The Reconstruction of Federal Reentry

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I. Introduction

Awareness of the racially disproportionate harms of mass incarceration, including the excesses wrought by the federal criminal justice system, is perhaps at an all-time high. Meanwhile, the men and women exiting federal prisons continue to be rearrested at an unacceptable rate. This Article explores how, for a host of reasons, current federal reentry practices are largely ineffective, delivering neither the level of support and assistance needed nor the level of monitoring adequate to mitigate the risk of recidivism that some individuals present.

We contend that there is no comprehensive federal reentry "system" or strategy at all, and that, absent congressional action, there likely will not be. It has been said that "every system is perfectly designed to get the results it gets." Regrettably, this is the case for federal reentry; there are significant structural, cultural, and bureaucratic obstacles in the delivery of reentry services. Absent a major realignment of authorities and resources, unsatisfactory outcomes will likely continue. We propose that current structures be dismantled, and then reconstructed, in a fashion that might reverse mass incarceration and better ensure community safety.

Before unpacking the specific shortcomings of federal reentry, it is important to first acknowledge three aspects of its current context. First, the American overreliance on and acceptance of incarceration has been driven in large part by our country's racist history.[1] Our nation incarcerates people at a higher rate than any other country in the world, and the patterns of arrest, conviction, and sentencing disparately impact different racial groups, especially African American and other communities of color, with concomitant negative impacts on their families and communities. This has been the reality within federal criminal justice for decades.

Second, this overreliance persists despite evidence that incarceration is iatrogenic (i.e., it makes people worse than when they entered). Notwithstanding its incapacitation and punitive effects, incarceration exacerbates the risks (criminogenic needs) and increases the barriers (responsivity factors) that contribute to criminal conduct in the first place.[2]

Third, what currently occurs within federal criminal justice is not working. The men and women leaving federal prison are reoffending and being arrested at an unacceptable rate. Now, fully aware of the drivers of disparities in federal criminal justice and of the damage done by our overreliance on incarceration, the federal government has an opportunity to dismantle current reentry practices and to reconstruct a more just, holistic, heavily resourced, and cohesive reentry system, fully informed by social science. We agree with James Oleson, who has written that

> within the boundaries of the federal criminal justice system, the uncoordinated and decoupled structure of federal agencies, in which no one group of stakeholders claim responsibility for the whole, limits the potential of these [evidence based] innovations. In all likelihood, without restructuring and adoption of a truly reentry-centered vision of criminal justice, the federal criminal justice system will continue to deliver what it has delivered for the past thirty years: a glut of imprisonment that is inefficient, unsustainable, and ultimately criminogenic.[3]

Below, we dig deeply into the current challenges of federal reentry. In Part II, we consider the iatrogenic nature of incarceration and consider how the organization and culture of the Federal Bureau of Prisons (BOP) prioritize security above all else. We suggest that perhaps the BOP is not best positioned for some of its current reentry responsibilities. In Part III, we explore the discontinuity that men and women currently face as they proceed from sentencing courts to incarceration within the BOP, and then return to supervision by the judiciary. In Part IV, we argue that U.S. Probation's supervision function, particularly regarding its oversight and the funding of its law enforcement function, is perhaps not best suited to reside within the judiciary. In Part V, however, we provide an example of how one federal probation office, on its own accord, operated with a "truly reentry-centered vision." Finally, in Part VI, we offer recommendations for an alternative approach that has the potential to reduce recidivism and to improve outcomes for the men and women reentering free society.

II. Incarceration and the Federal Bureau of Prisons

There is growing consensus, based on empirical literature, that incarceration, *at best*, does no harm, but that often it makes men and women worse than when they entered.[4] Research demonstrates that incarceration negatively affects emotional regulation, cognitive control, and emotion recognition, in addition to the more widely acknowledged negative impacts on social and employment outcomes.[5] But this is not a new revelation, at least not to criminologists. In

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their landmark 1993 study, Robert J. Sampson and John H. Laub wrote:

> From our perspective, imprisonment may have powerful negative effects on the prospects of future employment and job stability. In turn, low income, unemployment and under employment are themselves linked to heightened risks of family disruption. Through its negative effects on male employment, imprisonment may thus lead indirectly through family disruption to increases in future rates of crime and violence.[6]

Incarceration is a necessary evil and should be a last resort. Some men and women currently in federal prison have committed heinous offenses and need to be incarcerated; and, when released to free society, they need to be very closely monitored. The existence of such people will ensure that incarceration remains part of the American criminal justice system. But for other transgressors, incarceration should be used sparingly, if at all. Perhaps for the first time ever, we agree with former Congressman Newt Gingrich, a highly partisan politician not known for being soft on crime. He wrote:

> Violent, dangerous criminals belong in prison, and the cost of incarcerating them is money well spent. But we are overusing imprisonment. More than half of all people in federal prisons for drug offenses have no violent history, and more than one-quarter have no prior criminal history. Prisons are for people we are afraid of, but we are locking up a lot of people because we're just mad at them.[7]

Continuing to overrely on incarceration, particularly given the more tragic aspects of American history, is unjust, self-defeating, and not cost effective.

The BOP has often been criticized for its failure to provide men and women adequate preparation for release.[8] Except for pursuing a GED, as required by statute, inmates are not compelled to participate in any treatment or programming, and judicial officers' recommendations for programming at sentencing are not binding on the BOP. In a seminal essay from 1993, two correctional experts, one a BOP researcher, argued:

> It is the duty of prisons to govern fairly and well within their own walls. It is not their duty to reform, rehabilitate, or reintegrate offenders into society. Though they may attempt these things, it is not their duty even to attempt these goals, let alone their obligation to achieve them. Prisons ought not to impose upon themselves, by inclusion in a mission statement, any responsibility for inmates' future conduct, welfare, or social adjustment. These are primarily the responsibility of the offenders themselves, and perhaps secondarily a concern of some others outside the justice system. They should not be declared the official business of prisons.[9]

There are some exceptions to such pessimism about the potential for fostering behavioral change within prisons; the BOP's well-known Residential Drug Abuse Program (RDAP) is a prime example. It is also true that the First Step Act (FSA) of 2018 aimed to greatly enhance the BOP's ability to assess risk (including, for the first time, a focus on post-release reoffending), increase impactful programming, and incentivize participation.[10] However, we have concluded that the BOP, and perhaps all American prisons, prioritize security above all else. Reentry is not the priority, and arguably, a custodial environment—with little or no freedom, surrounded by others who have chosen to engage in criminal conduct, and cut off from the rest of the world—is not an optimal setting to foster behavioral improvements. A prison is perhaps more akin to a Petri dish that compounds criminogenic tendencies.

A tell-tale sign of the primacy the BOP has placed on security (and not rehabilitation) is the fact that the BOP made virtually no effort to evaluate the effectiveness of its programs *for decades*.[11] It is hard to make sense of such indifference to evaluating program effectiveness if rehabilitation and reentry have indeed been priorities. It belies any true commitment to prioritizing behavioral change.[12]

The BOP faces many challenges in implementing rehabilitative programming and changing procedures. One of these—at the risk of touching a "third rail" of liberal politics—is the collective bargaining requirements the BOP confronts. Even the slightest modification of policies impacting work requirements must be negotiated internally. Historically, correctional unions have not embraced a therapeutic focus in their work, have opposed closing prisons, and have resisted holding correctional staff accountable. In recent scholarship, John Pfaff explored some of the lesser-known forces behind mass incarceration, including private correctional companies and unions:

> Public sector unions representing prison guards have an incentive to fight for more prisoners to ensure job security, if not job growth. The California Peace Officer Association (CCPOA) is well known for campaigning for tough-on-crime laws. The unions also ensure that prison closures do not result in lost jobs. In Pennsylvania, the state laid off only three guards when it closed two entire prisons in 2013.[13]

However uncomfortable and disappointing, a clear-eyed view of the current federal correctional environment requires one to acknowledge the constraints above, and there are surely many more. Those challenges continue, however, and become even more pronounced as we explore the transition back into the community.

III. Discontinuity

The term *continuity of care* comes from health care science and refers to a model based on assuring the "quality of care over time . . . a process by which a patient and his/her physician led care team are cooperatively involved in

ongoing health care management toward the shared goal of high quality, cost-effective medical care."[14] Previously, we have used the term *(dis)continuity of care* to describe what men and women in the federal criminal justice system experience.[15] The "care" referred to here consists of services and resources to mitigate their deficits (i.e., the criminogenic needs and responsivity factors) in an integrated fashion. Some of the current *discontinuity* is structural, tied to the reality of a defendant's apprehension and prosecution by the executive branch, adjudication and sentencing by the federal judiciary, incarceration by the executive branch, and subsequent supervision by the judiciary. Jim Oleson has written:

> Most criminal justice agencies perform their function narrowly. Typically, they know only their individual processes and myopic objectives: few collaborate to advance wider goals. So blinkered, one government agency's processes and procedures can unintentionally hinder the mission of other agencies. It is easy to understand how agencies could (inadvertently) work at cross purposes within such a labyrinthine structure as the federal criminal justice system. . . . [T]he challenges of a fragmented federal criminal justice system cannot be solved by simply adopting a continuum of care model . . . the problems are too great. They are political. They are philosophical. They are structural.[16]

Below, we offer several examples of the discontinuity that plagues the federal reentry process. In our experience, the baton is too often dropped as men and women leave BOP custody and enter supervision by U.S. Probation.

A. Treatment Inconsistencies

According to BOP policy, all treatment is voluntary. Except for a statutory mandate requiring men and women in prison to pursue their GED,[17] no one is compelled to participate in treatment, despite research that proves the efficacy of coerced treatment. However, upon exiting prison to a judge-imposed term of supervised release with U.S. Probation, men and women are often obliged to undergo a variety of programs, both behavioral interventions and monitoring programs. Consider a man sentenced to prison for molesting children. He may spend a decade in federal prison with no obligation to address his pedophilia. Yet, upon his release, judge-imposed conditions, implemented by U.S. Probation officers, will likely require intensive sex offender therapy, including polygraphs and plethysmographs (used to measure sexual arousal), and being subjected to searches of his home and the monitoring of his personal computer and phone for illicit content.

From a risk reduction perspective, it is befuddling that sex offender treatment is not compulsory while the individual is incarcerated. Several correctional experts have commented that, given the robustness of the social science regarding what works in changing behavior, correctional professionals who fail to adopt these evidence-based practices are guilty of "correctional quackery."[18] This difference in treatment philosophies is compounded by differences between executive-branch and judicial-branch contracting authorities, which preclude the BOP and U.S. Probation from "piggy-backing" on each other's community-based treatment contracts. This is a bureaucratic morass, at best.

B. Data Limitations

A second challenge is the limited data sharing between the BOP and U.S. Probation. The BOP still sends most information regarding prisoners and their release to U.S. Probation in pdf documents via email. The BOP's primary data system, SENTRY, while accessible to U.S. Probation, was created in 1981 and is extremely antiquated and difficult to use. To compensate for this, the BOP provides a weekly "data dump," which is generally accessible to probation officers but not comprehensive. Moreover, the BOP has multiple other data systems with critical information that is not made available to U.S. Probation at all, and often not made broadly accessible within the the BOP itself. This includes basic case planning, psychological assessment and programming details, records of visitation, correspondence, financial transactions, and apprenticeship participation.

Similarly, information concerning men and women on supervised release, recorded in U.S. Probation's PACTS case management system, is not at all accessible to the BOP. In a modern health care system, all the medical professionals involved in someone's care would have an obligation to share critical data and would have access or permissions based on need to know. There is, today, no twenty-first-century approach to sharing data between the BOP and the federal judiciary, not to mention the host of other criminal justice agencies that interact with system-involved individuals. Such data exchange is critical to improving reentry outcomes. Regrettably, it will not come into existence absent a congressional directive.

C. Privatization

A third challenge is the privatization of BOP reentry efforts. BOP staff have no hands-on reentry duty within the community. Once released from federal prison, men and women are housed and supervised in private, nonsecure halfway houses, known as Residential Reentry Centers (RRCs). For-profit entities control roughly 70% of these and deliver services according to the BOP-issued Statements of Work (SOWs). These SOWs do not require RRCs to hire staff with the level of training, experience, and expertise needed given the challenges, internal and external, facing the men and women they house.

The BOP's initial use of halfway houses in the 1980s utilized trained BOP staff to manage and supervise these facilities, which were envisioned to help men and women adjust more gradually to the reality of free society. Also, originally, halfway houses were less expensive than prison. Today, however, the average daily cost of RRCs is greater

than that of all but the most secure federal prisons, averaging around $120 per day per resident. Aggravating this, the BOP has had difficulty "siting" private-sector RRCs due to local community resistance. This can lead to men and women being placed in cities, and even other states, far from the communities to which they plan to return. In the current privatized contract structure, the BOP has very little leverage to use in confronting the NIMBYism that limits placement.

Most RRCs also provide location monitoring services for some lower-risk inmates who have been compliant within the RRC and are allowed to complete the balance of their sentence at home. Oddly, U.S. Probation is statutorily authorized, *but not obligated*, to offer this service directly to the BOP, even though it can do so *at half the cost* of what the RRC companies charge.

D. Information Silos

The passage of the FSA in December 2018—followed by a government shutdown and later the first global pandemic in 100 years—highlighted the ways in which information silos weaken reentry efforts. One notable statutory change in the FSA affected compassionate release. Under the compassionate release system preceding the FSA, the BOP could, upon request by a prisoner facing terminal illness, propose early release to the sentencing court.[19] The FSA changed the procedures, authorizing prisoners to petition for compassionate release to their sentencing court directly if the BOP did not respond in a timely fashion. Yet, absent BOP support of a prisoner's request, access to and interpretation of BOP-controlled medical records remained an obstacle to the courts making informed decisions in these cases.

Later, driven by the COVID-19 pandemic, Congress passed the CARES Act to authorize the Attorney General to release thousands of inmates back into the community on location monitoring, even some with many years left in their sentence. This surge of releases outstripped U.S. Probation's capacity to absorb them, leaving the gap to be filled by the private-sector RRCs. Most recently, the BOP, perhaps under political pressure, expanded its previously stated method of counting pre-release credits, resulting in the sudden release of over 2,000 men and women to U.S. Probation supervision with little or no pre-release planning, with 4,000 more following shortly thereafter. When under duress, weaknesses in information sharing under the current federal reentry structures come into clearer view.

The situation described above is not an example of what twenty-first-century corrections should be. It is an incongruous, wasteful, and inefficient situation. We turn now to a final set of challenges.

IV. Sentencing Disparity, the Federal Courts, and Community Supervision

The United States incarcerates a higher percentage of its population than any other country in the world; it has approximately 5% of the world's population but accounts for 25% of the world's prisoners.[20] The current U.S. incarceration rate, 639 per 100,000, is 13% higher than that of the country with the second-highest rate, El Salvador. Particularly in the federal system, there are also glaring racial disparities in rates of incarceration, driven by inequities in enforcement patterns, prosecutorial practices, and penalty structure, all of which have disproportionately impacted communities of color, especially African Americans. Department of Justice enforcement initiatives drove BOP growth over the past three decades.[21]

The problems compounded by mass incarceration subsequently fall on U.S. Probation. Almost 90% of the men and women placed on federal post-conviction supervision arrive after serving a period of incarceration.[22] Many, if not most, will have been detained even prior to conviction.[23] And the recidivism rates for the men and women on federal supervision remain stubbornly high. A 2021 report by the U.S. Sentencing Commission (USSC) found that the recidivism rates of a cohort released in 2010, and followed for five years, was 49.3%,[24] unchanged from a similar USSC study conducted on a cohort released in 2005. Another USSC analysis reported that 64% of violent offenders are rearrested.[25] Perhaps such rates of failure are to be expected after years languishing in an iatrogenic custodial system. But can U.S. Probation just not fix these people?

U.S. Probation officers are directed to "use all suitable methods . . . to aid a probationer or person under supervised release . . . and to bring about improvements in his conduct and condition."[26] National policy identifies U.S. Probation officers as the "primary change agents" for those under supervision, with the goal of guiding them toward "lawful self-management."[27] During the past ten or fifteen years, correctional practice among U.S. Probation officers nationally has progressed greatly, drawing on the latest social science literature and embracing and advancing evidence-based practices. However, as noted in the recent USSC analysis, these efforts have apparently not led to reductions in recidivism for the men and women leaving federal prison. Below, we consider several obstacles that are rarely, if ever, discussed. This is followed by a brief example of how one district, nonetheless, was able to focus on reentry in a holistic fashion.

A. Balkanized Structure

Developing supportive efforts for men and women upon release is complicated by the unique structure of the federal judiciary, particularly the autonomy of ninety-four separate judicial districts.[28] The judiciary is run by committee, which is perhaps unfathomable to those from other parts of the federal government. Policy changes are incremental at best, and often not binding at the district level if a federal judge thinks otherwise. In such a context, delivering high-quality, consistent community supervision and supporting reentry in a centrally coordinated manner is very difficult. Each court chooses what to embrace. While such discretion is critical to judicial independence and essential to

sentencing, we contend that it is not ideal for consistently delivering high-quality supervision and reentry services across the country.

B. Limited Funding

National workload formulas determine the distribution of financial resources among the ninety-four districts, and funding priority goes to what are considered "must pay"—specifically, Article III judges' salaries and expenses (which are constitutionally guaranteed) and rental payments for courthouses and associated facilities. Whatever is left is distributed to the supporting court units, such as U.S. Probation and clerks' offices. In fiscal year 2022, U.S. Probation received a funding cut of over 14%,[29] which is currently severely straining operational abilities. Within this context, reentry efforts receive scant support nationally. In 2007, Congress allotted $30 million to support three years of Second Chance Act (SCA) programming, yet less than half was sent to the districts.[31] The balance was instead reabsorbed by the judiciary when faced with the sequester of 2011 for general operations.

C. Lack of Reentry Focus

The entire Administrative Office of the U.S. Courts has only one national staff position focused on reentry. By comparison, the BOP has a full Reentry Services Division with a staff of approximately 700, many of whom manage and oversee private-sector contracted services. There is little effort by the judiciary to engage upstream with the BOP, but rather a "we'll deal with this problem when it gets to us" approach. To repeat the words of Jim Oleson quoted above, "criminal justice agencies perform their function narrowly. Typically, they know only their individual processes and myopic objectives: few collaborate to advance wider goals."[32] There appears to be institutional reluctance, perhaps even an aversion, to substantive collaboration between the judiciary and the BOP.

D. Ineffectual Law Enforcement Status

U.S. Probation officers have quasi–law enforcement status.[33] All sworn probation officers, whether they perform a court-based function (pretrial services investigation, writing pre-sentence reports) or work in the field, are entitled to a generous law enforcement status in retirement. Statutorily, U.S. Probation officers have arrest authority,[34] yet judiciary policy prohibits them from making arrests. U.S. Probation officers also receive firearms training at a national academy, but the judges in each district decide whether their officers are allowed to carry firearms. U.S. Probation officers do not have "1811 status" as do many federal law enforcement officers, which means they are ineligible to receive the additional 25% Law Enforcement Availability Pay made available for work during irregular or unscheduled hours. This is despite policy requirements to work weekends and nontraditional hours when supervising higher-risk men and women. We contend that this awkward, in-between law enforcement status, as currently organized, hinders officers' ability to effectively monitor and interrupt the threat that some higher-risk people pose.

E. Lack of Transparency and Accountability

Lastly, and rarely if ever discussed, is the lack of transparency of activities within the judiciary. This is problematic in two ways that impact reentry. First, people under supervision do not have access to their supervision record, where officers note their efforts and interactions with those under supervision. But access can be particularly important when things go awry with the supervision process. Each sentencing judge decides what, if any, supervision records can be shared, and very rarely is there any broad disclosure. Nested within the judiciary, U.S. Probation and the records the court controls (which arguably should belong to the person under supervision) are not subject to Freedom of Information Act (FOIA) requests and therefore remain beyond scrutiny. By contrast, even a person's programming records while in the BOP system are accessible via FOIA. Since 1996, medical patients receiving treatment and services have been entitled under the Health Insurance Portability and Accountability Act to access their medical records. Why, then, does a man or woman under the court's authority—supervised by an officer considered by governmental authority to be their "primary change agent"—not have a similar right to access critical information about their own supervision?

Second, there is no centralized approach to, or accounting of, officer misconduct. In reaction to a recent account of misconduct by BOP staff, a U.S. Senator called for the resignation of the BOP Director. While not discounting the gravity of that report, it should be noted that given the decentralized structure of the U.S. Courts, probation officer misconduct is not consistently addressed or recorded. To our knowledge, there are no aggregate data that demonstrate the presence or the absence of a problem. This is not to suggest that misconduct by U.S. probation officers is rampant, but, given the vulnerability of the population under their charge, centralized oversight, transparency, and accountability across districts is imperative. This appears unlikely within the federal judiciary, which has been very resistant to coordinated documented oversight and is not obligated to provide public-facing reporting.

V. A Success Story

We believe that the challenges facing U.S. Probation, described above, constrain its ability to meet the compounded problems of the men and women reentering free society. But addressing the harms of incarceration is not limited to assisting those reentering society through behavioral change and additional resources upon release. Indeed, any proposed initiatives must not be naive; a subset of those released from federal prison pose significant risk to the community and may reoffend quickly. To significantly mitigate the risk of new criminal activity—especially by higher-risk individuals—supervision must contemplate

both supportive programming and robust monitoring, including through law enforcement measures.

There is reason for hope. Previously, we have documented the efforts of one federal Probation Office, the Eastern District of Missouri, to provide a holistic approach to reentry, an approach that was taken in the absence of any national direction.[35] The investigative and supportive activities described included a comprehensive effort to improve reentry, such as vocational assessments in presentence reports; leveraging the BOP's SENTRY database to identify training and certification completed while in prison; conducting remote needs assessments; providing cognitive behavioral therapy directly to the incarcerated; coordinating family video conferencing as well as in-person visitation to maintain prosocial ties; facilitating application to Medicaid prior to release; significant use of spending authority brought by the SCA; hiring specialized staff, especially those trained in social work; and much more.

Without a doubt, the U.S. Probation office in the Eastern District of Missouri represented the gold standard in assisting released men and women. What has not been recognized, however, is the district's equally robust law enforcement approach to monitoring. These efforts included the following: providing national search-and-seizure training prior to the creation of the national training academy; early adoption of the Global Positioning System (GPS) to track higher-risk people; using voice stress analysis in addition to polygraphs, particularly for those convicted of sexual offenses; establishing a forensic lab for analyzing seized computers and phones; using trained dogs capable of detecting unauthorized computers and cell phones; and intensive contact requirements, including weekends and after hours, for higher-risk individuals; among other methods. Even within a fractured and under-resourced system, the Eastern District of Missouri demonstrated what is possible through a holistic and multidimensional focus on improving outcomes for individuals reentering society.

Some perceive efforts to improve reentry as liberal-minded and overly felon-friendly. That is inaccurate at best and damaging at worst. Balanced, holistic approaches are critical for improving community public safety outcomes. Such an approach would limit the likelihood of low-risk people being exposed to the criminogenic effects of incarceration and ensure that those who need to be incarcerated receive the best available evidence-based programming in a context that truly prepares them to reenter free society. Any back-end efforts to safely reduce incarceration levels must include a balanced approach that makes use of state-of-the-art practices both in behavioral change and community-based law enforcement. Merging the best of the BOP's and U.S. Probation's reentry efforts could be one solution.

VI. Reconstruction

The federal government has provided significant funding to the states to reimagine how they organize their criminal justice systems, in order to both reduce incarceration and save money. Is it not curious, then, that the federal government has not turned a broader lens on itself? The BOP has received most of the attention, mostly unwelcome, in recent years. But any real possibility of improving outcomes requires a more open mind, informed by a detailed knowledge of current dysfunction across branches of government. Consider the recent comments of a former acting BOP director, Hugh Hurwitz:

> [We] need to rebuild our criminal justice system so that it is smaller, less punitive, more humane, and safer for all. With political will, independent oversight, and an unwavering commitment, we can make holistic change to a system long in need of it. U.S. prisons are in crisis, riddled with deep and systemic ills that won't be cured by simply replacing the BOP chief.[36]

Neither the BOP nor the judiciary—as they currently function—is structured to effectively meet the needs of individuals under supervision and improve critical public safety outcomes upon release. Could the BOP's reentry efforts—which have been significantly augmented by the FSA—be integrated with U.S. Probation's post-conviction operations into a new separate agency? Do the harms of mass incarceration warrant the creation of an agency truly committed to minimizing unnecessary incarceration, expanding noncustodial options, and improving outcomes for individuals upon release? Such an agency could be independent from the current constraints of both the judiciary and the BOP. To quote Hurwitz again:

> We also continue to over-incarcerate people with mental health disorders, and troubling *racial disparities in the system persist*. How do we move forward? We must rethink our overall approach to incarceration to ensure that only the right people—those who need to be separated from society or require intensive reentry programming—are confined for the appropriate amount of time. Shuttering these aging lock-ups, some of which are more than a century old, would allow the BOP to reallocate staff and resources to the remaining facilities, improving safety and security while strengthening programs and services.[37]

Such an agency could be built on a foundation of evidence-based practices and could prioritize the skills and abilities necessary for the profession. This agency could operate under the premise that, because the federal government bears the responsibility for incarceration, it bears an equivalent responsibility to the people under its care during and after incarceration. We will close with some recommended tasks that such an agency might assume. Adopting these changes would mark a major step forward in reconstructing federal reentry.

- Assist the BOP with downsizing prison infrastructure, including retrofitting some aging facilities into

state-of-the-art job training centers, with vocational programs informed by the real labor needs in the communities to which people will return. This programming would then be coordinated with community-based training upon the commencement of supervised release, and funded under SCA authority.[38]

- Establish and staff government-owned halfway house facilities built upon evidence-based practices that would incrementally replace the system's current reliance on for-profit entities. These would include intensive programming and comprehensive wraparound services (e.g., securing identification, health care benefits) in their local communities, assuring the best chance of post-release success.
- Ensure that RRCs' time frames are maximized for all, consistent with the statutory changes brought by the SCA.
- Require that those convicted of some charges (e.g., sex offenses) participate in programming while still in a quasi-custodial environment.
- Assume supervision of all those under community-based home confinement and leverage private-sector technologies that can both make programming available remotely and track an individual's whereabouts in real time.
- Assist the BOP with FSA implementation, particularly the delivery of rehabilitative programming within RRCs and for those on home confinement, and management of FSA credits.
- Integrate all relevant personal data held by the BOP and U.S. Probation to ensure continuity of care, include consolidation of disparate risk assessment tools built on shared data, and track outcomes through the completion of supervised release and beyond.
- Assist the judiciary with systematically revisiting the custodial sentences of men and women whose risks have been reduced, for whom there appears to be no further benefit to imprisonment.
- Provide balanced, field-based supervision for post-conviction, higher-risk men and women, with standardized practices across the country, particularly reentry resources and intensive monitoring.
- Ensure continuity of treatment providers as men and women progress to supervised release.

Notes

1 *See* Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2010).

2 The dominant theory in community corrections is that of risk, need, and responsivity, or RNR; *see* D. A. Andrews and James Bonta, The Psychology of Criminal Conduct (5th ed. 2010). The *risk* principle directs that actuarial risk assessment be used for those involved in criminal justice systems and that monitoring and behavioral interventions should focus on those of higher risk. The *need* principle directs that probation officers focus their efforts on those criminogenic needs that are dynamic and therefore subject to change. The *responsivity* principle identifies cognitive behavioral treatment as the best intervention to reduce recidivism and also sometimes refers generally to the barriers men and women face upon return to free society. In the language of the risk-needs-responsivity model, incarceration aggravates criminogenic needs and responsivity factors.

3 James C. Oleson, *A Decoupled System: Federal Criminal Justice and the Structural Limits of Transformation*, 35 Just. Sys. J. 383 (2014).

4 Damon M. Petrich et al., *A Revolving Door? A Meta-analysis of the Impact of Custodial Sanctions on Reoffending* (University of Cincinnati, Working Paper, July 2020); Daniel P. Mears & Joshua C. Cochran, *Progressively Tougher Sanctioning and Recidivism: Assessing the Effects of Different Types of Sanctions*, 55 J. Res. Crime & Delinq. 194 (2018); Paul Nieuwbeerta et al., *Assessing the Impact of First-Time Imprisonment on Offenders' Subsequent Criminal Career Development: A Matched Samples Comparison*, 25 J. Quantitative Criminology 227 (2009).

5 Rebecca Umbach et al., Cognitive Decline as a Result of Incarceration and the Effects of a CBT/MT Intervention, 45 Crim. Just. & Behav. 31 (2017).

6 Robert J. Sampson & John H. Laub, Crime in the Making: Pathways and Turning Points Through Life (1993).

7 Newt Gingrich & Pat Nolan, *Our Criminal Justice System Is Badly Broken. That's Why the First Step Act Matters*, Fox News (Nov. 28, 2018).

8 *See* U.S. Dep't of Justice, Off. of the Inspector Gen., Review of the Federal Bureau of Prisons' Release Preparation Program, Evaluation and Inspections Division Report (May 24, 2016).

9 Charles H. Logan & Gerald G. Gaes, *Meta-analysis and the Rehabilitation of Punishment*, 10 Just. Q. 245 (1993).

10 18 U.S.C. § 3631 et seq.

11 *See* James M. Byrne, *The Effectiveness of Prison Programming: A Review of the Research Literature Examining the Impact of Federal, State, and Local Inmate Programming on Post-release Recidivism*, 84 Fed. Prob., June 2020.

12 As part of FSA implementation, the National Institute of Justice is now aggressively pushing forward in evaluating more of the BOP's programs, and the BOP is investing heavily in updating much of their programming.

13 John F. Pfaff, Locked In—The True Causes of Mass Incarceration and How to Achieve Real Reform (2017).

14 AAFP, https://www.aafp.org/about/policies/all/continuity-of-care-definition.html.

15 Jay Whetzel & Sarah Johnson, *"To The Greatest Extent Practicable"—Confronting the Implementation Challenges of the First Step Act*, 83 Fed. Prob., Dec. 2019.

16 Oleson, *supra* note 3.

17 18 U.S.C. § 3624(f).

18 *See* Edward J. Latessa, Francis T. Cullen & Paul Gendreau, *Beyond Correctional Quackery—Professionalism and the Possibility of Effective Treatment*, 66 Fed. Prob., Sept. 2002.

19 Whetzel & Johnson, *supra* note 15.

20 *See* Am. C.L. Union, *Mass Incarceration*, https://www.aclu.org/issues/smart-justice/mass-incarceration.

21 While Congress and the U.S. Sentencing Commission (USSC) have attempted to partially address these long-recognized inequities, with changes such as the Fair Sentencing Act of 2010 and the "Drugs Minus 2" Amendments, these changes have come at a glacial pace. By contrast, sentencing excesses that impacted predominantly white defendants—such as those convicted of distributing the drug LSD—were quickly "corrected" by the USSC in 1993. In 2014, the USSC published data showing that the Fourth, Eleventh, and Fifth Circuits had more motions to retroactively adjust sentences than all other federal circuits combined. These three circuits almost exactly parallel the states of the former Confederacy,

a curious pattern. *See* U.S. Sentencing Comm'n, Final Crack Retroactivity Data Report Fair Sentencing Act (Dec. 2014).

[22] The study's authors express some surprise at the findings, citing among other things that during the latter period, U.S. Probation officers had begun the use of evidence-based practices, to no apparent effect. These included the introduction of fourth-generation risk assessment tools as well as core correctional practices and cognitive restructuring.

[23] Rates of federal pretrial detention hover around 70%. Excluding noncitizens, that rate falls to approximately 50%, all of whom are presumed innocent. Given that detained federal pretrial defendants are held by the U.S. Marshals, primarily in contracted local facilities, there is no opportunity for any treatment or programming while they await disposition, sentencing, and designation and transport to the BOP. Absent legislative action, specifically the elimination of the rebuttable presumption for drug offenses, these rates will likely remain high.

[24] *See* U.S. Sentencing Comm'n, Recidivism Among Federal Offenders: A Comprehensive Overview (2016). By comparison, as of 2014, the rate of incarceration in Norway was 75/100,000 (compared to 639/100,000 in the United States). In 2016, the Norwegian recidivism rate over five years was 20%.

[25] According to information provided at https://www.ussc.gov/.

[26] *See* 18 U.S.C.§ 3603.

[27] Admin. Off. of U.S. Courts, 8 Guide to Judiciary Policy.

[28] The distribution of these districts still reflects historical anomalies. For example, the small state of Louisiana is divided into three separate federal districts, each with a chief judge and a chief probation officer, who serves at the pleasure of the chief judge.

[29] One current chief advised that the 14% cut translates into four officers they are now unable to hire. Cuts are anticipated again in FY2022. The ability to hire officers is critical to maintaining manageable caseload and to providing high levels of assistance to and monitoring of men and women under supervision; for more on law enforcement–focused efforts, see Part VI of this Article.

[30] Passage of the SCA, in which Congress modified 18 U.S.C. §§ 3672 and 3154, enabled U.S. Probation and Pretrial Services to provide a much wider array of services for those under their supervision and the court's authority, including cognitive behavioral therapy, employment training, housing assistance, education, mentoring, and so on.

[31] For an explanation of how SCA resources and programming can mitigate the risks and needs of those reentering, *see* Jay Whetzel & Aaron McGrath, *Ten Years Gone: Leveraging Second Chance Act 2.0 to Improve Outcomes*, 83 Fed. Prob., June 2019.

[32] Oleson, *supra* note 3.

[33] U.S. Probation officers are eligible to retire at fifty years of age with at least twenty years of service and must retire at age fifty-seven.

[34] 18 U.S.C. § 3606.

[35] Scott Anders & Jay Whetzel, *All Hands on Deck*! *Toward a Reentry-Centered Vision of Federal Probation*, 84 Fed. Prob., Dec. 2020.

[36] Hugh Hurwitz, *To Fix Our Prison System, We Need Far More Than a Change in Leadership*, The Hill (Dec. 23, 2021), https://thehill.com/opinion/criminal-justice/586981-to-fix-our-prison-system-we-need-far-more-than-a-change-in/.

[37] *Id.*

[38] 18 U.S.C. § 3672.