

**STATEMENT OF  
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*“Promoting Inmate Rehabilitation and Successful Release Planning”*

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**I.  
INTRODUCTION**

Chairman Scott, Ranking Member Forbes, I wish to thank you and the other members of the Subcommittee for the privilege of appearing before you today to discuss the rising population of older and geriatric prisoners. I come to this issue with two related interests. First, at the George Washington University Law School, I hold the J.B. and Maurice C. Shapiro Chair for Public Interest Law where I teach in constitutional and criminal subjects. I am also the founder and Executive Director of the Project for Older Prisoners (POPS), the oldest legal organization dedicated to the issue of older and geriatric prisoners.

I am delighted that the Committee is considering changes to the federal law to allow for the early release of low-risk older prisoners. The new direction set out in H.R. 261, “*The Federal Bureau Prison Non-Violent Offender Relief Act of 2007*,” is long overdue and vitally needed in the federal prison system.

For a prison system, there are generally four horsemen of the apocalypse that can (like their biblical counterparts) combine to produce a catastrophic crisis: recidivism, overcrowding, budget shortfalls, and acute demographic shifts in population. Many states and the federal government are experiencing the ravages of all these dangers. These problems grew considerably worse after the United States moved to an indeterminate sentencing model to a determinate sentencing model. After Maine became the first state to abolish parole, the federal system followed suit and prompted a national movement. The Federal Sentencing Guidelines resulted in longer sentences and a greater proportion of defendants sent to prison. The result was a rapid expansion of both the prison population and the percentage of long-term incarcerated inmates. Prisons were forced to terminate many rehabilitation programs and special programs in favor of a warehousing approach for the influx of prisoners.

While there are various areas of the prison system that could be reformed to address one or more of these “horsemen,” all four of these problems can be significantly

reduced with reforms in the area of older and geriatric prisoners. Older prisoners represent a low-risk, high-cost population that can serve as a vital release valve for a system on overload. Of course, this reform depends on the willingness of Congress to take the initiative to avoid a crisis before it becomes acute.

The Bureau of Prisons (BOP) should be leading the nation in forward-looking reforms and cost-containment measures. After all, the BOP revolutionized our prison system by implementing a uniform and scientific approach to correctional institutions. Time, however, is of the essence. The fact is that our prisons are graying and the system is not prepared to handle the monumental burden of the new prison population of the twenty-first century. For that reason, before addressing the specific language of H.R. 261, I would like to put the problem that it addresses into a national context.

## **II. THE GRAYING OF AMERICA'S PRISON SYSTEM**

In many respects, prisons are a microcosm of society. As the general population ages, the prison population ages. However, in the last two decades, the aging of many prison systems appears to be accelerating. This trend is due to the reduction of parole opportunities and the lengthening of sentences. As a result, there is a large stagnant population of middle age prisoners who are approaching old age. For example, in the federal system, a remarkable 43.7% of the prison population is now 41 or older.<sup>1</sup> The older prisoner population is the fastest growing segment of the prison systems of many states.<sup>2</sup> As discussed below, this demographic shift comes with attendant problems of increased medical costs and overcrowding.

### **A. Increasing Prison Populations in the Federal and State Systems**

The increasing size and cost of the general prison population puts most states in a poor position to deal with an increase in a special needs sub-population. The rate of increase in the federal and state systems is quite daunting. Consider the growth in the federal system. In 1986, the federal system housed 33,132 prisoners. By 1990, the number of inmates had risen to 59,123. In 2002, the United States Bureau of Prisons for the first time surpassed California and Texas as the nation's largest prison system with 164,043. In 2006, the federal system stood at 193,046 inmates. In comparison, California's prison system increased to 161,412 inmates and Texas increased to 146,476 during the same period.<sup>3</sup>

The national prison system, therefore, is both growing and graying. This has

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<sup>1</sup> United States Department of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 2000, Table 6.47.

<sup>2</sup> For example, Colorado's inmate population grew 57% from 1995 to 2000. Yet, its population of prisoners over the age of 50 grew by 110%. See Robert Sanchez, *Colorado's Graying Inmates*, Rocky Mountain News, April 22, 2002.

<sup>3</sup> It is important to note that the prison population in California in 1977 was only 19,600 prisoners. Eric Schlosser, *The Prison Industrial Complex*, Atlantic Monthly, Dec. 1998, at 74.

produced a continually overcrowded system where facilities are forced to hold populations beyond their rated or design capacities. According to the BJS report, state prisons were operating between 98 percent and 114 percent of capacity.<sup>4</sup> While prison construction is necessary, neither states nor the federal system can build out of this crisis.<sup>5</sup>

Each year, the expansion of the federal system has out paced the states. For example, in 1989, the federal system expanded at an astonishing 12%, twice the average of the state systems. Even with intensive construction programs, of the six main federal penitentiaries, five prisons remained over their rated capacity by 40 to 100 percent. While the federal government has spent an enormous amount on building new prisons, prison construction has failed to keep pace with population growth. At an average cost of \$100,000 per cell, unlimited prison construction is simply unrealistic in today's economic environment. In the federal system alone, officials have estimated that they must add the equivalent of a new 1,000-bed facility every week to simply keep pace with the growth of their population.<sup>6</sup> In 2006, 7.2 percent (113,791) of state and federal inmates were held in private prison facilities, according to the Justice Department. Notably, one-quarter of all privately held inmates were federal prisoners. In fact, states like California have reduced their reliance on such private enterprises.<sup>7</sup>

The prison systems in the United States (when one considers incarceration, parole, and probation) now amount to an astonishing 7.2 million men and women, or about one in every 31 adults. The Justice Department's Bureau of Justice Statistics (BJS) announced this week that there has been an increase of 159,500 during prior year. The federal prisoner population increased by 2.9 percent.

## **B. The Increasing Older Prisoner Populations in the Federal and State Systems**

With the increase in the prisoner population, there has been a corresponding increase in the population of older prisoners. In the last 20 years, the population of older prisoners has grown by 750%.<sup>8</sup> Some states are reporting that their older prisoner population is now growing three times faster than any other segment of the population – as have other countries.<sup>9</sup> Since 1980, the nation's population of older prisoners has tripled

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<sup>4</sup> This report is available on-line at [WWW.OJP.USDOJ.GOV/BJS](http://WWW.OJP.USDOJ.GOV/BJS).

<sup>5</sup> Indeed, many sheriffs have found state overcrowding to be an environment rich with opportunities to make a profit in renting out jail cells. See generally Jonathan Turley, *Our Prison Profiteers*, N.Y. Times, Aug. 3, 1990, at A20.

<sup>6</sup> Timothy Egan, *Hard Time, Less Crime, More Criminals*, N.Y. Times, Mar. 7, 1999, at 1.

<sup>7</sup> See Peter Slevin, *Prison Firms Seek Inmates and Profits; Management Woes, Loss of Business Noted*, Wash. Post, Feb. 18, 2001, at A3 (discussing lower expectations from private correctional enterprises); Dan Morain, *Governor Now Backs Private Female Prison*, L.A. Times, Jun. 12, 2002, at 7 (noting that, while one private prison would remain open, four would be closed by order of the governor).

<sup>8</sup> Joanne O'Bryant, *Prisons: Policy Options for Congress*, Cong. Res. Service, Aug. 1999, at 7.

<sup>9</sup> Clarke, *supra*, at 1 (noting that Pennsylvania's older prisoner population is the fastest growing segment of its population). Other countries are experiencing the same increase. For example, in the last decade the number of older inmates has tripled, but facilities to deal with them have not been put in place. In 1993 there were 450 sentenced prisoners over the age of 60, but by 2003 the number had increased to

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and, by 2000, passed 100,000 in number.<sup>10</sup> Put another way, in 1986, prisoners over 50 represented 11.3% of the federal prison population. That number reached 26% in 1989 and it is expected to reach 33% by 2010.<sup>11</sup> In 1997, the federal system reported that 23.9% of its prison population was 45 or older.<sup>12</sup> In the state systems, on average 12.7% fall within this category.<sup>13</sup>

State studies show an exponential increase in the population of older prisoners that is being seen nationwide. For example, recently Oklahoma completed its budget and population projections. It found that 16 percent of new offenders were over 45 years old – more than double the rate in 1990. The state is now projecting that its population of prisoners older than 45 will increase 48 percent by 2018.<sup>14</sup>

It is important to keep in mind that these figures only represent chronological measurements of age. In reality, the number of physiologically older prisoners will be greater. Federal studies have shown that the average prisoner is seven years older physiologically than he or she is chronologically.<sup>15</sup> Thus, a 45-year old prisoner will often show the physical deterioration and require the level of care of a person in his early to mid-fifties. This is due to histories of poor diet, drug and alcohol abuse, stressful prison life, and often poor medical care.<sup>16</sup> Thus, a prison system must be concerned not just with chronologically older but also with the physiologically older prisoners in the system. It is the latter population that will allow the state to better track ballooning hidden costs in prison budget projections.

The problems associated with the older and geriatric prison population can be expected to increase significantly as this population of middle-aged prisoners swells the ranks of the older prisoners.

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1,441, many of whom are first-time non-violent offenders. Male prisoners over the age of 60 constitute the fastest growing sector of the prison population in England. See 'No Problems-Old and Quiet': Older Prisoners in England and Wales, available at [www.homeoffice.gov.uk/justice/prisons/inspprisons/thematic.html](http://www.homeoffice.gov.uk/justice/prisons/inspprisons/thematic.html), accessed 23 March 2005). Likewise, Japan has reported sharp increases in its population of older prisoners. From 2000 to 2006, the number of older inmates in Japan rose by 160 percent -- 46,637 from 17,942 inmates. See Norimitsu Onishi, *As Japan Ages, Prisons Adapt To Going Gray*, N.Y. Times, Nov. 3, 2007, at 1.

<sup>10</sup> *Aging, Infirm Inmates Quietly Stacking Up*, Associated Press, Oct. 3, 2001.

<sup>11</sup> Connie L. Neeley, et al., *Addressing the Needs of Elderly Offenders*, Corrections Today, August 1997, at 120.

<sup>12</sup> *Id.* at Table 6.38. In year 2000, the number of federal prisoners above the age of 51 was reported as 10.9%. *Id.* at Table 6.47.

<sup>13</sup> *Id.* California is illustrative of this sharply rising growth curve. Although the population of prisoners over 55 years old is only about 6,000, or about 4% of the prison population, the California Legislative Analyst's Office ("LAO") projects that the over-55 population will approach 50,000 in less than twenty years, growing at a rate faster than the prison population as a whole. See LAO, *Analysis of the 1996-97 Budget Bill*, available at <http://www.lao.ca.gov/a96d1.html#A1> (Feb. 21, 1996).

<sup>14</sup> Angel Riggs, *People Entering Prison Reaches Record Level*, Tulsa World, Oct. 26, 2007, at 1.

<sup>15</sup> This is a more conservative figure than the estimate of some states. For example, Florida recently estimated that an inmate's physiological age was 11 1/2 years greater than their chronological age. Clarke, *supra*, at 1.

<sup>16</sup> While some states offer adequate medical care, the prison system continues as a whole to give substandard care that causes further injuries and even death. See generally Jonathan Turley, *Why Prison Health Care is a Crime*, The Chicago Tribune, March 19, 1991, at A19.

**C. The Asymmetrical Costs of Maintaining an Older Prisoner Population**

Both the federal and state systems are reeling under the increasing costs of their prison systems. Nationally, the states are spending between \$30 - \$50 billion dollars a year to maintain the current prison population of almost 3 million prisoners,<sup>17</sup> a rate that has doubled in the last 10 years and will likely double by 2010 to \$60 billion. The per capita cost of prisoners is increasing.<sup>18</sup> Many states have experienced costs rising faster than their populations. This trend is largely due to two factors. First, correctional wages and benefits have increased and roughly 50% of the operating budget of a facility goes to correctional employment costs. Second, medical costs have risen dramatically, particularly with the imposition of court orders forcing improvements in correctional medical care.

The increase in medical outlays is due to often hidden ballooning costs associated with special needs populations ranging from HIV-positive prisoners to geriatric prisoners. Older and geriatric prisoners are the largest and fastest growing segment of special needs prisoners. As noted earlier, on average cost of an older prisoner is two to three times that of a younger prisoner.<sup>19</sup> The average cost of imprisoning an older prisoner today is roughly \$70,000.<sup>20</sup> The costs associated with older prisoners vary, but the highest costs are borne in medical care and maintenance. These costs tend to be much higher in systems that spread their older prisoners throughout their facilities under a classic “mainstreaming approach” as opposed to the establishment of geriatric units or facilities. As noted below, medical costs often rise unnecessarily due to the failure to diagnose preventable or treatable illnesses until they reach a chronic stage.

The increase in the older prisoner population is expressed in three types of social costs. First, older prisoners occupy cells that are in short supply and extremely expensive to construct. Thus, maintaining an older prisoner population has a displacement cost for the system, increasing the pressures of overcrowding and forcing greater construction of new cells. Second, because older prisoners are often serving long-term sentences, overcrowding can lead to court-ordered early releases. In a perverse twist, the prisoners who are most likely to be released are younger, statistically more dangerous prisoners serving shorter sentences. These younger prisoners are still in the age group with the highest recidivism rate and are graduating to more serious offenses. As a result, we have a system that works to the inverse of logic: we struggle to continue to incarcerate the lowest risk prisoners while releasing those with the highest risk. The social cost is then incurred through higher crime rates and victimization. Finally, there is the direct cost of maintaining an older prisoner population.

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<sup>17</sup> Egan, *supra*, at 1; see also Alexandra Marks, *Strapped for Cash, States Set Some Felons Free*, Christian Science Monitor, Jan. 21, 2002, at 1.

<sup>18</sup> In the federal system, projections forecast that treatment of older prisoners for common ailments like hypertension and cardiac conditions will increase over 14 times by 2005 from the rates in 1988. American Bar Association, Report on Elder Resolution 2 (2000).

<sup>19</sup> For example, in Pennsylvania, the average cost of a younger inmate is \$78 per day while an older prisoner will cost \$203 per day. Clarke, *supra*, at 1.

<sup>20</sup> See Patricia S. Corwin, *Senioritis: Why Elderly Federal Inmates are Literally Dying to Get Out of Prison*, 17 J. Contemp. Health L. & Pol’y 687, 688 (2001); Barry Holman, *Old Men Behind Bars*, Wash. Post, July 25, 1999, at B8.

Older prisoners represent an important opportunity for reform because their proper management can dramatically slash costs and reduce overcrowding.<sup>21</sup> Because the average cost of older prisoners is two to three times that of younger prisoners, the release of 500 older or geriatric prisoners is the equivalent to a reduction of 1000 to 1500 prisoners – roughly the total number of prisoners housed in two mid-sized prisons. This cost ratio was confirmed in California in a 1996 report revealing that the cost of an older prisoners was more than double the cost per inmate under the age of 55.<sup>22</sup> To put this into concrete terms, the average cost of a prisoner remains generally between \$20,000 and \$30,000 per year in various systems.<sup>23</sup> Again, consider California, which is facing a truly dangerous crisis of overcrowding and recidivism in its system. In that state, the annual cost of a prisoner is over \$26,000.<sup>24</sup> The cost of an older or geriatric inmate is likely between \$40,000 to \$70,000 per year. Obviously, due to serious illness and disability, it is not uncommon to find geriatric inmates who cost the system in excess of \$100,000 per year. The costs associated with geriatric illness tend to be higher in the correctional setting, which lacks the “efficiency of numbers” associated with large-scale civilian health care systems. Moreover, every medical treatment like dialysis that occurs outside of the prison facility generates collateral costs in correctional staff time and travel.<sup>25</sup>

On an individual institutional level, the increasing size of the older prisoner population can present an array of non-fiscal problems for both maintenance and security. Since roughly 50% of a prison's operating costs are dedicated to officer salaries and benefits, efforts to extend prison resources and control costs have centered on the officer to inmate ratio. Older prisoners often frustrate such efforts by requiring special care and attention within the system. In addition to difficulties in mobility and interaction, older prisoners can be targets of abuse by younger prisoners. Older prisoners make ideal targets for theft, extortion, and even sexual assault as part of the so-called “wolf-prey” syndrome.<sup>26</sup>

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<sup>21</sup> See generally Jonathan Turley, *An ‘Old’ Prison Solution*, The Los Angeles Times, October 7, 2006; Jonathan Turley, *A Solution to Prison Overcrowding*, USA Today Magazine, November 1992, at 80-81; Jonathan Turley, *Our Prison Profiteers*, New York Times, August 3, 1990, at A20; Jonathan Turley, *Solving Prison Overcrowding*, New York Times, October 9, 1989.

<sup>22</sup> See LAO, *supra* note 6.

<sup>23</sup> It should be noted that, depending on the state calculation, this figure should already include the high costs of older prisoners, which serve to drive up the average per capita costs. Thus, if one removes the older prisoners from the calculation as a separate group for analysis, presumably the average cost per prisoner would fall. However, currently the average system has between four and seven percent of its population in the older or geriatric category. Thus, the upward pressure is not nearly as great as the expected higher percentages facing states with the emergence of the expanded population in the next ten years.

<sup>24</sup> Gloria Romero, *Correctional System Needs Correcting; Cut State Costs by Reforming Parole and Releasing Elderly Inmates*, L.A. Times, Jan. 26, 2003, at 5.

<sup>25</sup> See Jason S. Ornduff, *Releasing the Elderly Inmate: A Solution to Prison Overcrowding*, 4 Elder L.J. 173, 186 (1996). Such trips often cost hundreds of dollars for just guards and gasoline. Jennifer Warren, *The Graying of Prisons*, L.A. Times, June 9, 2002, at 1. In facilities like the women’s prison in Corona, there are hundreds of such trips each month to outside hospitals. *Id.*

<sup>26</sup> O.W. Kelsey, *Elderly inmates Providing Safe and Humane Care*, Corrections Today, May 1986, at 56; Curran, *supra*, at 245, 250; see also Sol Chaneles, *Growing Old Behind Bars*, Psychol. Today, Oct. 1987, at 51.

The costs associated with a graying prison population can represent a serious threat to the correctional system as a whole if they expand exponentially and rapidly. Most correctional budgets are based on common projections of population growth, operational costs, and inflation. However, due to the demographic shift described above, the federal and state systems will face a different population in a decade. While many of the inmates will be the same, their costs and needs will be materially different. Without careful planning, this extreme shift can leave a state struggling to maintain minimal correctional services and public safety. The greatest danger is that such a budgetary crisis will lead to diminished capacity and ultimately court-ordered releases on a large scale. Many states have faced such court orders and they are the most dangerous form of reform. There is little attention to individual risk in such releases and society pays the price ultimately in increased crime.

#### **D. Recidivism Rates for Younger and Older Prisoners**

Any review of reforms related to older prisoners must ultimately focus on the most important question related to public safety: the likelihood of a given individual to commit another offense. This “recidivism rate” is at the heart of the POPS evaluation. Recidivism is measured by the commission of a crime that results in the “rearrest, reconviction, or return to prison with or without a new sentence during a three-year period following a prisoner's release.”<sup>27</sup> The rate of recidivism is calculated by the number of individuals who recidivate divided by the number at risk of recidivating during a certain period.<sup>28</sup>

States are experiencing exceptionally high levels of recidivism. The average rearrest rate for prisoners within the first three years after release is 67.5% according to the Bureau of Justice Statistics. This has increased since the 1980s. Notably, property and drug offenses have seen increases to 74% and 67% nationally. Individual states obviously can exceed this national average. The rate of recidivism in a state like California is staggering.<sup>29</sup> Studies show a recidivism rate almost twice the rate of other states in the country.<sup>30</sup> There has been an estimated 30-fold increase in the number of parole violators since 1980.<sup>31</sup> Of the 70% who return to prison, roughly two-thirds are a result of a parole violation and 14% commit a new crime.<sup>32</sup> Notably, in 1978, parole

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<sup>27</sup> Bureau of Justice, Reentry Trends in the United States, Definitions, *available at* <http://www.ojp.usdoj.gov/bjs/reentry/definition.htm>. The

<sup>28</sup> California Department of Corrections, Definitions and Formulas, at <http://www.cdc.state.ca.us/OffenderInfoServices/Reports/Annual/RECIDI/RECIDI1999.pdf>.

<sup>29</sup> Petersilia, Joan, *Challenges of Prisoner Reentry and Parole in California*, *available at*, <http://www.ucop.edu/cprc/parole.html>.

<sup>30</sup> *Id.*, Some studies indicate as many as 70% of California's paroled felons end up back in prison within 18 months of parole. Jim Herron Zamora, *Parolees in Revolving Door; California Has Highest Rate of Recidivism*, San Francisco Chronicle, Dec. 23, 2002, at A1. While other studies place the rate closer to 60%, even the lower figure would be alarmingly low.

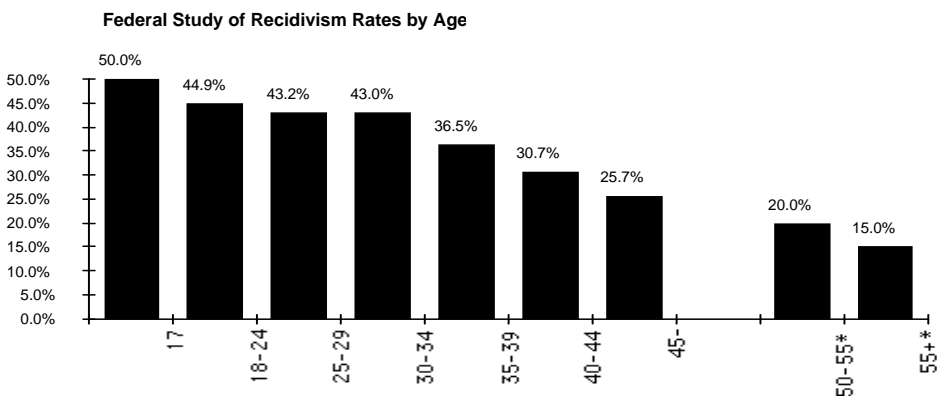
<sup>31</sup> Gloria Romero, *Correctional System Needs Correcting; Cut State Costs by Reforming Parole and Releasing Elderly Inmates*, L.A. Times, Jan. 26, 2003, at 5 (citing a report of the Urban Institute).

<sup>32</sup> Byrd, Gynnae, *The Future of the Prison State*, at <http://www.worldfreinternet.net/news/nws149.htm>.

violators represented approximately 8% of the total felons admitted to prison in that state. By 1988, this number had increased to 47%, and by 1998 parole violators constituted nearly three-fourths (71%) of all admissions to state prisons.<sup>33</sup>

By any objective measure, older prisoners are generally not the prisoners who need to be incarcerated in conventional prisons. Numerous studies show that age is one of the most reliable predictors of recidivism. Many older prisoners are statistically low-risk in comparison to younger prisoners and their conventional incarceration offers little for public safety. While academics often disagree on the specific cause, there is widespread agreement that the recidivism rate for adult male inmates tends to fall dramatically around the age of 30. This is most likely due to a mix of physiological and cultural influences. Whatever the cause, the reduction of recidivism with age is well-documented in figures from state and federal systems. As inmates age and their institutional cost skyrockets, the risk of releasing them decreases. This does not mean, of course, that every older prisoner is low-risk. To the contrary, this population will contain the same variation of individuals from first offenders to habitual offenders to avertable recidivists.<sup>34</sup> Obviously, a prisoner who committed murder at 60 years old is hardly a candidate for POPS or any rational system for release based on age and risk. Likewise, a habitual offender is unlikely to drop in risk of recidivism at the same rate as a non-habitual offender. However, what is clear is that the “yield” of low-risk, high-cost prisoners is greatest in the population of older prisoners. It is within this segment of the population that a state can get its highest return on savings and lowest risk of recidivism.

Federal statistics reflect the difference of age in recidivism that POPS has found on the state level. Older federal prisoners are half as likely to commit new offenses as younger prisoners and the difference is even greater with younger prisoners in their late teens and early twenties.



<sup>33</sup> *Id.* The most current data offered by the CDC is from 1999, which lists the recidivism rate within a one and two-year follow-up period for felons paroled to California supervision. This data is limited to felons paroled for the first time in 1999 on a new admission to prison and those returning to prison with a new court commitment. California Department of Corrections, Office of Correctional Planning, Recidivism Rates, available at <http://www.cdc.state.ca.us/OffenderInfoServices/Reports/Annual/RECID1/RECID1d1999.pdf>.

<sup>34</sup> An avertable recidivist is someone who commits a new crime after an early release and within the period of his or her original sentence.

Past statistical reports of the federal system show a recidivism rate of prisoners above the age of 40 as roughly a third of the rate for prisoners under 40. Specifically, prisoners above the age of 40 showed a recidivism rate of 11% where prisoners under the age of 40 showed a recidivism rate of 31.6%.<sup>35</sup> These statistics are interesting in two respects. First, the federal prison system is more likely to have a higher recidivism rate for older prisoners because of the lower percentage of violent crime sentences in comparison to the states, which continue to prosecute and sentence the vast majority of violent criminals annually. Over 60% of federal prisoners are serving for drug offenses, including possession.<sup>36</sup> Thus, the recidivism rate for states should be lower given the higher percentage of offenses that are most sensitive to the effect of aging.<sup>37</sup> Second, the majority of prisoners reported in this 40-plus category are ineligible for POPS, which uses 55 years as the threshold qualification. The rate of recidivism for those prisoners 55 years or older is likely even lower.

In its evaluation of the New York and Illinois systems, POPS found higher costs and lower recidivism rates among the older prisoner populations. In Illinois, older prisoners were over twice as likely to succeed on parole than younger prisoners. Likewise, the POPS study of the New York system found a similar age-recidivism correlation. This is demonstrated in New York's 48% recidivism rate for all inmates in comparison to its 22.1% recidivism rate for inmates over age 50 and under age 65. The rate for inmates over age 65 is only 7.4%. New York, therefore, has found almost identical recidivism rates for older offenders as in national studies. Both New York and the federal studies show a gradual and predictable fall in recidivism with age. While the most recent federal study consolidates all offenders over age 45, a projection of the existing federal figures shows a close correlation to the New York data. The figures show a clear and steady drop in recidivism with age, falling to approximately 25% for inmates over age 45 in comparison to 50% for the youngest prisoners. Our study of the California system showed the same marked differences in recidivism in a state in the grips of a recidivism crisis.<sup>38</sup>

Of particular relevance to this legislation is the apparent connection between warehousing policies and recidivism. Recidivism has gone up since the eradication of parole boards. Moreover, one of the few states to experience a drop in both prison population and recidivism is Missouri. This has been attributed to a revision of their parole and probation laws to allow move more non-violent offenders into alternative

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<sup>35</sup> United States Department of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 2000, Table 6.67.

<sup>36</sup> In the federal system, 97% of older prisoners are serving for non-violent crimes. Barry Holman, *Old Men Behind Bars*, Wash. Post, July 25, 1999, at B8.

<sup>37</sup> The number of older prisoners serving for violent offenses is quite low, even in the state systems. See generally Craig J. Forsyth & Robert Gramling, *Elderly Crime; Fact and Artifact*, in *Older Offenders: Perspectives in Criminology and Criminal Justice* 9. However, since a greater number are serving for violent offenses, this will have an impact in the different recidivism rate. An older prisoner serving as a first-offender for a violent crimes is probably less likely to commit a new crime with the advancement of age.

<sup>38</sup> POPS California Report (available upon request from the George Washington POPS office).

programs such as in-prison “shock” and treatment programs.<sup>39</sup> Likewise, prisoners who are released into parole systems early (rather than “maxed out” on their sentences) are 30% less likely to recidivate, according to a recent New York study.<sup>40</sup> Seventy-three percent of prisoners released after serving their full sentence were rearrested as opposed to 51 percent of those given parole.<sup>41</sup> The point is not that recidivism is due entirely to determinate sentencing and loss of parole systems. Rather, these studies show that our current system may be contributing to the recidivism crisis and that a more tailored approach to different categories of offenders would yield better results.

### **III. THE PROJECT FOR OLDER PRISONERS**

In 1989, I established POPS to work on the problems associated with the growing population of older offenders. POPS began with a single prisoner, Quenton Brown, who was incarcerated at the Angola Prison in Louisiana. On June 7, 1973, then 50 years old and homeless, Brown walked into a bread store in Louisiana and, at gunpoint, stole \$100 and a 15-cent pie. He then crawled under a nearby house where he remained until the police arrived. After his arrest, Louisiana determined that Mr. Brown had an I.Q. of 51—the intelligence of a three-year-old child. After a one-day trial, Mr. Brown was given a 30-year sentence without chance of parole. He had served 16 years when I first met him.

In a matter of weeks, I was deluged by letters from close to one hundred older and geriatric prisoners, who heard I was representing an older prisoner for free. This number was striking in a state with such extreme overcrowding that it had to rent out cells in local jails for a significant percentage of its population.<sup>42</sup> With the help of my students, POPS was born. We set out to develop new approaches to this population, including evaluative measures to isolate low-risk prisoners and policies to reduce the costs of this population while improving care for individual prisoners.

POPS works on both national and local aspects of this problem, and POPS continues to gather data on the special costs and necessities of this population. Hundreds of law students have been trained in POPS and are now practicing attorneys. All that is required is for a state to request such a program, give POPS researchers access to the prison population, and enlist the participation of one or more law schools. POPS/DC will help any law school establish an academic program and regional office for work in a given state. POPS largely performs three functions in this area: individual case evaluations, state reports and recommendations for reform, and legislative drafting.

POPS students work without compensation and the project does not charge for its services. When assigned a case, POPS students first interview prisoners over the age of 55. Each prisoner is then evaluated according to a long, comprehensive questionnaire that explores the prisoner's criminal history, chemical dependence history, health,

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<sup>39</sup> See *Report Shows Missouri's Use of Recommended Sentences Reduces Recidivism Rates, Prison Population*, Oct. 15, 2007, U.S. States News, at 1

<sup>40</sup> See Rick Hepp, *Study Cites Benefits of Supervision for Ex-Convicts*, Star Ledger, January 11, 2007, at 41.

<sup>41</sup> *Id.*

<sup>42</sup> See generally Jonathan Turley, *Our Prison Profiteers*, N.Y. Times, Aug. 3, 1990, at A20.

employment background, and family background. This information is generally taken from interviews with the inmate, review of the prison files, interviews with the correctional staff, and a search of all courts and news files available on LEXIS/NEXIS and Westlaw. POPS generally uses two different recidivism tests to gauge the risk of an individual inmate. If the inmate appears low risk on both tests, the student presents the case to the other POPS students.

If the students vote to go forward, the student then attempts to contact any victims or surviving family members as part of our victim consultation stage. POPS was one of the first organizations to make such interviews mandatory. Victim interviews can reveal inconsistencies in an inmate's account or simply show a level of violence or aggression that does not appear in a written record. In states allowing conditional paroles, victims are asked what conditions would make them feel more comfortable with a release.

Assuming the inmate's case is still viable, the case worker then proceeds to determine how a prisoner will live upon release. Specifically, the student confirms any benefits, such as veteran's benefits or social security payments, which the inmate may be entitled to receive. If the prisoner has a supportive family offering long-term housing, the student confirms who owns the house, who lives in the house, and the space available for the prisoner.<sup>43</sup> The student further confirms whether anyone in the house has a criminal record. Finally, if the prisoner is able to work, the student works with any family or friends to confirm employment upon release.

Once all of these facts have been ascertained, the case is presented a final time to the POPS members. If approved, the student then submits the comprehensive findings and recommendations to the appropriate parole or pardon board. The POPS model has been endorsed by leaders from both parties and state commissions in states like California.

#### **IV.**

#### **H.R. 261 AND OLDER PRISONERS**

Former Attorney General Janet Reno once remarked: "You don't want to be running a geriatric ward . . . for people who are no longer dangerous."<sup>44</sup> General Reno correctly understood that our prisons cannot serve as nursing homes and that it is possible to isolate low-risk, high-cost prisoners for release within the system. Good correctional policy requires that choices be made on the basis of societal risk and limited resources. Older prisoners present an opportunity to make efficient and humane decisions in using our limited resources. Obviously, a sizable population of still dangerous older and geriatric prisoners will remain after any process of winnowing out low-risk prisoners. Thus, any approach to aging prisoner reform should be comprehensive enough to address the three basic categories used by POPS in classifying prisoners: low-risk, mid-risk, and high-risk prisoners. H.R. 261 is a first step in dealing with the low-risk population of prisoners.

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<sup>43</sup> Students are encouraged to actually include photographs of the dwelling for review by POPS and ultimately the parole or pardon board. Older prisoners require living quarters that are accessible and stable.

<sup>44</sup> Federal News Service, Weekly News Conference with Attorney General Janet Reno, Feb. 10, 1994.

Unfortunately, the federal guidelines and policies have in the past allowed little flexibility in managing the older prisoner population in either sentencing or release determinations. The sentencing guidelines addressed this issue in Section 5H1.1:

Age (including youth) is not ordinarily important in determining whether a sentence should be outside the applicable guideline range. Age may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient and less costly than incarceration. Physical condition, which may be related to age, is addressed at 5H1.4.

Yet, courts have tried to incorporate considerations of age and infirmity.<sup>45</sup> Thus, despite references to age in a presentence report (PSR), courts found it difficult to tailor a sentence to such an element in the form of a downward departure.<sup>46</sup>

After sentencing, the prospect for early release due to age is equally poor. Congress has repeatedly indicated that it views age to be a valid criteria for release. In 18 U.S.C. § 3582 (c)(1)(A), Congress authorized sentencing reductions for a prisoner who is at least 70 years old, has served at least 30 years on a sentence imposed under 18 U.S.C. § 3559(c), and the BOP Director has determined that the prisoner is no longer a danger to society or individuals. Likewise, Congress allowed for early release under 18 U.S.C. § 3582(c)(1)(A) for "extraordinary and compelling reasons." Such releases in practice meant that an older prisoner was expected to die within six months – a limitation that did not comport with past congressional support for age-based releases.

It was not until 1994 and after considerable pressure that the BOP loosened the six-month rule. The period was extended to twelve months and estimated life expectancy was formally treated as "a general guideline, not a requirement." Despite such changes, the release of geriatric prisoners remains quite low.

Part of the problem is the reliance on the BOP as the critical gatekeeper. The BOP has a very distinguished history and has many very talented professionals who care deeply about correctional policy. However, the agency has always been viewed as somewhat resistant to reforms addressing special needs groups like older prisoners. The BOP was founded on a principle of uniformity and humane treatment in the incarceration of prisoners. This was a great advance at the time. However, this cultural touchstone has produced internal resistance to proposals for special units and programs to address a prison population that is far more heterogeneous than it was when the BOP was formed in 1930. Yet, when Congress abolished parole, it did away

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<sup>45</sup> Some relied on Section 5H1.4, which states:

Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

<sup>46</sup> See generally John D. Burrow & Barbara A. Koons-Witt, 11 Elder Law J. 273 (2003)

with the Parole Commission which was the best body to handle such case-by-case decisions. This left either the BOP making discretionary decisions or a statutory remedy for automatic release. Like their state counterparts, BOP officials are leery of exercising this authority out of fear of a political backlash if a released individual were to commit a high-profile crime. This “Willie Horton” fear is well-based, as shown by the recent attacks on Gov. Mike Huckabee’s release of Wayne Dumond.<sup>47</sup>

The current system, therefore, has the classic reluctant turnkey problem. By relying on the BOP, these releases have occurred at a slow trickle without a meaningful impact on the federal population. The ideal system would entail a commission to review individual cases and make case-by-case decisions to release based on recidivism elements. A long history of habitual non-violent offenses can indicate a likelihood of recidivism and a pattern leading to a violent crime. Some offenders “graduate up” in the criminal code. Ideally, habitual offenders should be excluded from release on the basis of age absent incapacity or terminal illness. Indeed, the language of the current bill could be tweaked to exclude such offenders.

Despite this reservation, H.R. 261 offers a compelling alternative to a case-by-case review by setting high standards for release that track current recidivism research.

The proposed change in the criminal code would add language to 18 U.S.C. 3624(a) to add a subsection (g) reading:

g) Early Release for Certain Nonviolent Offenders- Notwithstanding any other provision of law, the Bureau of Prisons, pursuant to a good time policy, shall release from confinement a prisoner who has served one half or more of his term of imprisonment (including any consecutive term or terms of imprisonment) if that prisoner—

- (1) has attained the age of 45 years;
- (2) has never been convicted of a crime of violence; and
- (3) has not engaged in any violation, involving violent conduct, of institutional disciplinary regulations.

This language mirrors some of the most important recidivism criteria used by POPS in assessing prisoners. While POPS uses the age of 55 years as our threshold requirement, recidivism studies show a decline in the likelihood of recidivism occurs well before 45 years of age. Likewise, the law directly prohibits those who are serving sentences for violent crimes, which tend to be some of the highest risk prisoners. Though POPS is a bit more conservative on the age criteria, subsection (2) is more conservative on the crime category. POPS does not exclude violent offenders. Rather, we consider a violent offense as weighing heavily against a low-risk determination. It is not an outcome-determinative criteria in our system. Notably, under this language, Quenton Brown would have been barred from participation.

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<sup>47</sup> See Susan Milligan, *Huckabee Could Face Hurdles From the Past; Parole of Rapist haunts Campaign*, Boston Globe, Oct. 14, 2007, at 1.

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The law also looks at the prisoner's history of incarceration in terms of disciplinary violations. POPS also considers any such violations but does not confine them to violent occurrences. Once again, the difference is probably small. Disciplinary write-ups occur for often trivial violations like failing to button a uniform (a problem for older prisoners) or having unapproved snacks in a cell. The predictive value of write-ups are largely confined to violent offenses, absent a pattern of disruptive behavior.

Finally, the law applies a similar standard on time served that is used in our own analysis. POPS will generally only consider a case for a recommendation of release if the person has served beyond the average for his offense. In this bill, the criterion is expressed in terms of having served "one-half or more of his term or imprisonment (including any consecutive term or terms of imprisonment)." This criterion is important for three reasons. First, age should not be an excuse for criminal conduct. An older prisoner needs to be punished for his crimes regardless of his age. Second, it prevents "late bloomers" (or prisoners who are first incarcerated in their later years) from immediately claiming age as a way to circumvent a sentence. Third, and finally, it helps preserve some uniformity of sentencing and punishment within the system.

As noted earlier, my preference would be for a more case-by-case determination, but that system was abolished with the U.S. Parole Commission. In the absence of such a system, the only practical alternative to the current system is a mandatory release program. This bill is sufficiently conservative in its threshold requirement to minimize the likelihood of recidivism. Obviously, recidivism will occur under any system. However, I would expect this system to experience a fraction of the recidivism rate currently seen across the country which stands at roughly two-thirds of released prisoners. I would recommend, however, the use of an organization like POPS to help identify such prisoners and bring their cases to the BOP for possible release. The various requirements in this law will inevitably raise case-by-case questions of prior records or the determination of time served. An outside group can help guarantee that such cases will move through the system, particularly given the difficulty of some older prisoners in completing necessary paperwork for such programs.

One of my greatest concerns is the necessity of a post-release program to guarantee a "soft landing" releasees. The success of POPS is largely due to the confirmation of jobs and living arrangements. This is particularly a concern with regard to drug offenders. Absent a job and structured environment, such an offense can easily recur. Drug dealing is motivated by economics and a return to the identical circumstances and neighborhood can easily produce the same conduct.

The most important contribution of this legislation, however, would be its impact on the states. Many states followed the lead of the federal government in abolishing parole and lengthening sentences. They are now in the grips of a massive over-crowding and recidivism crisis. The federal government could offer this reasonable reform as a model for duplication around the country. I expect that many states would be very interested in such a reform as they try to deal with the graying of their prison populations. Obviously, POPS has many other suggested reforms in

dealing with mid-risk and high-risk inmates that can lower the costs to the system while improving care for the inmates. However, for low-risk prisoners, this bill would represent a great advance in reforming our policies to reflect current knowledge of recidivism and correctional management.

**V.  
CONCLUSION**

I am eager to work with Congress in perfecting such legislation. The federal government is fortunate to have a great resource in the BOP and the Justice Department to assist on these reforms. I honestly believe that a responsible program for release can be drafted with consensus in the legal and correctional communities. What we cannot do is continue to ignore this problem.

The aging of the federal and state system represents a serious threat to not just our legal system, but to society as a whole. We cannot continue to live in denial of the realities before us. Rising recidivism rates and severe overcrowding are not just some abstract discussion among academics. Under our current system, the most dangerous prisoners are released to commit new crimes. The victims of those crimes are needlessly harmed. If we are truly going to serve victims, we should work to make fewer of them. One way to do that is to make mature decisions about who should be incarcerated and who can be released in a system struggling to hold the largest prison population in the world.

After years of passivity and stagnation across the country on this problem, H.R. 261 is an opportunity for Congress to play a true leadership role in a growing crisis around the country. For that reason, it is a great credit to this Subcommittee and its members that H.R. 261 has been offered as the first meaningful step toward reform in this area.

I want to thank you again for the honor of addressing you on this important issue. I would be happy to answer any questions that the members may have on my testimony.

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