gov/dibplan/dqualify.htm> (last visited May 24, 2012).
- 82 *Disproportionate Share Hospitals Allotments for Fiscal Year 2009*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Mar. 17, 2009), <http://www.hhs.gov/recovery/cms/dshstates.html>.
- 83 VISHER ET AL., *supra* note 64, at 136; NANCY G. LA VIGNE ET AL., THE URBAN INST., CHICAGO PRISONERS' EXPERIENCES RETURNING HOME 8 (2004), available at [http://www.urban.org/uploadedpdf/311115\\_chicagoprisoners.pdf](http://www.urban.org/uploadedpdf/311115_chicagoprisoners.pdf).
- 84 NANCY G. LA VIGNE & VERA KACHNOWSKI, THE URBAN INST., TEXAS PRISONERS' REFLECTIONS ON RETURNING HOME 6-7 (2005), available at [http://www.urban.org/UploadedPDF/311247\\_texas\\_prisoners.pdf](http://www.urban.org/UploadedPDF/311247_texas_prisoners.pdf); CHRISTY VISHER ET AL., THE URBAN INST., OHIO PRISONERS' REFLECTIONS ON RETURNING HOME 8 (2005), available at [http://www.urban.org/uploadedPDF/311272\\_ohio\\_prisoners.pdf](http://www.urban.org/uploadedPDF/311272_ohio_prisoners.pdf).
- 85 CATERINA GOUVIS ROMAN ET AL., THE URBAN INST., THE HOUSING LANDSCAPE FOR RETURNING PRISONERS IN THE DISTRICT OF COLUMBIA 10, 40 (2004), available at [http://www.urban.org/UploadedPDF/411433\\_Housing\\_Prisoners.pdf](http://www.urban.org/UploadedPDF/411433_Housing_Prisoners.pdf).
- 86 CITY OF SAN BERNARDINO MAYOR'S PAROLEE REENTRY AD HOC COMM., CAL. STATE UNIV. SAN BERNARDINO CTR. FOR THE STUDY OF CORR. EDUC., PAROLEE NEEDS: BEST PRACTICES AND NEEDS ASSESSMENT 10 (2008), available at [http://coe.csusb.edu/programs/correctionalEd/documents/final\\_research.pdf](http://coe.csusb.edu/programs/correctionalEd/documents/final_research.pdf).
- 87 *About NYCHA Fact Sheet*, N.Y.C. HOUS. AUTH. (Apr. 26, 2012), <http://www.nyc.gov/html/nycha/html/about/factsheet.shtml> (last visited May 24, 2012).
- 88 There are 2.3 million Americans behind bars – nearly a quarter of the world's incarcerated population. See ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST (NINTH EDITION) 1 (2011), available at <http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf>.
- 89 *E.g.*, CAL. PENAL CODE § 667(e) (2012) (establishing a mandatory minimum sentence of twice the normal term if the defendant has a prior conviction for certain felonies and a mandatory minimum sentence of twenty-five years to life if the defendant has two such prior convictions); FLA. STAT. § 775.087 (2011) (establishing a mandatory minimum sentence of ten years if a defendant carries a gun during the commission of certain felonies, a twenty-year minimum if the gun is fired, and twenty-five years to life if the offense results in death).
- 90 *U.S. v. Booker*, 543 U.S. 220 (2005).
- 91 *E.g.*, FLA. STAT. § 893.135(c) (2011) (establishing a twenty-five year mandatory minimum for possession or sale of 28 grams or more of heroin, morphine or other opiates); LA. REV. STAT. ANN. § 40:966(B)(1) (2011) (establishing a mandatory minimum sentence of five years in prison for possession or distribution of certain drugs).
- 92 See Michael Vitiello, "Three Strikes" Should Be Out, JURIST (Dec. 5, 2002), <http://jurist.law.pitt.edu/forum/forumnew79.php>; VINCENT SCHIRALDI ET AL., JUSTICE POLICY INST., THREE STRIKES AND YOU'RE OUT: AN EXAMINATION OF THE IMPACT OF 3-STRIKE LAWS 10 YEARS AFTER THEIR ENACTMENT (2004), available at [http://www.justicepolicy.org/uploads/justicepolicy/documents/04-09\\_rep\\_threestrikesnatl\\_ac.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/04-09_rep_threestrikesnatl_ac.pdf). Some states, like California, have both two-strikes and three-strikes laws. For further information, see Michael Vitiello & Clark Kelso, *A Proposal for a Wholesale Reform of California's Sentencing Practice and Policy*, 38 Loyola of L.A. L. Rev. 903, 926-27 (2004), available at <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=2464&context=llr>.
- 93 Jack Leonard, *Law Students Help Free Three-Strikes Offenders*, L.A. TIMES (May 13, 2009), <http://articles.latimes.com/2009/may/13/local/me-threestrikes13> (last visited May 23, 2012).
- 94 *A Voice for the Forsaken*, ECONOMIST, Jun. 11, 2009, available at <http://www.economist.com/node/13832435>.
- 95 The Sentencing Reform Act abolished parole in the federal system in 1984. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.
- 96 See PAULA M. DITTON & DORIS JAMES WILSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, TRUTH IN SENTENCING IN STATE PRISONS (1999), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/tssp.pdf>.
- 97 A whopping 35% of new prison admissions are for parole violations. GUERINO ET AL., *supra* note 5, at 6 tbl.3.
- 98 See *Lockyer v. Andrade*, 538 U.S. 63 (2003).
- 99 Ramon Antonio Vargas, *Fourth Marijuana Conviction Gets Slidell Man Life in Prison*, TIMES-PICAYUNE, May 5, 2011, available at [http://www.nola.com/crime/index.ssf/2011/05/fourth\\_marijuana\\_conviction\\_ge.html](http://www.nola.com/crime/index.ssf/2011/05/fourth_marijuana_conviction_ge.html) (last visited May 23, 2012).
- 100 Susan Donaldson James, *Supporters Applaud Plan to Release Scott Sisters in Kidney Deal*, ABC NEWS, Dec. 30, 2010, <http://abcnews.go.com/US/scott-sisters-released-16-years-prison-kidney-deal/story?id=12508754#.Tz6CnRxxNwc> (last visited May 23, 2012).
- 101 Press Release, American Civil Liberties Union, Grandmother Will Mark President's Day by Petitioning Obama to Com-

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  - 103 Correctional Population of the United States from 1980 to 2009, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (May 25, 2012), <http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm>; Guerino, *supra* note 5, at 2 tbl.1.
  - 104 See Merianos, Dorothy et al., *From the Outside In: Using Public Health Data to Make Inferences about Older Inmates*, 43 CRIME & DELINQUENCY 298, 301 (1997); U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, Arrests in the United States by Offense and Age in 2010, <http://www.albany.edu/sourcebook/pdf/t472010.pdf> (last visited May 25, 2012); U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, Percent Distribution of U.S. Population and Persons Arrested for All Offenses in 2006, <http://www.albany.edu/sourcebook/pdf/t442006.pdf> (last visited May 25, 2012).
  - 105 Merianos, *supra* note 104, at 303.
  - 106 See *Federal Criminal Case Processing Statistics*, U.S. Dep't of Justice, Bureau of Justice Statistics, <http://bjs.ojp.usdoj.gov/fjsrc/> (last visited May 25, 2012) (follow "prisoners in Federal prison at year-end – trends"; then select years 1998 and 2008; then select variable "Prison term in months"; then select display value "Life sentence"; then follow "Display as: HTML").
  - 107 ASHLEY NELLIS & RYAN S. KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 7 (2009), *available at* [http://sentencingproject.org/doc/publications/publications/inc\\_noexitseptember2009.pdf](http://sentencingproject.org/doc/publications/publications/inc_noexitseptember2009.pdf).
  - 108 See TINA CHIU, VERA INST. OF JUSTICE, IT'S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE 6 (2010), *available at* <http://www.vera.org/download?file=2973/its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf>. Virginia requires prisoners 65 and older to serve five years and those ages 60-64 to serve ten years before applying for geriatric release; in Maryland, to become eligible for release, prisoners must be over 65 and must serve at least 15 years of their sentence. MD. CODE ANN. CRIM. LAW § 14.101(g) (2012); VA CODE ANN. § 53.1-40.01 (2011).
  - 109 H.B. 138, 2011 Leg., Reg. Sess. (La. 2011), *available at* <http://www.legis.state.la.us/bills/data/streamdocument.asp?did=760442>. See also ACLU, VANITA GUPTA, INIMAI CHETTIAR, ET AL., SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES 54-55 (2011), *available at* <http://www.aclu.org/files/assets/smartreformispossible.pdf>.
  - 110 Similar bills were introduced in Texas in 2011, and in Tennessee, Hawaii, Missouri, and Florida in 2012. Unfortunately, none of these bills passed. See H.B. 3538, 2011 Leg., Reg. Sess. (Tex. 2011), <http://www.capitol.state.tx.us/BillLookup/Actions.aspx?LegSess=82R&Bill=HB3538> (no action since May 2011); S.B. 2153, 2012 Leg., Reg. Sess. (Tenn. 2012), <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB2153> (assigned to S. Jud. Comm. Apr. 2012); S.B. 2251, 2012 Leg., Reg. Sess. (Haw. 2012), [http://www.capitol.hawaii.gov/measure\\_indiv.aspx?billtype=SB&billnumber=2251](http://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=2251) (deferred by committee Feb. 2012); H.B. 1175, 2012 Leg., Reg. Sess. (Mo. 2012), <http://www.house.mo.gov/billsummary.aspx?bill=HB1175&year=2012&code=R> (last action Feb. 2012); S.B. 426, 2012 Leg., Reg. Sess. (Fla. 2012), <http://www.flsenate.gov/Session/Bill/2012/0426> (died in Jud. Comm. Mar. 2012).
  - 111 For example, prisoners are ineligible for the parole program if they committed a violent or sexual offense, violated any disciplinary rules in the year prior to their parole eligibility date, did not complete 100 hours of pre-release programming, or did not obtain a GED. H.B. 138, 2011 Leg., Reg. Sess. (La. 2011), *supra* note 110.
  - 112 See Jennifer M. Jolley & John J. Kerbs, *Risk, Need, and Responsivity: Unrealized Potential for the International Delivery of Substantive Abuse Treatment in Prison*, 20 INT'L CRIM. JUSTICE REV. 280 (2010).
  - 113 See James Austin, *The Proper and Improper Use of Risk Assessment in Corrections*, 16 FED. SENT'G REP. 1, 3 (2004), *available at* <http://www.jfa-associates.com/publications/pcras/proper%20userand%20misuse%20of%20risk.pdf>; Justice Susan Glazebrook, *Risky Business: Predicting Recidivism*, 17 PSYCHIATRY, PSYCHOL., & L. 88, 93 (2010); Jolley & Kerbs, *supra* note 113, at 283.
  - 114 See Jennifer L. Skeem & John Monahan, *Current Directions in Violence Risk Assessment*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 38 (2011), *available at* [http://riskreduction.sococo.uci.edu/pdfs/yasi/skeemMonahan\\_2011.pdf](http://riskreduction.sococo.uci.edu/pdfs/yasi/skeemMonahan_2011.pdf).
  - 115 See Austin, *supra* note 114, at 3; Jolley & Kerbs, *supra* note 113, at 283; Joan Petersilia & Susan Turner, *An Evaluation of Intensive Probation in California*, 82 J. CRIM. L. & CRIMINOLOGY 610, 650 (1991).
  - 116 See D.A. Andrews et al., *Classification for Effective Rehabilitation: Rediscovering Psychology*, 17 CRIM. JUSTICE & BEHAVIOR 19 (1990).
  - 117 See Austin, *supra* note 114, at 4; Joan Petersilia & Susan Turner, *Intensive Probation & Parole*, 17 CRIME & JUSTICE 281, 327 (1993).
  - 118 U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, POLLOCK, LOUISIANA FEDERAL CORRECTIONAL INSTITUTION INMATE HANDBOOK 103 (2009), *available at* [http://www.bop.gov/locations/institutions/pom/POL\\_fci\\_aohandbook.pdf](http://www.bop.gov/locations/institutions/pom/POL_fci_aohandbook.pdf).



- 119 N.C. DEP'T OF CORR., DIV. OF PRISONS, RULES AND POLICIES GOVERNING THE MANAGEMENT AND CONDUCT OF INMATES UNDER THE CONTROL OF THE DIVISION OF PRISONS: INMATE BOOKLET 12 (2010), *available at* <http://www.doc.state.nc.us/Publications/inmate%20rule%20book.pdf>.
- 120 Chapter XI of Mississippi Inmate Handbook, MISS. DEP'T OF CORR., [http://www.mdoc.state.ms.us/Inmate\\_Handbook/CHAPTER%20XI.pdf](http://www.mdoc.state.ms.us/Inmate_Handbook/CHAPTER%20XI.pdf) (last visited May 23, 2012).
- 121 Missouri's law, for example, restricts eligibility to prisoners sufficiently "advanced in age" and "in need of long-term nursing home care." MO. REV. STAT. § 217.250, *available at* <http://www.moga.mo.gov/statutes/C200-299/2170000250.HTM>. Wyoming requires that prisoners be severely "incapacitated" or "suffer from a terminal illness caused by injury or disease which is predicted to result in death within twelve months of the application for parole." WYO. STAT. ANN. § 7-13-424, *available at* <http://legisweb.state.wy.us/statutes/statutes.aspx?file=titles/Title7/T7CH13AR4.htm>.
- 122 HAW. DEP'T OF PUBLIC SAFETY, POL. NO. COR.10.1G.11, CORRECTIONS ADMINISTRATION POLICY AND PROCEDURES: COMPASSIONATE RELEASE FOR THE TERMINALLY ILL (2011), *available at* <http://hawaii.gov/psd/policies-and-procedures/P-P/3-COR/CORR%20%20P-P%20FINAL/CHAPTER%2010/COR.10.1G.11.pdf>.
- 123 The prisoner must first sign a medical information release form. Then the prisoner's doctor must write a memorandum to the Health Care Division Medical Director recommending compassionate release. The Director then approves or disapproves the doctor's recommendation. That decision, however, heavily relies on a separate report cataloguing the prisoner's "prison behavior, participation in required programs, detention charges, sentences, and prisoner custody status and conviction history." If the Director approves the recommendation, he or she must send it to the Health Care Division Administrator. The recommendation must then go through two more officials who each have discretion to approve or disapprove it before the prisoner can be released. *Id.* Such unnecessarily complicated processes putting a medical decision in the hands of so many corrections officials will undoubtedly hold up the release of ill prisoners.
- 124 A Freedom of Information Act request submitted by the ACLU to the Hawaii Department of Public Safety revealed that from January 2009 to January 2012, of 37 prisoners recommended for compassionate release, 22 cases were approved by the Public Safety Department, but only 14 were granted. Letter from Haw. Dep't of Public Safety, to ACLU of Hawaii (Jan. 19, 2012) (on file with authors).
- 125 See CO. DIV. OF CRIM. JUSTICE IN COOPERATION WITH THE STATE BOARD OF PAROLE, INFORMATION COLLECTION AND ANALYSIS OF PAROLE BOARD DECISIONS: PROGRESS REPORT (2011), *available at* [http://dcj.state.co.us/ors/pdf/docs/SB09-135/SB09-135\\_Report\\_11-01-10.pdf](http://dcj.state.co.us/ors/pdf/docs/SB09-135/SB09-135_Report_11-01-10.pdf).
- 126 Other states that require written explanations for denials of parole include Arizona, New York, and Montana. In Alabama, on the other hand, there is very little oversight of the parole board, and the parole board rarely provides written explanations for the denial of parole. Similarly in North Carolina, reasons for parole decisions are confidential and available to no one for review. See MONT. ADMIN. R. 20.25.501, *available at* [http://bopp.mt.gov/adminrules/admin\\_rule\\_20.25.501.mcp](http://bopp.mt.gov/adminrules/admin_rule_20.25.501.mcp); EQUAL JUSTICE INITIATIVE, CRIMINAL JUSTICE REFORM IN ALABAMA: A REPORT AND ANALYSIS OF CRIMINAL JUSTICE ISSUES IN ALABAMA 5 (2005), *available at* <http://eji.org/eji/files/criminaljusticereform.pdf>; Post-Release Supervision and Parole Commission, *The Parole Process*, N.C. DEP'T OF PUBLIC SAFETY, <http://www.doc.state.nc.us/parole/process.htm> (last visited May 23, 2012).
- 127 Chairperson, Nat'l Parole Board, Remarks at the Association of Paroling Authorities International Conference, May 18, 2010, *available at* <http://www.pbc-clcc.gc.ca/infocntr/speeches/201005-eng.shtml>.
- 128 New York's appeals process serves as one example, although not perfect. If a New York prisoner is denied release, he or she receives notice containing the reasons for the denial. An officer assists the prisoner with administrative questions for filing an appeal. An officer will also assist the prisoner in the acquisition of private counsel, though none is provided by the state. N.Y. STATE DIV. OF PAROLE, N.Y. STATE PAROLE HANDBOOK: QUESTIONS AND ANSWERS CONCERNING PAROLE RELEASE AND SUPERVISION 48-50 (2010), *available at* <https://www.parole.ny.gov/pdf/handbook-nov2010.pdf>. Placing the responsibility to help a prisoner with an independent actor is the best practice. Several states do not offer prisoners any opportunity to appeal the parole board's decision. These are Ohio, North Carolina, and Wisconsin, among others. Virginia's parole board considers appeals at its own discretion. OHIO PAROLE BOARD, OHIO PAROLE BOARD HANDBOOK 17 (2011) *available at* <http://www.drc.ohio.gov/web/paroleboardhandbook.pdf>; N.C. DEP'T OF PUBLIC SAFETY, *supra* note 127; See WIS. STAT. § 304.06 (2011); Virginia Board of Parole, *Community Corrections – Frequently Asked Questions*, VA. DEP'T OF CORR., <http://www.vadoc.state.va.us/community/faqs.shtml> (last visited May 25, 2012).
- 129 See, e.g., JAMES AUSTIN ET AL., JFA INST., UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA'S PRISON POPULATION (2006), *available at* <http://www.jfa-associates.com/publications/srs/UnlockingAmerica.pdf>.



## **At America's Expense:** The Mass Incarceration of the Elderly

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*At America's Expense* compiles extensive data detailing the epidemic of aging prisoners in the United States. It provides a comprehensive 50-state and federal analysis of the unnecessary incarceration of aging prisoners and provides a fiscal analysis showing the actual amount states would save, on average, by releasing aging prisoners: over \$66,000 per year per released prisoner. The report also includes new data showing that the elderly population is growing because of harsh sentencing laws and not because of new crimes, as well as data highlighting the low public safety risks posed by elderly prisoners. *At America's Expense* supplies detailed and practical legislative solutions that states and the federal government can implement to address the dramatic and costly growth in the number of elderly prisoners without putting communities at risk. This report has been a project of the ACLU's Safe & Fair Initiative to End Overincarceration, housed in the Center for Justice.

