

## NOTES

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# FROM FIRST STEPS TO SECOND CHANCES: ADDRESSING MASS INCARCERATION IN STATE PRISONS

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*It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones . . . .*

—Nelson Mandela<sup>1</sup>

## INTRODUCTION

The United States contains only 5% of the world’s population, but incarcerates over 20% of the world’s prisoners.<sup>2</sup> For the 2.3 million people currently behind bars in our country,<sup>3</sup> the situation is dire. In a recent investigation of Alabama’s state prisons for men, the Department of Justice (DOJ) found reasonable cause to believe the conditions violated the Eighth Amendment ban on cruel and unusual punishments.<sup>4</sup> During their site visits

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1 NELSON MANDELA, *LONG WALK TO FREEDOM* 201 (1st paperback ed. 2013).

2 Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 303 (2017) (citing John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. ON LEGIS. 173, 173 (2015)).

3 Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL’Y INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>.

4 U.S. DEP’T OF JUSTICE, INVESTIGATION OF ALABAMA’S STATE PRISONS FOR MEN 1 (2019), <https://www.justice.gov/crt/case-document/file/1149971/download>. In a single day, investigators witnessed the following incidents across Alabama prisons: a man beaten with a sock filled with metal locks so severely that he had to be transferred to an outside hospital for emergency care, two prisoners punched so forcefully that they had to be transferred to an outside hospital for help, a stabbing with homemade knives, an assault on a correctional officer, and a sexual assault report. *Id.* at 2–3.

to Alabama prisons, investigators witnessed a pervasive pattern of Eighth Amendment violations: rape, the use and sale of illegal drugs, arson, drug overdoses, stabbings, homicides, prisoner extortion, and “numerous dangerous and unsanitary conditions,” including maggots and rats in prison kitchens.<sup>5</sup> Chronic underfunding and staffing shortages exacerbate the problem.<sup>6</sup> One prisoner remained tied up and tortured for days before prison staff noticed.<sup>7</sup> Another prisoner was discovered lying face down on the ground. He lay dead for so long that his face was flattened before he was finally discovered.<sup>8</sup> One prisoner stabbing victim had to drag himself to the front of the dormitory while two other prisoners banged on the locked doors to get the staff’s attention.<sup>9</sup> The victim eventually bled to death.<sup>10</sup>

The effects of mass incarceration are felt inside and outside of the prison walls. While incarcerated, prisoners are at increased risk of experiencing bodily harm, death, suicide, and delayed medical care.<sup>11</sup> Once released, former prisoners face significant barriers to employment and reintegration into society. Many are politically silenced through felon disenfranchisement laws barring over 6.1 million Americans from voting.<sup>12</sup> The overwhelming burden has fallen on communities of color, who make up 37% of the United States population but 67% of the prison population.<sup>13</sup>

An important question emerges from the data on mass incarceration: *Is it working?* The answer is a resounding no. Changes in sentencing law and criminal justice policies, not crime rates, explain most of the increase in incarceration rates.<sup>14</sup> More people are being charged with felonies and sent to prison, notwithstanding a falling crime rate.<sup>15</sup> A large portion of our

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5 See *id.* at 1–6; see also *id.* at 1–2 (“The violations are severe, systemic, and exacerbated by serious deficiencies in staffing and supervision; overcrowding; ineffective housing and classification protocols; inadequate incident reporting; inability to control the flow of contraband into and within the prisons, including illegal drugs and weapons; ineffective prison management and training; insufficient maintenance and cleaning of facilities; the use of segregation and solitary confinement to both punish and protect victims of violence and/or sexual abuse; and a high level of violence that is too common, cruel, of an unusual nature, and pervasive.”).

6 *Id.* at 9.

7 *Id.* at 39.

8 Katie Benner & Shaila Dewan, *Alabama’s Gruesome Prisons: Report Finds Rape and Murder at All Hours*, N.Y. TIMES (Apr. 3, 2019), <https://www.nytimes.com/2019/04/03/us/alabama-prisons-doj-investigation.html>.

9 U.S. DEP’T OF JUSTICE, *supra* note 4, at 2.

10 *Id.*

11 Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J.F. 791, 813 (2019).

12 SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 7 (2019), <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>.

13 *Criminal Justice Facts*, SENT’G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited Jan. 13, 2020).

14 See SENTENCING PROJECT, *supra* note 12, at 3; Griffin & Yaroshefsky, *supra* note 2, at 307.

15 Griffin & Yaroshefsky, *supra* note 2, at 307.

nation's prison population is serving time in jail with little support from a public-safety rationale, and their release could result in cost savings of nearly \$20 billion per year.<sup>16</sup>

Experts offer varying explanations for the phenomenon of mass incarceration. Many trace its roots back to the infamous "war on drugs," a law enforcement campaign started in the 1980s to target the illegal use and sale of drugs.<sup>17</sup> As part of this campaign, Congress passed the Anti-Drug Abuse Act of 1986 (ADAA),<sup>18</sup> establishing mandatory minimum sentences for drug offenders. From 1980 to 1997, drug incarceration rates "increased nearly tenfold, from 15 per 100,000 adults to 148 per 100,000 adults."<sup>19</sup> Sentencing reforms such as "three-strikes" and "truth-in-sentencing" laws offer alternative explanations for the rising incarceration rates.<sup>20</sup> While there may not be a single reason for mass incarceration, the cumulative effects are undeniable: our country imprisons *far* too many people for *far* too long.

Congress is often slow to respond to the harmful effects of criminal justice policies,<sup>21</sup> but recent bipartisan legislation offers critics some hope for reform. In December 2018, Congress passed the First Step Act<sup>22</sup> in an effort to improve unduly harsh federal drug sentencing policies and reduce recidivism.<sup>23</sup> Many legislators consider the First Step Act to be an important victory for substantive prison reform as well as a sign that the tides are changing when it comes to the politics surrounding mass incarceration. "[N]o longer just a left-of-center or centrist movement," federal criminal justice reform is now supported by lawmakers on both sides of the aisle.<sup>24</sup> Critics of the bill

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16 JAMES AUSTIN ET AL., BRENNAN CTR. FOR JUSTICE, HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 7 (2016), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Unnecessarily\\_Incarcerated\\_0.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Unnecessarily_Incarcerated_0.pdf).

17 John Conyers, Jr., *The Incarceration Explosion*, 31 YALE L. & POL'Y REV. 377, 379 (2013).

18 Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

19 Conyers, *supra* note 17, at 379. The average amount of time drug offenders spend in prison has also increased dramatically. See SENTENCING PROJECT, *supra* note 12, at 3 (discussing how people released after serving time for federal drug offenses in 1986 spent an average of twenty-two months in prison, compared to the average sixty-two-month stay by drug offenders in 2004).

20 See AUSTIN ET AL., *supra* note 16, at 4; Conyers, *supra* note 17, at 380.

21 Hopwood, *supra* note 11, at 810 ("While public opinion is rapidly moving towards reform, Congress has not moved at the same pace.").

22 First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18, 21, and 34 U.S.C.).

23 *Id.* § 101.

24 Hopwood, *supra* note 11, at 802; *see id.* at 791 ("The federal reform community is now better funded, more prolific, and more politically diverse than ever before, and it successfully provided the political cover necessary for congressional members to vote for reform."); *see also* LAUREN-BROOKE EISEN & INIMAI CHETTIAR, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE: AN ELECTION AGENDA FOR CANDIDATES, ACTIVISTS, AND LEGISLATORS (2018), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Criminal%20Justice%20Agenda.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal%20Justice%20Agenda.pdf) (discussing recent polling showing bipartisan support for criminal justice reform, including a 2017 poll from the Charles Koch Institute revealing that

are not so optimistic, considering incremental federal criminal justice reform to be insufficient for addressing the magnitude of our current carceral crisis. Federal prisoners make up about 12% of our country's total prison population.<sup>25</sup> The First Step Act fails to address the remaining 88% percent of the U.S. prison population—approximately 1,306,000 prisoners in state prisons and 612,000 in local jails.<sup>26</sup> States are paying the bulk of the cost of mass incarceration, including over \$59.8 billion in corrections expenditures in 2017 alone.<sup>27</sup>

In order to address mass incarceration meaningfully, Congress must pass legislation aimed at reducing state prison populations. The legislation's name (the *First Step Act*) suggests there will be follow-up legislation—that Congress's end goal has yet to be fully realized. This Note explores the details of the First Step Act with an eye toward drafting the "Second Step Act" in a way that adequately addresses the root causes of mass incarceration.<sup>28</sup> In Part I, this Note discusses the events leading up to the passage of the First Step Act and its key provisions addressing sentencing reform and rehabilitative programming. Part II discusses the First Step Act's successes and shortcomings with respect to three prisoner subgroups: mentally ill inmates, nonviolent offenders, and recidivists. After identifying the main problems with the First Step Act in Part II, Part III offers a new legislative solution: the Second Step Act. Through the Second Step Act, Congress will set up a competitive grant fund for purposes of incentivizing states to reduce incarceration rates in a targeted fashion. In their grant proposals, applicants will include comprehensive plans for reducing their state prison population without a significant rise in crime rates. The proposals will specifically address the needs of the three prisoner subgroups discussed in Part II. Much like the U.S. Department of Education's Race to the Top initiative—the competitive funding grant created to reward innovative state education reforms<sup>29</sup>—the Second Step Act will reward states that are paving the way for meaningful criminal justice reform. Grant applicants will rely on successful evidence-based prison reforms to craft their plans, the implementation of which will provide effective, reproducible models for other states and local agencies to follow.

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81% of Trump voters consider criminal justice reform important, and a 2017 ACLU poll showing that 71% of Americans support reducing the population, including 50% of Trump voters).

25 JENNIFER BRONSON & E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2017, at 3 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf> (discussing prison population data at year-end 2017).

26 Sawyer & Wagner, *supra* note 3.

27 SENTENCING PROJECT, *supra* note 12, at 2.

28 Other reforms must be implemented in order to fully address the mass incarceration crisis. The scope of this Note is limited to reforms relating to three prisoner subgroups: mentally ill inmates, nonviolent offenders, and recidivists.

29 See U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 2 (2009), <https://www2.ed.gov/programs/racetothetop/executive-summary.pdf>.

The Second Step Act will not be a step worth taking unless Congress cures the First Step Act's shortcomings with respect to the growing state prison population and, more specifically, the needs of three groups of prisoners: prisoners with mental health problems, nonviolent offenders, and recidivists.

## I. CRAWLING TO THE FIRST STEP: A HISTORY OF CONGRESSIONAL CRIMINAL JUSTICE REFORM EFFORTS

"[M]ass incarceration was not a spasm without a cause."<sup>30</sup> From 1960 to 1980, violent crime rates rose sharply.<sup>31</sup> The federal government responded by enacting laws intended to restore "order" to the nation by lengthening prison sentences and creating new crimes. Since the 1980s' war on drugs, criminal justice policies have become increasingly punitive, contributing to a "culture of punishment" with disproportionate impacts on communities of color.<sup>32</sup> For example, the ADAA contained a significant sentencing disparity for crack cocaine offenders versus powder cocaine offenders, resulting in crack cocaine offenders being sentenced one hundred times more harshly than powder cocaine offenders for the same quantity of drugs.<sup>33</sup> Statistics show African Americans are more likely to be convicted of crack cocaine offenses and white people are more likely to be convicted of powder cocaine offenses.<sup>34</sup> The disparity produced harsh outcomes. In 1986, the average federal drug sentence for African American offenders was 11% higher than the sentence for white offenders. Four years after the passage of the ADAA, the average federal drug sentence for African Americans was 49% higher than for white offenders.

In the course of a decade, Congress abolished parole entirely and restrained judicial discretion by creating strict sentencing guidelines for meting out punishment.<sup>35</sup> Often, states followed suit. Immediately following the 1994 crime bill introducing the three-strikes law—legislation imposing lengthy prison sentences for offenders convicted of a third felony<sup>36</sup>—half of the states adopted similar laws.<sup>37</sup> From 1993 to 2009, the average prison term for state inmates increased by 33%, while the average term for federal prisoners nearly doubled from 1988 to 2012.<sup>38</sup>

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30 AUSTIN ET AL., *supra* note 16, at 3.

31 *Id.* at 3 ("From 1960 to 1980, violent crime soared 270 percent.").

32 Nicole D. Porter, *Unfinished Project of Civil Rights in the Era of Mass Incarceration and the Movement for Black Lives*, 6 WAKE FOREST J.L. & POL'Y 1, 1 (2016).

33 Conyers, *supra* note 17, at 381.

34 DEBORAH J. VAGINS & JESSELYN McCURDY, AM. CIVIL LIBERTIES UNION, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW, at i (2006).

35 AUSTIN ET AL., *supra* note 16, at 4.

36 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 70001(2), 108 Stat. 1796, 1982 (codified as amended at 18 U.S.C. § 3559(c) (2018)).

37 AUSTIN ET AL., *supra* note 16, at 4.

38 *Id.* at 17 (noting that the average stay for federal prisoners increased from 1.5 to 3.1 years during this time period).

Congress has been slow to correct the mistakes of the past. In 2007, twenty-one years after the ADAA, Congress passed the Second Chance Act.<sup>39</sup> The legislation was designed in part to assist states in their criminal justice reform efforts through federal grants to government agencies and nonprofits providing rehabilitation services. Three years later, Congress reduced the drug-sentencing disparity from 100:1 to 18:1 for crack cocaine and powder cocaine offenses through the Fair Sentencing Act of 2010.<sup>40</sup> Critics of the bill argued the reforms were too little, too late. Further, the sentencing reductions did not apply retroactively. One critic employed an analogy to illustrate the problem: "Imagine that the Civil Rights Act of 1964 had upheld segregation in existing schools and only mandated integration for new schools being built."<sup>41</sup> Similarly, punitive sentencing guidelines were upheld for those prisoners sentenced prior to 2010, and only prisoners sentenced after 2010 were able to reap the legislation's benefits.

In 2013, then-Attorney General Eric Holder published a memorandum on mandatory minimum sentences instructing federal prosecutors to avoid mandatory minimum sentences for certain nonviolent, low-level drug offenders, arguing that long sentences for such populations do not promote public safety and increase prison costs.<sup>42</sup> Former Attorney General Jeff Sessions, known for being "tough on crime,"<sup>43</sup> rescinded the Holder memo in 2017 and replaced it with his own memo calling for prosecutors to adhere to strict charging policies.<sup>44</sup> In late 2016 and early 2017, Sessions' vocal opposition to criminal justice reform combined with President Trump's campaign statements calling for a return to "law and order"<sup>45</sup> to create an atmosphere in our country where few legislators or citizens thought criminal justice reform

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39 Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657.

40 Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

41 Press Release, Drug Policy All., U.S. Sentencing Commission Votes to Make Crack/Powder Cocaine Sentencing Reforms Retroactive (June 29, 2011), <http://www.drugpolicy.org/news/2011/06/us-sentencing-commission-votes-make-crackpowder-cocaine-sentencing-reforms-retroactive>.

42 Memorandum from Eric Holder, Attorney Gen., U.S. Dep't of Justice, Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases 1 (Aug. 12, 2013), <https://assets.documentcloud.org/documents/1094233/attorney-general-eric-holders-memorandum-on.pdf> ("[W]e now refine our charging policy regarding mandatory minimums for certain nonviolent, low-level drug offenders. . . . [O]ur most severe mandatory minimum penalties are reserved for serious, high-level, or violent drug traffickers.").

43 Jessica Schneider & David Shortell, *Sessions' Agenda at DOJ Reflects Trump's, Despite Rocky Relationship*, CNN, <https://www.cnn.com/2017/12/31/politics/doj-year-end-recap/index.html> (last updated Jan. 5, 2018).

44 Memorandum from Jeff Sessions, Attorney Gen., U.S. Dep't of Justice, Department Charging and Sentencing Policy (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download>.

45 Josh Zeitz, *How Trump Is Recycling Nixon's 'Law and Order' Playbook*, POLITICO (July 18, 2016), <https://www.politico.com/magazine/story/2016/07/donald-trump-law-and-order-richard-nixon-crime-race-214066> (discussing Donald Trump's campaign promise to make America "safe again").

was possible. Nonetheless, the First Step Act was introduced to the Senate in March 2017. The bill aimed to cure the legislative mistakes of the past by making certain drug sentences less punitive and giving some federal prisoners the opportunity to have a judge take a “second look” at their sentences in light of the prisoner’s rehabilitation. Congress reached a series of compromises and the bill ultimately passed with overwhelming bipartisan support.<sup>46</sup> On December 21, 2018, President Trump signed the bill into law.

The First Step Act implements several meaningful sentencing reforms, including expanding the safety valve,<sup>47</sup> eliminating the “stacking” provision,<sup>48</sup> and making the Fair Sentencing Act retroactive.<sup>49</sup> Prisoners sentenced before the enactment of the Fair Sentencing Act can now apply directly to a federal court for a sentence reduction based on decreased mandatory minimums. As of January 2020, 2387 inmates have received sentence reductions under this provision.<sup>50</sup> Next, Congress requires the Bureau of Prisons (BOP) to provide rehabilitation programs for federal inmates. The lynchpin of these programs is the “risk and needs assessment system,” which requires the DOJ to develop a system for measuring the risk of recidivism among federal prisoners and use the data to place them in “evidence-based recidivism reduction programs.”<sup>51</sup> Prisoners who participate in these programs are eligible for time credits to be applied toward their prerelease custody or supervised release.<sup>52</sup> The First Step Act contains additional provisions targeting smaller prison populations, including a ban on shackling pregnant inmates, a ban on solitary confinement for juvenile inmates, a requirement that prisoners must be in facilities within five hundred miles of their families, and expanded access to compassionate release for terminally

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46 Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next> (noting that the Senate voted in favor of the bill eighty-seven to twelve).

47 First Step Act of 2018, Pub. L. No. 115-391, § 402(a), 132 Stat. 5194, 5221 (codified at 18 U.S.C. § 3553 (2018)). For an explanation of the safety-valve provision, see NATHAN JAMES, CONG. RESEARCH SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW 9 (2019) (“The safety valve allows judges to sentence low-level, nonviolent drug offenders to a term of imprisonment that is less than the applicable mandatory minimum.”).

48 First Step Act § 403(a), 132 Stat. at 5221–22 (codified at 18 U.S.C. § 924(c)(1)(C)). For an explanation of the “stacking” provision and how the First Step Act eliminated it, see JAMES, *supra* note 47, at 9 (explaining how under previous law, two concurrent convictions for using a firearm in furtherance of a drug trafficking crime triggered a twenty-five-year mandatory minimum, whereas the First Step Act only triggers the enhanced mandatory minimum for a “second or subsequent” conviction for using a firearm in furtherance of a drug trafficking crime where the offender has a prior final conviction for use of a firearm).

49 First Step Act § 404, 132 Stat. at 5222 (codified at 21 U.S.C. § 841 note (2018))

50 U.S. SENTENCING COMM’N, FIRST STEP ACT OF 2018 RESENTENCING PROVISIONS: RETROACTIVITY DATA REPORT 4 tbl.1 (2020).

51 First Step Act § 101(a), 132 Stat. at 5195–96 (codified at 18 U.S.C. §§ 3631–3635).

52 *Id.*, 132 Stat. at 5198 (codified at 18 U.S.C. § 3632(d)(4)).

ill and elderly inmates.<sup>53</sup> Finally, the First Step Act reauthorizes the Second Chance Act, legislation that provides grants on the state and local level for prisoner reentry programming.<sup>54</sup>

## II. THE PROBLEM

Responses to the First Step Act have been mixed. Proponents of the Act laud the legislation as a sign of hope for future bipartisan reform efforts, while critics argue its potential impact is overstated. One critic summarized the frustration: “It’s indeed a first step, one perhaps better described as a baby step. And it needs to be followed by a second step, third step and more . . .”<sup>55</sup> Prior to the bill’s passage, several members of Congress expressed their concern in a “Dear Colleague” letter, arguing that the bill will actually *worsen* the federal prison system by “creating discriminatory non-evidence-based policies.”<sup>56</sup> The letter details research suggesting that risk assessments are ineffective when it comes to accurately predicting risk and tend to institutionalize discriminatory practices.<sup>57</sup> Organizations including Black Lives Matter and Movement for Black Lives expressed similar concerns.<sup>58</sup> The Leadership Conference on Civil and Human Rights criticized the legislation for focusing too much on “‘back-end’ reform[s]”—including sentence reductions and reentry and rehabilitation programs—rather than “‘front-end’ reform[s],” such as the elimination of mandatory minimums.<sup>59</sup>

This Note argues that the First Step Act’s greatest shortcoming lies in its scope. The bill addresses only a small percentage of the federal prison population—approximately 5500<sup>60</sup> out of 175,483 prisoners,<sup>61</sup> or about 3.1% of

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53 *Id.* § 301(a), 132 Stat. at 5217 (codified at 18 U.S.C. § 4322(a)) (ban on shackling pregnant inmates); § 613(a), 132 Stat. at 5247–49 (codified at 18 U.S.C. § 5043) (ban on solitary confinement for juveniles); § 601, 132 Stat. at 5237 (codified at 18 U.S.C. § 3621(b)) (placement within five hundred miles of families); § 603, 132 Stat. at 5238–41 (codified at 34 U.S.C. 60541(g), 18 U.S.C. §§ 3582) (compassionate release).

54 Second Chance Reauthorization Act of 2018, Pub L. No. 115-391, tit. V, 132 Stat. 5222 (codified in scattered sections of 18 and 34 U.S.C.).

55 Steve Horn, *First Step Act Passes—Includes Federal Sentencing, Prison Reforms*, PRISON LEGAL NEWS (Jan. 8, 2019), <https://www.prisonlegalnews.org/news/2019/jan/8/first-step-act-passes-includes-federal-sentencing-prison-reforms/>.

56 Richard J. Durbin et al., *Dear Colleague Letter Expressing Concerns with FIRST STEP Act*, 31 FED. SENT’G REP. 150, 150 (2018).

57 *Id.*

58 *Black Lives Matter Global Network Responds to the United States Senate Passage of the First Step Act, A Criminal Reform Package*, BLACK LIVES MATTER (Dec. 20, 2018), <https://blacklivesmatter.com/black-lives-matter-global-network-responds-to-the-united-states-senate-passage-of-the-first-step-act-a-criminal-reform-package/>; *The Movement for Black Lives Opposes the First Step Act: Statement*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/2018/12/the-movement-for-black-lives-opposes-the-first-step-act/> (last visited Dec. 1, 2019).

59 Letter from the Leadership Conference on Civil & Human Rights et al., to the House Judiciary Comm. (May 8, 2018), <http://civilrightsdocs.info/pdf/policy/letters/2018/not-retroactive-Sign-On-Letter-Oppose-First%20Step%20Act-5.8.18-FINAL.pdf>.

60 I arrived at this figure by adding the number of prisoners released for good conduct time under the Act, *see* U.S. DEP’T OF JUSTICE, FIRST STEP ACT IMPLEMENTATION FACT SHEET

the federal prison population. Further, the federal prison population is only 12% percent of the *total* U.S. prison population.<sup>62</sup> In light of this data, the legislation can hardly be considered a meaningful “step.” In order to truly make this bill a catalyst for ending mass incarceration nationwide, it must be followed by a second bill addressing the bulk of the prison population remaining in state prisons. This goal can be accomplished by focusing on three prisoner subgroups: mentally ill offenders, nonviolent offenders, and recidivists. This Part discusses the three subgroups in detail, examining the reasons for overrepresentation of these subgroups in our nation’s prisons and the unique challenges associated with each group. The ultimate goal of this analysis is to provide a framework for this Note’s proposed “Second Step Act,” federal legislation that will incentivize states to reduce their prison populations by implementing reforms aimed at addressing each prisoner subgroup.

#### A. *The First Step Act and Prisoners with Mental Illnesses*

People with mental illnesses, like people of color, are significantly overrepresented in the criminal justice system. Approximately 15% of incarcerated males and 30% of incarcerated females have a severe mental illness, compared to 5% of the general population.<sup>63</sup> A “[s]erious mental illness” is generally defined as “mental, behavioral, or emotional disorder resulting in serious functional impairment, which substantially interferes with or limits one or more major life activities.”<sup>64</sup> This category includes those who suffer from disorders such as schizophrenia, bipolar disorder, and delusional disorder.<sup>65</sup> Prisoners with mental disorders are more likely than other inmates to suffer from substance abuse disorders—a phenomenon often referred to as “co-occurring disorders” or “comorbidity.”<sup>66</sup>

In the 1960s and 1970s, a “deinstitutionalization” movement resulted in a dramatic reduction in mental health hospitals, based on a commonly held

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1 (2019) (approximately 3100), to the number of prisoners who received sentence reductions under § 404 of the First Step Act, *see* U.S. SENTENCING COMM’N, *supra* note 50, at 4 tbl.1 (2387).

61 *Population Statistics*, FED. BUREAU PRISONS, [https://www.bop.gov/mobile/about/population\\_statistics.jsp](https://www.bop.gov/mobile/about/population_statistics.jsp) (last updated Mar. 12, 2020).

62 BRONSON & CARSON, *supra* note 25, at 3.

63 AUSTIN ET AL., *supra* note 16, at 13.

64 *Mental Illness*, NAT’L INST. MENTAL HEALTH, [https://www.nimh.nih.gov/health/statistics/mental-illness.shtml#part\\_154784](https://www.nimh.nih.gov/health/statistics/mental-illness.shtml#part_154784) (last visited Jan. 15, 2020).

65 H. Richard Lamb & Linda E. Weinberger, *Deinstitutionalization and Other Factors in the Criminalization of Persons with Serious Mental Illness and How It Is Being Addressed*, CNS SPECTRUMS 1 (Oct. 10, 2019), <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/A6003281BD5FA8974CEC97E1E592500F/S1092852919001524a.pdf>.

66 See Roger H. Peters et al., Editorial, *Co-Occurring Substance Use and Mental Disorders in the Criminal Justice System: A New Frontier of Clinical Practice and Research*, 38 PSYCHIATRIC REHABILITATION J. 1, 1 (2015) (capitalization altered); *see also* JENNIFER BRONSON ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, DRUG USE, DEPENDENCE, AND ABUSE AMONG STATE PRISONERS AND JAIL INMATES, 2007–2009 (2017).

belief that the needs of the mentally ill were best served through community mental health systems.<sup>67</sup> The plan was to transition patients from psychiatric hospitals to a community health system while still accommodating all of their mental health needs. For those former patients who needed a highly structured care environment—like the psychiatric hospitals they were discharged from—the transition failed.<sup>68</sup> Due in part to a lack of adequate funding and poor planning, a significant number of formerly hospitalized patients were left with nowhere to go, leading to substance abuse, homelessness, and incarceration.

The deinstitutionalization movement provided a catalyst for what many people consider the criminalization of the mentally ill. A lack of community treatment resources, combined with the increased use of police officers as first responders to mental health crises, created a recipe for disaster in which prisons became the “new asylums.”<sup>69</sup> In forty-four states, a jail or prison holds more mentally ill individuals than the largest state psychiatric hospital.<sup>70</sup> And prisons are ill equipped to serve the needs of those with serious mental illness. While prisons are often able to provide medical attention to inmates in crisis, long-term treatment—capable of having a lasting positive impact—is harder to come by.<sup>71</sup> Inmates suffering from serious mental illness require consistent psychotherapy and drug therapy, and it can take several years before patients see improvements.<sup>72</sup> The prison environment, which is often isolating, overcrowded, and violent, can exacerbate the effects of mental illness for many inmates.<sup>73</sup> The rate of recidivism among former inmates with serious mental illness is nearly *twice* the national average.<sup>74</sup>

The First Step Act includes several important provisions addressing prison conditions for inmates with severe mental illnesses. First, the Act bans solitary confinement for juveniles except when they pose a “serious and immediate risk of physical harm to any individual.”<sup>75</sup> The punitive practice of solitary confinement is associated with increased instances of self-mutila-

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67 Lamb & Weinberger, *supra* note 65, at 2.

68 *See id.*

69 TREATMENT ADVOCACY CTR., SERIOUS MENTAL ILLNESS (SMI) PREVALENCE IN JAILS AND PRISONS 1 (2016), <https://www.treatmentadvocacycenter.org/storage/documents/backgrounders/smi-in-jails-and-prisons.pdf>.

70 *Id.*

71 ALEXANDER BLACK ET AL., LEVITT CTR. FOR PUB. AFFAIRS, THE TREATMENT OF PEOPLE WITH MENTAL ILLNESS IN THE CRIMINAL JUSTICE SYSTEM: THE EXAMPLE OF ONEIDA COUNTY, NEW YORK 29–30 (Jennifer Ambrose ed., 2019), [https://digitalcommons.hamilton.edu/cgi/viewcontent.cgi?article=1005&context=student\\_scholarship](https://digitalcommons.hamilton.edu/cgi/viewcontent.cgi?article=1005&context=student_scholarship).

72 *Id.*

73 *Id.* at 29.

74 Matthew E. Hirschtritt & Renee L. Binder, Viewpoint, *Interrupting the Mental Illness-Incarceration-Recidivism Cycle*, 317 JAMA 695, 696 (2017).

75 First Step Act of 2018, Pub. L. No. 115-391, § 613(a), 132 Stat. 5194, 5248 (codified at 18 U.S.C. § 5043 (2018)).

tion, suicide attempts, and suicides.<sup>76</sup> The ban comes after years of human rights organizations' condemning the practice as harmful.<sup>77</sup> Second, in an attempt to address the addictions many inmates bring with them to prison, Congress included a provision in the First Step Act for medication-assisted opioid and heroin treatment.<sup>78</sup> Effective prison drug treatments can reduce inmate misconduct in prison, improve levels of education and employment once inmates leave prison, and reduce the chances of recidivism.<sup>79</sup> Due to the high instance of co-occurring disorders among mentally ill inmates, effective mental health treatment often includes substance abuse treatment as well.

Finally, Congress requires BOP to submit a report to Congress on the capacity of federal prisons to treat heroin and opioid addictions through evidence-based programs, including a plan for expanding access to such treatment for prisoners.<sup>80</sup> After submitting the report, the BOP must begin implementing the plan. Only time will tell how the new plan is implemented and whether it will improve outcomes for prisoners suffering from addiction or comorbidity.<sup>81</sup>

### B. The First Step Act and Nonviolent Offenders

Over two-thirds of federal inmates serving a life sentence or “virtual life sentence”—a sentence term exceeding an individual’s life expectancy<sup>82</sup>—are convicted of nonviolent crimes.<sup>83</sup> The five most common offenses among the federal prison population are nonviolent crimes involving drugs, firearms, immigration, porn or prostitution, and fraud.<sup>84</sup> The prison environment is often referred to as being “‘criminogenic,’ meaning it can increase the criminal behavior” among released prisoners.<sup>85</sup> For lower-level

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76 Andrew B. Clark, *Juvenile Solitary Confinement as a Form of Child Abuse*, 45 J. AM. ACAD. PSYCHIATRY & L. 350, 351 (2017).

77 See *id.*

78 First Step Act § 607(a), 132 Stat. at 5244 (codified at 18 U.S.C. § 3621 note).

79 *Substance Abuse Treatment*, FED. BUREAU PRISONS, [https://www.bop.gov/inmates/custody\\_and\\_care/substance\\_abuse\\_treatment.jsp](https://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp) (last visited Dec. 1, 2019).

80 § 607(a) (“Not later than 90 days after the date of enactment of this Act, the Director of the Bureau of Prisons shall submit . . . a report assessing the availability of and the capacity of the Bureau of Prisons to treat heroin and opioid abuse through evidence-based programs, including medication-assisted treatment where appropriate.”).

81 In Part III, this Note discusses how many states are addressing the problem by improving police interactions with mentally ill offenders, implementing cross-system diversion programs, and establishing more mental health courts based on models proven successful.

82 Jessica S. Henry et al., *Virtual Life Sentences: An Exploratory Study*, 98 PRISON J. 294, 294 (2018).

83 Grawert & Lau, *supra* note 46.

84 U.S. SENTENCING COMM’N, QUICK FACTS: FEDERAL OFFENDERS IN PRISON—FEBRUARY 2017 (2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP\\_Feb2017.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP_Feb2017.pdf).

85 See EISEN & CHETTIAR, *supra* note 24, at 11.

and nonviolent offenders, the criminogenic effects are particularly potent.<sup>86</sup> It should come as no surprise, then, that a 2016 Brennan Center report concluded that “an estimated 39 percent (approximately 576,000 people) are incarcerated with little public safety rationale,” finding that alternatives to incarceration are more effective sanctions for many lower-level crimes.<sup>87</sup>

Mandatory minimum sentences for nonviolent drug offenses, resulting in more people being sent to prison for longer sentences than ever before, also means more inmates will grow old in prison. Elderly inmates are the fastest growing segment of the prison population.<sup>88</sup> Because elderly inmates are more likely to experience dementia, impaired mobility, and loss of hearing and vision, prisons must increase their staff numbers and invest in officer training in order to accommodate geriatric needs.<sup>89</sup> The cost of treatment can be up to *four to eight times* more expensive than costs for younger prisoners.<sup>90</sup> Prisons are ill equipped to handle this financial burden, and research shows they are not particularly effective at serving elderly needs. People generally “age out” of crime, with crime rates peaking during the mid-to-late teenage years and dropping off significantly once adults reach their thirties and forties.<sup>91</sup> A more efficient approach to preventing crime by incapacitation—one that would increase cost-savings and decrease incarceration rates—involves providing elderly and nonviolent offenders alternatives to incarceration or “second looks” at their sentences once they have served a significant portion of their sentence.

Consider the case of the first inmate released under the First Step Act: Matthew Charles. Matthew was sentenced to thirty-five years in prison for distributing 216 grams of crack cocaine and illegally possessing a firearm, among other things.<sup>92</sup> At the time of his sentencing, the judge described him as “a danger to society” who “should simply be off the streets.”<sup>93</sup> The judge had no way of knowing Matthew would take his rehabilitation seriously, immerse himself in Bible studies, work as a law clerk in the prison law library, and help illiterate inmates understand the law.<sup>94</sup> At the time of sentencing, the judge could not possibly know that Matthew would go on to spend over

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86 *Id.*

87 AUSTIN ET AL., *supra* note 16, at 7.

88 Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL’Y 833, 897 n.217 (2016).

89 Matt McKillop & Alex Boucher, *Aging Prison Populations Drive Up Costs*, PEW CHARITABLE TR. (Feb. 20, 2018), <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/02/20/aging-prison-populations-drive-up-costs>.

90 Grace McCarten, *Jailed While Frail: Examining Rationales for Incarcerating Aging and Infirm Criminals*, 27 ELDER L.J. 221, 222 (2019).

91 *Criminal Justice Facts*, *supra* note 13.

92 Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 84 (2019). Matthew’s harsh sentence was due in large part to his violent criminal history, which included kidnapping, burglary, and shooting a man in the head. *Id.* at 86.

93 *Id.* (quoting Transcript of Sentencing Hearing at 50, United States v. Charles, No. 3-96-00051 (M.D. Tenn. Jan. 7, 1997), ECF No. 96).

94 Hopwood, *supra* note 92, at 85.

twenty-one years of his lengthy sentence in prison without receiving a single disciplinary infraction.<sup>95</sup> But as Matthew's story illustrates, people can and do redeem themselves. Our criminal justice system puts too much pressure on judges at the front end to determine whether a particular offender will be rehabilitated.<sup>96</sup>

The First Step Act provides an avenue for decisionmakers to take a "second look" at offenders after they have served a substantial portion of their sentences in order to see whether inmates have been rehabilitated. In certain circumstances involving drug offenders and terminally ill or elderly inmates, judges may be able to reconsider inmates' sentences in light of their rehabilitative efforts to determine whether such offenders deserve sentence reductions. Low-risk individuals—such as the elderly or terminally ill—may be placed in home confinement subject to certain conditions and restrictions.<sup>97</sup> Additionally, the Act includes a safety-valve provision expanding judicial discretion to deviate from mandatory minimum sentences for low-level, nonviolent drug offenders,<sup>98</sup> and softens the harsh three-strikes rule.<sup>99</sup>

Despite these important sentencing reforms, The First Step Act repeats several mistakes of the past. The Act cabins the scope of relief in three main ways. First, many of the sentence reductions are not retroactive. For example, the three-strikes rule will be reduced to twenty-five years for sentences imposed *going forward*. Those who are currently imprisoned under this punitive policy have no form of relief. The First Step Act repeats the mistakes of its predecessor, the Fair Sentencing Act, in its failure to make sentencing reforms apply retroactively. Second, multiple categories of prisoners are excluded from earning good-time credits for recidivism reduction programming, including those convicted of certain nonviolent immigration offenses, prisoners subject to deportation after serving their time, and those convicted of offenses related to criminal street gangs.<sup>100</sup> Finally, federal judges can only take a "second look" at a limited group of offenders: drug offenders now eligible for sentence reductions based on the retroactivity of the Fair Sentencing Act, and terminally ill or elderly offenders applying for compassionate release. The policy does not apply to many groups of offenders who will continue to serve harsh mandatory minimum sentences.

### C. The First Step Act and Recidivism

A primary concern for individuals upon being released from prison is finding a job. Formerly incarcerated people are more likely than the general population to be looking for jobs, and yet the unemployment rate among

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95 *Id.*

96 *Id.* at 88.

97 See First Step Act of 2018, Pub. L. No. 115-391, § 602, 132 Stat. 5194, 5238 (codified at 18 U.S.C. § 3624 (2018)).

98 *Id.* § 402(a), 132 Stat. at 5221 (codified at 18 U.S.C. § 3553).

99 *Id.* § 401(a)(2)(A)(ii), 132 Stat. at 5220 (codified at 21 U.S.C. § 841(b)(1)(A) (2018)).

100 Durbin et al., *supra* note 56, at 150; Horn, *supra* note 55.

formerly incarcerated individuals is nearly five times higher than the unemployment rate for the rest of the United States population.<sup>101</sup> This discrepancy can be explained in part by the practice of employment discrimination against those with criminal records. While employers do not openly admit to their unwillingness to hire people with criminal records, research indicates that having a criminal record reduces employer callback rates by 50%.<sup>102</sup> Faced with obstacles to finding employment, mental health resources, and addiction support, many formerly incarcerated individuals return to crime as a source of income. In May 2018, the Bureau of Justice Statistics released the results of an extended recidivism study showing that five out of six state prisoners were arrested at least once within nine years of their release.<sup>103</sup>

Under the First Step Act, Congress seeks to remedy the high rate of recidivism by providing reentry programs. The primary vehicle for achieving this goal is through the use of a “risk and needs assessment system.”<sup>104</sup> The DOJ must develop a system that will be used by BOP to assess inmate risk of recidivism and assign prisoners to programs specifically designed to reduce risk. Within 180 days of the system’s development, BOP must complete an initial risk and needs assessment for each prisoner and use the assessment to begin assigning prisoners to their appropriate “recidivism reduction programs.”<sup>105</sup> BOP must expand recidivism programming available at its facilities in order to meet the needs of all prisoners within two years of their completing the initial assessment.<sup>106</sup> High- and medium-risk prisoners are given priority for placement in recidivism reduction programs, as are individuals approaching their date of release. For low-risk inmates, the program focuses on participation in “productive activities.”<sup>107</sup>

Prisoners are given incentives to participate in the programs, including additional phone privileges, increased visitation time, transfer to a facility closer to the prisoner’s release residence, consideration for transfer to preferred housing units, and earned time credits.<sup>108</sup> Prisoners earn ten days of time credits for every thirty days of program participation and can apply

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101 Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL’Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html>.

102 *Id.*

103 MARIEL ALPER ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005–2014), at 1 (2018), <https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf>.

104 First Step Act § 101(a), 132 Stat. at 5195–96 (codified at 18 U.S.C. §§ 3631–3635 (2018)).

105 JAMES, *supra* note 47, at 4.

106 *Id.*

107 For a description of “productive activities,” see *id.* at 1 n.3 (“The act defines *productive activities* as a group or individual activity that is designed to allow prisoners determined as having a minimum or low risk of recidivating to remain productive and thereby maintain a minimum or low risk of recidivating.”).

108 *Id.* at 4–5.

these credits toward placement in prerelease custody.<sup>109</sup> As part of the effort to reduce recidivism rates among federal inmates, Congress also seeks to expand inmate employment through Federal Prison Industries<sup>110</sup> and requires BOP to ensure a smoother reintegration experience by assisting prisoners in obtaining important documents such as driver's licenses and social security cards before being released from confinement.<sup>111</sup> And, as previously discussed, the First Step Act reauthorizes the Second Chance Act.<sup>112</sup>

While many are hopeful that the First Step Act's recidivism reduction programs could help stop—or at least slow—the revolving carceral door for repeat offenders, the policies prove far less promising in practice. The evidence that participation in job training and educational programming reduces recidivism is relatively weak.<sup>113</sup> The National Institute of Justice conducted a “prospective outcome study,” focusing specifically on the grantees implementing reentry programs, and concluded “[n]o clear pattern of consistent positive effects were found in any site.”<sup>114</sup> Research suggests recidivism reduction programs are most effective for high-risk individuals, but the First Step Act programs prioritize incentives for low- and minimum-risk individuals.<sup>115</sup> The program’s goal is to employ at least 75% of eligible low- and minimum-risk individuals, who have priority access to federal prison industries.<sup>116</sup> The result of such prioritization is that access to federal prison industries is severely limited for medium- and high-risk individuals who could benefit the most from participation.<sup>117</sup>

The potential impact of the time-credit provisions may be overstated. Several groups are ineligible to receive good-time credits, including those convicted of immigration violations.<sup>118</sup> Based on early estimates, the system will only be available to about 56% of the BOP population after accounting for the number of individuals excluded on the basis of the offense.<sup>119</sup> BOP corrections officers have predicted that shortages in staffing and funding will make implementing the recidivism reduction programs untenable.<sup>120</sup> The

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109 *Id.* at 5.

110 First Step Act of 2018, Pub. L. No. 115-391, § 605, 132 Stat. 5194, 5242–44. (codified at 18 U.S.C. §§ 4126, 4130 (2018)).

111 *See id.* § 604(b), 132 Stat. at 5241–42 (codified at 18 U.S.C. § 4042(a)).

112 *See supra* text accompanying note 54. This Note uses the Second Chance Act as a framework for proposed legislation: the “Second Step Act.” *See infra* Part III.

113 PROJECT NEW OPPORTUNITY, THE FIRST STEP ACT IS NOT REENTRY-FRIENDLY: WHAT TO DO ABOUT IT 2 (2019) <http://projectnewopportunity.org/wp-content/uploads/2019/03/Final-Making-the-FSA-Reentry-friendly-March-6-2019.pdf>.

114 *Id.* at 2–3.

115 Durbin et al., *supra* note 56, at 150; *see also* PROJECT NEW OPPORTUNITY, *supra* note 113, at 4.

116 First Step Act § 101(a), 132 Stat. at 5206 (codified at 18 U.S.C. § 3634(4)(B) (2018)).

117 Durbin et al., *supra* note 56.

118 *See* First Step Act § 101(a), 132 Stat. at 5198–203 (codified at 18 U.S.C. § 3632(d)(4)(D)).

119 PROJECT NEW OPPORTUNITY, *supra* note 113, at 5.

120 Durbin et al., *supra* note 56, at 151.

current political climate further undermines any prospects that this potential solution could have a lasting impact on recidivism reduction, with current DOJ officials working to limit the numbers of inmates released under the First Step Act, and prosecutors actually seeking to reincarcerate over half a dozen prisoners released under the Act.<sup>121</sup>

### III. THE SOLUTION

As of July 2019, over 3100 federal inmates were released as a result of good conduct time under the First Step Act.<sup>122</sup> As of January 2020, 2387 inmates received sentence reductions.<sup>123</sup> These numbers will continue to increase as time goes on, but statistics clearly reveal the legislation's insufficiency. The First Step Act addressed only a small percentage of the *federal* prison population—approximately 3.1%<sup>124</sup>—which in turn constitutes only 12% of the *national* prison population. In order to adequately address the needs of the remaining 88% of the national prison population, the Second Step Act must entice states to adopt policies aimed at reducing their state and local prison populations. At the same time, the Second Step Act must hold grantees accountable for meeting objective measures of success, as evidenced by reducing prison populations and maintaining or reducing crime rates.

#### A. *The Framework*

The interaction between federal criminal justice reform and state criminal justice reform is embodied in the First Step Act's passage and public reception. One of the reasons the bill was able to gain such widespread bipartisan support was because Congress adopted reforms modeled after successful state-level programs.<sup>125</sup> In an impactful letter written to Donald Trump in the months leading up to the bill's passage, several conservative leaders stated, "We point out the successes in the states because many of the same principles are included in the FIRST STEP Act and have been proven to cut crime while reducing spending."<sup>126</sup> The law also acts as a catalyst for

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121 Neena Satija et al., *Trump Boasts That His Landmark Law Is Freeing These Inmates. His Justice Department Wants Them to Stay in Prison.*, WASH. POST (Nov. 7, 2019), [https://www.washingtonpost.com/investigations/trump-brags-that-his-landmark-law-freed-these-inmates-his-justice-department-wants-them-to-stay-in-prison/2019/11/07/5f075456-f5db-11e9-a285-882a8e386a96\\_story.html?wpisrc=al\\_news\\_alert-politics-alert-national&wpmk=1](https://www.washingtonpost.com/investigations/trump-brags-that-his-landmark-law-freed-these-inmates-his-justice-department-wants-them-to-stay-in-prison/2019/11/07/5f075456-f5db-11e9-a285-882a8e386a96_story.html?wpisrc=al_news_alert-politics-alert-national&wpmk=1).

122 U.S. DEP'T OF JUSTICE, *supra* note 60, at 1.

123 U.S. SENTENCING COMM'N, *supra* note 50, at 4 tbl.1.

124 As discussed, over 3100 prisoners were released as a result of an increase in "time credits" under the Act, *see supra* text accompanying note 122, and 2387 inmates have received sentence reductions under § 404 of the Act, *see supra* text accompanying note 123. The current federal prison population is 175,483. *Population Statistics*, *supra* note 61.

125 *See* Douglas A. Berman & Steven L. Chanenson, *Learning from Recent State Drug Sentencing Reform Efforts*, 31 FED. SENT'G REP. 169, 169 (2019).

126 Jim DeMint et al., *Conservative Leaders' Letter to President Trump Expressing Support for the FIRST STEP Act*, 31 FED. SENT'G REP. 160, 161 (2018).

states to implement new criminal justice reforms, as state legislators often look to federal law for guidance in this area.<sup>127</sup> For example, a bill commonly referred to as the Florida First Step Act was filed by the Florida legislature only six weeks after President Trump signed the federal First Step Act into law.<sup>128</sup>

The primary means by which the federal government provides assistance to state and local public-safety agencies is through DOJ grant programs. Three key grants include the Justice and Mental Health Collaboration Program (JMHCP), the Justice Reinvestment Initiative (JRI), and the Second Chance Act.<sup>129</sup> States use these grants to test new strategies and innovative approaches to reducing incarceration rates. In 2004, Congress authorized the JMHCP, a fifty-million-dollar grant program to help states and local governments improve responses to mentally ill offenders through a cross-system approach.<sup>130</sup> In 2006, the Bureau of Justice Assistance launched the JRI, which focuses specifically on using data to reduce criminal-justice-related spending for states and reinvesting funds in other programs aimed at increasing public safety.<sup>131</sup> Through the Second Chance Act, Congress awards grants to agencies and organizations working to reduce recidivism and increase public safety.<sup>132</sup> Grantees provide fundamental services, including substance-abuse treatment, employment training, housing, and victims support. In 2010, the funding for the Second Chance Act reached \$100 million.<sup>133</sup>

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127 Mark Holden, *The First Step Act: It's Only a First Step*, CRIME REP. (Feb. 18, 2019), <https://thecrimereport.org/2019/02/18/the-first-step-act-its-only-a-first-step/>.

128 Danny McAuliffe, *Senate Ready to Move on Florida First Step Act*, FLA. POL. (Apr. 19, 2019), <https://floridapolitics.com/archives/294152-senate-ready-to-move-on-florida-first-step-act>.

129 Anna Bailey, *Federal Government Should Fully Fund Grants That Help States Improve Corrections*, CTR. ON BUDGET & POL'Y PRIORITIES (Nov. 13, 2017), <https://www.cbpp.org/blog/federal-government-should-fund-grants-help-states-improve-corrections>.

130 See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, JUSTICE AND MENTAL HEALTH COLLABORATION PROGRAM FY 2019 COMPETITIVE GRANT ANNOUNCEMENT 4 (2019), <https://www.bja.gov/funding/JMHC19.pdf>; NAT'L ASS'N OF CTYS., 2019 POLICY BRIEF: SUPPORT LOCAL EFFORTS TO REDUCE MENTAL ILLNESS IN JAILS BY FULLY FUNDING THE JUSTICE AND MENTAL HEALTH COLLABORATION PROGRAM IN ANNUAL APPROPRIATIONS (2019), <https://www.naco.org/sites/default/files/documents/Mental%20Illness%20in%20Jails%20Policy%20Brief.pdf>.

131 See COUNCIL OF STATE GOV'TS JUSTICE CTR., THE JUSTICE REINVESTMENT INITIATIVE (2018) [https://csgjusticecenter.org/wp-content/uploads/2018/06/JRI\\_2pager\\_Update\\_June2018.pdf](https://csgjusticecenter.org/wp-content/uploads/2018/06/JRI_2pager_Update_June2018.pdf); Daniel G. Solomon, Note, *Lock 'Em Up and Set Them Free?: How to Reconcile Tough-on-Crime Sentencing Policies with Justice Reinvestment in Maryland*, 59 WASH. U. J.L. & POL'Y 243, 251 (2019).

132 See Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified as amended in scattered sections of 18, 34, and 42 U.S.C.); BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, & NAT'L REENTRY RESOURCE CTR., THE SECOND CHANCE ACT (2018), [https://csgjusticecenter.org/wp-content/uploads/2018/07/July-2018\\_SCA\\_factsheet.pdf](https://csgjusticecenter.org/wp-content/uploads/2018/07/July-2018_SCA_factsheet.pdf).

133 Bailey, *supra* note 129.

While all three initiatives have helped incentivize states to reform their criminal justice systems, the lack of adequate funding has been an obstacle to widespread success.<sup>134</sup> Further, none of these programs has focused specifically on the goal of reducing state prison populations until recently. In May 2019, U.S. Senators Cory Booker and Richard Blumenthal, along with U.S. Representative Tony Cárdenas, introduced the Reverse Mass Incarceration Act<sup>135</sup> (RMIA)—legislation aimed at incentivizing states to decrease their prison populations by 7% each year without raising the rate of crime within their jurisdictions by more than 3%. Compared to the relatively limited funding provided for the previous grants, the RMIA would allow Congress to appropriate substantial funding for prison reform: \$2 billion for each of the fiscal years between 2020 and 2029.<sup>136</sup>

Congress can solve the shortcomings of the First Step Act through a bill that combines the “carrot” approach to funding laid out in the Second Chance Act with the “stick” approach to accountability standards proposed by the RMIA. In the Second Step Act, Congress would incentivize states through criminal justice reform grants (like it did in the Second Chance Act) and hold grantees accountable through objective measures of success (like it did in the RMIA). Congress must focus on the *means* of reform, as well as the *end*—a decrease in state incarceration rates.

Finally, the Department of Education’s Race to the Top competitive funding grant provides a potential model for implementation. States will compete for grants by submitting applications including detailed plans for criminal justice reform. The applications will be assessed by the DOJ based on a series of selection criteria. For example, states competing for funding under the Race to the Top initiative were given “points” for enacting certain education reforms, such as implementing data-driven instruction systems.<sup>137</sup> Similarly, grant applicants under the Second Step Act would be given “points” for enacting certain criminal justice reforms, such as creating mental health courts or prison reentry programs. The most competitive applicants are the ones that amass the greatest number of points. If DOJ determines a state is eligible based on selection criteria, the funding will then go directly toward implementing the state’s proposed reforms. The overarching goal of the funding program will be to reduce state prison populations while maintaining or decreasing the crime rate. The selection criteria will be based on the three main policy priorities: mentally ill offenders, nonviolent offenders, and recidivists. By combining the strengths of these three legislative actions, informed by the lessons learned from the First Step Act, Congress can enact

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134 *Id.*

135 Reverse Mass Incarceration Act of 2019, S. 1557, 116th Cong. (2019), <https://www.congress.gov/116/bills/s1557/BILLS-116s1557is.pdf>.

136 *Id.*

137 See U.S. DEP’T OF EDUC., *supra* note 29, at 3 (providing an overview of the Race to the Top program points system, including points allocated for “Data Systems to Support Instruction”).

legislation that will have a lasting impact on reducing mass incarceration in our nation.

### B. *The Funding Proposals*

The overarching goal of the Second Step Act's competitive funding program is reducing prison populations in three key subgroups: mentally ill offenders, nonviolent offenders, and recidivists. Grant applicants must include detailed plans for implementing different reform methods for each subgroup, bolstered by data to support the likely effectiveness of their chosen methods. In crafting their proposals, applicants should consider replicating successful reform efforts, such as particularly effective reentry courts for reducing recidivism or state-level diversion programs that have removed mentally ill offenders from the traditional incarceration system. This Section will discuss specific success stories for each subgroup to illustrate the type of programs the Second Step Act aims to expand, and provide a slate of reform options for applicants to consider. These models may be used as a guide for grant applicants considering the most effective reform policies for each subgroup.

#### 1. Grant Proposals Addressing Mentally Ill Offenders

A useful approach to understanding criminal justice reform for mentally ill offenders is to break reforms down by the needs of offenders at each stage of the system. Many mentally ill offenders first encounter the criminal justice system through their interactions with police. Next, during the postarrest and pretrial interim period, mentally ill offenders may participate in mental health courts. The third encounter occurs while incarcerated. Because most of the harm has been done by the time offenders reach this third encounter, this Note focuses primarily on the first two stages for reform purposes. Grant applicants should address in their proposals how they will implement effective policies at these first two stages in order to ensure we have less problems at the third. This subsection provides some specific examples of state-level policies and practices that have proven successful.

The first encounter many mentally ill offenders have with the criminal justice system is with police. At this stage, some law enforcement agencies have invested in a cross-system approach called "police–mental health collaborations" (PMHCs).<sup>138</sup> PMHCs include multiple types of response models, such as "Crisis Intervention Teams (CIT), co-responders, and mobile crisis intervention teams."<sup>139</sup> PMHCs link specialized healthcare teams to desig-

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<sup>138</sup> BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, & COUNCIL OF STATE GOV'TS JUSTICE CTR., POLICE-MENTAL HEALTH COLLABORATIONS: A FRAMEWORK FOR IMPLEMENTING EFFECTIVE LAW ENFORCEMENT RESPONSES FOR PEOPLE WHO HAVE MENTAL HEALTH NEEDS 2 (2019) [hereinafter BJA & CSG, POLICE-MENTAL HEALTH COLLABORATIONS], <https://csgjusticecenter.org/wp-content/uploads/2019/04/Police-Mental-Health-Collaborations-Framework.pdf>.

<sup>139</sup> *Id.* (footnote omitted).

nated officers in order to mitigate the potentially dangerous effects of such encounters while simultaneously diverting offenders away from prison and into treatment programs. By teaming up with local mental health providers and organizations, police officers can better respond to mentally ill people during times of crisis and potentially eliminate the need for arrest or incarceration.<sup>140</sup> At this stage, success can take many different forms: decreased rates of “repeat encounters” with law enforcement, minimized arrests, and reduced use of force during police encounters with mentally ill offenders.<sup>141</sup>

CIT models focus specifically on training police officers how to use deescalation strategies when responding to people with mental health conditions.<sup>142</sup> Often, extensive training is provided to a select group of volunteer officers who are dispatched whenever the department receives psychiatric crises calls.<sup>143</sup> The success of CITs depends on the extent of the training and the percentage of the police force that receives it. The Miami-Dade County Police Department trained more than 4600 police officers in “best practices” for assisting people with mental health conditions.<sup>144</sup> The police force arrested an estimated 10 to 20 people for every 5000 CIT calls, as compared to 400 to 500 arrests for every 5000 non-CIT police calls.<sup>145</sup> The Portland, Maine, Police Department implemented a similarly successful program in which 100% of the officers completed CIT training.<sup>146</sup> The Portland Police Department incorporates several notable positions into its CIT model: a full-time behavioral health coordinator, mental health liaison, and substance abuse liaison.<sup>147</sup> This division of authority facilitates both specialization and collaboration, allowing PHMC teams to efficiently connect their clients to services in community.

Another effective policy option at this first encounter stage involves jail diversion programs, which rely entirely on mental health responders to co-respond to psychiatric crises calls rather than require police officers to be specifically trained.<sup>148</sup> When police departments receive a call involving a psychiatric emergency situation, mental health responders can “co-respond,” often by traveling in the same squad car as the police officer to the scene, and use their extensive training to deescalate the situation.<sup>149</sup> This model is more feasible for police departments lacking sufficient resources to adequately train their officers under the CIT model.<sup>150</sup> Jail diversion programs

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140 *Id.* at 9.

141 *Id.* at 3.

142 Paras V. Shah, Note, *A Use of Deadly Force: People with Mental Health Conditions and Encounters with Law Enforcement*, 32 HARV. HUM. RTS. J. 207, 218 (2019).

143 See BJA & CSG, POLICE-MENTAL HEALTH COLLABORATIONS, *supra* note 138, at 9; BLACK ET AL., *supra* note 71, at 11.

144 Shah, *supra* note 142, at 218.

145 *Id.*

146 BJA & CSG, POLICE-MENTAL HEALTH COLLABORATIONS, at 7.

147 *Id.*

148 BLACK ET AL., *supra* note 71, at 7.

149 *Id.* at 7, 11.

150 *Id.* at 11.

provide the opportunity for significant cost savings in the form of “dual diversion”—diversion from jail *and* emergency departments.<sup>151</sup> Some municipalities avoid the need for police intervention entirely by using “mobile crisis teams” composed of psychiatric nurses, social workers, and paraprofessionals. Mobile crisis teams meet individuals at the time of their psychiatric crisis and attempt to connect them with treatment options.<sup>152</sup> Although the particular methods of diversion at this stage vary depending on the specific locale, all models implicitly recognize the need to proactively address the crisis of incarceration for people with mental illness.

For many mentally ill offenders, their next encounter with the system comes during the postarrest but pretrial interim period. At this stage, many jurisdictions have started using mental health courts (MHCs), or “voluntary criminal diversion programs that remove mentally ill individuals from the traditional sentencing system and place them in court-supervised outpatient treatment programs to address the issues at the root of their criminal behavior.”<sup>153</sup> The court has a designated judge, a separate docket, and a “nonadversarial” approach to problem solving.<sup>154</sup> Defendants agree to follow a treatment plan and subject themselves to court monitoring in exchange for a reduction in charge or sentencing.

MHCs are generally characterized by three components: screening, assessment, and negotiation.<sup>155</sup> First, defendants are screened for mental illness. Next, a mental health professional performs an assessment of sentencing. Finally, there is a “negotiation” of sentencing between the mental health court staff and judicial staff.<sup>156</sup> This last component is critical for successful diversion and involves collaboration between prosecutors, defense attorneys, courts, and mental health care providers to try to get the defendant’s charges reduced or waived.<sup>157</sup> Because MHCs generally involve a high level of supervision for an extended period of time, they may be better suited for dealing with defendants charged with serious offenses.<sup>158</sup>

Research shows MHCs have the potential to reduce recidivism among people with mental disorders who are in the criminal justice system.<sup>159</sup> One study examining the San Francisco MHC found that eighteen months after enrollment in a MHC, the chances of a mental health court participant being charged with a new violent crime was 55% lower than that of people who

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151 *Id.*

152 Shah, *supra* note 142, at 220.

153 BLACK ET AL., *supra* note 71, at 12.

154 Dale E. McNeil & Renée L. Binder, *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence*, 164 AM. J. PSYCHIATRY 1395, 1395 (2007).

155 Desmond Loong et al., *The Effectiveness of Mental Health Courts in Reducing Recidivism and Police Contact: A Systematic Review*, 55 COMMUNITY MENTAL HEALTH J. 1073, 1073 (2019).

156 *Id.*

157 *Id.* at 1073–74.

158 Kelli Canada et al., *Bridging Mental Health and Criminal Justice Systems: A Systematic Review of the Impact of Mental Health Courts on Individuals and Communities*, 25 PSYCHOL. PUB. POL’Y & L. 73, 73 (2019).

159 McNeil & Binder, *supra* note 154, at 1401.

received “treatment as usual.”<sup>160</sup> Michigan’s MHCs have proven particularly effective in this regard. A 2011 report published by the Michigan Supreme Court’s State Court Administrative Office showed that mental health court participants experienced recidivism rates of 14.29% as compared to the non-participants—mentally ill offenders sentenced in traditional courts—who experienced a 36.17% recidivism rate.<sup>161</sup> For Wayne County’s MHC, the reduction in days participants spent in jail led to nearly \$1.5 million in savings over a span of approximately four years.<sup>162</sup>

In light of this success, several Michigan state organizations collaborated to publish a guide outlining MHC practices “shown by empirical research to produce better outcomes than other practices.”<sup>163</sup> The guide includes information on the roles and responsibilities of the mental health court judge, which include attending staffing meetings to receive updates on a participant’s progress and conducting status review hearings.<sup>164</sup> The guide also suggests frequent continuing education workshops, data-driven program modifications, and the use of incentives and sanctions to address noncompliance.<sup>165</sup> Resources exist at the federal level as well. The Bureau of Justice Assistance released a list of “10 essential elements of MHCs,” including “timely identification of participants and linkage to services, clear terms of participation with informed choice,” and “adequate treatment supports and services that are grounded in evidence.”<sup>166</sup>

When outlining plans for implementing MHCs in their jurisdictions, grant applicants should take into account the wealth of data resources in this area. A comprehensive grant proposal will include not only the chosen method of reform for addressing the needs of mentally ill offenders, but it will also provide data to support the effective use of the chosen method.

## 2. Grant Proposals Addressing Nonviolent Offenders

While there has been a steady decline in crime rates over the last four decades, research shows that social factors and economic factors—rather than increased incarceration—contributed most significantly to the decline.<sup>167</sup> In fact, in the last decade, twenty-seven states have reduced both

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160 *Id.*

161 Ariella Morrison, Note, *Everybody Matters: An Exploration of Diversion Programs Benefiting Mentally Ill Nonviolent Offenders in the Michigan and Federal Legal Systems*, 15 J.L. SOC’Y 167, 183 (2013).

162 *Id.*

163 MICH. STATE COURT ADMIN. OFFICE & MICH. ASS’N OF TREATMENT COURT PROF’LS, ADULT MENTAL HEALTH COURT STANDARDS, BEST PRACTICES, AND PROMISING PRACTICES, at ii (2019), <https://courts.michigan.gov/Administration/SCAO/Resources/Documents/best-practice/MHC-BPManual.pdf>.

164 *Id.* at 1.

165 *Id.* at 58, 61, 66.

166 Canada et al., *supra* note 158, at 73.

167 AUSTIN ET AL., *supra* note 16, at 5.

their crime *and* imprisonment rates.<sup>168</sup> For elderly and lower-level offenders, alternatives to incarceration can better serve the penological goal of rehabilitation, in which the purpose of the criminal justice system is to restore the offender through treatment and training.<sup>169</sup> Further, the goal of deterrence is undermined by keeping elderly people imprisoned because often they are too old to recidivate upon release. In light of this data, grant applicants should consider three main reform options for this subgroup: (1) incentivizing probation officers and prosecutors to reduce incarceration and recidivism, (2) expanding the scope of “second-look” provisions, and (3) providing alternatives to incarceration for lower-level offenders and elderly inmates.

#### a. Effective Criminal Justice Reform: The Carrot or the Stick?

There is an increasing awareness of the immense power prosecutors wield in the criminal justice system. Prosecutors are often rewarded for zealously pursuing cases, “winning” convictions, and pressing for lengthier sentences.<sup>170</sup> Rather than reward prosecutors for conviction rates, some reformers suggest incentivizing prosecutors for reducing crime and incarceration.<sup>171</sup> States could provide bonus funds to prosecutor’s offices that reduce unnecessary incarceration, crime, and recidivism in their jurisdictions.<sup>172</sup> Incentives could also be provided for prosecutors who take advantage of diversion and treatment opportunities for defendants. Illinois and California have implemented an incentives-based approach to criminal justice reform, and the results are promising. Both states offer incentives to probation officers to reduce the number of offenders they send back to jail.<sup>173</sup> Both states achieved reductions in incarceration, costs, *and* crime.<sup>174</sup> In Illinois, the incentives program saved counties \$47 million over four years, diverted more than 2000 nonviolent offenders, and cut recidivism by as much as 20%.<sup>175</sup>

Alternatively, Ohio employs the “carrot” *and* the “stick” approach to reducing incarceration. In 2017, the Ohio General Assembly enacted the Targeted Community Alternatives to Prison program (T-CAP), legislation aimed at reducing the prison population by diverting offenders deemed less dangerous from prison to community control programs, such as probation, parole, or a community treatment facility.<sup>176</sup> The program is mandatory for

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168 EISEN & CHETTIAR, *supra* note 24, at 1.

169 See McCarten, *supra* note 90, at 229.

170 EISEN & CHETTIAR, *supra* note 24, at 4, 23.

171 *Id.* at 25.

172 *Id.* at 23.

173 *Id.*

174 *Id.*

175 *Id.* at 25.

176 See OHIO DEP’T OF REHAB. & CORR., TARGETING COMMUNITY ALTERNATIVES TO PRISON BY HELPING OHIO COMMUNITIES MANAGE LOW-LEVEL, NON-VIOLENT OFFENDERS (2017) <http://www.ccao.org/wp-content/uploads/TCAP%20Fact%20Sheet.pdf> (last visited Nov.

ten target counties and voluntary for Ohio's other seventy-eight counties.<sup>177</sup> Under T-CAP, participating counties divert level-five felony offenders—the lowest felony level recognized by Ohio law, typically relating to drug possession or theft—from state prison to local community sanction programs.<sup>178</sup> Participating counties receive funding to supplement community corrections funds, which can be used on community corrections programs other than prison, including supervision services, electronic monitoring, substance use monitoring, substance abuse treatment, and other programs aimed at community corrections.<sup>179</sup> Counties are incentivized to join the program in exchange for grant money, but they are also penalized with a deduction from the grant for every prisoner the county sentences to prison that would be eligible for a diversion program.<sup>180</sup> Because the county loses funds when an eligible T-CAP offender is sentenced to prison, judges and prosecutors are directly accountable for their charging decisions and are forced to prioritize the offenders they choose to lock up.<sup>181</sup>

### b. Expanding the Scope of Second-Look Provisions

The Second Look Act, a bill introduced by Senator Cory Booker and Representative Karen Bass, would allow individuals who have served at least ten years to petition to federal court for a “second look” at their sentence.<sup>182</sup> The bill would vastly expand the scope of the First Step Act’s “second-look” provisions by offering sentencing review for all prisoners who have served at least ten years of their sentence. If the court finds that the offender is (1) not a danger to the community, (2) ready for reentry, and (3) that “the interests of justice warrant a sentence modification,” the court may reduce the term of imprisonment.<sup>183</sup> For offenders who are at or over the age of fifty and who have served at least ten years of their sentence, there is a “rebuttable presumption” that the defendant shall be released.<sup>184</sup>

Proponents of the Second Look Act recognize the need to provide relief to prisoners subject to the punitive “one-size-fits-all” federal sentencing practices, especially since there is no parole in the federal system.<sup>185</sup> The reform

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29, 2019); *Targeted Community Alternatives to Prison (T-CAP)*, OHIO DEP’T REHAB. & CORR., <https://drc.ohio.gov/tcap> (last visited Mar. 10, 2020).

177 Samantha Sohl, Note, *Ohio’s Targeted Community Alternative to Prison Program: How a Good Idea Is Implemented Through Bad Policy*, 67 CLEV. ST. L. REV. 463, 464–65 (2019).

178 *Id.* at 468–69.

179 *Id.* at 470.

180 *Id.* at 468.

181 See Bryan Furst, *How to Reduce Incarceration? Change Prosecutors’ Incentives*, BRENNAN CTR. FOR JUST. (July 9, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/how-reduce-incarceration-change-prosecutors-incentives>.

182 Second Look Act of 2019, S. 2146, 116th Cong. (2019).

183 *Id.* § 3.

184 *Id.*

185 DANIEL LANDSMAN, FAMILIES FOR JUSTICE REFORM, A SECOND CHANCE STARTS WITH A SECOND LOOK: THE CASE FOR RECONSIDERATION OF LENGTHY PRISON SENTENCES (2019), <https://famm.org/wp-content/uploads/Second-Look-White-Paper.pdf>.

is not a new proposition. The American Law Institute proposed a similar reform to the Model Penal Code in 2011.<sup>186</sup> The provision allows judges to hear applications for modification of sentence from prisoners who have served at least fifteen years of their sentences. The inquiry for a sentence modification is “whether the purposes of sentencing . . . would better be served by a modified sentence than the prisoner’s completion of the original sentence.”<sup>187</sup> The comments to the Model Penal Code identify one of the purposes of the reform—to avoid the shortcomings of the parole-release framework.<sup>188</sup>

The reform caught national attention at both the state and federal levels. For state reformers, the “second-look” provision offers an alternative to the increasingly dissatisfactory parole board system, which has been criticized as contributing to an indeterminate sentencing system.<sup>189</sup> For federal reformers, the second-look provision provides an alternative mechanism for sentencing review to replace the former system of parole. In 2016, the Charles Colson Task Force recommended establishing a second-look provision in light of the elimination of parole in the federal system, the increasingly lengthy sentences, emerging research on the “age-crime” curve showing recidivism rates drop off sharply after age forty, and the inadequacy of clemency as a mechanism for reviewing long federal sentences.<sup>190</sup> Congress implemented a narrow second-look provision in the First Step Act, the scope of which may be broadened by the future passage of bills such as Cory Booker’s Second Look Act. As part of their funding proposals, applicants should consider the feasibility of a second-look program, taking into account the overburdened nature of the state court system when setting the time intervals for sentencing review.

### c. Alternatives to Incarceration

The effects of incarceration “make some people *more* likely to commit crimes”—a phenomenon called the “‘criminogenic’ effect.”<sup>191</sup> Once in prison, many lower-level offenders find themselves cut off from family and friends, surrounded by criminals more violent than themselves, and deprived of meaningful treatment opportunities or job training. Upon release, many offenders struggle to find jobs, struggle to reconnect with loved ones, and end up turning to crime in order to support themselves.<sup>192</sup> In light of the criminogenic effect of prison, state legislatures should change sentencing

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186 MODEL PENAL CODE: SENTENCING § 305.6 (AM. LAW INST., Tentative Draft No. 2, 2011).

187 *Id.*

188 *Id.* cmt. a.

189 *Id.* cmt. f.

190 CHARLES COLSON TASK FORCE ON FED. CORR., TRANSFORMING PRISONS, RESTORING LIVES 46–47 (2016), <http://www.urban.org/sites/default/files/publication/77101/2000589-Transforming-Prisons-Restoring-Lives.pdf>.

191 AUSTIN ET AL., *supra* note 16, at 21.

192 *Id.* at 21–22.

laws and provide alternatives to imprisonment for certain lower-level offenses. Lower-level offenses, including drug possession, lesser burglary, minor drug trafficking, minor theft, minor fraud or forgery, and simple assault, account for 25% of the prison population.<sup>193</sup> Alternative sanctions for such crimes could reduce the costs of unnecessary incarceration for states and help reduce recidivism.<sup>194</sup>

Alternatives to incarceration include probation, electronic monitoring, treatment, community service, or fines and restitution. The Brennan Center undertook an ambitious crime-by-crime analysis for 370 crimes to determine whether incarceration is an effective sanction for each, relying on the following four factors: seriousness of the crime, victim impact, intent, and likelihood of recidivism.<sup>195</sup> The report concluded that 25% of the national prison population would benefit from alternatives to incarceration. Of the lower-level crimes for which alternatives to incarceration are *more* effective than incarceration, 95% are nonviolent.<sup>196</sup> The report provides compelling evidence for why states should invest in alternative sanctions that are cost effective and better at reducing recidivism. Supervision services, including probation, reduce recidivism by as much as 34% and cost an average of \$3.42 per day, as compared to the \$79 cost of a day in prison.<sup>197</sup> Electronic monitoring is another cost-effective alternative, capable of reducing rearrest rates by as much as 25%.<sup>198</sup> New York, Washington, and Vermont have all implemented drug treatment alternatives to prison, and participants are rearrested at a rate of 21% to 58% less often than those who go to prison.<sup>199</sup>

Incarceration is not the answer for many elderly offenders. Incarceration is not the answer for state corrections departments housing elderly offenders, either. Health care for older prisoners costs four to eight times as much as it does for younger prisoners.<sup>200</sup> Studies show states could save \$66,294 annually for every elderly inmate released.<sup>201</sup> One potential reform would be to create alternative rehabilitation programs for elderly offenders, similar to those provided for juvenile delinquents and substance abusers.<sup>202</sup> For example, the Hocking Correctional Facility in Ohio was established specifically to meet the needs of elderly prisoners through “one-stop wrap-around services,” including “a pre-release program that provides offenders with information on social security or welfare benefits, job-seeking skills, housing-placement services, employment training, property maintenance,

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193 *Id.* at 9.

194 *Id.* at 23.

195 *Id.* at 24.

196 *Id.*

197 *Id.* at 23.

198 *Id.*

199 *Id.*

200 McCarten, *supra* note 90, at 222.

201 Stephanie C. Yarnell et al., *Geriatrics and the Legal System*, 45 J. AM. ACAD. PSYCHIATRY & L. 208, 211 (2017).

202 McCarten, *supra* note 90, at 251.

[and] self-care and gero-informed psycho-educational classes.”<sup>203</sup> The staff at Hocking are trained to better meet the needs of geriatric populations, and the prison is able to focus their reintegration efforts on the unique situation of their inmates, some of whom may need to be placed in nursing homes.<sup>204</sup> A “geriatric court” could provide another alternative. Just as judges in drug courts are able to give special consideration to the physiological needs of substance abusers, judges in geriatric courts could consider the effectiveness of punishment in light of the unique physiological circumstances of elderly offenders.<sup>205</sup>

Finally, because many states make decisions about whether a suspect should remain incarcerated while waiting for trial based on the defendant’s ability to pay, eliminating cash bail could help states save money and avoid a policy perceived as punishing the poor.<sup>206</sup> Detaining a defendant before trial can have lasting impacts on sentencing and plea bargaining. Research shows defendants imprisoned before trial are quicker to plead guilty to a lower charge so as to avoid the risk of exposing themselves to horrific prison conditions (which they have already experienced) any longer than necessary.<sup>207</sup> Defendants jailed pretrial are *four times* more likely to be sentenced to prison than defendants released before trial.<sup>208</sup> New Jersey eliminated the cash bail system in 2017 and transitioned to using risk assessments. By 2018, the state’s pretrial population decreased by 20%.<sup>209</sup> Since 2011, Kentucky has relied on pretrial risk assessments, with 90% of released defendants returning to court and not committing any new crimes.<sup>210</sup>

In crafting grant proposals under the Second Step Act, applicants must consider solutions for reducing the growing population of prisoners convicted of nonviolent offenses, using the reforms mentioned above as a starting point. States are incentivized to implement these reforms—prosecutorial incentives, second-look provisions, and alternatives to incarceration—because such reforms have been shown to reduce recidivism and increase cost savings. When 25% of the current prison population could be better served through alternatives to incarceration, it is imperative to find ways to effectively implement such alternatives.

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203 Frank J. Porporino, *Managing the Elderly in Corrections*, in RESOURCE MATERIAL SERIES NO. 94: WORK PRODUCT OF THE 157TH INTERNATIONAL TRAINING COURSE “ASSESSMENT AND TREATMENT OF SPECIAL NEEDS OFFENDERS” 34, 46 (2014).

204 *Id.*

205 See McCarten, *supra* note 90, at 254.

206 See EISEN & CHETTIAR, *supra* note 24, at 8, 34.

207 *Id.* at 8.

208 *Id.*

209 *Id.*

210 *Id.*

### 3. Grant Proposals Addressing Recidivism

Over 600,000 people transition from prisons to the community each year.<sup>211</sup> This transition is fraught with obstacles, including reconnecting with family and friends, finding a job, and complying with ongoing supervision requirements, including “staying clean,” if necessary. Statistics show that we need to do more to ensure these people do not have to make the transition back to prison.<sup>212</sup> The final section of an applicant’s grant proposal should include reforms for addressing recidivists, or “repeat offenders.” The proposal must address recidivism reforms for inmates while incarcerated, as well as reforms for recently released inmates in need of reintegration services. The failure to cure recidivism is twofold: (1) corrections departments are not doing enough to adequately prepare inmates for life outside of prison, and (2) there is a lack of “wrap-around” services to address the unique challenges of reintegration for former inmates trying to get back on their feet. This subsection discusses successful practices for addressing recidivism at both stages.

#### a. Addressing Recidivism While Inmates Are Still Imprisoned

There has been a recent surge in job-assistance prison programming to prepare inmates for reentering society upon release. The Aspen Institute issued a comprehensive report on entrepreneurship as a reentry strategy, in which the institute identified the most successful business and entrepreneurship-focused reentry programs across the country.<sup>213</sup> The report concludes by listing the “elements of successful programs” for funders interested in investing in business programs for formerly incarcerated inmates.<sup>214</sup> The elements include a broad set of program activities and supports, mentoring and peer engagement, selective participation, tailored credit building and credit access, and distinct measures of success.<sup>215</sup> Two particularly successful programs, Lifelong Information for Entrepreneurs (LIFE) in Oregon and Prison Entrepreneurship Program (PEP) in Texas, seek to reduce recidivism by increasing economic opportunity for incarcerated individuals.<sup>216</sup> Because both programs have proven effective at reducing recidivism and increasing employment rates, grant applicants should consider replicating these programs in practice.

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211 Couloute & Kopf, *supra* note 101.

212 See ALPER ET AL., *supra* note 103; text accompanying *supra* note 103.

213 JOYCE KLEIN & LAVANYA MOHAN, ASPEN INST., PRISON TO PROPRIETOR: ENTREPRENEURSHIP AS A RE-ENTRY STRATEGY (2016), [https://assets.aspeninstitute.org/content/uploads/2016/09/AFN-PrisonToProprietor.pdf?\\_ga=2.265713487.1356063636.1574022455-1230457220.1574022455](https://assets.aspeninstitute.org/content/uploads/2016/09/AFN-PrisonToProprietor.pdf?_ga=2.265713487.1356063636.1574022455-1230457220.1574022455).

214 *Id.* at 13 (capitalization altered).

215 *Id.*

216 INITIATIVE FOR A COMPETITIVE INNER CITY, IMPACT ANALYSIS OF THE PRISON ENTREPRENEURSHIP PROGRAM: REDUCING RECIDIVISM AND CREATING ECONOMIC OPPORTUNITY 6 (2018), [https://www.pep.org/wp-content/uploads/2018/07/ICIC\\_PEP-Impact-Analysis\\_final.pdf](https://www.pep.org/wp-content/uploads/2018/07/ICIC_PEP-Impact-Analysis_final.pdf); KLEIN & MOHAN, *supra* note 213, at 6–9.

Oregon's LIFE prison reentry program focuses on entrepreneurship development for incarcerated inmates at the state's only women's prison.<sup>217</sup> The 2016 Aspen Institute report described the LIFE program as "a 32-week course that covers business development, reentry planning, and character building for female prisoners," covering topics "such as business plan development, marketing strategy, financial management, legal knowledge, public speaking, and time management."<sup>218</sup> Upon release, program participants are eligible for a \$500 stipend to use on "immediate transitional need" based on good attendance, homework completion, and creating and executing a savings plan.<sup>219</sup> Graduates receive a broad set of case-management services through organizations and agency partners.<sup>220</sup> A LIFE evaluation showed that program participants were 41% less likely to recidivate than the control group.<sup>221</sup> The program's success can also be measured by the significant number of graduates who return to help teach and mentor new students.

The second model program, Texas's PEP, was established in 2004 to address a growing prison population in a state that outranks all other states in the number of people incarcerated.<sup>222</sup> Since its inception, 2180 people have graduated from PEP.<sup>223</sup> The program recruits inmates within three years of release who "demonstrate readiness to make a personal transformation and are looking for a means to do so."<sup>224</sup> This nine-month program starts with three months of leadership training and parenting education for fathers, followed by six months of business development training.<sup>225</sup> The results speak for themselves: 100% of program participants are employed within ninety days of release and 88% of graduates have checking and savings accounts within one year of release.<sup>226</sup> The program boasts a 380% greater reduction in recidivism than the average similar program.<sup>227</sup> Finally, as of 2015, six of the PEP-created businesses have generated more than \$1 million in annual revenue.<sup>228</sup> Programs such as LIFE and PEP are changing the way people think about returning citizens. One report aptly described the philosophy as "a hand up, not a hand out" approach to reentry.<sup>229</sup>

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217 KLEIN & MOHAN, *supra* note 213, at 9.

218 *Id.* at 8.

219 *Id.*

220 *Id.*

221 *Id.* at 9.

222 See INITIATIVE FOR A COMPETITIVE INNER CITY, *supra* note 216, at 5 (noting that in 2016, Texas incarcerated 151,276 prisoners in state or federal correctional facilities).

223 *Id.* at 63.

224 KLEIN & MOHAN, *supra* note 213, at 6.

225 *Id.* at 6–7.

226 *Id.* at 7.

227 *Id.*

228 *Id.*

229 *Id.* at 6.

b. Addressing Recidivism Through the Use of Community Reintegration Services for Former Inmates

Studies show that reentry support is most critical in the time immediately following release.<sup>230</sup> For this reason, connecting ex-offenders with job-assistance programs immediately upon release can significantly reduce criminal recidivism. The unemployment rate for formerly incarcerated people is almost five times higher than unemployment rates for the rest of the population.<sup>231</sup> Because many formerly incarcerated inmates return to crime as a way to make money, finding employment is integral to reducing recidivism. Having a criminal record proves a formidable obstacle for individuals trying to find a job or secure housing, and it accounts for higher rates of homelessness among formerly incarcerated individuals.<sup>232</sup> For ex-offenders still living with the stigma of a criminal record years after release, expungement and sealing reforms can help them obtain better employment and stay out of jail.

In order to make the transition from prison to the community smoother, the Second Step Act could incentivize local organizations to provide business counseling and entrepreneurial training for ex-offenders returning to society. This is the basis for the New Start Act,<sup>233</sup> legislation proposed by Senator Ben Cardin, who cosponsored the First Step Act. The bill includes a five-year pilot program for awarding grants to organizations with ties to the business community and to the “returning citizen communities” to provide entrepreneurial training to formerly incarcerated individuals reentering society.<sup>234</sup> Organizations must partner with lenders in the Small Business Administration’s microloan program to provide loans for qualifying participants.<sup>235</sup> The proposed legislation builds on the successful programs across the country that have already implemented entrepreneurial development programs with subsequent reductions in recidivism and increased employment rates, including Oregon’s LIFE program and Texas’s PEP.<sup>236</sup> Similarly, through the Second Step Act, grant applicants could submit plans for mirroring successful entrepreneurial development programs, such as LIFE and PEP.

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<sup>230</sup> CHARLES COLSON TASK FORCE ON FED. CORR., *supra* note 190, at 50 (“Reentry support is most critical in the first days, weeks, and months immediately following release, when the risk of recidivism is highest.” (footnote omitted)).

<sup>231</sup> Couloute & Kopf, *supra* note 101.

<sup>232</sup> FAIR & JUST PROSECUTION ET AL., 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR 21 (2018), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_21st\\_century\\_prosecutor.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_21st_century_prosecutor.pdf).

<sup>233</sup> S. 1077, 116th Cong. (2019), <https://www.congress.gov/116/bills/s1077/BILLS-116s1077is.pdf>.

<sup>234</sup> Press Release, U.S. Senate Comm. on Small Bus. & Entrepreneurship, Cardin Introduces Legislation to Empower Returning Citizens to Start Businesses (Apr. 9, 2019), <https://www.sbc.senate.gov/public/index.cfm/2019/4/cardin-introduces-legislation-to-empower-returning-citizens-to-start-businesses>.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

Criminal records make it harder for people to vote, obtain professional or occupational licenses, access public benefits, and receive federal loans.<sup>237</sup> To alleviate this problem, a number of states have adopted expungement and sealing provisions. In 2018, Pennsylvania adopted the first-ever Clean Slate Act, including an automatic sealing provision.<sup>238</sup> To qualify for sealing, an individual must (1) be convicted of a misdemeanor or ungraded offense carrying a maximum penalty of no more than five years imprisonment, (2) be free from conviction for ten years, and (3) pay off all court fines.<sup>239</sup> The Act excludes more serious crimes from eligibility, including convictions for first-degree felonies, offenses involving firearms, and sexual offenses requiring registration as a sex offender. If an individual qualifies, a computer system automatically seals qualifying records after a certain period of time. Pennsylvania Governor Tom Wolf's administration estimates the law will seal up to 30 million cases by June 2020—half of the entire database.<sup>240</sup>

## CONCLUSION

Mass incarceration in America represents a moral and economic crisis. Lawmakers on both sides of the aisle recognize as much. A large portion of our nation's prison population is serving time in jail with little public-safety rationale—by one estimate, as many as 560,000 people—and their release could result in cost savings of nearly \$20 billion per year.<sup>241</sup> These funds could be put to better use: public education, public benefits, and social services. Legislation that focuses solely on the “means” of criminal justice reform is insufficient for achieving the goal of ending mass incarceration. But legislation that focuses solely on this end goal, without considering the steps for getting there, risks increased crime rates and a threat to public safety. This Note proposes one potential legislative solution. The “end” of the Second Step Act is clear: incentivize states to reduce their prison populations while maintaining or reducing their crime rates. By requiring detailed grant proposals addressing the needs of three prisoner subgroups, the Second Step Act also addresses the “means.” A comprehensive approach to criminal justice reform is necessary in order to cure the legislative failures of the past and ensure a better future for the victims of a broken system.

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237 FAIR & JUST PROSECUTION ET AL., *supra* note 232, at 21.

238 Jillian Atelsek, *Pa.’s Clean Slate Act, a One-of-a-Kind Law That Seals Some Criminal Files, Gets Official Introduction*, PENN LIVE (June 28, 2019), <https://www.pennlive.com/news/2019/06/pas-clean-slate-act-a-one-of-a-kind-law-that-seals-some-criminal-files-gets-official-introduction.html>.

239 18 PA. STAT. AND CONS. STAT. ANN. §§ 9122.1–2 (West 2019).

240 Atelsek, *supra* note 238.

241 AUSTIN ET AL., *supra* note 16, at 7.

